

Towards an Instrument for the Portability of Social Security Benefits in the Southern African Development Community

Lethokwa George Mpedi
Mathias Ashu Tako Nyenti





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ACRONYMS AND ABBREVIATIONS

AU	African Union
ASEAN	Association of South East Asian Countries
CARICOM	Caribbean Community
CELLS	Centre for European Law and Legal Studies
CIPRES	<i>Conférence Interafricaine de la Prévoyance Sociale</i> (Inter-African Conference on Social Insurance)
CNaPS	National Social Insurance Fund (<i>Caisse Nationale de Prévoyance Sociale</i>)
COIDA	Compensation of Occupational Injuries and Diseases Act
CRPB	<i>Caisse de Retraite du Personnel des Banques</i>
DTVS	Data Transfer and Validation System
EAC	East African Community
ECOWAS	Economic Community of West African States
ELS	Employment and Labour Sector
EEM	<i>Ecclésiá Episcopal Malagasy</i>
EU	European Union
GEPF	Government Employees Provident Fund
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
ILO	International Labour Organisation
IOM	International Organisation for Migration
ICM	Integrated Committee of Ministers
INAS	<i>Instituto Nacional de Acção Social</i> (National Institute of Social Action)
INSS	<i>Instituto Nacional de Segurança Social</i> (National Institute of Social Security)
LAPF	Local Authorities Provident Fund
MERCOSUR	<i>Mercado Común del Sur</i> (Southern Common Market)
MINAS	Ministry of Social Affairs, Humanitarian Action and National Solidarity
MIRTM	<i>Mutuelle Interprofessionnelle de Retraite des Travailleurs de Madagascar</i>
NAPSA	National Pension Scheme Authority
NPF	National Pensions Fund
NSSF	National Social Security Fund
ODMWA	Occupational Diseases in Mines and Works Act
OSCE	Organisation for Security and Co-operation in Europe
PASD	<i>Programa de Apoio Social Directo</i> (Direct Social Support Programme)
PAUS	<i>Programa de Apoio às Unidades Sociais</i> (Social Assistance Services)
PPF	Parastatal Pensions Fund
PSA	<i>Programa de Segurança Alimentar</i> (Food Subsidy Programme)
PSPF	Public Service Pensions Fund

PSSB	<i>Programa Subsídio Social Básico</i>
PSSN	Productive Social Safety Net
PSRB	Political Service Retirement Benefits
RECs	Regional Economic Communities
RHVP	Regional Hunger and Vulnerability Programme
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SHIB	Social Health Insurance Benefits
TASAF	Tanzania Social Action Fund
UK	United Kingdom
UNESCO	United Nations Education, Scientific and Cultural Organisation
WCF	Workers Compensation Fund
WESTADI	Welfare Scheme for Tanzanians in the Diaspora

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Johannesburg, June 2017

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EXECUTIVE SUMMARY

The right to social security is a fundamental human right guaranteed to all persons. However, non-citizens are not always granted access to social security because of discriminatory provisions in national social security laws and the ‘nationality or territoriality principle’ of social security systems (which requires a claimant to be physically present in the country to be eligible for benefits). Such principles and provisions hinder the cross-border portability of social security benefits.

This is especially the case in the Southern African Development Community (SADC) region, where the portability of social security benefits is limited because of the absence of a region-wide social security coordination agreement.

Internationally, such agreements regulate issues such as equality of treatment of citizens and non-citizens, aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits to other countries, choice of law applicable, etc.

The SADC Treaty and its subsidiary instruments point to the need for such an instrument for the portability of social security benefits in the region. SADC’s institutional framework (SADC’s main organs and institutions) is also conducive to becoming an instrument for the portability of social security benefits in the region.

Comparative bilateral agreements that have been concluded in SADC in the area of social security portability, and in labour supply and free movement of persons, provide lessons for the region on adopting or concluding a multilateral instrument. They indicate some experience in SADC in the development of coordination agreements and an appreciation of the need for the portability of social security benefits.

The experiences of comparative regional communities which have concluded or adopted social security coordination instruments (such as the East African Community, Economic Community of West African States, Caribbean Community and Common Market, Association of Southeast Asian Nations, Southern Common Market (*Mercado Común del Sur*) and the European Union) are also instructive. These communities have all been established to achieve the objectives of regional integration and cooperation. The conclusion of social security coordination instruments by these regions indicates the feasibility of SADC countries concluding or adopting a similar multilateral instrument.

SADC national social security systems are diverse in nature. This has led to the conclusion that it is difficult to develop baseline standards for the region and to adopt measures to coordinate the various countries’ social security systems. However, harmonisation of the various social security systems is not imperative to the conclusion of a multilateral social security agreement. All that may be required is a convergence of the social protection policies of the member states.

Therefore, diversity in national social security systems and schemes does not preclude the adoption of a regional instrument for social security coordination. SADC member states merely need to specify issues such as the social security risks or benefits (and

scope of beneficiaries) to be covered; equality of treatment in the respective national systems; exportability of benefits; aggregation of insurance periods; determination of the legislation applicable; and institutional and administrative cooperation.

The task of coordinating social protection in the SADC region is further enhanced by the presence of some similar schemes in all the countries (such as employment injury and disease, or workers' compensation schemes).

However, there are issues that must be considered in negotiating a social security coordination agreement. These include the exhaustive non-discrimination provisions in the SADC Treaty; discriminatory provisions in national legislation; the prevalence of private, occupational or supplementary schemes; and the lack of institutional and administrative cooperation between schemes.

BACKGROUND AND PURPOSE OF STUDY

The right to social security is a fundamental human right protected in international and regional instruments such as the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Labour Organisation (ILO) Social Security (Minimum Standards) Convention 102 of 1952; the African Charter on Human and Peoples' Rights (1981); and the Charter of Fundamental Social Rights in the Southern African Development Community (SADC) (2003). These rights are guaranteed to all persons, without discrimination of any kind. This implies that non-citizens should have access to social security in their host countries.

However, entitlement to social security benefits usually depends on periods of employment or contributions or residency in a particular country. This means that the residency status of non-citizens in a country determines their access to that country's social security system. Therefore, non-citizens may face restrictive conditions on access to the host country's social security system, while they may have lost their entitlement to social security benefits in their country of origin as a result of their departure from that country.¹

This is also the case in SADC as non-citizens are excluded from most national social security systems. Non-citizens are not always granted access to social security, as social security systems are established, regulated and administered at a national level.² Non-citizens are marginalised or excluded because access to social security depends on nationality, immigration status, length of residence or some other condition.³

Furthermore, even where non-citizens are eligible for social security, national systems tend to embrace the rule that requires a claimant to be physically present in the country for such a beneficiary to draw benefits.⁴ The 'nationality or territoriality principle' of social security can hinder the portability of social security benefits (i.e. the ability of a migrant to preserve, maintain and transfer acquired social security rights from one country to another).

1 See Baruah N and Cholewinski R Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination (OSCE/IOM/ILO (2006)) 153-154.

2 See Mpedi LG, Smit N and Nyenti M "Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community: A synthesis" in Mpedi LG and Smit N (eds) Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community (SUN PRess (2011)).

3 Mpedi LG and Smit N (eds) Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community (SUN PRess (2011)).

4 *Ibid.*

This has led, in part, to the limited social security coverage of non-citizens in the SADC region. Other factors limiting access to social security in SADC include the socio-economic, labour market and poverty contexts of intra-SADC migrants; the formal sector bias of most SADC national social security systems; the non-ratification or non-enforcement of international social security standards; and the absence of bi- and multilateral social security coordination arrangements in the region.⁵

In the SADC region the portability of social security benefits is limited. This is because SADC countries have not yet concluded a region-wide social security portability agreement.⁶ However, some countries have concluded bilateral labour and social security agreements. These include the labour agreements signed between South Africa and its neighbours (Botswana, Lesotho, Malawi, Mozambique, Swaziland and Zimbabwe),⁷ and the social security agreement between Malawi and Zambia.⁸ Mauritius has also signed a social security agreement with the United Kingdom.⁹

These agreements call for (amongst other things) the extension of social security protection to the atypically employed and persons working in the informal economy; elimination of restrictions in national legal systems on access to social security for some non-citizens; ratification or/and enforcement of international social security standards;

5 *Ibid* 54-55.

6 *Ibid.*

7 Agreement between the Government of the Republic of South Africa and Government of the Republic of Botswana relating to the establishment of an office for a Botswana Government Labour Representative in the Republic of South Africa, Botswana citizens in the Republic of South Africa and the movement of such persons across the international border (signed on 24 December 1973 and entered into force on 24 December 1973); Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho relating to the establishment of an office for a Lesotho Government Labour Representative in the Republic of South Africa, Lesotho citizens in the Republic of South Africa and the movement of such persons across the international border (signed on 24 August 1973 and entered into force on 24 August 1973); Agreement between the Governments of the Republic of South Africa and Malawi relating to the employment and documentation of Malawi nationals in South Africa (signed on 1 August 1967 and entered into force on 1 August 1967); Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal regulating to the employment of Portuguese workers from the Province of Mozambique on certain mines in the Republic of South Africa (signed on 13 October 1964 (amended by exchange of notes on 24 February 1971 and 11 May 1971) and entered into force on 1 January 1965); and Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland relating to the establishment of an office for a Swaziland Government Labour Representative in the Republic of South Africa, certain Swaziland citizens in the Republic of South Africa, the movement of such persons across the common border and the movement of certain South African citizens across the common border, and addendum thereto (signed on 22 August 1975 and entered into force on 22 August 1975).

8 Malawi/Zambia Social Security Agreement (2003).

9 Mauritius/United Kingdom Social Security Convention (1981).

and the conclusion of bi- or multilateral social security coordination arrangements in the region.¹⁰

Since restrictive eligibility conditions in the social security systems of host countries mean that non-citizens risk the loss of entitlements in their countries of origin because of their absence and are without any social security coverage,¹¹ there is a need for the conclusion of a social security coordination agreement by SADC member states so as to extend social security protection to intra-SADC migrants. Internationally, such agreements regulate issues such as equality of treatment of citizens and non-citizens, aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits to other countries, choice of law applicable, etc.

The extension of the social security scope of coverage (also to intra-SADC migrants) and the cross-border portability of social security benefits are issues that are high on the agenda of SADC. According to the SADC Treaty, key objectives of SADC are 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.¹² One way SADC hopes to achieve these objectives is to harmonise the political and socio-economic policies and plans of member states.

The Charter of Fundamental Social Rights in SADC also has as one of its objectives the promotion of the establishment and harmonisation of social security schemes.¹³ Social rights portability and remittances is one of the priority areas of the Draft Labour Migration Policy of 2013. The Draft Policy envisages a harmonised social protection regime across SADC countries for migrant workers and nationals, and it is informed by existing institutional good practices and supporting grassroots mechanisms.¹⁴ The Code on Social Security in the SADC seeks to provide SADC and member states with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region.¹⁵

Extending the scope of coverage of social security is also a priority of the African Union (AU). The AU Social Policy Framework requires Regional Economic Communities (RECs) such as SADC to increase inter-governmental cross-border cooperation on policies which address social issues and social problems such as poverty and social

10 Mpedi LG and Smit N (eds) *Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community (SUN PRess (2011))* 55-58.

11 Mpedi LG, Smit N and Nyenti M "Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community: A synthesis" in Mpedi LG and Smit N (eds) *Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community (SUN PRess (2011))* 1-63.

12 Article 5(1) of the SADC Treaty.

13 Article 1(1) of the Charter of Fundamental Social Rights in the SADC.

14 Para 3 of the Draft SADC Labour Migration Policy (2013).

15 Article 3 of the Code on Social Security in the SADC.

exclusion. Such policies should promote regional social justice and equity, social solidarity and social integration.¹⁶

The purpose of this study was to undertake research and make recommendations to SADC on the development of a multilateral instrument to regulate the coordination of social security in the SADC region. The study involved desktop research that led to a literature review on the following:

- Investigation of the concept of coordination of social security benefits;
- review of international social security coordination instruments, such as the instruments of the East African Community (EAC), the Economic Community of West African States (ECOWAS); the European Union (EU), the Caribbean Community (CARICOM), the Association of South East Asian Countries (ASEAN), etc.;
- evaluation of SADC institutional and regulatory frameworks and their role in promoting the coordination of social security in the region;
- evaluation of current bilateral initiatives towards the coordination of social security in the SADC region and their impact;
- analysis of the status of national social security systems; and
- making of policy recommendations for a regional mechanism for the portability of social security benefits.

16 African Union Social Policy Framework (2008) 39.

CONCEPT OF SOCIAL SECURITY COORDINATION

2.1 GENERAL OVERVIEW

Social security systems are, as a rule, *established, regulated and administered* at a national level. As a result, the social security system of a country operates within a particular *legal context* and *institutional framework* applicable to such a system.¹⁷ It is this framework which determines the:

- *Personal scope of coverage*: Who is or should (not) be covered by a particular social security scheme?
- *Period of eligibility*: When are social security benefits (not) payable to an individual and/or his or her dependant(s)?
- *Territorial scope of coverage*: Where the social security benefits should (not) be payable?

Provisions in national social security laws providing for the personal scope of coverage often discriminate between nationals and non-nationals. In addition to other eligibility requirements, persons are often required to be citizens or permanent residents in order to be covered by social security schemes. Furthermore, national social security systems tend to embrace the rule that requires a (prospective) beneficiary to be physically present in the country for such a beneficiary to draw benefits. In so doing, these provisions territorialise the scope of coverage of the social security system. It is because of this scenario that reference is often made to the so-called ‘territoriality principle’. The eligibility requirement can, at times, exclude and marginalise non-citizens from participating in the social security system of a particular country. To address this, countries do conclude bilateral or multilateral social security agreements to ensure that migrants are not excluded from the scope of coverage of their social security systems and, where coverage is granted, they do *inter alia* benefit from the benefits provided when they become payable.

2.2 SOCIAL SECURITY COORDINATION RULES AND KEY CHARACTERISTICS OF COORDINATING INSTRUMENTS

The bilateral and multilateral social security agreements invariably make provision for the so-called (social security) ‘coordination rules’. These are the “rules intended to adjust social security schemes in relation to each other (as well as those of international

¹⁷ Nickless J and Siedl H Co-ordination of Social Security in the Council or Europe: Short Guide (Council of Europe (2004)) 9.

regulations) in order to regulate transnational questions, with the objective of protecting the social security position of migrants.”¹⁸ The key characteristics of the social security coordinating instruments, which can to some degree be gleaned from the preceding definition of coordination rules have been summarised as follows:

“Co-ordinating instruments are only concerned with migrants. Co-ordinating instruments do not change the substance of the national social security system, they do not change the amount of benefit or the conditions of entitlement. They only apply in situations where there is some cross-border element. They ensure that migrants are treated fairly. Where social security is a creature of national law, co-ordination is a creature of international law and relies heavily upon co-operation between states.”¹⁹

2.3 SOCIAL SECURITY COORDINATION PRINCIPLES

The following five social security coordination principles are particularly notable:

- *Equality of treatment*: The principle of equality of treatment requires contracting parties to treat nationals of the contracting parties in the same way they would treat their own nationals when applying their legislation.²⁰ The primary aim of this principle is to prevent unfair discrimination against migrant workers by guaranteeing equality and equal treatment of all workers.²¹
- *Aggregation of insurance periods*: The crux of the principle of aggregation of insurance periods is that “the elements of a worker’s career are consolidated and [...] his [or her] career [...] [is] considered as a whole”.²² Pursuant to this principle, member states are required to “aggregate periods which, pursuant to the legislation of different Member States, are taken into account in order to qualify for and retain a benefit and to calculate the amount of the benefit”.²³
- *Maintenance of acquired rights and benefits*: In accordance with this principle, “periods of residence, employment or other economic activity performed in one state should be recognised in another”.²⁴ The maintenance of acquired rights and benefits ensures

18 Pennings F *European Social Security Law* (6th edition) (Intersentia (2015)) 6.

19 Nickless J and Siedl H *Co-ordination of Social Security in the Council of Europe: Short Guide* (Council of Europe (2004)) 11.

20 *Ibid* 44.

21 Kaufmann O “International aspects of social security in the French-speaking countries south of the Sahara” 1986 *Law and State*, Vol. 34, 106 at 112.

22 Sakslin M “Social security co-ordination – adapting to change” 2000 *European Journal of Social Security*, Vol. 2, 169 at 175.

23 *Ibid* 174.

24 Nickless J and Siedl H *Co-ordination of Social Security in the Council of Europe: Short Guide* (Council of Europe (2004)) 13.

that “any right to benefit, or paid-up prospective right, should be guaranteed to the migrant in either country, even if it has been acquired in the other”.²⁵

- *Applicable law*: This principle is more concerned with the determination of a ‘competent state’. A ‘competent state’ is a contracting party whose social security legislation will apply to a migrant worker.²⁶ The determination of applicable legislation is crucial for the prevention of double benefits or double obligation to contribute towards a social security scheme.
- *Transferability or exportability of benefits*: The provision of social security benefits abroad (that is, the export of benefits) is one of the common objectives of social security agreements which are aimed at guaranteeing the social security rights of migrant workers.²⁷ The exportability of benefits entails “reducing or eliminating restrictions on the payment of benefits and receipt of services when a worker who had previously been covered by a country’s social security scheme is no longer resident in that country”.²⁸

25 Dupper O “Migrant workers and the right to social security: An international perspective” in Becker U and Olivier M (eds) *Access to Social Security for Non-citizens and Informal Sector Workers: An International, South African and German Perspective* (SUN PReSS (2008)) 13 at 31.

26 Nickless J and Siedl H *Co-ordination of Social Security in the Council or Europe: Short Guide* (Council of Europe (2004)) 45.

27 McGillivray W *Strengthening Social Protection for African Migrant Workers through Social Security Agreements* (International Labour Office (2010)) 3.

28 *Ibid.*

INTERNATIONAL LABOUR STANDARDS AND SOCIAL SECURITY COORDINATION

Social security coordination principles mentioned in paragraph 2.3 above can be found in United Nations (UN) and International Labour Organisation instruments. Article 27(1) of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families²⁹ makes provision for the equality of treatment as follows:

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.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families provides further in article 61(3) that:

“Subject to bilateral or multilateral agreements in force for them, the States Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.”

The ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families by SADC countries is, as on 06 March 2017, as follows:

Table 1 Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families by SADC countries

Member state	Signature, succession to signature (d)	Ratification, accession (a), succession (d)
Angola	-	-
Botswana	-	-
DR Congo	-	-
Lesotho	24 September 2004	16 September 2005
Madagascar	24 September 2014	13 May 2015

29 Adopted by General Assembly Resolution 45/158 of 18 December 1990.

Member state	Signature, succession to signature (d)	Ratification, accession (a), succession (d)
Malawi	-	-
Mauritius	-	-
Mozambique	15 March 2012	19 August 2013
Namibia	-	-
Seychelles	-	15 December 1994 (a)
South Africa	-	-
Swaziland	-	-
Tanzania	-	-
Zambia	-	-
Zimbabwe	-	-

Source: United Nations Treaty Collection – accessed at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-13&chapter=4&lang=en (06 March 2017).

The table above reveals that only four of the 15 SADC member states have signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families as on 06 March 2017. Relevant ILO instruments include the following: The Equality of Treatment (Accident Compensation) Convention 19 of 1925; Equality of Treatment (Social Security) Convention 118 of 1962; Maintenance of Social Security Rights Convention 157 of 1982; Social Security (Seafarers) Convention (Revised) 165 of 1987; Equality of Treatment (Accident Compensation) Recommendation 25 of 1952; Migration for Employment Convention (Revised) 97 of 1949; Migration for Employment Recommendation (Revised) 86 of 1949; and Unemployment Convention 2 of 1919. As is apparent from the table below, the number of SADC countries that have signed (and in certain instances ratified) these international instruments (particularly the up-to-date ones) is lamentable.

Table 2 Ratification of selected pertinent social security conventions by SADC countries

Country	Equality of Treatment (Accident Compensation) Convention 19 of 1925	Equality of Treatment (Social Security) Convention 118 of 1962	Maintenance of Social Security Rights Convention 157 of 1982	Social Security (Seafarers) Convention (Revised) 165 of 1987	Migration for Employment Convention 97 of 1949
Angola	✓	x	x	x	x
Botswana	✓	x	x	x	x
DR Congo	✓	✓ <i>Has accepted Branches (d), (e) and (g)</i>	x	x	x
Lesotho	✓	x	x	x	x

Country	Equality of Treatment (Accident Compensation) Convention 19 of 1925	Equality of Treatment (Social Security) Convention 118 of 1962	Maintenance of Social Security Rights Convention 157 of 1982	Social Security (Seafarers) Convention (Revised) 165 of 1987	Migration for Employment Convention 97 of 1949
Madagascar	✓	✓ <i>Has accepted Branches (b) to (d) and (g)</i>	x	x	✓ <i>Has excluded the provisions of Annex III</i>
Malawi	✓	x	x	x	✓
Mauritius	✓	x	x	x	✓ <i>Has excluded the provisions of Annexes I to III</i>
Mozambique	x	x	x	x	x
Namibia	x	x	x	x	x
Seychelles	x	x	x	x	x
South Africa	✓	x	x	x	x
Swaziland	✓	x	x	x	x
Tanzania (Zanzibar)	✓	x	x	x	✓ <i>Has excluded the provisions of Annexes I to III</i>
Zambia	✓	x	x	x	✓ <i>Has excluded the provisions of Annexes I to III</i>
Zimbabwe	✓	x	x	x	x

✓ = ratified
x = not yet ratified
As of 06 March 2017

Source: International Labour Organisation NORMLEX – Information System on International Labour Standards accessed at <http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO:::> (06 March 2017).

Table 2 shows the scope of ratification of key ILO Conventions. The Equality of Treatment (Accident Compensation) Convention 19 of 1925 is the most ratified Convention (12 countries), followed by the Migration for Employment Convention 97 of 1949 (four countries with three exclusions) and the Equality of Treatment (Social Security) Convention 118 of 1962 (two countries). This points to the reluctance of SADC countries to ratify international social security conventions.

SADC INSTITUTIONAL AND REGULATORY FRAMEWORKS AND THEIR ROLE IN PROMOTING THE COORDINATION OF SOCIAL SECURITY IN THE REGION

SADC's objectives and institutional and regulatory frameworks are important in the development of an instrument for the coordination of social security benefits in the region. The SADC institutional framework relates to SADC as an organisation, while the SADC regulatory framework entails instruments adopted by SADC in relation to or affecting social security (coordination).

4.1 OBJECTIVES OF SADC

SADC was transformed from the Southern African Development Coordination Conference (SADCC) when the Declaration and Treaty of SADC was signed at the Summit of Heads of State and Government in Windhoek, Namibia on 17 August 1992.³⁰ The SADC Treaty provides the legal basis for the Community and a framework for achieving its vision, mission, objectives and common agenda.³¹ Articles 2 and 3 of the SADC Treaty established SADC as an international organisation. The Treaty commits member states to the fundamental principles of sovereign equality of all member states; solidarity, peace and security; human rights, democracy and rule of law; equity, balance and mutual benefit; and peaceful settlement of disputes.³²

30 The Southern African Development Coordination Conference (SADCC) was formed in April 1980 by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. SADCC was formed to advance the cause of national political liberation in Southern Africa, and to reduce dependence particularly on the then apartheid regime in South Africa through effective coordination of utilisation of the specific characteristics and strengths of each country and its resources. However, SADCC's objectives went beyond just dependence reduction to embrace basic development and regional integration. SADCC was formed with the four principal objectives of reduction of member state dependence particularly, but not only, on apartheid South Africa; forging of linkages to create genuine and equitable regional integration; mobilisation of member states' resources to promote the implementation of national, interstate and regional policies; and concerted action to secure international cooperation within the framework of the strategy for economic liberation (see SADC "History and Treaty" accessed at <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (09 June 2015)).

31 The member states of SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

32 Article 4 of the SADC Treaty.

The SADC vision is a region in which there will be a high degree of harmonisation and rationalisation, which will enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region. SADC's vision is thus one of a common future, a future within a regional community that will ensure economic well-being; improvement of the standards of living and quality of life; freedom and social justice; and peace and security for the people of Southern Africa.³³

SADC's mission is to promote sustainable and equitable economic growth and socio-economic development through efficient, productive systems, deeper cooperation and integration, good governance, and durable peace and security so that the region emerges as a competitive and effective player in international relations and the world economy.³⁴

SADC's Common Agenda includes the promotion of sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication; the promotion of common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective; and the consolidation and maintenance of democracy, peace and security.³⁵ The Agenda is based on several principles such as development orientation, subsidiarity, market integration and development, facilitation and promotion of trade and investment, and variable geometry.

The objectives of SADC are to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective; consolidate, defend and maintain democracy, peace, security and stability; promote self-sustaining development on the basis of collective self-reliance and the interdependence of member states; achieve complementarity between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the region; achieve sustainable utilisation of natural resources and effective protection of the environment; strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the region; combat HIV/AIDS or other deadly and communicable diseases; ensure that poverty eradication is addressed in all SADC activities and programmes; and mainstream gender equity in the process of community building.³⁶

33 SADC "SADC Vision" accessed at <http://www.sadc.int/about-sadc/overview/sadc-vision/> (09 June 2015).

34 SADC "SADC Mission" accessed at <http://www.sadc.int/about-sadc/overview/sadc-mission/> (09 June 2015).

35 See Article 5A of the SADC Treaty and SADC *Review of Operations of SADC Institutions* (April 2001) 7-9.

36 Article 5(1) of the SADC Treaty.

In order to achieve these objectives, SADC is compelled to harmonise political and socio-economic policies and plans of member states; encourage the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC; create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions; 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; promote the development of human resources; promote the development, transfer and mastery of technology; improve economic management and performance through regional cooperation; promote the coordination and harmonisation of the international relations of member states; secure international understanding, cooperation and support, and mobilise the inflow of public and private resources into the region; and develop such other activities as member states may decide in furtherance of the objectives of the SADC Treaty.³⁷

SADC member states also undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and to refrain from taking any measures likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the SADC Treaty; not to discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability; not to discriminate against any member state; to take all steps necessary to ensure the uniform application of the SADC Treaty; to take all necessary steps to accord the SADC Treaty the force of national law; and to cooperate with and assist institutions of SADC in the performance of their duties.³⁸

SADC member states are compelled to cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit.³⁹ They are further compelled to coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in the areas of cooperation (through appropriate SADC institutions).⁴⁰

Member states agree to cooperate, in accordance with the provisions of the Treaty, in the areas of food security, land and agriculture; infrastructure and services; trade, industry, finance, investment and mining; social and human development and special programmes; science and technology; natural resources and environment; social welfare, information and culture; politics, diplomacy, international relations, peace and security; and any additional areas of cooperation that may be decided upon by the Council.⁴¹ Member states also agree to conclude such Protocols as may be necessary in each area of cooperation,

37 Article 5(2) of the SADC Treaty.

38 Article 6 of the SADC Treaty.

39 Article 21(1) of the SADC Treaty.

40 Article 21(2) of the SADC Treaty.

41 Article 21(3) and (4) of the SADC Treaty.

which will spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration.⁴²

Various milestones have been set in achieving SADC's objective of regional integration. These are the attainment of a Free Trade Area in 2008,⁴³ a Customs Union in 2010,⁴⁴ a Common Market in 2015,⁴⁵ a Monetary Union in 2016,⁴⁶ and an Economic Union with a single currency in 2018.⁴⁷ The SADC Free Trade Area was established in 2008, but the Customs Union is still to be established. The delay has been attributed to the complexity created by multiple memberships of SADC member states in other regional trading arrangements pursuing similar integration ambitions as SADC.⁴⁸ As a result, it is unlikely that the other milestones on the SADC Regional Integration Agenda would be realised on time.

The SADC Free Trade Area was established under the Protocol on Trade. The Protocol compels member states to phase out existing tariffs; harmonise trade procedures and documentation within SADC; define SADC Rules of Origin; and reduce other barriers to trade. The Free Trade Area is facilitating the movement of goods through the harmonisation of customs procedures and customs classifications; an increase in customs cooperation; reduction of costs by introducing a single, standardised document for customs clearance throughout the region; establishment of 'one-stop' border posts that cut time spent at borders; and making transshipment easier by enabling a single declaration and single bond to be used when transporting goods across several borders within the community.⁴⁹

SADC states that the Free Trade Area is the first step towards deeper regional integration in SADC as set out in the Regional Indicative Strategic Development Plan.⁵⁰ The Free Trade Area increases intra-SADC trade as well as trade between the region and the rest of the world. As the first step towards deeper regional integration in SADC, its

42 Article 22 of the SADC Treaty.

43 A Free Trade Area refers to a group of countries in which tariffs and non-tariff barriers are eliminated on substantially all trade between them. Each member maintains its own tariffs on non-members (in contrast to a Customs Union). The SADC Free Trade Area was established by Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

44 A Customs Union is created when a group of countries form a single customs territory in which duties and other restrictive trade regulations are eliminated for substantially all trade between the parties and, in addition, where a common external tariff applies to trade with non-members.

45 A Common Market removes the restrictions on the movement of capital and labour allowing the free movement of goods, services and factors of production.

46 A Monetary Union establishes a single monetary authority which sets monetary policy and interest rates for the union, preparing the way for the introduction of a single currency.

47 See SADC Desk Assessment of the Regional Indicative Strategic Development Plan 2005 – 2010 (November 2011) 29.

48 *Ibid* 30.

49 SADC Free Trade Area Handbook (2008) 8-9.

50 SADC Free Trade Area Handbook (2008) 5.

successful implementation will facilitate the implementation of the other stages towards eventual integration. Therefore, although not having direct social security (coordination) implications, the free trade area promotes some of SADC's overall objectives (e.g. regional integration, poverty alleviation, enhancement of the standard and quality of life of the people of Southern Africa, and support of the socially disadvantaged).

4.2 INSTITUTIONAL FRAMEWORK OF SADC

Article 9 of the SADC Treaty outlines SADC's main organs and institutions, which are the following:

- **Summit of Heads of State or Government:** The Summit is comprised of all SADC Heads of State and/or Government. It is the ultimate policy-making institution of SADC. It is responsible for the overall policy direction and control of functions of the Community. The Summit usually meets once yearly around August/September in the member state holding the Deputy Chairpersonship of SADC at the time. Extraordinary meetings of the Summit are also held if and when the need arises. The Summit elects SADC office bearers, namely the Chairperson and Deputy Chairperson of SADC, and the Chairperson and Deputy Chairperson of the SADC Organ on Politics, Defence and Security Cooperation. The functions of the Summit are enumerated under article 10 of the SADC Treaty.
- **Organ on Politics, Defence and Security Co-operation:** The structure, operations and functions of the Organ on Politics, Defence and Security Cooperation are regulated by the Protocol on Politics, Defence and Security Cooperation, which was approved and signed by the Summit at its meeting of August 2001 in Blantyre, Malawi. The Organ is coordinated at the level of the Summit on a Troika basis and reports to the Chairperson of SADC. Like the Summit, the Organ is chaired on a rotation basis for a period of one year. The Chairperson of the Organ does not simultaneously hold the Chair of the Summit. At the executive level, its work is coordinated by the Directorate of the Organ at the SADC Secretariat.
- **Council of Ministers:** The Council of Ministers consists of ministers from each member state, usually those responsible for ministries of foreign affairs, economic planning and finance. The functions of the Council are provided for under article 11 of the Treaty and include, amongst other things, overseeing the functioning and development of SADC and ensuring that policies are properly implemented. The Council usually meets twice a year in February and just before the Summit in August or September.
- **Integrated Committee of Ministers:** Established under article 12 of the SADC Treaty, the Integrated Committee of Ministers (ICM) is meant to ensure policy guidance, coordination and harmonisation of cross-sectoral activities. The ICM consists of at least two ministers from each member state and is responsible to the Council.
- **Standing Committee of Officials:** The functions of this Committee are enumerated under article 13 of the Treaty. The Standing Committee of Senior Officials consists of

one Permanent/Principal Secretary or an official of equivalent rank from each member state, preferably from a ministry responsible for economic planning or finance. As a technical advisory committee to the Council of Ministers, this Committee serves as the clearing house for the Council Agenda. The Chairperson and Vice-Chairperson of the Standing Committee are appointed from the member states holding the SADC Chairpersonship and Deputy Chairpersonship of Council.

- Secretariat: The functions of the Secretariat are set out in article 14 of the Treaty. The SADC Secretariat is the principal executive institution of SADC responsible for, amongst other things, the strategic planning and management of SADC programmes, implementation of decisions of SADC policy organs and institutions, such as the Summit, Council and the Troikas, and coordination and harmonisation of the policies and strategies of member states.
- Tribunal: Article 16 of the Treaty establishes the SADC Tribunal to ensure adherence to, and proper interpretation of, the provisions of the SADC Treaty and subsidiary instruments, and to adjudicate disputes referred to it.
- SADC National Committees: Article 16A of the Treaty provides for the establishment of these national-level SADC institutions in each SADC member state, to be comprised of key stakeholders, notably the government, the private sector and civil society in each member state. The main functions of a National Committee are to provide inputs at the national level in the formulation of regional policies, strategies and the SADC Programme of Action, as well as coordinate and oversee the implementation of these programmes at the national level. The Committees are also responsible for the initiation of SADC projects and issue papers as an input into the preparation of the regional strategies.

The activities of SADC are grouped into four clusters called Directorates. These are the Directorates of Trade, Industry, Finance and Investment; Infrastructure and Services; Food, Agriculture and Natural Resources; and Social and Human Development and Special Programmes. Social security falls under the Directorate of Social and Human Development and Special Programmes (together with Culture and Information; Health and Pharmaceuticals; HIV and AIDS; Education, Skill Development and Capacity Building; Employment, Productivity, Labour and Social Security; and Special Programmes).⁵¹ Some of the objectives of the Directorate of Social and Human Development and Special Programmes are the development, promotion and harmonisation of policies and programmes to ensure sustainable human development; development, promotion and harmonisation of human resources development, educational, skills development and training policies, strategies and programmes; development, promotion and harmonisation of policies on social welfare for the vulnerable groups; development, promotion and harmonisation of health care policies and standards; coordination of the development of policies to effectively combat the HIV/AIDS pandemic and all other communicable diseases; and development; promotion and harmonisation of employment policies and labour standards.

51 See <http://www.sadc.int/shdsp> accessed on 23 April 2009.

The Directorate of Social and Human Development and Special Programmes houses the Employment and Labour Sector (ELS), which is responsible for the promotion of employment and labour issues for the improvement of labour productivity and social development in SADC. Some of the objectives of the ELS are to promote the formulation and harmonisation of social policies and programmes in SADC member states which contribute to the generation of productive employment opportunities and increased income; promote labour policies and practices and measures in member states which facilitate labour mobility, remove distortions in labour markets as well as enhance industrial harmony and increase productivity; provide a framework for regional cooperation in the area of employment and labour with the full participation and involvement of all social partners; promote the establishment and harmonisation of social security schemes; harmonise regulations relating to safety and health standards at work places across the region; promote equity and protection of vulnerable groups; and promote the development of institutional capacities as well as vocational and technical skills in the region.⁵²

4.3 REGULATORY FRAMEWORK OF SADC

Instruments adopted by SADC in relation to or affecting social security or social security coordination include the Treaty of the SADC, pertinent SADC Protocols, the Charter of Fundamental Social Rights in the SADC, the Code on Social Security; and the Code on HIV/AIDS and Employment. A Draft SADC Labour Migration Policy has been developed, which will have an impact on the social protection position of intra-SADC migrants.⁵³ Since the SADC Treaty has been discussed in relation to the objectives of SADC and SADC's institutional framework, further discussion of it here is not necessary.

4.3.1 Charter of Fundamental Social Rights in the SADC

The Charter of Fundamental Social Rights in the SADC (Social Charter) was adopted to realise some of the objectives in article 5 of the SADC Treaty.⁵⁴ The aims are to facilitate, through close and active consultations amongst social partners and in a spirit conducive to harmonious labour relations, the accomplishment of the objectives of:⁵⁵

52 Chitambo A "SADC Policy Dimensions of Social Protection" Paper presented at the SADC Social Security Consultative Workshop Towards the Development of Social Protection in the SADC Region, held at the Helderfontein Conference Centre, Johannesburg, South Africa (17-19 October 2001).

53 The overall objective of the Draft SADC Labour Migration Policy is to develop a harmonised regional policy framework to regulate labour migration within SADC that benefits sending and receiving countries, protects the rights of migrant workers, contributes to equitable and just development in the region, and builds on principles of mutual respect and cooperation. One of its specific objectives is to create a harmonised social protection regime across SADC for migrant workers and nationals that takes into consideration a minimum floor of social security for migrant workers (SADC Labour Migration Policy (Draft) December 2013, 8).

54 See Preamble to the Social Charter.

55 Article 2(1) of the Social Charter.

- ensuring the retention of the tripartite structure of the three social partners, namely governments, organisations of employers, and organisations of workers;
- promoting the formulation and harmonisation of legal, economic and social policies and programmes which contribute to the creation of productive employment opportunities and generation of incomes in member states;
- promoting labour policies, practices and measures which facilitate labour mobility, remove distortions in labour markets and enhance industrial harmony, and increase productivity in member states;
- providing a framework for regional cooperation in the collection and dissemination of labour market information;
- promoting the establishment and harmonisation of social security schemes;
- harmonising regulations relating to health and safety standards at work places across the region; and
- promoting the development of institutional capacities as well as vocational and technical skills in the region.

Governments have the responsibility of creating an enabling environment for these objectives to be realised.⁵⁶ The Charter embodies the recognition by SADC governments, employers and workers 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, the Philadelphia Declaration and other relevant international instruments.⁵⁷ As a result, member states undertake to observe the basic rights referred to in the Charter.⁵⁸

The Charter guarantees a right to social protection. In terms of article 10:

SADC Member States shall create an enabling environment such that every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance.

56 Article 2(2) of the Social Charter.

57 Article 3(1) of the Social Charter.

58 Article 3(2) of the Social Charter.

It further provides for the equal treatment of men and women,⁵⁹ as well as the protection of the rights of elderly persons⁶⁰ and persons with disabilities.⁶¹

The responsibility for the implementation of the Charter is vested in the national tripartite institutions and regional structures.⁶² These institutions and structures must promote social legislation and equitable growth within the region and prevent non-implementation of the Charter.⁶³ Member states are required to submit regular progress reports to the annual tripartite sectoral meeting, with the most representative organisation of employers and workers consulted in the preparation of the report.⁶⁴

4.3.2 SADC Protocols

In accordance with article 22(1) of the SADC Treaty, several Protocols have been concluded. These Protocols regulate cooperation between member states in various

59 Article 6 of the Social Charter requires member states to create an enabling environment consistent with ILO Conventions on discrimination and equality and other relevant instruments so that: (a) gender equity, equal treatment and opportunities for men and women are ensured; (b) equal opportunities for both men and women shall apply, in particular, to access to employment, remuneration, working conditions, social protection, education, vocational training and career development; and (c) reasonable measures are developed to enable men and women to reconcile their occupational and family obligations.

60 In terms of article 8, member states must endeavour to create an enabling environment in accordance with arrangements applying to each member state so that (*inter alia*): (a) every worker in the region at the time of retirement enjoys resources affording him or her a decent standard of living, including equity in post-employment security schemes; and (b) every worker who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence shall be entitled to adequate social assistance to cater specifically for basic needs including medical care.

61 According to article 9, member states must create an enabling environment such that all persons with disabilities, whatever the origin and nature of their disability, are entitled to additional concrete measures aimed at improving their social and professional integration. These measures relate to, in particular, according to the capacities of beneficiaries, vocational training, accessibility and mobility, means of transport and housing, and appropriate organisation of work and workplaces to take into account their needs.

62 Article 16(1) of the Social Charter.

63 Article 16(2) of the Social Charter.

64 Article 16(3) and (4) of the Social Charter.

areas.⁶⁵ Although many of the Protocols have provisions relating to social security,⁶⁶ the most pertinent for the coordination of social security in the region are the Draft Protocol on the Facilitation of Movement of Persons and the Protocol on the Tribunal and Rules of Procedure Thereof. A Protocol on Employment and Labour, which regulates aspects of social security, has been developed but is yet to be implemented.⁶⁷

4.3.2.1 Draft Protocol on the Facilitation of Movement of Persons (2005)

A SADC Protocol on the movement of persons has been in process for over 20 years, without adoption. A Draft Protocol on Freedom of Movement of Persons was first drafted

65 Some of these are the Protocol against Corruption; Protocol on Combating Illicit Drugs; Protocol on Control of Firearms, Ammunition and other related materials; Protocol on Culture, Information and Sport; Protocol on Gender and Development; Protocol on Energy; Protocol on Extradition; Draft Protocol on the Facilitation of Movement of Persons; Protocol on Fisheries; Protocol on Forestry; Protocol on Health; Protocol on Immunities and Privileges; Protocol on Legal Affairs; Protocol on Mining; Protocol on Mutual Legal Assistance in Criminal Matters; Protocol on Politics, Defence and Security Cooperation; Protocol on Shared Watercourse Systems; Revised Protocol on Shared Watercourses; Protocol on Tourism; Protocols on Trade; Protocol on Transport, Communications and Meteorology; Protocol on the Tribunal and Rules of Procedure Thereof; and Protocol on Wildlife Conservation and Law Enforcement.

66 As examples, the Protocol on Gender and Development aims to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender-responsive legislation, policies, programmes and projects (article 3). This will address discriminatory provisions and practices affecting women's access to social security. The Protocol on Health provides for a system of cooperation to address health issues and for establishing institutional mechanisms to implement the Protocol. The Protocol on Energy aims to ensure the wellbeing of the people of the region through the provision and use of energy for people throughout the SADC region, particularly ensuring that low-income residents have access to energy.

67 The Protocol on Employment and Labour was approved by the Council of Ministers and signed by the Summit of Heads of State and Government in August 2014. It will be implemented after ratification by two thirds of the SADC member states. Some of the objectives of the Protocol are to provide member states with strategic direction and guidelines for the harmonisation of employment and labour, as well as social security, policies and legislation; enhance cohesion, encourage collaboration amongst member states and promote common approaches to labour market challenges for the attainment of sustainable development; ensure the achievement of minimum labour standards, social protection and creating sustainable social dialogue; promote the development of employment and labour, as well as social security, policies, measures and practices which facilitate labour mobility, and enhance industrial harmony and increase sustainable productivity and decent work in member states; create a legal and policy framework for labour migration within SADC through harmonised labour and social security legislation, in the context of ILO Conventions on migrant workers and African Union policy documents; facilitate formulation and harmonisation of legal instruments, economic and social policies and programmes for the generation of productive employment and sustainable and inclusive development in member states; and support the establishment of inclusive social security schemes in member states providing income maintenance and minimum income protection and facilitating labour market integration (article 3 of the Protocol on Employment and Labour).

in 1995.⁶⁸ The Draft Protocol has been adopted in accordance with article 5(2)(d) of the SADC Treaty, which requires 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.

Because of weaknesses in the Draft Protocol,⁶⁹ it was revised and reintroduced in 1997 as the Draft Protocol on the Facilitation of Movement of Persons.⁷⁰ Concerns were raised about the 1997 Protocol by Botswana, Namibia and South Africa, which led to a request to member states to consult internally on the Protocol and send proposals to the Chairman of the Council.⁷¹ After a further revision of the Draft Protocol, a Draft Protocol was tabled in 2005. The 2005 Draft Protocol has been adopted, but is not yet operational because of the lack of the requisite number of signatories.

According to the Preamble to the Protocol, it is dictated by various provisions of the Treaty, including the duty to promote the interdependence and integration of SADC national economies for the harmonious, balanced and equitable development of the region; the necessity to adopt a flexible approach in order to accommodate disparities in the levels of economic development among member states; the need to redress imbalances in large-scale population movement within SADC; and the need to support, assist and promote the efforts of the AU, which is encouraging free movement of persons

68 The Draft Protocol on Freedom of Movement of Persons (1995) aimed for the gradual abolition of barriers to movement across national borders of SADC member states. This was evident from article 3 of the Protocol, which cited its ultimate objective as the progressive elimination of all controls on SADC citizens, bringing about free movement of people within a projected ten years. The Draft Protocol thus had a vision of a future where people, capital and goods moved freely across national borders (see Perbedy S and Crush J “Histories, realities and negotiating free movement in Southern Africa” in Pécoud A and De Guchteneire P (eds) *Migration Without Borders: Essays on the Free Movement of People* (UNESCO Publishing/Berghahn Books (2007)) 187).

69 Perceived weaknesses of the Draft Protocol included its failure to take the socio-economic reality of the region into account in its assumption that the free movement of people would ultimately lead to the interdependence and integration of SADC national economies for the harmonious, balanced and equitable development of the region; and its aim of eliminating all internal borders within the region not only requiring extensive planning and cooperation with regard to strengthening SADC’s external borders (which were not catered for in the Protocol), but also requiring some form of centralised database through which the movements of people in the region could be tracked (see Preamble to the Draft Protocol and Solomon H “Towards the Free Movement of People in Southern Africa?” *Institute for Security Studies Papers* No. 18 (March 1997)).

70 The 1995 Draft Protocol was revised in order to address the concerns of member states, while maintaining its original objectives and principles. The 1997 Draft Protocol had the objectives of facilitating the movement of people within the region by gradually eliminating obstacles impeding such movement; expanding the network of bilateral agreements among member states in this regard as a step towards a multilateral regional agreement; preventing the illegal movement of citizens of member states and the illegal movement of nationals of third states within and into the region; improving control over external borders of the SADC community; and promoting common policies with regard to immigration matters, where necessary and feasible (see article 2 of the Draft Protocol on the Facilitation of Movement of Persons in the SADC (1997)).

71 Perbedy S and Crush J “Histories, realities and negotiating free movement in Southern Africa” in Pécoud A and De Guchteneire P (eds) *Migration Without Borders: Essays on the Free Movement of People* (UNESCO Publishing/Berghahn Books (2007)) 189.

in SADC as a stepping stone towards free movement of persons in an eventual African Economic Community.

The overall objective of the Draft Protocol is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the region generally into and within the territories of state parties.⁷² This overall objective is to be achieved by facilitating entry into the territory of another state party for a maximum period of 90 days per year for *bona fide* visits (for a lawful purpose) without a visa and in accordance with the laws of the state party concerned; permanent and temporary residence in the territory of another state party; and establishment of oneself and working in the territory of another state party.⁷³

The Draft Protocol adopts a flexible approach, with undefined timeframes and subject to national laws.⁷⁴ SADC member states are encouraged to conclude bilateral agreements to facilitate movement of persons.⁷⁵ The types of movement envisaged by the Protocol are visa-free travel, permanent and temporary residence and establishment.⁷⁶ In terms of visa-free travel, a person may be admitted into the territory of another state, if the visit is for a maximum period of 90 days, although the person may apply for an extension, subject to the laws of the state party concerned. The visitor must also possess a valid travel document; must have sufficient means of support for the duration of the visit; must not be a prohibited person under the laws of the intended host state; and must enter the territory of the other state through an official port of entry. However, the Draft Protocol permits state parties to apply, in writing, for an exemption from implementing the requirements of visa-free travel in terms of article 14.⁷⁷

Residence is defined as permission or authority to live in the territory of a state party in accordance with the legislative and administrative provisions of that state party.⁷⁸ Residence will be obtained through an application for a residence permit, which will be made by the applicant to the appropriate authorities of the relevant state party in accordance with the laws of that state party. State parties are encouraged to facilitate the processing of residence applications, and to avoid unnecessary delays.⁷⁹

72 See Article 2 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

73 Article 3 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

74 Article 10 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

75 Articles 13 and 14 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

76 Article 14(2) of the Draft Protocol on the Facilitation of Movement of Persons (2005).

77 Article 15 of the Draft Protocol on the Facilitation of Movement of Persons (2005). Where such an exemption is granted, it allows the state party concerned to impose on a citizen of another state party the requirement of an entry visa. However, the imposition of an entry visa is on condition that a citizen who requires a visa will be able to apply for such a visa at the entry border post; no fee will be chargeable for such visa; and that each exemption will be valid for a period not longer than twelve months (although a member state may be granted an extension of the exemption granted for such further periods as the Summit determines).

78 Article 16 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

79 Article 17 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

Establishment means permission or authority granted by a state party, in terms of its national laws, to a citizen of another state party for exercise of economic activity and profession either as an employee or a self-employed person; or establishing and managing a profession, trade, business or calling.⁸⁰

A citizen of a state party who acquires residence or establishment in the territory of another state party enjoys the rights and privileges as determined by the laws of a host state and must also fulfil his or her obligations accordingly.⁸¹ In addition, the Protocol does not infringe on the enjoyment by any citizen of a state party of the right of residence or establishment acquired in another state party before the entry into force of the Protocol.⁸²

The removal of persons from the territory of a member state is prohibited except in the following situations:⁸³

- where reasons of national security, public order or public health of the host state so dictate;
- where an important essential condition of the issue or validity of such person's residence or establishment permit has ceased to exist or cannot be fulfilled or complied with any longer;
- where a citizen of another state party acts in conflict with the purposes for which such permit was issued or contravenes or fails to comply with any such conditions subject to which it was issued; or
- where a person refuses to comply with a lawful order of an appropriate public health authority issued for the protection of public health in circumstances where the consequences of such refusal have been explained.

4.3.2.2 Protocol on the Tribunal and Rules of Procedure Thereof

The SADC Treaty states that the Tribunal must be constituted to ensure adherence to and the proper interpretation of the provisions of the Treaty and subsidiary instruments and to adjudicate such disputes referred to it.⁸⁴ The composition, powers, functions, procedures and other related matters governing the Tribunal are to be prescribed in a protocol.⁸⁵

⁸⁰ Article 18 of the Draft Protocol on the Facilitation of Movement of Persons (2005). Although the Draft Protocol does not specify the difference between residence and establishment, the provision in article 17(S) that a residence permit may be renewed suggests residence is a more temporary situation, while establishment indicates the possibility of a person applying for and being granted permanent residence or citizenship in another state.

⁸¹ Article 20 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

⁸² Article 21 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

⁸³ Article 22 of the Draft Protocol on the Facilitation of Movement of Persons (2005).

⁸⁴ Article 16(1) of the SADC Treaty.

⁸⁵ Article 16(2) of the SADC Treaty.

The Protocol on the Tribunal and Rules of Procedure Thereof was adopted in 2000 to formally establish the organisation, jurisdiction and operating procedures of the SADC Tribunal. It specifies the Tribunal's constitution and composition, its process for appointment and dismissal of members, and its policies on legal decisions, reviews, representation, interim measures, fees and legal aid, enforcement of decisions, and other aspects of international law in the region.⁸⁶ However, the Tribunal was suspended in 2010 for a review to be conducted of its powers and functions. In 2012 the SADC Summit resolved that a new Tribunal should be negotiated and that its mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between member states.⁸⁷ A new Protocol was adopted in 2014 to reconstitute the Tribunal with a new mandate of dealing only with inter-state disputes and no longer with cases brought by individuals.

Under the 2000 Protocol on the Tribunal and Rules of Procedure Thereof, the Tribunal had jurisdiction over all disputes and all applications referred to it in accordance with the SADC Treaty and the Tribunal Protocol which relate to the interpretation and application of the Treaty; the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of SADC, and acts of the institution of SADC; and all matters specifically provided for in any other agreements that states may conclude among themselves or within the community and which confer jurisdiction to the Tribunal.⁸⁸

The Tribunal had the power to hear a matter brought by member states against one another and between natural or legal persons and member states.⁸⁹ However, the Tribunal could not hear a matter brought by a natural or legal person against the member state unless he or she had exhausted all available remedies or is unable to proceed under the domestic jurisdiction.⁹⁰

The Tribunal had jurisdiction to give preliminary rulings in proceedings of any kind and between any parties before the courts or tribunals of member states.⁹¹ However, the Tribunal did not have jurisdiction but could rule on a question of interpretation, application or validity of the provisions in issue, if the question is referred to it by a court or tribunal of a member state for a preliminary ruling in accordance with the provisions of the Protocol on the Tribunal.⁹²

86 See SADC "Protocol on the Tribunal and Rules thereof (2000)" accessed at www.sadc.int (14 April 2015).

87 See SADC "SADC Tribunal" accessed at <http://www.sadc.int/about-sadc/sadc-institutions/tribun/> (14 April 2015).

88 Article 14 of the Protocol on the Tribunal and Rules of Procedure Thereof.

89 Article 15(1) of the Protocol on the Tribunal and Rules of Procedure Thereof.

90 Article 15(2) of the Protocol on the Tribunal and Rules of Procedure Thereof.

91 Article 16(1) of the Protocol on the Tribunal and Rules of Procedure Thereof.

92 Article 16(2) of the Protocol on the Tribunal and Rules of Procedure Thereof.

The Tribunal had exclusive jurisdiction over all disputes between the member states and SADC, as well as over all disputes between natural or legal persons and SADC.⁹³ Such disputes could be referred by the member state concerned or by the competent institution or organ of SADC (in the case of member state and SADC disputes), or by the natural or legal person or by the competent institution or organ of SADC (in the case of natural or legal person and SADC disputes). The Tribunal also had exclusive jurisdiction to hear disputes between the community and its staff (employees) that arise from the application and interpretation of the staff rules and regulations of the Secretariat or the terms and conditions of employment of the staff (employees).⁹⁴ The Tribunal further had power to give advisory opinions at the request of the Summit or the Council.⁹⁵

The Tribunal had the power to apply the SADC Treaty, the Protocol on the Tribunal and other Protocols that form part of the Treaty, all subsidiary instruments adopted by the Summit, by the Council or by any other institution or organ of the community pursuant to the Treaty or Protocols.⁹⁶ It also had the power to develop its own community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of member states.⁹⁷

The law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the member state in which the judgment is to be enforced govern the enforcement of the Tribunal's decisions.⁹⁸ Member states and SADC institutions were required to take all measures necessary to ensure execution of the Tribunal's decisions.⁹⁹ The Tribunal's decisions were binding on the parties to the dispute in respect of the particular case and were enforceable within the territories of the states concerned.¹⁰⁰ Failure by a state to comply with a decision of the Tribunal could be referred to the Tribunal by a party concerned.¹⁰¹

4.3.3 Code on Social Security in the SADC

The Code on Social Security in the SADC also aims to realise some of the objectives in article 5 of the SADC Treaty.¹⁰² The Code is a non-binding instrument which aims to provide member states with strategic direction and guidelines in the development and improvement of social security schemes in order to enhance the welfare of the people of the SADC region; to provide SADC and member states with a set of general principles

93 Articles 17 and 18 of the Protocol on the Tribunal and Rules of Procedure Thereof.

94 Article 19 of the Protocol on the Tribunal and Rules of Procedure Thereof.

95 Article 20 of the Protocol on the Tribunal and Rules of Procedure Thereof.

96 Article 21(a) of the Protocol on the Tribunal and Rules of Procedure Thereof.

97 Article 21(b) of the Protocol on the Tribunal and Rules of Procedure Thereof.

98 Article 32(1) of the Protocol on the Tribunal and Rules of Procedure Thereof.

99 Article 32(2) of the Protocol on the Tribunal and Rules of Procedure Thereof.

100 Article 32(3) of the Protocol on the Tribunal and Rules of Procedure Thereof.

101 Article 32(4) of the Protocol on the Tribunal and Rules of Procedure Thereof.

102 See Preamble to the Code.

and minimum standards of social protection, as well as a framework for monitoring at national and regional levels; and to provide SADC and member states with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region.¹⁰³

The Code is mindful of and attempts to give expression to salient principles underlying the development of sound social security systems, with specific reference to SADC member states.¹⁰⁴ The provisions of the Code are guided by the underlying principles of:¹⁰⁵

- solidarity and redistribution;
- variable geometry (the principle, according to the Regional Indicative Strategic Development Plan (RISDP), where a group of member states could move faster on certain activities and the experiences learnt are replicated in other member state); and
- multi-actor responsibility (that is to say, social security provisioning is a function shared by governments, public social security institutions and private role-players, keeping in mind that governments bear the overall responsibility).

The Code protects the right to social security by stating that:¹⁰⁶

Everyone in SADC has the right to social security.

Every Member State should establish and maintain a system of social security in accordance with the provisions of this Code and Article 10 of the Charter of Fundamental Social Rights in SADC.

Every Member State should maintain its social security system at a satisfactory level at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security No. 102 of 1952.

Every Member State should progressively raise its system of social security to a higher level, which should include achieving the meaningful coverage of everyone under the system, bearing in mind the realities and level of development in the particular Member State.

The right to social security is guaranteed to everyone in the region, including migrants, foreign workers and refugees. The Code enjoins member states to work towards the free movement of persons and for immigration controls to be progressively reduced.¹⁰⁷ Member states are also encouraged to ensure that all lawfully employed immigrants are protected through the promotion of the following core principles, which should be contained in both the national laws of member states and in bi- or multilateral arrangements between member states:¹⁰⁸

103 Article 3 of the Code.

104 Article 2(1) of the Code.

105 Article 2(2) of the Code.

106 Article 4 of the Code

107 Article 17(1) of the Code.

108 Article 17(2) of the Code.

- migrant workers should be able to participate in the social security schemes of the host country;
- migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country;
- there should be an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different member states;
- member states should ensure the facilitation of exportability of benefits, including the payment of benefits in the host country;
- member states should identify the applicable law for purposes of the implementation of the above principles; and
- member states should ensure coverage of self-employed migrant workers on the same basis as employed migrants.

The Code also states that illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country.¹⁰⁹ In addition, the Code requires that social protection should be extended to refugees in accordance with the provisions of international and regional instruments.¹¹⁰

Implementation and monitoring of the Code is to be undertaken by the Independent Committee of Experts within the relevant SADC structures to be established by the Integrated Committee of Ministers.¹¹¹ The Independent Committee of Experts will monitor compliance with the Code and make recommendations to the relevant SADC structures and the respective national structures on the progressive attainment of the Code's provisions.

4.4 PRELIMINARY OBSERVATIONS ON THE ROLE OF SADC

The objectives of SADC and its institutional and regulatory frameworks point towards the feasibility of concluding an instrument for the portability of social security benefits in the region. SADC's vision is a region with a high degree of harmonisation and rationalisation. Its mission is to promote sustainable and equitable economic growth and socio-economic development through (among other things) deeper cooperation and integration. Its Common Agenda includes the promotion of sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication. One of its objectives is to promote sustainable and equitable economic growth and socio-economic development to ensure the alleviation and ultimate eradication of poverty, enhance the standard and quality of life of the people of Southern Africa, and support the socially disadvantaged

¹⁰⁹ Article 17(3) of the Code.

¹¹⁰ Article 17(4) of the Code.

¹¹¹ Article 21 of the Code.

through regional integration. These indicate that the main objective of SADC (as was the case with its predecessor, the SADCC) is to create genuine and equitable regional integration.

This is why SADC is compelled to harmonise political and socio-economic policies and plans of member states and 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. It is also the reason for compelling SADC member states to cooperate in all areas necessary to foster regional development and integration. Regional integration is also the motivation for SADC member states' agreement to cooperate in the area of social welfare (amongst others), and to conclude such Protocols as may be necessary in this area. SADC's regional integration agenda is confirmed by the milestones laid down in the Regional Indicative Strategic Development Plan (RISDP) (i.e. Free Trade Area in 2008, Customs Union in 2010, Common Market in 2015, Monetary Union in 2016 and an Economic Union with a single currency in 2018).

SADC's institutional framework (its main organs and institutions) is also conducive to becoming an instrument for the portability of social security benefits in the region. The aims of the Directorate of Social and Human Development and Special Programmes (which is responsible for social security), and of the Employment and Labour Sector (ELS) within it, promote the realisation of such an instrument. It has been proposed in the past that a board or subcommittee under SADC's auspices should be established to promote the integration of social security in the region (through ratification of ILO Conventions on the portability of social security). The SADC board or subcommittee could provide a forum for resolving practical issues of compliance and to suggest common programme definitions, application procedures and waiting periods, thereby encouraging greater conformity among schemes.¹¹² The ELS is a subcommittee of SADC and should be able to undertake these functions under a regional social security portability agreement.

The SADC Treaty and its subsidiary instruments point to the need for such an instrument for the portability of social security benefits in the region. The Treaty recognises that its objectives can only be attained if SADC (*inter alia*) harmonises the political and socio-economic policies and plans of member states, and develops 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. Furthermore, the objectives can only be realised if SADC member states adopt adequate measures to promote their achievement and cooperate in all areas necessary to foster regional development and integration (in this case social security or welfare).

However, the SADC Treaty is not fully conducive to regional integration and to the development of a social security portability instrument. In the first instance, the principle of non-discrimination in article 6(2) is a closed list and does not include the prohibition of discrimination based on nationality or citizenship. The prohibition of discrimination

112 See Fultz E and Pieris B "The social protection of migrant workers in South Africa" (ILO/SAMAT Policy Paper No. 3, 1997) 16.

based on nationality or citizenship is fundamental to the coordination of social security and to regional integration. In addition, the Treaty fails to guarantee freedom of movement, but only provides for the facilitation of movement of persons. Article 5(2)(d) merely compels member states 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 Charter of Fundamental Social Rights also has objectives that can be achieved through an instrument for the portability of social security benefits in the region.¹¹³ The Social Charter requires the establishment of harmonised programmes of social security throughout the region. No distinction is drawn between citizens and non-citizens, as the Charter emphasises regional integration and focuses on the harmonisation of social security schemes in SADC.

Several Protocols have also been concluded to promote SADC's objectives. The most notable of these are the Draft Protocol on the Facilitation of Movement of Persons; the Protocol on the Tribunal and Rules of Procedure Thereof; and the Protocol on Employment and Labour. These instruments envisage and/or facilitate the conclusion of a social security portability instrument.¹¹⁴ Although the Draft Protocol on the Facilitation of Movement of Persons fails to guarantee freedom of movement, it encourages member states to conclude bilateral agreements to facilitate movement of persons. It further seeks to facilitate the movement of citizens of member states within the region by gradually eliminating obstacles which impede such movement; expanding the network of bilateral agreements among member states in this regard is a step towards a multilateral regional agreement. The reconstitution of the SADC Tribunal with a new mandate of dealing only with inter-state disputes and no longer with cases brought by individuals also means that an avenue for the resolution of individual disputes relating to the social security coordination instrument has been closed.

The Code on Social Security in the SADC provides SADC and member states with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region. It encourages member states to provide social protection to

113 See article 2(1) of the Social Charter.

114 The overall objective of the Draft Protocol on the Facilitation of Movement of Persons is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the region generally into and within the territories of state parties. The Protocol on the Tribunal and Rules of Procedure Thereof was concluded in terms of the directive in the SADC Treaty for it to be constituted to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and subsidiary instruments, as well as for the adjudication of disputes. Some of the objectives of the Protocol on Employment and Labour are to provide member states with strategic direction and guidelines for the harmonisation of employment and labour, as well as social security, policies and legislation; to promote the development of employment and labour, as well as social security, policies, measures and practices, which facilitate labour mobility, and enhance industrial harmony and increase sustainable productivity and decent work in member states; and to create a legal and policy framework for labour migration within SADC through harmonised labour and social security legislation, in the context of ILO Conventions on migrant workers and African Union policy documents.

all within their territory. This is to be guided by principles such as the ability to participate in the social security schemes of the host country, and equal treatment alongside citizens within the social security system of the host country. It also envisages social security coordination by encouraging member states to introduce cross-border coordination by way of national legislation and through bi- or multilateral arrangements (inclusive of principles such as maintenance of acquired rights, aggregation of insurance periods, and exportability of benefits).

SADC may have formulated objectives and institutional and regulatory frameworks, but their implementation by member states is necessary for the success of SADC's regional integration agenda (including an instrument for the portability of social security benefits in the region). While the institutional and regulatory frameworks for the establishment of an integrated regional social protection regime have been developed, implementation has lagged behind because no concrete mechanisms have been established as yet to implement the SADC social protection agenda. According to the SADC Treaty, sanctions can be imposed against a member state that persistently fails to fulfil, without good reason, its obligations under the treaty or that implements policies which undermine the principles and objectives of SADC.¹¹⁵ Sanctions are determined by the SADC Summit on a case-by-case basis.¹¹⁶ However, this aspect has proven to be difficult, as the Treaty further states that except otherwise provided in the Treaty, decisions of the institutions of SADC are taken by consensus.¹¹⁷

The Charter of Fundamental Social Rights also does not establish implementation mechanisms, allocating this responsibility to national tripartite institutions and regional structures.¹¹⁸ The Charter further only requires member states to submit regular progress reports to the SADC Secretariat.¹¹⁹ The flexible approach of 'variable geometry' adopted by SADC instruments and the SADC Secretariat¹²⁰ also means that member states cannot be sanctioned for not implementing SADC regulatory instruments.

Non-implementation and non-enforcement of SADC obligations is also a consequence of the absence of the SADC Tribunal. The Tribunal, which could be used as an implementation and enforcement institution, was dissolved in 2011. As indicated in the Protocol on the Tribunal and the Rules of Procedure Thereof,¹²¹ the Tribunal could have

115 Article 33(1) of the SADC Treaty.

116 Article 33(2) of the SADC Treaty.

117 Article 19 of the SADC Treaty.

118 Article 16(1) of the SADC Social Charter.

119 Article 16(3) of the SADC Social Charter.

120 Variable geometry is the principle according to which a member state or group of member states could move faster on certain activities and the experiences learnt are replicated in other member states (see SADC Regional Indicative Strategic Development Plan (2003) 84 and article 2 of the Code on Social Security in the SADC).

121 SADC Protocol on the Tribunal and the Rules of Procedure Thereof (2000).

been an instrument for the promotion of the rights of citizens in the SADC region.¹²² However, even when the Tribunal was operational, its effectiveness was limited, as shown in the case of *Mike Campbell (Pty) Ltd and Others v Republic of Zimbabwe*.¹²³

122 See also Mpedi LG and Nyenti M “Perspectives towards the development of the social protection dimension of the SADC regional integration agenda” 2012 *SADC Law Journal* Vol. 2, 164-186.

123 *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADC (T) 2 (28 November 2008)*.

COMPARATIVE SADC AGREEMENTS AND NATIONAL PORTABILITY PROVISIONS

In developing a multilateral social security agreement, SADC member states can learn lessons from comparative bilateral agreements that have been concluded in the areas of social security coordination, labour supply and free movement of persons. These indicate that SADC member states have some experience in concluding coordination agreements. Examples of these agreements are the Malawi/Zambia Social Security Agreement of 2003; the Mauritius/United Kingdom Social Security Convention of 1981; bilateral labour agreements between South Africa and its neighbours; and agreements between South Africa and neighbouring countries on the facilitation of cross-border movement of persons.

5.1 MALAWI/ZAMBIA SOCIAL SECURITY AGREEMENT (2003)

The bilateral social security agreement between Malawi and Zambia was concluded to resolve problems that Malawians who had worked in Zambia experienced in accessing their social security benefits. Some of the issues addressed in the Agreement include the creation of a Joint Permanent Commission of Cooperation; the need for the Workers Compensation Fund to identify a medical centre practitioner in Malawi to administer a medical examination, assessment for pneumoconiosis and silicosis for miners who worked in Zambia; and the need to establish a mechanism to facilitate the payment of social security benefits through the Malawi High Commission in Lusaka.¹²⁴ The Agreement also involves reciprocal visits between the two countries by social security officials. The visits provide an opportunity for officials from both countries to discuss issues that require attention, present status reports and, when the visit is in Malawi, meet with affected persons.

The Agreement has been hailed for its contribution to the maintenance of the social security rights of Malawians who worked in Zambia.¹²⁵ However, it is still not a classic social security coordination agreement as it only regulates the position of Malawians who worked in Zambia and not the position of Zambians who work or have worked in Malawi (non-reciprocity).

¹²⁴ See Malawi/Zambia Social Security Agreement (2003) and Agreed Minutes of a Social Security meeting of the Malawi/Zambia Bilateral Cooperation held in Malawi, April 2013.

¹²⁵ Chisupa N "Social protection in SADC: Developing an integrated and inclusive framework – The case of Zambia" in Olivier MP and Kalula ER (eds) *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law and Institute of Development and Labour Law (2004)) 204.

5.2 MAURITIUS/UNITED KINGDOM SOCIAL SECURITY CONVENTION (1981)

The Preamble to the Convention states that the Convention was agreed upon as a result of the United Kingdom (UK) and Mauritius governments' resolve to cooperate in the field of social affairs and, in particular, in the matter of social security; their desire to promote the welfare of persons moving between or working in their respective territories; their desire to ensure that persons from both countries enjoy equal rights under their respective social security legislation; their desire to make arrangements for insurance periods completed under the legislation of the contracting parties to be added together for the purpose of determining the right to receive benefit; and their further desire to make arrangements enabling persons moving between their respective territories to retain the rights which they have acquired under the legislation of the one party or to enjoy corresponding rights under the legislation of the other.

The Convention regulates issues such as the social security benefits (and scope of beneficiaries) covered,¹²⁶ equality of treatment,¹²⁷ exportability of benefits,¹²⁸ determination of the legislation applicable,¹²⁹ aggregation of insurance periods,¹³⁰ institutional and administrative cooperation,¹³¹ etc. The provisions on the determination of the applicable legislation stipulate the continued payment of contributions by UK employers for their workers who are posted in Mauritius for periods less than 24 months.¹³²

126 Article 2 of the Mauritius/United Kingdom Social Security Convention.

127 Article 3 of the Mauritius/United Kingdom Social Security Convention.

128 Article 4 of the Mauritius/United Kingdom Social Security Convention.

129 Articles 5-9 of the Mauritius/United Kingdom Social Security Convention.

130 Articles 11, 12 and 18 of the Mauritius/United Kingdom Social Security Convention.

131 Articles 21-22 of the Mauritius/United Kingdom Social Security Convention.

132 Articles 6-7 of the Mauritius/United Kingdom Social Security Convention.

5.3 SADC BILATERAL LABOUR AGREEMENTS

The bilateral labour agreements are those signed by South Africa and Botswana,¹³³ Lesotho,¹³⁴ Malawi,¹³⁵ Mozambique¹³⁶ and Swaziland.¹³⁷ These agreements regulate the following:

- the flow of migrant labour from these countries to South Africa;¹³⁸
- the conditions and obligations on the part of both South Africa and the source countries (including the privileges and immunities enjoyed by labour representatives while employed in the labour office as full-time government officials, and the functions of the labour representative and his or her staff);¹³⁹

133 Agreement between the Government of the Republic of South Africa and Government of the Republic of Botswana relating to the establishment of an office for a Botswana Government Labour Representative in the Republic of South Africa, Botswana citizens in the Republic of South Africa and the movement of such persons across the international border (signed on 24 December 1973 and entered into force on 24 December 1973).

134 Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho relating to the establishment of an office for a Lesotho Government Labour Representative in the Republic of South Africa, Lesotho citizens in the Republic of South Africa and the movement of such persons across the international border (signed on 24 August 1973 and entered into force on 24 August 1973).

135 Agreement between the Governments of the Republic of South Africa and Malawi relating to the employment and documentation of Malawi nationals in South Africa (signed on 1 August 1967 and entered into force on 1 August 1967).

136 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 (signed on 13 October 1964 (amended by exchange of notes on 24 February 1971 and 11 May 1971) and entered into force on 1 January 1965).

137 Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland relating to the establishment of an office for a Swaziland Government Labour Representative in the Republic of South Africa, certain Swaziland citizens in the Republic of South Africa, the movement of such persons across the common border and the movement of certain South African citizens across the common border, and addendum thereto (signed on 22 August 1975 and entered into force on 22 August 1975).

138 See the preambles to the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana, Agreement between the Government of the Republic of South Africa and the Kingdom of Lesotho, Agreement between the Governments of the Republic of South Africa and Malawi, Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal, and Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland.

139 See articles I-III of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana; articles I-III of the Agreement between the Government of the Republic of South Africa and the Kingdom of Lesotho; article 18 of the Agreement between the Governments of the Republic of South Africa and Malawi; article VI of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal; and articles I-III of the Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland.

- payment of deferred pay to a worker in his home country upon his return thereto;¹⁴⁰
- payment of allowances to a worker's family residing in his home country;¹⁴¹ and
- payment of monies into a welfare fund which the authorities in the sending countries may establish for the purpose of supporting citizen during periods of disablement upon their return home.¹⁴²

These agreements cannot be considered to be social security coordination agreements as this is not their main purpose. This is despite the agreement between South Africa and Portugal regarding Mozambican migrant workers making provision for the payment of workers compensation benefits to former migrant workers in Mozambique.¹⁴³ In addition, although workers employed in terms of the labour agreements are not eligible for unemployment insurance benefits,¹⁴⁴ they are eligible for compensation for occupational injuries and diseases, and occupational private social security benefits (such as medical care and retirement insurance). However, these agreements indicate a willingness of (some) SADC member states to conclude coordination agreements.

140 See article IV of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana; article IV of the Agreement between the Government of the Republic of South Africa and the Kingdom of Lesotho; article 17 of the Agreement between the Governments of the Republic of South Africa and Malawi; articles IV and XXIV of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal; and article IV of the Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland.

141 See article IV of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana; article IV of the Agreement between the Government of the Republic of South Africa and the Kingdom of Lesotho; article 17 of the Agreement between the Governments of the Republic of South Africa and Malawi; articles IV and XXIV of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal; and article IV of the Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland.

142 See article IV of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana; article IV of the Agreement between the Government of the Republic of South Africa and the Kingdom of Lesotho; article 17 of the Agreement between the Governments of the Republic of South Africa and Malawi; articles IV and XXIV of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal; and article IV of the Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland.

143 Articles IV and XXII of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal.

144 South Africa's Unemployment Insurance Act excludes non-citizen fixed-term contract workers who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any other agreement or undertaking that such persons must leave the Republic, or that such person be repatriated upon termination of the contract (section 3(1)(d) of the Unemployment Insurance Act 63 of 2001 and section 4(1)(d) of the Unemployment Insurance Contributions Act 4 of 2002). Therefore, non-citizen workers employed in terms of a labour agreement are not regarded as contributors to, and therefore cannot benefit from, the Unemployment Insurance Fund.

5.4 SADC BILATERAL AGREEMENTS ON FACILITATION OF MOVEMENT

South Africa and Zimbabwe signed a memorandum of understanding in May 2009 to facilitate the legal movement of people between the two countries.¹⁴⁵ This led to South Africa lifting visa restrictions against Zimbabwean citizens visiting the country for periods of up to 90 days – in line with similar agreements with Angola, Botswana, Namibia, Mozambique, Lesotho, Swaziland and Mauritius. It was stated that the lifting of visa restrictions is a further step towards implementing the SADC Protocol on Facilitation of Movement, which South Africa has signed but is yet to be ratified by SADC member states.¹⁴⁶

South Africa and Mozambique signed a Waiver of Visa Requirements for Holders of Ordinary Passports Agreement in 2005, which gave Mozambicans 30-day visiting visa status.¹⁴⁷

South Africa and Lesotho signed an agreement on the Facilitation of Cross-border Movement of Citizens of South Africa and Lesotho in 2007.¹⁴⁸ A Memorandum of Understanding was signed in October 2006. The Memorandum addressed issues relating to progress made on compensation issues, the general welfare of migrant workers, difficulties encountered by widows in trying to access death benefits for their husbands, repatriation of funds to Lesotho, unemployment insurance fund deductions, the non-support of dependants of deceased workers, review of the labour law agreement between the two countries, capacity building, health and safety, national employment services, skills development, and HIV and AIDS partnership programmes.¹⁴⁹

Namibia and Angola have signed an agreement for mutual visa exemption. The visa exemption is for stays of up to 30 days, and allows citizens in border communities to travel freely within a range of sixty kilometres in each country with only a border pass.¹⁵⁰

145 See Government of South Africa “SA signs MOU with Zimbabwe” (12 May 2009) accessed at <http://www.suedafrika.org/en/news-archive/newsarchive-details/datum/2009/05/12/sa-signs-mou-with-zimbabwe.html> (18 May 2015) and United Nations Economic Commission for Africa Best Practices in Regional Integration in Africa (E/ECA/CTRCI/8/4 6 September 2012) 6.

146 See Government of South Africa “SA signs MOU with Zimbabwe” (12 May 2009) accessed at <http://www.suedafrika.org/en/news-archive/newsarchive-details/datum/2009/05/12/sa-signs-mou-with-zimbabwe.html> (18 May 2015).

147 Nshimbi CC and Fioramonti L A Region without Borders? Policy Frameworks for Regional Labour Migration Towards South Africa MiWORC Report No. 1 (African Centre for Migration & Society, University of the Witwatersrand, 2013) 68, and United Nations Economic Commission for Africa Best Practices in Regional Integration in Africa (E/ECA/CTRCI/8/4 6 September 2012) 6.

148 *Ibid* 6.

149 South African Migration Project (SAMP) “Labour Agreement with Lesotho Govt, (BuaNews, 2006-10-25)” (South Africa: October 2006) accessed at http://www.queensu.ca/samp/migration/news/article.php?Mig_News_ID=3964&Mig_News_Issue=22&Mig_News_Cat=8 (18 May 2015).

150 Migration Dialogue for Southern Africa (MIDSA) Report and Recommendations of the MIDSA Workshop on Migration, Poverty and Development (Windhoek, Namibia 24-25 April, 2006) 3;

Mozambique and Lesotho signed an agreement on visa exemption in 2009.¹⁵¹ It is reported that the decision to conclude the agreement was based on one of the principles of SADC, within the framework of regional integration.¹⁵²

5.5 PORTABILITY PROVISIONS IN SADC NATIONAL LEGISLATION

Some social security legislation in some SADC countries makes provision for the conclusion of agreements regulating the portability of benefits. An example is South Africa, where the Compensation for Occupational Injuries and Diseases Act (COIDA) provides for the exportability of compensation when a claimant or beneficiary is leaving the country. The Act empowers the Minister (of Labour) to make arrangements with foreign states regarding compensation. Section 94 states that:

The Minister may, by notice in the *Gazette*, issue directions to give effect to the provisions of any agreement between the Republic and any other state in which provision is made for reciprocity in matters regarding compensation to employees for accidents resulting in disablement or death, including directions—

(a) to determine in any case where an employee is entitled to compensation both in terms of this Act and in terms of the law of any such state under the law of which party such employee or his dependants shall be entitled to recover compensation;

(b) to authorise the Director-General to allow evidence taken in any such state, and to obtain and take evidence for use in such state or for the facilitation of proceedings for the recovery of compensation in terms of the law of any such state.

In addition, COIDA states that an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for (a) period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum.¹⁵³ The Social Assistance Act stipulates that the Act applies to a person who is not a South African citizen, if an agreement, contemplated in section 231(2) of the Constitution, between the Republic and the country of which that person is a citizen makes provision for the Act to apply to a citizen of that country who resides in the Republic (of South Africa).¹⁵⁴

United Nations Economic Commission for Africa Best Practices in Regional Integration in Africa (E/ECA/CTRCI/8/4 6 September 2012) 6; and Macauhub “Angolan parliament approves agreement for mutual visa exemption with Namibia” (7 February 2007) accessed at <http://www.macauhub.com.mo/en/2007/02/07/2516/> (18 May 2015).

151 See Macauhub “Mozambique and Lesotho sign visa exemption deal” (27 August 2009) accessed at <http://www.macauhub.com.mo/en/2009/08/27/7668/> (18 May 2015) and United Nations Economic Commission for Africa Best Practices in Regional Integration in Africa (E/ECA/CTRCI/8/4 6 September 2012) 6.

152 Macauhub “Mozambique and Lesotho sign visa exemption deal” (27 August 2009) accessed at <http://www.macauhub.com.mo/en/2009/08/27/7668/> (18 May 2015).

153 Section 60 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

154 Section 2(1) of the Social Assistance Act 13 of 2004.

Swaziland's National Provident Fund pays an emigration benefit to a member of the Fund who emigrates permanently, or is intending to emigrate with no present intention of returning to Swaziland.¹⁵⁵ Furthermore, the Swaziland Provident Fund Order states that:¹⁵⁶

The Government may enter into a reciprocal agreement with the government of any other country in which a fund or scheme similar to the Fund has been established, and there may be included in the agreement that:

(a) any period of membership of such fund or scheme in the country of such government may be treated as a period of membership of the Fund and vice versa.

The legislative provisions indicate an appreciation of the need for the portability of social security benefits from these countries so as to promote the social security rights of migrant workers.

5.6 PRELIMINARY OBSERVATIONS ON COMPARATIVE SADC AGREEMENTS AND NATIONAL PORTABILITY PROVISIONS

Comparative bilateral agreements in the areas of social security coordination, labour supply and free movement of persons have been concluded by some SADC member states with other countries. With the exception of the Mauritius/United Kingdom Social Security Convention of 1981, these agreements are not classic social security coordination agreements (e.g. Malawi/Zambia Social Security Agreement of 2003 is non-reciprocal, since it only regulates the position of Malawians who worked in Zambia and not the position of Zambians who work or have worked in Malawi; and the bilateral labour agreements signed between South Africa and Botswana, Lesotho, Malawi, Mozambique and Swaziland do not have as their main purpose the coordination of social security). However, these agreements reveal that SADC countries have experience in developing instruments in coordinating their national systems and laws. Therefore, these instruments provide lessons for the development of a SADC social security portability instrument.

In addition, legislative provisions in South Africa and Swaziland indicate an appreciation of the need for the portability of social security benefits from these countries so as to promote the free movement and social security rights of migrant workers. Bilateral agreements on facilitation of movement that several SADC countries have signed also point to their desire to further the SADC regional integration agenda. A SADC instrument for the portability of social security will complement these initiatives for the facilitation of intra-SADC movement, promoting SADC integration.

The Mauritius/United Kingdom Social Security Convention of 1981 further reveals the desirability and feasibility of a SADC member state concluding a classic (albeit bilateral)

155 Section 27 of the Swaziland Provident Fund Order of 1974.

156 Section 45 of the Swaziland Provident Fund Order of 1974.

social security portability agreement. The Convention regulates issues to be addressed in any SADC social security portability agreement such as the social security benefits and scope of beneficiaries covered, equality of treatment, exportability of benefits, determination of the legislation applicable, aggregation of insurance periods, institutional and administrative cooperation, etc.).

COMPARATIVE SOCIAL SECURITY COORDINATION INSTRUMENTS

6.1 EAST AFRICAN COMMUNITY (EAC)

The East African Community (EAC) is the regional intergovernmental organisation of the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania, which was established when the Treaty for the Establishment of the East African Community was concluded by Kenya, Tanzania and Uganda on 30 November 1999 and entered into force on 7 July 2000.¹⁵⁷

The EAC Treaty was adopted because of the member states' determination to strengthen their economic, social, cultural, political, technological and other ties for fast, balanced and sustainable development.¹⁵⁸ It was motivated by member states' conviction that cooperation at sub-regional and regional levels in all fields of human endeavour will raise the standards of living of African peoples, maintain and enhance economic stability, foster close and peaceful relations among African states, and accelerate the successive stages in the realisation of the proposed African Economic Community and Political Union.¹⁵⁹

The objectives of the EAC are to develop policies and programmes aimed at widening and deepening cooperation among member states in political, economic, social and cultural fields; research and technology; and defence, security and legal and judicial affairs, for their mutual benefit.¹⁶⁰ In order to achieve these objectives, member states undertake to establish among themselves, and in accordance with the provisions of the Treaty, a customs union, a common market, subsequently a monetary union and ultimately a political federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the member states, so that there will be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which will be equitably shared.¹⁶¹

Specific measures to be adopted include the attainment of sustainable growth and development of the member states by the promotion of a more balanced and harmonious development of the member states; the strengthening and consolidation of cooperation in agreed fields that would lead to equitable economic development within the member

157 See East African Community "History of the EAC" accessed at <http://www.eac.int> (27 April 2015).

158 Preamble to the Treaty for the Establishment of the East African Community.

159 *Ibid.*

160 Article 5(1) of the Treaty for the Establishment of the East African Community.

161 Article 5(2) of the Treaty for the Establishment of the East African Community.

states and which would in turn raise the standard of living and improve the quality of life of their populations; strengthen and consolidate the long-standing political, economic, social, cultural and traditional ties and associations between the peoples of the member states, so as to promote a people-centred mutual development of these ties and associations; and encourage the undertaking of such other activities calculated to further the objectives of the Community, as the member states may from time to time decide to undertake in common.¹⁶²

In achieving the EAC's objectives, member states are guided by fundamental and operational principles.¹⁶³ Fundamental principles are mutual trust, political will and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; good governance, including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; equitable distribution of benefits; and cooperation for mutual benefits.

Operational principles include people-centred and market-driven cooperation; the provision by the member states of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure; the establishment of an export-oriented economy for the member states in which there shall be freedom of movement of goods, persons, labour, services, capital, information and technology; the principle of subsidiarity with the emphasis on multi-level participation and the involvement of a wide range of stakeholders in the process of integration; the principle of variable geometry which allows for progression in cooperation among groups in the Community for wider integration schemes in various fields and at different speeds; the principle of complementarity; and the principle of asymmetry. Member states further undertake to abide by the maintenance of universally-accepted standards of human rights.

In the implementation of the Treaty, member states undertake to direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of the Treaty; to coordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and abstain from measures likely to jeopardise the achievement of the Community's objectives or the implementation of the provisions of the Treaty.¹⁶⁴

Within twelve months from the date of signing the Treaty, each member state is required to enact and implement legislation necessary to give effect to the Treaty.¹⁶⁵ This involves in particular the duty to confer upon the Community the legal personality and capacity required for the performance of its functions and the duty to confer upon the legislation,

162 Article 5(3) of the Treaty for the Establishment of the East African Community

163 Articles 6 and 7 of the Treaty for the Establishment of the East African Community.

164 Article 8(1) of the Treaty for the Establishment of the East African Community.

165 Article 8(2) of the Treaty for the Establishment of the East African Community.

regulations and directives of the Community, as provided in the Treaty, the force of law within its territory.

EAC organs, institutions and laws take precedence over similar national ones on matters pertaining to the implementation of the EAC Treaty. In furtherance of this, member states undertake to make the necessary legal instruments to confer precedence of EAC organs, institutions and laws over similar national ones.¹⁶⁶

The Treaty established various organs of the Community. These include the Summit, the Council, the Co-ordinating Committee, Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat. The Summit is also empowered to create other organs.¹⁶⁷ In addition, institutions in existence upon the entry into force of the Treaty are considered to be institutions of the EAC and are designated and function as such. These are the East African Development Bank, the Lake Victoria Fisheries Organisation and surviving institutions of the former East African Community.

EAC member states are compelled to cooperate in various fields, including social welfare and freedom of movement.¹⁶⁸ With regards to social welfare, member states are required to closely cooperate amongst themselves with respect to employment, poverty-alleviation programmes and working conditions; vocational training and the eradication of adult illiteracy in the Community; and development and adoption of a common approach towards the disadvantaged and marginalised groups, including children, the youth, the elderly and persons with disabilities through rehabilitation and provision of, amongst other things, foster homes, health care, education and training.

In relation to freedom of movement, member states agree to adopt measures to achieve the freedom of movement of persons, labour and services, and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community. For the promotion of free movement, member states agree to conclude a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence at a time to be determined by Council. When determined by Council, member states must ease border crossing by citizens of the member states; maintain common standard travel documents for their citizens; maintain common employment policies; and harmonise their labour policies, programmes and legislation, including those on occupational health and safety (amongst others).

A Protocol on the Establishment of the East African Community Common Market was adopted in 2010 to promote the objectives of the EAC Treaty.¹⁶⁹ The overall objective of the Common Market is to widen and deepen cooperation among the member states in the economic and social fields for the benefit of member states.¹⁷⁰ The specific objectives

166 Article 8(4) and (5) of the Treaty for the Establishment of the East African Community.

167 Article 9 of the Treaty for the Establishment of the East African Community.

168 Articles 104 and 120 of the Treaty for the Establishment of the East African Community.

169 See article 2(1) of the EAC Common Market Protocol.

170 See article 4(1) of the EAC Common Market Protocol.

include the acceleration of the economic growth and development of the member states through attainment of free movement of goods, persons and labour; the rights of establishment and residence and the free movement of services and capital; strengthening, coordinating and regulating the economic and trade relations among member states in order to promote accelerated, harmonious and balanced development within the Community; promote common understanding and cooperation among the nationals of the member states for their economic and social development; and enhance research and technological advancement to accelerate economic and social development.¹⁷¹ In order to realise these objectives, member states are required to cooperate, integrate and harmonise their policies in the areas provided in the Protocol and any other areas that the Council may determine in order to achieve the objectives of the Common Market.¹⁷²

Members of the Common Market are guided by the fundamental principles of the EAC as enshrined in articles 6 and 7 of the EAC Treaty.¹⁷³ In this regard, member states undertake (amongst other things) to observe the principle of non-discrimination on grounds of nationality and to accord treatment to nationals of other member states not less favourable than the treatment accorded to their parties.¹⁷⁴

In accordance with the provisions of articles 76 and 104 of the EAC Treaty, the Protocol provides for the free movement of goods, the free movement of persons, the free movement of labour, the right of establishment, the right of residence, the free movement of services and the free movement of capital.¹⁷⁵

The Protocol regulates every activity undertaken in cooperation by member states to achieve the free movement of goods, persons, labour, services and capital and to ensure the enjoyment of the rights of establishment and residence of Community citizens.¹⁷⁶ In this respect, member states agree to (amongst other things) ease cross-border movement of persons and eventually adopt an integrated border-management system; remove restrictions on movement of labour; harmonise labour policies, programmes, legislation and social services; provide for social security benefits; and remove restrictions on the right of establishment and residence of nationals of other member states in their territory in accordance with the Protocol.¹⁷⁷

The coordination and harmonisation of their social policies is one of the undertakings agreed to by member states in order to facilitate the implementation of the Common Market.¹⁷⁸ Member states undertake to “coordinate and harmonise their social policies to promote and protect decent work and improve the living conditions of the citizens of

171 See article 4(2) of the EAC Common Market Protocol.

172 See article 4(3) of the EAC Common Market Protocol.

173 See article 3(1) of the EAC Common Market Protocol.

174 See article 3(2) of the EAC Common Market Protocol.

175 See article 2(4) read with articles 6, 7, 10, 13, 14 and 16 of the EAC Common Market Protocol.

176 See article 5(1) of the EAC Common Market Protocol.

177 Article 5(2) of the EAC Common Market Protocol.

178 Article 5(3) of the EAC Common Market Protocol.

the Member States for the development of the Common Market.”¹⁷⁹ Member states will coordinate and harmonise their social policies relating to (*inter alia*) good governance, the rule of law and social justice; promotion and protection of human and peoples’ rights; promotion of equal opportunities and gender equality; and the promotion and protection of the rights of marginalised and vulnerable groups.¹⁸⁰

The EAC is still to conclude a social security coordination agreement. However, preparatory work is underway.¹⁸¹ In the meantime, some EAC member states are harmonising their national social security legislation. An example is Kenya, which enacted the National Social Security Fund (NSSF) Act in 2013. The Act, which repeals the old National Social Security Fund (Chapter 258 of the laws of Kenya), will boost cross-border portability of social security benefits if its provisions are properly implemented. It distinguishes between treatment of workers within the EAC and workers from other foreign countries in relation to social security.¹⁸² The Act requires the NSSF Board of Trustees to, among other things, ensure that it coordinates with the social security scheme of the EAC member states where its members may reside to ensure that while the member works in that EAC member state, he or she is registered for membership in the member state’s social security scheme and can make the required contributions. The NSSF Board is also required to coordinate with the other member states’ social security schemes to guarantee the exportability of that worker’s benefits, including the actual physical transmission of contributions and benefits to the Kenyan National Social Security Fund.¹⁸³ It has been held that these changes are a positive step in furthering the EAC’s ultimate objective of achieving a single market in which there is free movement of people, goods and services.¹⁸⁴

6.2 ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

The Economic Community of West African States (ECOWAS) is made up of fifteen member states (Benin, Burkina Faso, Cape Verde, Cote d’Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo). It was formed in 1975 with the signing of the Treaty of the Economic Community of West African States. A Revised Treaty of the Economic Community of West African States was

179 Article 39(1) of the EAC Common Market Protocol.

180 Article 39(2) of the EAC Common Market Protocol.

181 See, for example, Report of the Technical Meeting of Social Security Experts to Discuss the way Forward on the Co-ordination of Social Security Benefits Within the EAC Common Market/ Develop Terms of Reference for the Consolidation of a Regional Actuarial Study (Arusha, Tanzania 15-17 June 2011) accessed at <http://www.eac.int/> (28 April 2015).

182 Harney C “East Africa Community works towards the harmonisation of pension” Coulson Harney Advocates of 6 August 2014 accessed at <http://www.coulsonharney.com/News-Blog/Blog/East-Africa-Harmonisation-of-Pension-Laws> (28 April 2015).

183 *Ibid.*

184 *Ibid.*

concluded in 1993. While reaffirming the 1975 Treaty and considering its achievement, the ECOWAS Treaty of 1993 recognises that the integration of the member states into a viable regional community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will.¹⁸⁵ It also affirms that the ultimate goal of ECOWAS is the accelerated and sustained economic development of member states, culminating in the economic union of West Africa.¹⁸⁶

The aims of ECOWAS are to promote cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among member states, and contribute to the progress and development of the African continent.¹⁸⁷ In order to achieve these aims, some of the endeavours that the Community must undertake (in stages) include:¹⁸⁸

- the harmonisation and coordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism and legal matters;
- the establishment of a common market through (amongst other things) the removal between member states of obstacles to the free movement of persons, goods, services and capital, and to assert the right of residence and establishment;
- the establishment of an economic union through the adoption of common policies in the economic, financial, social and cultural sectors, and the creation of a monetary union; and
- any other activity that member states may decide to undertake jointly with a view to attaining Community objectives.

Some of the fundamental principles guiding ECOWAS member states are equality and inter-dependence of member states; solidarity and collective self-reliance; inter-state cooperation, harmonisation of policies and integration of programmes; peaceful settlement of disputes among member states, active cooperation between neighbouring countries and promotion of a peaceful environment as a prerequisite for economic development; recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights; accountability, economic and social justice, and popular participation in development; recognition and observance of the rules and principles of the Community; and equitable distribution of the costs and benefits of economic cooperation and integration.¹⁸⁹

185 Preamble to the Revised Treaty of the Economic Community of West African States (1993).

186 *Ibid.*

187 Article 3(1) of the Revised Treaty of the Economic Community of West African States (1993).

188 Article 3(2) of the Revised Treaty of the Economic Community of West African States (1993).

189 Article 4 of the Revised Treaty of the Economic Community of West African States (1993).

Member states undertake to create favourable conditions for the attainment of objectives of ECOWAS, and in particular to take all necessary measures to harmonise their strategies and policies, and to refrain from any action that may hinder the attainment of its objectives.¹⁹⁰ Each member state also undertakes to take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of the ECOWAS Treaty, in accordance with its constitutional procedures.¹⁹¹

In a bid to further the achievement of its objectives, the Revised ECOWAS Treaty established various Community institutions.¹⁹² These are the Authority of Heads of State and Government,¹⁹³ the Council of Ministers,¹⁹⁴ the Community Parliament,¹⁹⁵ the Economic and Social Council,¹⁹⁶ the Community Court of Justice,¹⁹⁷ the Arbitration Tribunal,¹⁹⁸ the Executive Secretariat (Commission),¹⁹⁹ the Fund for Co-operation,

190 Article 5(1) of the Revised Treaty of the Economic Community of West African States (1993).

191 Article 5(2) of the Revised Treaty of the Economic Community of West African States (1993).

192 See article 6 of the Revised Treaty of the Economic Community of West African States (1993).

193 Articles 7, 8 and 9 of the Revised Treaty of the Economic Community of West African States (1993).

194 Articles 10, 11 and 12 of the Revised Treaty of the Economic Community of West African States (1993).

195 Article 13 of the Revised Treaty of the Economic Community of West African States (1993). The ECOWAS Parliament is the Assembly of the peoples of the Community. The Parliament may consider any matter concerning the Community, in particular, issues relating to human rights and fundamental freedoms, and make recommendations to the institutions and organs of the Community. The Parliament may be consulted for its opinion on matters concerning the Community, including public health policies for the Community, ECOWAS Treaty review, Community citizenship, social integration, and respect for human rights and fundamental freedoms in all their plenitude (see ECOWAS “ECOWAS Parliament” accessed at www.parl.ecowas.int (20 April 2015)).

196 Article 14 of the Revised Treaty of the Economic Community of West African States (1993).

197 Article 15 of the Revised Treaty of the Economic Community of West African States (1993). Its organisational framework, functioning mechanism, powers and procedure applicable before it are set out in Protocol A/P1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005, Supplementary Protocol A/SP.2/06/06 of 14 June 2006, Regulation of 3 June 2002, and Supplementary Regulation C/REG.2/06/06 of 13 June 2006. The Community Court of Justice gives legal advisory opinions on any matter that requires interpretation of the Community text. It also examines cases of failure by member states to honour their obligations under Community law. In this respect, it has competence to adjudicate on any dispute relating to the interpretation and application of acts of the Community; adjudicate disputes between institutions of the Community and their officials; has the power to handle cases dealing with liability for or against the Community; has jurisdiction to determine cases of violation of human rights that occur in any member state; and adjudges and makes declarations on the legality of Regulations, Directives, Decisions, and other subsidiary legal instruments adopted by ECOWAS (see Community Court of Justice - ECOWAS “Jurisdiction of the Community Court” accessed at <http://www.courtecowas.org/> (20 April 2015)).

198 Article 16 of the Revised Treaty of the Economic Community of West African States (1993).

199 Articles 17, 18 19 and 20 of the Revised Treaty of the Economic Community of West African States (1993). The ECOWAS administrative unit was transformed from an Executive Secretariat

Compensation and Development,²⁰⁰ and Specialised Technical Commissions.²⁰¹ In addition, it provides for the creation of any other institutions that may be established by the Authority.

The Treaty regulates cooperation between member states in various areas. These include agricultural development and food security;²⁰² industry, science and technology and energy;²⁰³ environment and natural resources;²⁰⁴ transport, communications and tourism;²⁰⁵ trade, customs, taxation, statistics, money and payments;²⁰⁶ political, judicial and legal affairs, regional security and immigration;²⁰⁷ and human resources, information, social and cultural affairs.²⁰⁸ In addition, member states are obliged to consult with one another, through appropriate Community institutions, for the purpose of harmonising and coordinating their respective policies in all other fields not specifically covered by the Revised Treaty for the efficient functioning and development of the Community and for the implementation of the provisions of the Revised Treaty.²⁰⁹

In terms of cooperation on immigration, ECOWAS citizens are granted the right of entry, residence and establishment; and member states undertake to recognise these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto.²¹⁰ Member states further undertake to adopt all appropriate measures to ensure that Community citizens fully enjoy the right of entry, residence and establishment, and to adopt, at national level, all measures necessary for the effective implementation of these rights.²¹¹ The rights to free movement of persons, residence and

into a Commission in 1997. The Commission is responsible for the administration of all ECOWAS programmes, projects and activities.

200 Article 21 of the Revised Treaty of the Economic Community of West African States (1993).

201 Article 22 of the Revised Treaty of the Economic Community of West African States (1993). Technical Commissions established were for Food and Agriculture; Industry, Science and Technology and Energy; Environment and Natural Resources; Transport, Communications and Tourism; Trade, Customs, Taxation, Statistics, Money and Payments; Political, Judicial and Legal Affairs, Regional Security and Immigration; Human Resources, Information, Social and Cultural Affairs; and Administration and Finance. However, the Authority is empowered to restructure the existing Commissions or establish new Commissions whenever it deems appropriate.

202 Article 25 of the Revised Treaty of the Economic Community of West African States (1993).

203 Articles 26-28 of the Revised Treaty of the Economic Community of West African States (1993).

204 Articles 29-31 of the Revised Treaty of the Economic Community of West African States (1993).

205 Articles 32-34 of the Revised Treaty of the Economic Community of West African States (1993).

206 Articles 35-53 of the Revised Treaty of the Economic Community of West African States (1993).

207 Articles 56-59 of the Revised Treaty of the Economic Community of West African States (1993)

208 Articles 60-66 of the Revised Treaty of the Economic Community of West African States (1993).

209 Article 67 of the Revised Treaty of the Economic Community of West African States (1993).

210 Article 59(1) of the Revised Treaty of the Economic Community of West African States (1993).

211 Article 59(2) and (3) of the Revised Treaty of the Economic Community of West African States (1993).

establishment were also guaranteed in the Treaty of the Economic Community of West African States of 1975.²¹²

Under the commitment to cooperate in social affairs, ECOWAS member states undertake to cooperate with a view to mobilising the various sections of the population and ensuring their effective integration and involvement in the social development of the region.²¹³ In this regard, member states undertake to (*inter alia*) harmonise their labour laws and social security legislation, and encourage and strengthen cooperation amongst themselves in health matters.²¹⁴

Several instruments have been adopted by ECOWAS member states in the realisation of the commitments to cooperate in various areas. Areas of cooperation related to social security coordination are immigration and social affairs. In this regard, a Protocol on Free Movement of Persons and the Right of Residence and Establishment, and a General Convention on Social Security have been adopted. These are complemented by the ECOWAS Common Approach on Migration, which ensures protection of migrant workers and promotes regular migration and gender-sensitive migration policies.²¹⁵

6.2.1 Protocol on Free Movement of Persons and the Right of Residence and Establishment (1979)

The Protocol on Free Movement of Persons and the Right of Residence and Establishment was adopted in 1979.²¹⁶ Supplementary Protocols to the Protocol on Free Movement were also concluded.²¹⁷ It has been stated that the 1979 Protocol, along

212 See articles 2(2) and 27 Treaty of the Economic Community of West African States (1975).

213 Article 61(1) of the Revised Treaty of the Economic Community of West African States (1993).

214 Article 61(2) of the Revised Treaty of the Economic Community of West African States (1993).

215 See Murthy S, Winder N and Taran P “Youth and international migration: role and relevance of social protection” in Cortina J, Taran P and Raphael A (eds) *Migration and Youth: Challenges and Opportunities* (UNICEF (2014)) (Chapter 3, 1-37 at 30). The ECOWAS Common Approach on Migration is premised on the following principles: free movement of persons within the ECOWAS zone is one of the fundamental priorities of the integration policy of ECOWAS member states; legal migration to other regions of the world contributes to ECOWAS member states’ development; combating human trafficking is a moral and humanitarian imperative; harmonisation of policies; protection of the rights of migrants, asylum seekers and refugees; and recognition of the gender dimension of migration. These principles are pillars on which action plans and policies are (to be) developed to ensure a common regional approach to migration in West Africa (see Brown CK *The ECOWAS Common Approach on Migration: Policy Implications and Challenges for Labour Migration and Development in Ghana* (International Organization for Migration (2009)) 10).

216 Protocol on Free Movement of Persons, Residence and Establishment A/P.1/5/79 of 1979.

217 Such as the Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment A/SP.1/7/85 of 1985; Supplementary Protocol on the Second Phase (Right of Residence) A/SP.1/7/86 of 1986; Supplementary Protocol amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment A/SP.1/6/89 of 1989; and Supplementary Protocol on the Implementation of the Third Phase (Right to Establishment) A/SP.2/5/90 of 1990.

with the supplementary Protocols adopted later, testifies to ECOWAS member states' determination to place the free intra-regional movement of persons at the heart of the regional integration process.²¹⁸

The 1979 Protocol set out the right of ECOWAS citizens to enter, reside and establish in the territory of member states.²¹⁹ It proposed a three-phase approach of five years each (15 years in total) for the implementation of the right of entry and abolition of visas, the right of residence and the right of establishment.²²⁰

The entitlement of ECOWAS citizens to enter the territory of a member state is on condition that they are in possession of valid travel documents and international health certificates.²²¹ However, ECOWAS member states were empowered to refuse admission of ECOWAS citizens into their territory if they are deemed inadmissible under the member state's domestic law.²²² Requirements were laid down in the Protocol for the expulsion of an ECOWAS citizen from the territory of a member state.²²³ The Protocol did not preclude the operation of more favourable provisions in other agreements concluded by member states.²²⁴

The 1985 Supplementary Protocol on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment compelled member states to provide valid travel documents to their citizens.²²⁵ It set out additional requirements for the treatment of persons being expelled,²²⁶ as well as requirements for the protection of illegal immigrants.²²⁷

The 1986 Supplementary Protocol on the Second Phase (Right of Residence) required member states to grant ECOWAS citizens who are nationals of other member states the right of residence in their territory for the purpose of seeking and carrying out income-earning employment.²²⁸ The right of residence and the seeking and carrying out of income-earning employment is conditional on the possession of an ECOWAS residence card or permit and harmonisation by member states of rules pertaining to the issuance of such cards and permits.²²⁹

218 ECOWAS Commission Draft Report of the Meeting of Ministers on ECOWAS Common Approach on Migration (Abuja, Nigeria, 14 June 2007) 3.

219 Article 2(1) of the 1979 Protocol on Free Movement of Persons.

220 Article 2 of the 1979 Protocol on Free Movement of Persons.

221 Article 3(1) of the 1979 Protocol on Free Movement of Persons.

222 Article 4 of the 1979 Protocol on Free Movement of Persons.

223 Article 11 of the 1979 Protocol on Free Movement of Persons.

224 Article 12 of the 1979 Protocol on Free Movement of Persons.

225 Article 2(1) of the 1985 Supplementary Protocol.

226 Article 4 of the 1985 Supplementary Protocol.

227 Articles 5 and 7 of the 1985 Supplementary Protocol.

228 Article 2 of the 1986 Supplementary Protocol.

229 Articles 5 and 9 of the 1986 Supplementary Protocol.

The Supplementary Protocol prohibits mass expulsion and limits the grounds for individual expulsion to reasons of national security, public order or morality, public health or non-fulfilment of essential conditions of residence.²³⁰ It stipulates equal treatment with nationals for migrant workers complying with the rules and regulations governing their residence in areas such as security of employment, participation in social and cultural activities, re-employment in certain cases of job loss, and training.²³¹

The 1990 Supplementary Protocol on the Implementation of the Third Phase (Right to Establishment) defines the right of establishment, emphasising non-discriminatory treatment of nationals and companies of other member states, except where justified by exigencies of public order, security or health.²³² It forbids the confiscation or expropriation of assets or capital on a discriminatory basis and requires fair and equitable compensation where such confiscation or expropriation is undertaken.²³³

6.2.2 ECOWAS General Convention on Social Security (2012)

The General Convention on Social Security of Member States of ECOWAS was adopted as a Supplementary Act to the Revised ECOWAS Treaty. This means it is a binding instrument which does not require ratification by member states. The Preamble to the Convention recalls the objectives of the International Labour Organisation's Equality of Treatment (Social Security) Convention, 1962 (No. 118) and the Maintenance of Social Security Rights Convention, 1982 (No. 157) aimed at the effective realisation of equal treatment for migrant workers and the preservation of their social security rights. It also recalls the ECOWAS Treaty and its Protocol on Free Movement of Persons, the Right of Residence and establishment, and the African Union Migration Policy Framework for Africa (Banjul 2006), particularly its sections on migrant workforce and regional integration.

The Convention is based on the consideration of the need to coordinate the social security programmes of ECOWAS member states and the desire to restructure the social security systems of member states. This is derived from the realisation that greater benefit would be derived from the ECOWAS Free Movement Protocols if a General Convention on Social Security was adopted for the Community, and that the implementation of the Protocol on the Free Movement of Persons, Right of Residence and Establishment may be achieved through the adoption of a General Convention on Social Security.²³⁴

The Convention applies to all branches of social security protected under the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102) (i.e. disability benefits, old-age benefits, survivors' benefits, occupational diseases and work-related accidents, family benefits, maternity benefits, health care and sickness benefits, and unemployment

230 Articles 13 and 14 of the 1986 Supplementary Protocol.

231 Article 23 of the 1986 Supplementary Protocol.

232 Articles 2-4 of the 1990 Supplementary Protocol.

233 Article 7 of the 1990 Supplementary Protocol.

234 Preamble to the General Convention on Social Security of Member States of ECOWAS.

benefits).²³⁵ It applies to general and special compulsory social insurance schemes, including employers' contributions and provident fund schemes.²³⁶ In addition, bilateral or multilateral agreements between two or more member states may determine, whenever practicable, the conditions under which the Convention will apply to provident schemes or funds instituted by collective agreements made compulsory by governments.

The Convention applies to workers who are, or have been, subject to the legislation of one or more of the contracting parties and who are nationals of one of the member states, or refugees or stateless persons who have acquired social security rights in the territory of a member state and are resident in the territory of a contracting party and are nationals of a member state, as well as members of their family and their survivors.²³⁷ However, it does not apply to career diplomatic or consular staff, including officials working in diplomatic circles.

The Convention provides for equality of treatment, with all persons residing in the territory of a member state and who are covered by the Convention having the same rights and obligations under the legislation of every member state as the nationals of the member state.²³⁸

The Convention guarantees the portability of migrant workers' benefits: aggregation of insurance periods through the totalisation of employment or contribution periods (if necessary), maintenance of acquired rights, and export of benefits abroad.²³⁹ It also regulates the choice of law (i.e. the legislation applicable in cases of portability of benefits). In terms of article 11:

(1) Employed persons shall be subject to the legislation of one Contracting Party only. That legislation shall be determined in accordance with the rules set out in the following paragraphs of this Article.

(2) Workers employed in the territory of a Contracting Party shall be subject to the legislation of that party, even if they are resident in the territory of another Contracting

235 Article 2(1) of the General Convention on Social Security of Member States of ECOWAS.

236 Article 2(2) of the General Convention on Social Security of Member States of ECOWAS.

237 Article 4 of the General Convention on Social Security of Member States of ECOWAS.

238 Article 6 of the General Convention on Social Security of Member States of ECOWAS.

239 See Cisse A "ECOWAS General Convention on Social Security" presentation at the conference on Regional Economic Integration and Development of National Migration Policies: What Challenges for the ECOWAS Zone? (Abidjan, Côte d'Ivoire, 13-17 May 2014). As an example, article 7 states that "[w]here the legislation of a Contracting Party makes the admission to voluntary insurance conditional upon the completion of periods of insurance, the institution applying that legislation shall, to that end and for the purpose of aggregating the period, take account of the periods of insurance completed under the legislation of any other Contracting Party, as if they were periods of insurance completed under the legislation of the first party." In addition, article 16 provides that where the legislation of one member state makes the acquisition or maintenance of entitlement to benefits conditional upon the completion of periods of insurance, the institution that applies that legislation shall, to that end and for the purpose of aggregation, take account of the periods of insurance completed under the legislation of any other member state, as if they were periods completed under the legislation of the first state.

Party or if the company or the employer that employs them has its headquarters, or resides, in the territory of another Contracting Party. These provisions shall apply to members of the service staff of diplomatic missions or consular posts and to persons employed in the private service of officials of such missions or posts, without prejudice to the provisions of Article 4(2).

(3) Staff of one of the Contracting Parties as well as persons treated as such shall be subject to the legislation of the administration of the Contracting Party that employs them.

(4) Employed persons who ply their occupational activity on board a ship flying the flag of a Contracting Party shall be subject to the legislation of that party.

However, there are exceptions or particularities applicable to the rules laid down in article 11(2) and (4).²⁴⁰

In order to further the objectives of the Convention, the competent authorities of the member states are required to communicate to each other all information regarding measures taken by them for the application of the Convention; all information regarding their legislation and subsequent changes in that legislation; and all statistical information regarding the beneficiaries and the amount of benefit provided under the Convention.²⁴¹ The authorities and institutions of the member states must also assist one another as if it were a matter of applying their own legislation.²⁴² Such assistance should be free of charge, although the competent authorities of the member states may agree to reimburse certain expenses.

A claimant can submit his or her claim to the institution of his place of residence for onward forwarding by the institution to the institution(s) in another member state referred to in the claim.²⁴³ In addition, medical examinations prescribed by the legislation of one member state may be carried out at the request of the institution which applies that legislation in the territory of another member state by the institution of the place of temporary residence or residence.²⁴⁴ In such event, the examination is deemed to have been carried out in the territory of the first state.

The liability of an institution in one member state to pay cash benefits to a beneficiary who is in the territory of another member state is to be expressed in the currency of the first member state.²⁴⁵ However, the liable institution will validly discharge its liability in the currency of the second member state, using any appropriate method of payment.

Disputes arising between two or more member states relating to the interpretation or application of the Convention are first subject to negotiations between the parties to the

240 Article 12 of the General Convention on Social Security of Member States of ECOWAS.

241 Article 46(1) of the General Convention on Social Security of Member States of ECOWAS.

242 Article 46(2) of the General Convention on Social Security of Member States of ECOWAS.

243 Article 48 of the General Convention on Social Security of Member States of ECOWAS.

244 Article 49 of the General Convention on Social Security of Member States of ECOWAS.

245 Article 50 of the General Convention on Social Security of Member States of ECOWAS.

dispute.²⁴⁶ Where the dispute cannot be resolved through negotiations, the parties to the dispute will jointly appoint an arbitration body composed of three member states. The decision of the arbitration body will be binding on the parties to the dispute.²⁴⁷ Where one of the parties to the dispute considers that there is an issue likely to affect all the member states, the parties to the dispute can jointly, or in default, individually submit such issue to the Committee of Experts on Social Security which will give its opinion on the matter to the appropriate authorities in the states signatory to the Convention.²⁴⁸

The General Convention on Social Security of Member States of ECOWAS is instrumental in improving the social protection position of ECOWAS citizens travelling within the Community. However, its impact is limited by its application to workers with regular migration status and who are employed in the formal sector only. Since this category makes up a small fraction of migrant workers in the region, a vast majority of ECOWAS citizens are left out of its scope of coverage and protection.²⁴⁹

6.3 INTER-AFRICAN CONFERENCE ON SOCIAL SECURITY (CONFÉRENCE INTERAFRICAINNE DE LA PRÉVOYANCE SOCIALE (1996))

The Inter-African Conference on Social Insurance (CIPRES) consists of 15 French-speaking countries in western and central Africa and the Indian Ocean.²⁵⁰ These countries have adopted a General Convention on Social Security with the aim of integrating the right to social security in the relevant countries, through the harmonisation of legislation and social security contributions.²⁵¹ These are to be achieved through the establishment of regional control for the management of social security institutions; the definition of common management rules; carrying out studies and elaborating proposals towards a harmonisation of legislative and statutory provisions relevant to social security schemes and institutions; and facilitating the implementation, through specific actions on the regional level, of a policy for initial and permanent training of executives and technicians working in social providence bodies of member states.

246 Article 53(1) of the General Convention on Social Security of Member States of ECOWAS.

247 Article 53(2) of the General Convention on Social Security of Member States of ECOWAS.

248 Article 53(3) of the General Convention on Social Security of Member States of ECOWAS.

249 Cisse A “ECOWAS General Convention on Social Security” presentation at the conference on Regional economic integration and development of national migration policies: what challenges for the ECOWAS zone? (Abidjan, Côte d’Ivoire, 13-17 May 2014).

250 These are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Côte d’Ivoire, Equatorial Guinea, Gabon, Mali, Niger, Senegal and Togo.

251 Article 1 of the CIPRES General Convention on Social Security. See also Diop A “Migratory flows and access to social security for nationals and resident migrants workers in West Africa” presentation at the Meeting of Experts on the Social Rights of Migrants and their Portability under a Transnational Framework (Rabat, Morocco, 31 March – 1 April 2011).

The CIPRES General Convention on Social Security applies to all the laws related to the branches of social security in the member states of CIPRES, including the health branch.²⁵² The Convention applies to workers who are nationals of a member state and who are or have been subject to the laws of one or more member states. This also applies to their family members.²⁵³

Equality of treatment is ensured, as the main principle of the CIPRES Convention is that it enacts that the residents of a member state are subject to the social security laws of the host state and benefit from the same rights in the same conditions as the nationals of that state.²⁵⁴ However, it is prohibited for the same insured person to cumulate the same types of benefits or to cumulate several benefits relating to the same period of mandatory insurance.²⁵⁵

In addition to the general equality of treatment provision, old-age pension, disability and survivor benefits are guided by the principles of maintenance of the benefits accumulated and the benefits being accumulated;²⁵⁶ departure from the principle of territoriality;²⁵⁷ aggregation of insurance periods;²⁵⁸ the prorated calculation of rights;²⁵⁹ and the possibility of payment of benefits abroad.

In relation to the maintenance of the benefits accumulated and the benefits being accumulated, the receipt of a benefit by virtue of the benefits accumulated in the worker's country of employment is guaranteed to the worker when leaving that country or when the worker's family or survivors reside in another country. This principle is essential for the old-age pension benefit.²⁶⁰

Under the principle of aggregation of the insurance periods and prorated distribution of benefits: in the case of a mixed employment history, the institution of each member state first calculates the theoretical amount of benefits to which the insured may be entitled, as if all the periods of insurance had been completed solely under the law that the institution

252 Article 2 of the CIPRES General Convention on Social Security and Mkoumbou I "Presentation of the CIPRES General Convention on Social Security and challenges for its implementation" presentation at the Meeting of Experts on the Social Rights of Migrants and their Portability under a Transnational Framework (Rabat, Morocco, 31 March – 1 April 2011). Both cash or in-kind benefits are included in the Convention in the case of old age, disability, death of a family member, employment injury, maternity or sickness, including family allowances, provided under all statutory social security schemes (see ILO "Examples of multilateral social security agreement" accessed at <http://www.socialsecurityextension.org/gimi/gess/ShowWiki.action?wiki.wikiId=953> (23 April 2015)).

253 Article 3 of the CIPRES General Convention on Social Security.

254 Article 6 of the CIPRES General Convention on Social Security.

255 Article 9 of the CIPRES General Convention on Social Security.

256 Article 8 of the CIPRES General Convention on Social Security.

257 Article 7 of the CIPRES General Convention on Social Security.

258 Article 17 of the CIPRES General Convention on Social Security.

259 Article 15 of the CIPRES General Convention on Social Security.

260 Article 8 of the CIPRES General Convention on Social Security.

applies. It then determines the effective amount of the benefit due to the beneficiary by applying the rules of *prorata temporis* distribution.

In the case of periods of insurance totalling less than one year, the Convention obliges the bodies of the member states to include the periods below the legal thresholds for eligibility of benefits as part of the total of all the periods of insurance accumulated by the migrants insured in all the member states.²⁶¹ Thus, the interested parties will not be deprived of the benefit for the periods of insurance which, according to the applicable laws, would not give them entitlement to benefits.

The Convention guarantees that workers who have not satisfied the conditions prescribed by law can maintain their entitlement to benefits being accumulated under those laws.²⁶² All of the benefits to which a person is entitled will be calculated automatically as soon as the conditions required by such laws have been met.

All insured persons are entitled to a differential supplement when the amount of the pension to which the insured person may be entitled under the law of a member state, without applying the method of totalling and the prorated distribution, is greater than the total amount of the pension that the worker obtains according to this method.²⁶³ The relevant institution of this member state must issue a supplement corresponding to the difference between these two amounts (guarantee of the real entitlement of the insured person).²⁶⁴

The Convention affirms the principle of uniformity of the applicable law and recognises the law of the state where the worker carries out professional activities as the only applicable law, regardless of the worker's country of residence (law of the country of employment).²⁶⁵ The main purpose here is to avoid positive or negative conflicts of law. However, there are exceptions to this rule. The first is the case of secondment of workers employed in the territory of a member state by a company of another member state for a job in which the projected duration does not exceed six months. In addition, workers of international transport companies who normally carry out their activity in the territory of member states are regulated by the laws applicable in the country where their company headquarters are located.²⁶⁶

The CIPRES Convention grants those who wish to take out a voluntary insurance policy the freedom to join the organisation of their choice.²⁶⁷ It is an opportunity to arrange coverage for workers of a sector not covered by the national statutory schemes. Similarly, optional continued insurance has been established, with a possibility for workers who

261 Article 17 of the CIPRES General Convention on Social Security.

262 Article 18 of the CIPRES General Convention on Social Security.

263 Article 19 of the CIPRES General Convention on Social Security.

264 Article 14 of the CIPRES General Convention on Social Security.

265 Article 10 of the CIPRES General Convention on Social Security.

266 Article 11 of the CIPRES General Convention on Social Security.

267 Article 12 of the CIPRES General Convention on Social Security.

were under the mandatory scheme and who no longer meet the conditions of this to benefit from their contributions for the old-age pension.

In relation to benefits for occupational injuries and diseases, exemptions have been established to the principles of coordination.²⁶⁸ In this instance, special authorisation is needed from the relevant social security institutions before the transfer of residence of a victim of an occupational injury or disease and for the provision of certain types of benefits.²⁶⁹

In the case of a protracted work-related illness, the increase of benefits or the granting of new benefits is borne by the institution responsible for the first benefit, provided that the victim has not subsequently been employed under the laws of another member state where he or she was exposed to the risk.²⁷⁰ Where applicable, the relevant institution of the first member state continues to provide the original benefits, while the institution of the other member state issues a differential supplement.

There are special provisions for family and maternity benefits. For the receipt of maternity benefits, there is no requirement that the wives of workers must reside in the territory of the country of employment before the awarding of benefits.²⁷¹ For family benefits, the rate applicable is that of the member state or territory where the worker is employed.

In terms of health benefits, workers and members of their families who reside in the territory of a member state other than the relevant state of jurisdiction may enjoy health insurance benefits as established.²⁷²

Social security administrative institutions are required to provide assistance to other institutions in the application of the Convention. The assistance is to be provided free of charge. They are also required to apply the Convention in the same manner as they apply their domestic legislation.²⁷³

The CIPRES General Convention on Social Security aims at responding to the limits in social coverage of migrant workers from member countries and to improve social protection of migrant workers of member states. It constitutes a common response by countries in different geographical areas to national systems' coordination difficulties on issues of social protection of migrant workers.²⁷⁴ It thus aims to promote the social security rights of migrants within its member countries. However, its application is facing

268 Article 23 of the CIPRES General Convention on Social Security.

269 Article 26 of the CIPRES General Convention on Social Security.

270 Article 30 of the CIPRES General Convention on Social Security.

271 Article 35 of the CIPRES General Convention on Social Security.

272 Article 38 of the CIPRES General Convention on Social Security.

273 Article 39 of the CIPRES General Convention on Social Security.

274 Dioh A "Migratory flows and access to social security for nationals and resident migrants workers in West Africa" presentation at the Meeting of Experts on the Social Rights of Migrants and their Portability under a Transnational Framework (Rabat, Morocco, 31 March – 1 April 2011).

some challenges.²⁷⁵ The most notable of these is non-ratification by the principal migrant-receiving countries of the region and the wealthiest countries, Cameroon, Gabon and Senegal, which makes its current impact limited.²⁷⁶

6.4 CARIBBEAN COMMUNITY AND COMMON MARKET (CARICOM)

The Caribbean Community and Common Market (CARICOM) was established by the Treaty of Chaguaramas, which was signed by Barbados, Jamaica, Guyana and Trinidad & Tobago and came into effect on 1 August 1973.²⁷⁷ The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy was adopted in 2001. The objectives of CARICOM are improved standards of living and work; full employment of labour and other factors of production; accelerated, coordinated and sustained economic development and convergence; expansion of trade and economic relations with third states; enhanced levels of international competitiveness; organisation for increased production and productivity; the achievement of a greater measure of economic leverage and effectiveness of member states in dealing with third states, groups of states and entities of any description; enhanced coordination of member states' foreign and [foreign] economic policies; and enhanced functional cooperation (including more efficient operation of common services and activities for the benefit of its peoples; accelerated promotion of greater understanding among its peoples and the advancement of their social, cultural and technological development; and intensified activities in areas such as health, education, transportation, telecommunications).²⁷⁸

In terms of article 9 of the CARICOM Revised Treaty, member states undertake to take all appropriate measures, whether general or particular, to ensure the carrying out of obligations arising out of the Treaty or resulting from decisions taken by the organs and bodies of the Community. Furthermore, they undertake to facilitate the achievement of the objectives of the Community; and to abstain from any measures which could jeopardise the attainment of the objectives of the Treaty.

275 See Mkoumbou I "Presentation of the CIPRES General Convention on Social Security and challenges for its implementation" presentation at the Meeting of Experts on the Social Rights of Migrants and their Portability under a Transnational Framework (Rabat, Morocco, 31 March-1 April 2011).

276 ILO "Examples of multilateral social security agreement" accessed at <http://www.socialsecurityextension.org/gimi/gess/ShowWiki.action?wiki.wikiId=953> (23 April 2015) and CIPRESS "Historique" accessed at <http://www.lacipres.org/presentation/article/historique> (23 April 2013).

277 See Caribbean Community Secretariat "History of the Caribbean Community (CARICOM)" accessed at <http://www.caricom.org/jsp/community/history.jsp?menu=community> (26 April 2015). The members of CARICOM are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname and Trinidad & Tobago. Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos Islands are associate members.

278 Article 6 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy.

The Treaty promotes non-discrimination, especially on grounds of nationality. It states that within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality only is prohibited.²⁷⁹ The Community Council is empowered to establish rules to prohibit any such discrimination, after consultation with the competent organs.²⁸⁰

The Treaty also guarantees freedom of movement, as article 45 provides that member states commit themselves to the goal of the free movement of their nationals within the Community. In addition, the Treaty states that without prejudice to the rights recognised and agreed to be accorded by member states in articles 32 (Prohibition of New Restrictions on the Right of Establishment), 33 (Removal of Restrictions on the Right of Establishment), 37 (Removal of Restrictions on Provision of Services), 38 (Removal of Restrictions on Banking, Insurance and Other Financial Services) and 40 (Removal of Restrictions on Movement of Capital and Current Transactions) among themselves and to Community nationals, member states agree and undertake, as a first step towards achieving the goal of free movement, to accord the right to seek employment in their jurisdictions by Community nationals who are university graduates, media workers, sportspersons, artists and musicians (recognised as such by the competent authorities of the receiving member states).²⁸¹

Member states are required to establish appropriate legislative, administrative and procedural arrangements to facilitate the movement of skills and to provide for movement of Community nationals into and within their jurisdictions without harassment or the imposition of impediments (including the elimination of the requirement for passports for Community nationals travelling to their jurisdictions; the elimination of the requirement for work permits for Community nationals seeking approved employment in their jurisdictions; establishment of mechanisms for certifying and establishing equivalency of degrees and for accrediting institutions; and harmonisation and transferability of social security benefits).²⁸² Article 46(3) further states that nothing in the Treaty can be construed as inhibiting member states from according CARICOM nationals unrestricted access to, and movement within, their jurisdictions subject to such conditions as the public interest may require.

The Treaty also compels the Community, in establishing its industrial policy, to promote appropriate measures for the establishment of adequate social infrastructure, the alleviation of poverty, and securing social stability in the member states.²⁸³ These

279 Article 7(1) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy.

280 Article 7(2) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy. See also Caribbean Community Secretariat “Objectives of the Community” accessed at <http://www.caricom.org/jsp/community/objectives.jsp?menu=community> (26 April 2015).

281 Article 46(1) of the CARICOM Agreement on Social Security.

282 Article 46(1) of the CARICOM Agreement on Social Security.

283 Article 75 of the Revised CARICOM Treaty.

measures involve the Community promoting in the member states (amongst others) the establishment and improvement of health, education, sports and social security institutions and facilities, and the conclusion of reciprocal social security agreements among member states in order to facilitate the movement of skills.

CARICOM member states have also adopted a Charter of Civil Society for the Caribbean Community (1992), which acts as a Bill of Rights for CARICOM. The Charter obliges states to respect the fundamental human rights and freedoms of the individual without distinction as to age, colour, creed, disability, ethnicity, gender, language, place of birth or origin, political opinion, race, religion or social class, but subject to respect for the rights and freedoms of others and for the public interest.²⁸⁴ Fundamental human rights and freedoms protected in the Charter include the rights to life, liberty and security of the person; protection of the privacy of the home and other property of the individual; protection from deprivation of property without due process and just compensation within a reasonable time; freedom of conscience, of expression, and of assembly and association within the meaning of the constitutions of states; and freedom of movement within the Caribbean Community (subject to such exceptions and qualifications as may be authorised by national law and which are reasonably justifiable in a free and democratic society);²⁸⁵ human dignity;²⁸⁶ equality before the law;²⁸⁷ health;²⁸⁸ and to basic necessities.²⁸⁹

In furtherance of the right to free movement, CARICOM member states have concluded the CARICOM Agreement on Social Security. The Agreement is considered a supportive measure for the free movement of skills.²⁹⁰ Free movement of skills entails the right to seek employment in any member state and the elimination of the need for work permits and permits of stay. It is reflective of CARICOM's view that free movement is an important pillar of any genuine single market and economy.²⁹¹ The CARICOM Agreement on social security came into effect on 1 April 1997 in fulfilment of the Caribbean Community objective of fostering unity amongst its members by functional cooperation in the area of social security.²⁹² The Agreement is a recognition by CARICOM member states that harmonisation of their social security legislation is one of the ways envisaged to promote functional cooperation and regional unity, and affirms the principles of equality of treatment for residents of the contracting parties under their social security legislation,

284 Article II(1) of the Charter of Civil Society for the Caribbean Community.

285 Article II(2) of the Charter of Civil Society for the Caribbean Community.

286 Article III of the Charter of Civil Society for the Caribbean Community.

287 Article V of the Charter of Civil Society for the Caribbean Community.

288 Article XX of the Charter of Civil Society for the Caribbean Community.

289 Article XXI of the Charter of Civil Society for the Caribbean Community.

290 Caribbean Community Secretariat The free movement of skills and social security accessed at http://www.caricom.org/jsp/single_market/free_movement.jsp?menu=csme (26 April 2015).

291 *Ibid.*

292 Preamble to the CARICOM Agreement on Social Security and Caribbean Community Secretariat The free movement of skills and social security accessed at http://www.caricom.org/jsp/single_market/free_movement.jsp?menu=csme (26 April 2015).

the maintenance of rights acquired, or in the course of acquisition, as well as the protection and maintenance of such rights notwithstanding changes of residence among their respective territories – principles which underlie several of the Conventions of the International Labour Organisation.²⁹³

The CARICOM Agreement is only applicable in respect of invalidity pensions; disablement pensions; old-age or retirement pensions; survivors' pensions; and death benefits in the form of pensions.²⁹⁴ The Agreement covers insured persons who are or have been subject to the applicable legislation of one or more of the contracting parties as well as to their dependants or survivors.²⁹⁵ However, diplomatic agents within the meaning of the Vienna Convention on Diplomatic Relations (1961), consular officers within the meaning of the Vienna Convention on Consular Relations (1963), or persons of equivalent rank in international organisations of which a contracting party is a member, are excluded.²⁹⁶

The Agreement contains provisions on determining the applicable law as well as the law to be applied to certain insured persons (i.e. persons employed in transnational enterprises; itinerant employed persons; persons employed in international transport; persons employed on ships; persons employed in diplomatic missions, consulates and international organisations; and self-employed persons);²⁹⁷ maintenance of acquired rights;²⁹⁸ the aggregation of insurance periods (totalisation of contribution periods);²⁹⁹ the need for communications and assistance between competent authorities of contracting

293 Preamble to the CARICOM Agreement on Social Security.

294 Article 2 of the CARICOM Agreement on Social Security.

295 Article 3(1) of the CARICOM Agreement on Social Security.

296 Article 3(2) of the CARICOM Agreement on Social Security.

297 Articles 6-14 of the CARICOM Agreement on Social Security.

298 Article 16 of the CARICOM Agreement on Social Security.

299 Articles 4, 17 and 32 of the CARICOM Agreement on Social Security.

parties;³⁰⁰ investigations and medical examinations;³⁰¹ currency of payment;³⁰² and the settlement of disputes.³⁰³

6.5 ASSOCIATION OF SOUTH EAST ASIAN COUNTRIES (ASEAN)

The Association of Southeast Asian Nations (ASEAN) was established in 1967 with the signing of the ASEAN Declaration (Bangkok Declaration) by Indonesia, Malaysia, Philippines, Singapore and Thailand (Founding Fathers of ASEAN).³⁰⁴ ASEAN is currently made up of ten member states (Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam).³⁰⁵

300 In terms of article 52 of the CARICOM Agreement on Social Security, the competent authorities of contracting parties must communicate to each other all information concerning measures taken by them for the application of the Agreement; all information concerning their legislation which may affect the application of the Agreement; and all statistical information concerning beneficiaries and the amount of benefits paid under the Agreement. In application of the Agreement, the competent authorities and competent institutions of the contracting parties must also assist one another as if they were applying their own legislation, and provide administrative assistance free of charge. However, the competent authorities of the contracting parties may agree to reimburse certain expenses.

301 Under article 55 of the CARICOM Agreement on Social Security, investigations or medical examinations prescribed by the legislation of one contracting party may, at the request of the institution which administers such legislation, be carried out in the territory of another contracting party by the institution of the place of stay or residence. In such instances, the investigations or medical examinations are deemed to have taken place in the territory of the first contracting party.

302 Article 56 of the CARICOM Agreement on Social Security empowers the competent institutions to discharge their financial obligations under the Agreement in their national currencies. However, where, under the Agreement, a competent institution is required to pay a benefit to a beneficiary resident in the territory of another contracting party or to another competent institution in such territory, it must discharge its obligation in the currency of such other contracting party (in this case the conversion rate will be the rate of exchange in effect on the date of payment). Benefits are to be paid to beneficiaries free from any deductions for administrative or other expenses.

303 Article 57 of the CARICOM Agreement on Social Security provides (*inter alia*) that any dispute arising between two or more contracting parties concerning the interpretation or application of the Agreement must first be subject to negotiation between the contracting parties concerned. Where the dispute is not settled within three months from the request for commencement of negotiations, the dispute must be submitted to arbitration on the written request of any of the contracting parties to the Secretary-General of CARICOM. A dispute to be submitted to arbitration will be referred to a tribunal consisting of three arbitrators. Each party to the dispute appoints an arbitrator and the two arbitrators appoint the third arbitrator, who will be the chairman. The chairman must be a person with legal qualifications.

304 See ASEAN "Overview" accessed at <http://www.asean.org/asean/about-asean/overview> (03 May 2015).

305 See ASEAN "ASEAN Member States" accessed at <http://www.asean.org/asean/asean-member-states> (03 May 2015).

According to the ASEAN Declaration, the aims and purposes of ASEAN were to accelerate economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations; promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter; promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields; provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres; collaborate more effectively for the greater utilisation of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples; promote Southeast Asian studies; and maintain close and beneficial cooperation with existing international and regional organisations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.

ASEAN member states are guided by the fundamental principles of mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; the right of every state to lead its national existence free from external interference, subversion or coercion; non-interference in the internal affairs of one another; settlement of differences or disputes by peaceful means; renunciation of the threat or use of force; and effective cooperation among themselves.³⁰⁶

The vision of ASEAN member states was for the creation of a Community by 2020. The Community, envisaged in the ASEAN Vision 2020 adopted in 1997, would be “a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies.”³⁰⁷ Plans for the establishment of the ASEAN Community were moved forward, with its establishment in 2015.³⁰⁸

The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community. The ASEAN Socio-Cultural Community aims to contribute to realising an ASEAN Community that is people-oriented and socially responsible with a view to

306 See Treaty of Amity and Cooperation in Southeast Asia (TAC) (1976).

307 ASEAN “Overview” accessed at <http://www.asean.org/asean/about-asean/overview> (03 May 2015).

308 The commitment to accelerate the establishment of an ASEAN Community by 2015 is contained in the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 signed in 2007. ASEAN states that the establishment of the ASEAN Economic Community (AEC) in 2015 is a major milestone in the regional economic integration agenda in ASEAN, offering opportunities in the form of a huge market of USD 2.6 trillion and over 622 million people (ASEAN “ASEAN Economic Community” accessed at <http://asean.org/asean-economic-community/> (24 April 2017)).

achieving enduring solidarity and unity among the peoples and member states of ASEAN. It seeks to forge a common identity and build a caring and sharing society which is inclusive and where the well-being, livelihood and welfare of the peoples are enhanced.³⁰⁹

The ASEAN institutional and legal framework is currently regulated by the Charter of the Association of Southeast Asian Nations (ASEAN Charter) of 2007. The Charter is a legally binding agreement among the ten ASEAN member states, which serves as a firm foundation in achieving the ASEAN Community by providing legal status and an institutional framework for ASEAN. It also codifies ASEAN norms, rules and values, and sets clear targets for ASEAN.³¹⁰

The ASEAN Charter was born out of the member states' conviction of the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities.³¹¹ It was further motivated by ASEAN member states' commitment to intensify community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community.³¹²

The Charter states that some of the purposes of ASEAN are to:³¹³

- enhance regional resilience by promoting greater political, security, economic and socio-cultural cooperation;
- create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation of trade and investment in which there is a free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital;
- alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;
- strengthen democracy, enhance good governance and the rule of law, and promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of member states; and
- enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice.

309 ASEAN "ASEAN Socio-Cultural Community" accessed at <http://www.asean.org/communities/asean-socio-cultural-community> (03 May 2015).

310 ASEAN "Overview" accessed at <http://www.asean.org/asean/about-asean/overview> (03 May 2015).

311 Preamble to the ASEAN Charter.

312 *Ibid.*

313 Article 1 of the ASEAN Charter.

The guiding principles of ASEAN include respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states; reliance on peaceful settlement of disputes; enhanced consultations on matters seriously affecting the common interest of ASEAN; adherence to the rule of law, good governance, the principles of democracy and constitutional government; respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; and upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN member states.³¹⁴

ASEAN member states have the obligation to take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all the obligations of membership.³¹⁵

The institutional framework of ASEAN consists of the Summit,³¹⁶ the Coordinating Council,³¹⁷ Community Councils,³¹⁸ Sectoral Ministerial Bodies,³¹⁹ the Secretariat,³²⁰ the Committee of Permanent Representatives,³²¹ ASEAN National Secretariats,³²² the Human Rights Body,³²³ and the ASEAN Foundation.³²⁴ In addition, there are other entities associated with ASEAN.³²⁵

ASEAN member states have signed various agreements in support of the objectives of integration and community building. These include the Framework Agreement on

314 Article 2 of the ASEAN Charter.

315 Article 5 of the ASEAN Charter.

316 Article 7 of the ASEAN Charter. The ASEAN Summit is the supreme policy-making body and is comprised of the heads of state or government of the member states.

317 Article 8 of the ASEAN Charter. The ASEAN Coordinating Council is made up of foreign ministers. Its functions include preparing the meetings of the Summit, coordinating the implementation of agreements and decisions of the Summit, etc.

318 Article 9 of the ASEAN Charter. These are the ASEAN Political-Security Community Council, ASEAN Economic Community Council and ASEAN Socio-Cultural Community Council.

319 Article 10 and annex 1 of the ASEAN Charter. Their functions include implementation of the agreements and decisions of the Summit under their respective purview, and strengthening cooperation in their respective fields in support of ASEAN integration and community building.

320 Article 11 of the ASEAN Charter. The Secretariat is the administrative unit of ASEAN.

321 Article 12 of the ASEAN Charter. The Committee supports the work of the Community Councils and the Sectoral Ministerial Bodies, and coordinates with ASEAN National Secretariats and other ASEAN Sectoral Ministerial Bodies.

322 Article 13 of the ASEAN Charter. These serve as the national focal points of ASEAN.

323 Article 14 of the ASEAN Charter envisages the establishment of a human rights body for the promotion and protection of human rights and fundamental freedoms.

324 Article 15 of the ASEAN Charter. The Foundation supports the Secretary General and collaborates with the relevant ASEAN bodies to support community building by promoting greater awareness of the ASEAN identity, people-to-people interaction, and close collaboration among the business sector, civil society, academia and other stakeholders.

325 Article 16 and annex 2 of the ASEAN Charter.

Visa Exemption and the Agreement on the Movement of Natural Persons. However, a multilateral social security treaty or agreement is yet to be concluded.

6.5.1 ASEAN Framework Agreement on Visa Exemption (2006)

The Framework Agreement on Visa Exemption enjoins member states, where applicable, to exempt citizens of any other member countries holding valid national passports from visa requirements for visits of up to 14 days.³²⁶ Entry to a member state for other purposes or for a longer period still requires the appropriate visas or passes. However, member states are free to provide visa-free travel for temporary visits for longer than 14 days in accordance with their domestic legislation and/or bilateral protocols or arrangements.

Member states have the right to temporarily suspend the implementation of the Agreement for reasons of national security, public order and public health.³²⁷ This can be done by giving immediate notice to other member countries through diplomatic channels. The suspension must be lifted immediately after the situation that gave rise to it ceases to exist. Member states can also terminate the implementation of the Agreement by means of written notification. Any termination takes effect after 90 days of receipt of the notification.

The Framework Agreement does not affect the implementation of existing agreements on visa exemption between member states. It also does not affect the rights and obligations of member states under any existing agreements or international conventions of which they are parties.³²⁸ However, if the provisions of other agreements are less preferential to those of the Framework Agreement, the member states concerned must negotiate for amendments in compliance with the provisions of the Framework Agreement. In addition, members states are required to negotiate and conclude bilateral agreements as soon as possible to implement the Framework Agreement.³²⁹

6.5.2 ASEAN Agreement on the Movement of Natural Persons (2012)

The ASEAN Agreement on the Movement of Natural Persons reflects member states' desire for an effective mechanism to further liberalise and facilitate movement of natural persons towards free flow of skilled labour through close cooperation among related ASEAN bodies in various areas, including trade in goods, trade in services, investment, immigration and labour.³³⁰ It further indicates their desire to substantially eliminate all restrictions in the temporary cross-border movement of natural persons involved in the provision of trade in goods, trade in services and investment.³³¹

326 Article 1 of the ASEAN Framework Agreement on Visa Exemption.

327 Article 5 of the ASEAN Framework Agreement on Visa Exemption.

328 Article 6 of the ASEAN Framework Agreement on Visa Exemption.

329 Article 7 of the ASEAN Framework Agreement on Visa Exemption.

330 Preamble to the ASEAN Agreement on the Movement of Natural Persons.

331 *Ibid.*

The objectives of the Agreement are to:³³²

- provide within the scope of the Agreement the rights and obligations additional to those set out in the ASEAN Framework Agreement on Services and its Implementing Protocols in relation to the movement of natural persons between member states;
- facilitate the movement of natural persons engaged in the conduct of trade in goods, trade in services and investment between member states;
- establish streamlined and transparent procedures for applications for immigration formalities for the temporary entry or temporary stay of natural persons to whom the Agreement applies; and
- protect the integrity of member states' borders and protect the domestic labour force and permanent employment in the territories of member states.

The Agreement applies to measures affecting the temporary entry into, or temporary stay of natural persons of a member state in, the territory of another member state. The categories of natural persons may include business visitors, intra-corporate transferees, contractual service suppliers, and other categories as may be specified in the Schedules of Commitments for the temporary entry and temporary stay of natural persons of the member state.³³³ The Agreement does not apply to measures affecting natural persons seeking access to the employment market of another member state, nor to measures regarding citizenship, residence or employment on a permanent basis. The Agreement does not prevent member states from applying measures to regulate the entry, or temporary stay, of natural persons of the other member state into its territory. These include measures necessary to protect the integrity of a member state's territory and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in a manner that nullifies or impairs the benefits accruing to the other member state under the terms of a specific commitment.

Each member state is compelled to grant temporary entry or temporary stay in accordance with the Agreement to natural persons of another member state, provided that the persons follow prescribed application procedures for the immigration formality sought, and meet all relevant eligibility requirements for temporary entry or temporary stay of the granting member state.³³⁴ A member state is empowered to deny temporary entry or temporary stay to natural persons of another member state who do not comply with these requirements.

The Agreement does not prevent a member state from adopting or enforcing measures necessary to protect public morals or to maintain public order; measures necessary to protect human, animal or plant life or health; measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement, including those relating to the prevention of deceptive and fraudulent practices or to

332 Article 1 of the ASEAN Agreement on the Movement of Natural Persons.

333 Article 2 of the ASEAN Agreement on the Movement of Natural Persons.

334 Article 4 of the ASEAN Agreement on the Movement of Natural Persons.

deal with the effects of a default on service contracts; the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and safety.³³⁵ This is on condition that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on the movement of natural persons.

6.6 SOUTHERN COMMON MARKET (MERCADO COMÚN DEL SUR)

Mercado Común del Sur (MERCOSUR) or Southern Common Market was established on 26 March 1991 with the signing of the Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Southern Common Market Treaty) in Asunción (Paraguay) by Argentina, Brazil, Paraguay and Uruguay.³³⁶ The Treaty created an integrated regional market whose members were committed to “strengthening the economic integration process by making the most efficient use of available resources, preserving the environment, improving physical links, coordinating macroeconomic policies and complementing the different sectors of the economy, based on the principles of gradualism, flexibility and balance.”³³⁷

- MERCOSUR is based on reciprocity of rights and obligations between the member states;³³⁸ and involves the following:³³⁹
- the free movement of goods, services and factors of production (i.e. labour and capital) between countries through, *inter alia*, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures;
- the establishment of a common external tariff and the adoption of a common trade policy in relation to third states or groups of states, and the coordination of positions in regional and international economic and commercial forums;
- the coordination of macroeconomic and sectoral policies between the member states in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the member states; and
- the harmonisation of their legislation in the relevant areas in order to strengthen the integration process.

335 Article 9 of the ASEAN Agreement on the Movement of Natural Persons.

336 MERCOSUR is currently made up of Argentina, Brazil, Paraguay, Uruguay and Venezuela as members, with Bolivia, Colombia, Ecuador and Peru as associate members.

337 See Preamble to, and article 1 of, the Southern Common Market Treaty.

338 Article 2 of the Southern Common Market Treaty.

339 Article 1 of the Southern Common Market Treaty.

In furtherance of their integration objectives, MERCOSUR member states adopted a Multilateral Agreement on Social Security, a Social and Labour Declaration, and an Agreement Relating to Residence Permits for Nationals of States Parties to MERCOSUR (as well as Bolivia and Chile).

6.6.1 MERCOSUR Multilateral Agreement on Social Security (1997)

The MERCOSUR Multilateral Agreement on Social Security establishes a standardised coordination mechanism of social welfare systems within MERCOSUR. The Agreement applies to retirement benefits (retirement due to age (voluntary or compulsory) and retirement due to disability) and survivors' benefits.

The main objective of the Agreement is to integrate the social security systems of the MERCOSUR countries through the development and implementation of a Data Transfer and Validation System (DTVS) to process retiree benefits under MERCOSUR's Multilateral Social Security Agreement.³⁴⁰

The Agreement guarantees equality and non-discrimination between nationals and non-nationals in each of the member states. In this regard, it states that social security rights will be afforded to workers that render or have rendered services in any of the member states, the same rights being afforded to them, their families and dependants, while being subject to the same obligations as the nationals of the member states regarding those specifically mentioned by the Agreement.³⁴¹

It allows MERCOSUR's workers or their dependants to preserve their rights acquired, or in the process of being acquired, when they are in the territory of signatory countries (maintenance of acquired rights) and pro rata payment of benefits.³⁴² According to the Agreement, the periods of insurance or contributions paid in the territories of "any of the Contracting States will be considered for purposes of benefit entitlement"³⁴³

The Agreement exempts workers from making contributions in the country of destination during periods of temporary displacement (under twelve months), which may be extended for an equal period. This is premised on prior authorisation from the country of destination.³⁴⁴ In addition, it guarantees temporarily displaced workers and their dependants free medical assistance throughout the public healthcare network.

The responsibility of monitoring and enforcing the Agreement is bestowed on member states. However, it established a Multilateral Committee with the function of interpreting

340 Pucheta M "The Social Dimension of MERCOSUR" Centre for European Law and Legal Studies (CELLS) Online Paper Series, Volume 3 (Number 5) 17.

341 Article 2 of the MERCOSUR Multilateral Social Security Agreement.

342 Pucheta M "The Social Dimension of MERCOSUR" Centre for European Law and Legal Studies (CELLS) Online Paper Series, Volume 3 (Number 5) 17.

343 *Ibid.*

344 *Ibid.*

and implementing the Agreement.³⁴⁵ The Committee makes decisions by consensus about the potential conflicts which may arise in the application of the Agreement.

6.6.2 MERCOSUR Social and Labour Declaration (1998)

The MERCOSUR Social and Labour Declaration is the region's recognition that regional integration cannot be confined to the commercial and economic spheres, and must also incorporate social issues.³⁴⁶ This includes the adaptation of the regulatory frameworks for labour to the new circumstances resulting from integration and the process of economic globalisation, as well as the recognition of a minimum floor of workers' rights within MERCOSUR, in line with the fundamental ILO Conventions. The Declaration is also a consolidation, in a common instrument, of the progress made in the social dimension of the integration process. It lays down the foundations for future and ongoing progress in the social sphere, primarily through the ratification and implementation of the principal ILO Conventions.³⁴⁷

The Declaration guarantees fundamental individual and collective rights of workers and employers. Individual rights of workers include the rights to non-discrimination,³⁴⁸ the promotion of equality,³⁴⁹ social security,³⁵⁰ as well as the rights of migrant and cross-border workers.³⁵¹ In terms of social security, the Declaration grants workers in MERCOSUR an entitlement to social security, in accordance with the levels and conditions established by their respective national laws. Member states undertake to guarantee a minimum social safety net to protect their inhabitants against the contingencies of illness, old age, invalidity and death, while seeking to coordinate policies in the social sphere in

345 Article 16 of the MERCOSUR Multilateral Social Security Agreement.

346 Preamble to the MERCOSUR Social and Labour Declaration (1998).

347 *Ibid.*

348 In terms of article 1 of the MERCOSUR Social and Labour Declaration, all workers are guaranteed the effective equality of rights, treatment and opportunity in employment and occupation, without distinction or exclusion on the grounds of race, national origin, colour, sex or sexual orientation, age, belief, political or trade union views, ideology, economic situation or any other social or family circumstance, in accordance with the legal provisions in force. The state parties undertake to guarantee the application of the principle of non-discrimination. In particular, they commit themselves to adopt measures for eliminating discrimination with respect to disadvantaged groups in the labour market. Member states further undertake to guarantee, through labour practices and legislation, equality of treatment and opportunity for men and women (article 3).

349 Article 2 of the MERCOSUR Social and Labour Declaration requires persons with special needs to be treated in a dignified and non-discriminatory manner, so as to favour their integration into society and the labour market. Member states commit themselves to adopting effective measures to protect persons with special needs.

350 Article 19 of the MERCOSUR Social and Labour Declaration.

351 All migrant workers, irrespective of their nationality, are entitled to the same assistance, information, protection and equality of rights and working conditions as recognised for the nationals of the host country (article 4). In addition, member states undertake to adopt measures to establish common standards and procedures relating to the movement of workers in border areas and to take necessary action to improve the employment opportunities and working and living conditions of such workers.

such a way as to eliminate possible discrimination on the basis of the national origin of the beneficiaries.

The Declaration compels member states to respect the fundamental rights it contains and to promote their implementation in accordance with national law and practice, collective accords and collective agreements. In order to achieve its implementation, a Social and Labour Commission – an auxiliary tripartite body within the Common Market Group – was established to play a promotional role instead of applying the use of sanctions.³⁵² The Social and Labour Commission has national and regional centres for promoting and following up on the application of the Declaration.

6.6.3 Agreement Relating to Residence Permits for Nationals of States Parties to MERCOSUR (as well as Bolivia and Chile) (2002)

The Agreement relating to residence permits for nationals of MERCOSUR member states (as well as Bolivia and Chile) now also includes Colombia, Ecuador and Peru. The Agreement aims to promote the MERCOSUR member states' objective of regional integration. This is indicated in the Preamble, which states that it affirms the desire of the member states and associates of MERCOSUR to strengthen and deepen the process of integration; and that the implementation of a policy of free movement of people in the MERCOSUR region is essential for the realisation of these objectives.

The Agreement promotes regular migration and equal treatment between nationals. It also recognises fundamental rights of non-citizens of a member state, regardless of their immigration status.³⁵³ It regulates entry into and residence in the territory of member states and other signatory states. The Agreement provides for an automatic visa for citizens and the freedom to work and live within the territory of any of the states, provided that they have no criminal record for the past five years. The visa also allows them to stay in a state party for up to four years for the purpose of providing services.³⁵⁴ The Agreement

352 Article 20 of the MERCOSUR Social and Labour Declaration. The Common Market Group, along with the Council of the common market, are institutions created by the Southern Common Market Treaty for the administration and implementation of the Treaty, and of any specific agreements or decisions adopted during the transition period within the legal framework established thereby (article 9). The Council is the highest organ of the common market, with responsibility for its political leadership and for decision-making to ensure compliance with the objectives and time-limits set for the final establishment of the common market (article 10). The Common Market Group is the executive organ of the common market. Its duties are to monitor compliance with the Treaty; to take the necessary steps to enforce decisions adopted by the Council; to propose specific measures for applying the trade liberalisation programme, coordinating macroeconomic policies and negotiating agreements with third parties; and to draw up programmes of work to ensure progress towards the formation of the common market (article 13).

353 Pucheta M "The Social Dimension of MERCOSUR" Centre for European Law and Legal Studies (CELLS) Online Paper Series, Volume 3 (Number 5) 19.

354 Giupponi BO "Citizenship, migration and regional integration: Re-shaping citizenship conceptions in the Southern Cone" 2011 *European Journal of Legal Studies*, Vol. 4, Issue 2, 104-136 and Pucheta M "The Social Dimension of MERCOSUR" Centre for European Law and Legal Studies (CELLS) Online Paper Series, Vol. 3 (Number 5) 19.

also guarantees the right to family reunification, to the transfer of remittances, and the protection of the rights of migrant children equally with those of nationals' children.

The Agreement is complemented by a regional plan to facilitate the free movement of work within MERCOSUR.³⁵⁵ It has been held that the Agreement represents, without any doubt whatsoever, an important step forward as regards the free movement of workers and citizens.³⁵⁶

6.7 EUROPEAN UNION (EU)

The European Union (EU) is a supranational organisation currently made up of 28 member states.³⁵⁷ The establishment of the EU was the result of (among other things) the members' determination to promote economic and social progress for their peoples, taking into account the principle of sustainable development; this was to take place within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.³⁵⁸ It was also as a result of their resolution to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union; and in view of further steps to be taken in order to advance European integration.³⁵⁹ The EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.³⁶⁰

Some of the aims of the EU are to promote peace, its values and the well-being of its peoples.³⁶¹ In order to achieve this, it commits to (*inter alia*):

355 MERCOSUR Regional Plan to facilitate the Free Movement of Work (2013).

356 Giupponi BO "Citizenship, migration and regional integration: Re-shaping citizenship conceptions in the Southern Cone" 2011 *European Journal of Legal Studies*, Vol. 4, Issue 2, 104-136 and Pucheta M "The Social Dimension of MERCOSUR" Centre for European Law and Legal Studies (CELLS) Online Paper Series, Volume 3 (Number 5) 19.

357 European Union member states are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom. However, the United Kingdom is in the process of withdrawing from the Union.

358 Preamble to the Treaty of Maastricht on European Union of 1992 (as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community in 2007).

359 Preamble to the Treaty on European Union.

360 Article 2 of the Treaty on European Union.

361 Article 3(1) of the Treaty on European Union.

- offering its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;³⁶² and
- combating social exclusion and discrimination, and promoting social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.³⁶³

The EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union,³⁶⁴ which have the same legal value as the Treaties.³⁶⁵ In addition, the Union accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁶⁶ Fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and those that result from the constitutional traditions common to the member states constitute general principles of EU law.³⁶⁷

Institutions of the EU are the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.³⁶⁸

The Treaty on the Functioning of the European Union defines the competencies of the EU and its member states. Areas of concurrent competence between the Union and member states are social policy (for the aspects defined in the Treaty); economic, social and territorial cohesion; and the area of freedom, security and justice.³⁶⁹ The Treaty further empowers the Union to take measures to ensure coordination of the employment policies of the member states, in particular by defining guidelines for these policies, and it may take initiatives to ensure coordination of member states' social policies.³⁷⁰

The Treaty prohibits discrimination on grounds of nationality in the scope of application of the EU's Treaties.³⁷¹ It establishes Union citizenship, with every person holding the nationality of a member state becoming a citizen of the Union (citizenship of the Union is additional to and does not replace national citizenship).³⁷² EU citizens enjoy the rights

362 Article 3(2) of the Treaty on European Union.

363 Article 3(2) of the Treaty on European Union.

364 Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted in Strasbourg, on 12 December 2007.

365 Article 6(1) of the Treaty on European Union.

366 Article 6(2) of the Treaty on European Union.

367 Article 6(3) of the Treaty on European Union.

368 Article 13 of the Treaty on European Union.

369 Article 4 of the Treaty on the Functioning of the European Union.

370 Article 5 of the Treaty on the Functioning of the European Union.

371 Article 18 of the Treaty on the Functioning of the European Union.

372 Article 20(1) of the Treaty on the Functioning of the European Union.

and are subject to the duties provided for in the Treaties. These include the right to move and reside freely within the territory of the member states.³⁷³ The right to free movement is recognised for all EU citizens, whether they are economically active or not. This means being able to move freely for purposes other than working (e.g. to retire, study or accompany family) is an essential feature of EU citizenship.³⁷⁴

Freedom of movement for workers within the Union is also ensured.³⁷⁵ This entails the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment. It further entails the right (subject to limitations justified on grounds of public policy, public security or public health) to accept offers of employment actually made; to move freely within the territory of member states for this purpose; to stay in a member state for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law, regulation or administrative action; and to remain in the territory of a member state after having been employed in that state, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. However, this does not apply to employment in the public service.

The European Parliament and European Council are mandated (acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee) to issue directives or make regulations setting out the measures required to bring about freedom of movement for workers.³⁷⁶ They are further obliged to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers.³⁷⁷ This entails them making arrangements for employed and self-employed migrant workers and their dependants to secure aggregation of all periods taken into account under the laws of the several countries for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, and payment of benefits to persons resident in the territories of member states.

Any restriction on the freedom of establishment of nationals of a member state in the territory of another member state is prohibited.³⁷⁸ This includes restrictions on

373 Articles 20(2) and 21 of the Treaty on the Functioning of the European Union.

374 European Commission Free Movement of EU Citizens and Their Families: Five actions to make a difference (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) 01 November 2013.

375 Article 45 of the Treaty on the Functioning of the European Union.

376 Article 46 of the Treaty on the Functioning of the European Union.

377 Article 48 of the Treaty on the Functioning of the European Union.

378 Article 49 of the Treaty on the Functioning of the European Union. Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected (subject to the provisions of the Chapter relating to capital).

the setting-up of agencies, branches or subsidiaries by nationals of any member state established in the territory of any member state.

The social policy objectives of the EU and its member states are the promotion of employment; improved living and working conditions; proper social protection; dialogue between management and labour; and the development of human resources with a view to lasting high employment and the combating of exclusion.³⁷⁹ In order to achieve these objectives, the EU supports and complements the activities of the member states in the following fields:³⁸⁰

- improvement in particular of the working environment to protect workers' health and safety;
- working conditions;
- social security and social protection of workers;
- protection of workers where their employment contract is terminated;
- the information and consultation of workers;
- representation and collective defence of the interests of workers and employers, including co-determination;
- conditions of employment for third-country nationals legally residing in Union territory;
- the integration of persons excluded from the labour market (without prejudice to article 166 (on the implementation of a vocational training policy by the EU));
- equality between men and women with regard to labour market opportunities and treatment at work;
- the combating of social exclusion; and
- the modernisation of social protection systems.

The EU Commission is also mandated to encourage cooperation between the member states and facilitate the coordination of their actions in all social policy fields under the Treaty to ensure the achievement of the EU social policy objectives.³⁸¹ Particular areas in which the Commission must encourage cooperation and facilitate the coordination relate to employment, labour law and working conditions, basic and advanced vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene, and the right of association and collective bargaining between employers and workers.

As mentioned above, the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union are recognised by the EU as having the same legal value as the EU Treaties. In addition, the EU has developed Regulations on the coordination of social security systems to promote fundamental rights within the

379 Article 151 of the Treaty on the Functioning of the European Union.

380 Article 153 of the Treaty on the Functioning of the European Union.

381 Article 156 of the Treaty on the Functioning of the European Union.

Union. These are Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (as amended) and Regulation (EC) No. 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 on the coordination of social security systems (as amended). The Regulations bind all the EU member states as well as Iceland, Liechtenstein, Norway and Switzerland (32 countries in total).

Regulations (EC) No. 883/2004 and (EC) No. 987/2009 initially covered nationals of a member state, stateless persons and refugees residing in a member state who are or have been subject to the legislation of one or more member states, as well as to the members of their families and to their survivors. As a result, Regulation (EU) No. 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality was adopted to deal with the position of all third country nationals in cross-border situations. For a person to be covered by Regulation (EU) No. 1231/2010, he or she must be legally resident in a member state, and must be in “a situation which is not confined in all respects within a single Member State.”³⁸²

6.7.1 Charter of Fundamental Rights of the European Union (2000)

The EU has adopted a Charter of Fundamental Rights because of the need to strengthen the protection of fundamental rights in the light of changes in society, social progress, and scientific and technological developments by making these rights more visible.³⁸³ Some of the rights guaranteed in the Charter are freedom to choose an occupation and right to engage in work;³⁸⁴ non-discrimination;³⁸⁵ social security and social assistance;³⁸⁶ and freedom of movement and of residence.³⁸⁷

In terms of the freedom to choose an occupation and right to engage in work, every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any member state. Nationals of third countries who are authorised to work in the territories of the member states are entitled to working conditions equivalent to those of citizens of the Union.

Discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership

382 Article 1 of EU Regulation No 1231/2010 of the European Parliament and of the Council of 24 November 2010.

383 Preamble to the Charter of Fundamental Rights of the European Union.

384 Article 15 of the Charter of Fundamental Rights of the European Union.

385 Article 21 of the Charter of Fundamental Rights of the European Union.

386 Article 34 of the Charter of Fundamental Rights of the European Union.

387 Article 45 of the Charter of Fundamental Rights of the European Union.

of a national minority, property, birth, disability, age or sexual orientation is prohibited. In applying the EU Treaties, any discrimination on grounds of nationality is prohibited.

With regard to social security and social assistance, the Charter states that the EU recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by EU law and national laws and practices.³⁸⁸ Everyone residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.³⁸⁹ In order to combat social exclusion and poverty, the EU recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by EU law and national laws and practices.³⁹⁰

The Charter grants every EU citizen the right to move and reside freely within the territory of the member states.³⁹¹ In addition, freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a member state.³⁹²

6.7.2 EU Regulations on the Coordination of Social Security Systems

The Regulations were adopted because of the EU's conviction 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.³⁹³ They were also motivated by the fact that Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community had been amended and updated on numerous occasions in order to take into account not only developments at Community level, including judgments of the Court of Justice, but also changes in legislation at national level. Such factors have played a part in making the Community coordination rules complex and lengthy. Replacing the rules, while modernising and simplifying them, was therefore essential to achieve the aim of the free movement of persons.³⁹⁴

Furthermore, the EU aimed to guarantee within the Community equality of treatment under the different national laws for the persons concerned; the aggregation of all the periods taken into account under the various national laws for the purpose of acquiring and retaining the right to benefits and of calculating the amount of benefits, and by

388 Article 34(1) of the Charter of Fundamental Rights of the European Union.

389 Article 34(2) of the Charter of Fundamental Rights of the European Union.

390 Article 34(3) of the Charter of Fundamental Rights of the European Union.

391 Article 45(1) of the Charter of Fundamental Rights of the European Union.

392 Article 45(2) of the Charter of Fundamental Rights of the European Union.

393 Preamble to Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

394 Preamble to Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

providing benefits for the various categories of persons covered; and ensuring that persons moving within the Community are subjected to the social security scheme of only one single member state in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom, etc.³⁹⁵

The Regulations are a recognition that the objective of coordination measures to guarantee that the right to free movement of persons can be exercised effectively cannot be sufficiently achieved by the member states and can be better achieved at Community level because of the scale and effects of the measures.³⁹⁶

In addition to nationals of a member state, stateless persons and refugees, Regulation (EC) No. 883/2004 covers the survivors of persons who have been subject to the legislation of one or more member states, irrespective of the nationality of such persons, where their survivors are nationals of a member state or stateless persons or refugees residing in one of the member states.³⁹⁷ The Regulation applies to all legislation for sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, occupational injury and diseases benefits, death grants, unemployment benefits, pre-retirement benefits, and family benefits.³⁹⁸ The Regulation applies to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or ship-owner (unless otherwise provided for in annex XI of the Regulation).³⁹⁹ It also applies to special non-contributory cash benefits covered by article 70.⁴⁰⁰

The Regulation addresses a number of issues.

- Equality of treatment: Under article 4, persons to whom the Regulation applies enjoy the same benefits and are subject to the same obligations under the legislation of any member state as the nationals thereof (unless otherwise provided for by the Regulation).
- Aggregation of periods: The Regulation compels the competent institution of a member state whose legislation makes the acquisition, retention, duration or recovery of the right to benefits; the coverage by legislation; or the access to or the exemption from compulsory, optional continued or voluntary insurance, conditional upon the completion of periods of insurance, employment, self-employment or residence to take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other member state as though they were periods completed under the legislation which it applies (unless otherwise provided for by the Regulation).⁴⁰¹

395 *Ibid.*

396 *Ibid.*

397 Article 2 of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

398 Article 3(1) of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

399 Article 3(2) of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

400 Article 3(3) of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

401 Article 6 of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

- Exportability of benefits (through the waiving of residence rules): Cash benefits that are payable under the legislation of one or more member states or under Regulation 883/2004 cannot be reduced, amended, suspended, withdrawn or confiscated because the beneficiary or the members of his or her family reside in a member state other than that in which the institution responsible for providing benefits is situated (unless otherwise provided for by the Regulation).⁴⁰²
- Prevention of overlapping of benefits: The Regulation does not confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance (unless otherwise provided for).⁴⁰³
- Determination of the applicable legislation: Persons to whom this Regulation applies shall be subject to the legislation of a single member state only.⁴⁰⁴ The Regulation stipulates rules for the determination of the applicable legislation for different categories of persons.⁴⁰⁵
- Good administrative cooperation: Authorities and institutions of member states must “lend one another their good offices and act as if implementing their own legislation.”⁴⁰⁶ They may also communicate directly with one another and with the persons involved or their representatives, and have a duty of mutual information and cooperation to ensure the correct implementation of the Regulation.⁴⁰⁷

6.8 PRELIMINARY OBSERVATIONS ON COMPARATIVE SOCIAL SECURITY COORDINATION INSTRUMENTS

The East African Community (EAC), Economic Community of West African States (ECOWAS), Caribbean Community and Common Market (CARICOM), Association of Southeast Asian Nations (ASEAN), Southern Common Market/*Mercado Común del Sur* (MERCOSUR) and the European Union (EU) have all been established to achieve the objectives of regional integration and cooperation in their respective regions. In furtherance of these objectives, these regional communities promote the freedom or facilitation of movement of persons within the region. Therefore, the regional communities have either concluded or adopted instruments for the free movement or the facilitation of movement of persons and for the right of residence (e.g. the ECOWAS Protocol on Free Movement of Persons and the Right of Residence and Establishment; the Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy; the ASEAN Framework Agreement on Visa Exemption and Agreement on the Movement of Natural Persons; the *Mercado Común*

402 Article 7 of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

403 Article 10 of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

404 Article 11 of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

405 Articles 12-16 of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

406 Article 76(2) of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

407 Article 76(1) and (3) of Regulation (EC) No 883/2004 on the Coordination of Social Security Systems.

del Sur (MERCOSUR)/Southern Common Market Treaty and the Agreement Relating to Residence Permits for Nationals of States Parties to MERCOSUR (as well as Bolivia and Chile); and the Treaty of Maastricht on European Union of 1992 (as amended by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community in 2007). The Treaty for the Establishment of the East African Community also envisages an agreement on the freedom of movement of persons, labour and services, and the enjoyment of the right of establishment and residence of their citizens within the Community.

Many of the regional communities have adopted an instrument for the coordination of social security or plan to do so (e.g. the ECOWAS General Convention on Social Security; CARICOM Agreement on Social Security; MERCOSUR Multilateral Agreement on Social Security; and the EU Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (as amended)). These instruments were adopted or concluded because of the realisation by the regional communities that greater benefit would be derived from the instruments on free movement or facilitation of movement of persons, if an instrument for the coordination of social security were to be concluded or adopted. This is also the realisation of the 15 French-speaking countries in western and central Africa and the Indian Ocean which have concluded the Inter-African Conference on Social Security (*Conférence Interafricaine de la Prévoyance Sociale* (CIPRES)).

These instruments typically specify their personal and material scope (persons and the branches of social security or social security laws covered). They guarantee equality of treatment, with all persons residing in the territory of a member state or state party and who are covered by the instrument having the same rights and obligations under the legislation of every member state or state party as the nationals of the member state or state party.

The instruments further guarantee the portability of migrant workers' social security benefits. This is achieved through the aggregation of insurance periods through the totalisation of employment or contribution periods (where necessary); the maintenance of rights acquired in each member state or state party; and the export of benefits abroad. They also regulate the choice of applicable law (i.e. the legislation applicable in cases of the portability of benefits) and administrative assistance and cooperation between member states or state parties and national social security institutions.

These indicate that a social security coordination instrument is a vital tool in promoting freedom or facilitation of movement, as persons are not restricted from moving within a regional economic community (or between states) for fear of losing their entitlement to social security benefits. It thus facilitates movement of persons within a region (or between countries) which is necessary for the creation of a regional community.

The conclusion of social security coordination instruments by regions comparable to SADC (i.e. ECOWAS countries, the 15 French-speaking western and central Africa and Indian Ocean countries in the Inter-African Conference on Social Insurance (including

SADC member state Congo DR), Caribbean Community countries and South American (MERCOSUR) countries) supports the feasibility of Southern African countries concluding or adopting a multilateral instrument for social security coordination.

6.9 LESSONS TO BE LEARNT BY SADC

The adoption of an instrument for the coordination of social security by most of the regional communities under review presents a number of lessons for SADC.

- Just like SADC, the various regions which have established regional communities strive for the attainment of regional integration.
- Regional integration entails a single unified entity, without discrimination of any kind, especially based on nationality.
- The achievement of freedom of movement of persons and of residence within a regional community promotes the advancement of the goal of regional integration.
- Regional communities (as well as countries with shared values such as the CIPRES member states) realise that freedom of movement and of residence would be promoted with the adoption or conclusion of an instrument for the coordination of social security within the region.
- Issues typically covered by these instruments include:
 - Specification of persons and the branches of social security or social security laws covered;
 - guarantee of equality of treatment of all covered persons;
 - aggregation of insurance periods through the totalisation of employment or contribution periods (where necessary);
 - maintenance of rights acquired in each member state or state party;
 - exportability of benefits abroad;
 - regulation of the choice of applicable law (i.e. the legislation applicable in cases of the portability of benefits);
 - need for administrative assistance and cooperation between member states or state parties and national social security institutions.
- The adoption or conclusion of a social security coordination instrument in the SADC regional community is necessary and feasible.
- Such an instrument promotes freedom or facilitation of movement as persons are free to move within the region without fear of losing their entitlement to social security benefits.

STATUS OF SADC NATIONAL SOCIAL SECURITY SYSTEMS⁴⁰⁸

The status of SADC national social security systems has implications for the adoption or conclusion of a social security agreement. Therefore, this section analyses the social security systems of SADC member states. This does not present a complete view of national social security systems, since the objective is merely to assess states' readiness for the conclusion of a social security coordination agreement. It thus only reviews the schemes present in each of the countries to ascertain their suitability for inclusion into such an agreement.⁴⁰⁹

7.1 ANGOLA

Angola's social security system consists of basic social protection (social assistance), compulsory social protection and supplementary or voluntary social protection (both social insurance).⁴¹⁰ Social assistance and other basic social protection measures constitute the basic social protection element of the Angolan social protection system. Basic social protection covers people living in extreme poverty; women in vulnerable situations; children and teenagers with special needs or in environments of risk; the elderly in a situation of physical or economic dependency and isolation; people with special needs in an environment of risk or social exclusion; and unemployed persons who are at risk of marginalisation.⁴¹¹ Categories of benefits include support in a risk situation (cash or in-kind benefits to address serious or urgent circumstances such as primary health protection, pensions and social subsidies, basic goods distribution), social support (services, equipment, projects and programmes targeting the eligible groups in areas of housing, food, education and health) and solidarity support (benefits from professional groups, neighbours associations and others to perform a range of social services).⁴¹²

Compulsory social protection covers the contingencies of illness, maternity, occupational injuries and diseases, disability, old age or retirement, death (survivorship) and

408 This section is partly based on Mpedi LG and Nyenti MAT Key international, regional and national instruments regulating social security in SADC: A general perspective (SUN PReSS (2015)).

409 As a result of language constraints, the analysis of Angola, Madagascar and Mozambique are not as detailed as the others (with programme eligibility criteria, targeting modalities, types of benefits, etc.) Angola and Mozambique are Portuguese-speaking countries, while Madagascar is a French-speaking country.

410 See article 2 of *Lei de Bases da Protecção* (Basic Law for Social Protection) 7 of 2004.

411 Article 5 of the Basic Law for Social Protection 7 of 2004.

412 Article 6 of the Basic Law for Social Protection 7 of 2004.

unemployment.⁴¹³ Compulsory social protection is administered by the National Institute of Social Security (*Instituto Nacional de Segurança Social (INSS)*). A foreign worker registered for compulsory social protection who meets the benefit eligibility conditions is also entitled to an old-age pension where there is an agreement between the respective states.⁴¹⁴ Voluntary social protection is provided in the form of supplementary pensions. These are private or occupational schemes regulated by the Institute for Pension Supervision under the Ministry of Finance.

7.2 BOTSWANA

Botswana's social assistance system provides old-age benefits, war veterans' pensions, disability benefits, assistance to destitute persons (including the Vulnerable Group Feeding Programme) and children's benefits (such as the Orphan Care Benefit and the Schooling Feeding Programme).⁴¹⁵

Social insurance consists of a special retirement system for public-sector employees and a workers compensation scheme. The workers compensation scheme is an employer-liability system, which involves insurance with a private carrier. Coverage is extended to employed persons, including government and local authority employees and military personnel. However, casual workers, family labour and self-employed persons are excluded. The workers compensation scheme provides disability benefits, medical benefits, survivors' benefits and a funeral grant.⁴¹⁶

Employers provide sickness benefits (up to 20 days of paid sick leave a year) as well as maternity benefits (12 weeks).⁴¹⁷ The Employment Act further requires employers in designated areas to provide certain medical services to employees and their dependants, including transportation to the nearest hospital. Employees with 60 months of continuous employment are entitled to a severance benefit from their employer (unemployment benefits).

413 Articles 7, 10, 17 and 18 of the Basic Law for Social Protection 7 of 2004.

414 See Decree No. 40/08 July 2.

415 See Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 37-38; Revised National Policy on Destitute Persons (2005); Regional Hunger and Vulnerability Programme (RHVP) *Social Protection in Botswana – a model for Africa?* (Frontiers of Social Protection Brief No. 9) March 2011; Ntseane D and Solo K *Social Security and Social Protection in Botswana* (2007); Solo K and Ntseane D *International Encyclopaedia for Social Security Law: Botswana* (2008); and Short Term Plan of Action on Care of Orphans of 1999.

416 Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 37-38.

417 See Botswana Employment Act 29 of 1982 (as amended).

7.3 DEMOCRATIC REPUBLIC OF CONGO

Support is provided to vulnerable groups (including orphans and vulnerable children).⁴¹⁸ The Ministry of Social Affairs, Humanitarian Action and National Solidarity (MINAS) provides basic skills training for vulnerable youths, support to orphans and street children in institutions, and programmes for the reintegration of the disabled. Destitute persons receive an entitlement card (*carte d'ayant-droit*) which gives them fee-free access to public schools, justice services and health consultations and examinations, but not to medication.⁴¹⁹

In relation to social insurance, there is a special system for public servants (including military personnel, magistrates, workers in higher education and research institutions, and members of parliament).⁴²⁰ In addition, the National Institute for Social Security or *Institut National de la Sécurité Sociale* (INSS) provides benefits to categories of persons not covered by a special system for public servants.⁴²¹ There is voluntary coverage for unemployed persons who were previously insured for at least five years and who request coverage in the six-month period after the end of their employment.⁴²² However, self-employed persons are excluded. Benefits consist of retirement, invalidity, occupational injury and disease (disability and medical), family allowances and survivors' benefits.⁴²³

Sickness and maternity benefits are not provided by the INSS or any other social security scheme but by employers. The Labour Code requires employers to pay 66.7 per cent of wages during periods of illness.⁴²⁴ Medical care is available for old-age and disability pensioners and their dependants in government hospitals and clinics and in the medical facilities of the National Social Security Institute.⁴²⁵ The Labour Code requires employers to provide medical care for workers and their dependants. In addition, it requires employers to provide 14 weeks of paid maternity leave.⁴²⁶

7.4 LESOTHO

Lesotho's social assistance scheme consists of old-age pension and war veterans' pension regulated by the Old Age Pension Act of 2005 and African Pioneer Corps (Pensions)

418 National Strategy for Social Protection of Vulnerable Groups (2008) and the National Action Plan for Orphans and Vulnerable Children in the Democratic Republic of the Congo (2009).

419 *Ibid.*

420 Social Security Administration Social Security Programs Throughout the World: Africa, 2015 (Social Security Administration and International Social Security Association (2015)) 80.

421 *Ibid* 80-81.

422 *Ibid* 80.

423 *Ibid* 68-69.

424 *Ibid* 81.

425 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 68.

426 *Ibid* 68.

Act of 2000, respectively. The old-age pension is a universal system as it is paid to all citizens aged 70 years and older.⁴²⁷ The war veterans' (African Pioneer Corps) pension is paid to citizens who took part in the first and second World Wars or their dependants (spouses). Since most war veterans are over 70 years of age, they receive an old-age pension in addition to the war veterans' pension.⁴²⁸ The Ministry of Health and Social Welfare provides assistance to the indigent. This is provided in the form of a means-tested monthly stipend, a medical exemption voucher for use at the public health service, food parcels, assistive devices, clothes and assistance with funeral services.⁴²⁹

The social insurance framework consists of retirement benefits for public servants and occupational injury and disease benefits. Retirement benefits are paid to public servants employed on permanent and pensionable terms. In addition, there is a Defined Contribution Pension Scheme for Public Officers for public servants who are 45 years and younger.⁴³⁰

In relation to employment injuries and diseases, Lesotho has separate schemes relating to employment injuries and diseases for public servants and for other workers. The Pensions Proclamation of 1964 and Public Service Regulations of 1969 regulate the compensation of public servants for employment injuries and diseases. Occupational injury and disease compensation for all other employees is provided in terms of the Workmen's Compensation Act.⁴³¹ It is an individual employer liability scheme, as the employer is required to take out insurance cover with a private carrier approved by the Minister of Labour. Benefits include a disability benefit, a survivor's benefit and medical benefits.⁴³²

Maternity benefits are provided for under the Labour Code of 1992, which requires private-sector employers to provide 12 weeks of paid maternity leave, for up to two children for each employee. Public-sector employers receive two months of paid maternity leave.⁴³³

Sickness benefits are provided through paid sick leave. The Labour Code of 1992 requires employers to provide up to 12 days of sick leave with full pay in the first 12 months of employment, if the insured had at least six months of continuous employment with

427 *Ibid* 108.

428 *Ibid*.

429 Bitso PB "Access to social services for non-citizens and the portability of social benefits in Lesotho" in Mpedi LG and Smit N (eds) *Access to Social Services for Non-citizens and the Portability of Social benefits within the Southern African Development Community* (SUN PReSS (2011)) 74.

430 Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 108.

431 *Workmen's Compensation Act 13 of 1977*.

432 Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 109.

433 *Lesotho Labour Code of 1992*.

the same employer, and up to 12 days with full pay and 12 days with half pay for each subsequent 12 months of employment.⁴³⁴

7.5 MADAGASCAR

Social assistance in Madagascar is limited mainly to nutritional supplements and school feeding. An example is the Tsena Mora initiative, launched in October 2010, to provide subsidised basic food (rice and cooking oil) to the urban poor.⁴³⁵ Faith-based and non-governmental organisations, in partnership with the Ministry of Population and Social Affairs, also provide assistance to very vulnerable children and women.⁴³⁶

Social insurance is mainly provided by the National Social Insurance Fund (*Caisse Nationale de Prévoyance Sociale* (CNaPS)). The Fund provides coverage for employment injury and disease, retirement and family benefits.⁴³⁷ Employment injury and disease benefits are available to employees and workers affiliated to CNaPS, apprentices, farm workers employed by tobacco growers, members and self-employed managers of worker's cooperatives, seasonal agricultural workers, and pastors and catechists.⁴³⁸ Benefits include a daily allowance, medical expenses, a disability pension and survivors' benefits.

Retirement benefits include a dependant's supplement which is equivalent to 10 per cent of the old-age pension and is paid to a spouse older than 59 years (for men) or 54 years (for women and merchant seamen).⁴³⁹ In addition, a special supplement is paid to a worker who receives a medal for long service at work (a bronze-medal recipient gets 5 per cent of the basic pension, while a silver medallist receives 10 per cent of the basic pension). A supplementary or additional pension is paid to workers who, together with their employer, opt to join CNaPS.⁴⁴⁰ Admission depends on membership of the majority of workers in an enterprise (50 per cent + 1) and all workers hired after the date of accession. The supplementary pension scheme includes the same benefits as the old-age insurance scheme. CNaPS also pays retirement pensions to workers who were members of an earlier private scheme and whose benefits were due and paid before 1 January 1969

434 *Ibid.*

435 See Hodges A Strategic Directions for Social protection in Madagascar (World Bank (2010)) 7.

436 *Ibid.*

437 See Caisse Nationale de Prévoyance Sociale Madagascar accessed at <http://www.cnaps.mg> (01 May 2014) and Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 115-116.

438 See Caisse Nationale de Prévoyance Sociale Madagascar accessed at <http://www.cnaps.mg> (01 May 2014).

439 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 132.

440 See Caisse Nationale de Prévoyance Sociale Madagascar accessed at <http://www.cnaps.mg> (01 May 2014).

(private pension).⁴⁴¹ The private schemes concerned are *Mutuelle Interprofessionnelle de Retraite des Travailleurs de Madagascar (MIRTM)*, *Caisse de Retraite du Personnel des Banques (CRPB)* and *Éclésiastique Malagasy (EEM)*.⁴⁴²

Family benefits include a prenatal allowance, maternity allowance, family allowance, the refund of medical expenses after confinement related to childbirth, and half salary compensation.⁴⁴³ A prenatal allowance is granted to expectant mothers as soon as their application has been received. It is a monthly family allowance that is open to a female employee, the legitimate wife of a male employee, a student and the legitimate wife of a student.⁴⁴⁴ A maternity allowance or birth grant is paid to women who have just given birth.⁴⁴⁵ It is paid in two parts. The first amount is 12 000 Ariary per child. The second part of the allowance is equal to six monthly payments of the mean monthly amount of the family allowance.⁴⁴⁶ The family allowance is a monthly benefit paid to workers who have dependent children and meet the required conditions.⁴⁴⁷ The medical expenses of a female worker who meets conditions to benefit from family allowances and who can verify that the expenses for delivery have been paid are refunded.⁴⁴⁸ Compensation in the form of half of wages is a daily allowance equivalent to the salary paid by CNaPS during maternity leave of a worker who is eligible for family benefits.⁴⁴⁹

7.6 MALAWI

The Ministry of Gender, Children and Community Development provides some assistance to extremely poor individuals and households. This is mostly in the form of technical support to community-based organisations caring for orphans and vulnerable

441 See Caisse Nationale de Prévoyance Sociale Madagascar accessed at http://www.cnaps.mg/EN/espace_travailleurs/PEN_retraite_complementaire.php (25 April 2017).

442 See Caisse Nationale de Prévoyance Sociale Madagascar accessed at <http://www.cnaps.mg> (01 May 2014).

443 See Caisse Nationale de Prévoyance Sociale Madagascar accessed at <http://www.cnaps.mg> (01 May 2014) and Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 119.

444 See Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 136 and Caisse Nationale de Prévoyance Sociale Madagascar accessed at http://www.cnaps.mg/EN/espace_travailleurs/PF_allocation_prenatale.php (25 April 2017).

445 *Ibid.*

446 *Ibid.*

447 *Ibid.*

448 Caisse Nationale de Prévoyance Sociale Madagascar accessed at http://www.cnaps.mg/EN/espace_travailleurs/PF_remboursement_frais_medicaux.php (25 April 2017).

449 *Ibid.*

children through Community-Based Child Care Centres.⁴⁵⁰ Government health centres and hospitals provide some free medical services in times of sickness and during pregnancy.⁴⁵¹

Social insurance is made up of a retirement scheme and an occupational injury and disease (workers compensation) system. In terms of retirement, the Pension Act⁴⁵² established a mandatory National Pension Scheme which is made up of a National Pension Fund and other licensed pension funds. The Act applies to all employers and employees in Malawi unless expressly exempted. Excluded categories are employees earning below or above prescribed thresholds, employers employing less than five employees, seasonal workers, tenants, domestic workers, expatriates on valid temporary employment permits, and members of parliament. Workers who are already employed on pensionable terms with three years or less to retirement are also excluded. Employees and employers exempted under the Pension Act are governed by the Employment Act (the payment of a gratuity on termination of employment).⁴⁵³

The occupational injury and disease (workers compensation) system is an employer-liability system, which involves insurance with a private carrier. It is open to employed persons, although casual workers, self-employed persons, family workers and military personnel are excluded. It provides disability cash benefits, medical benefits and survivors' benefits.⁴⁵⁴ A funeral benefit or grant is also paid. However, if there are no surviving dependants, the cost of the burial is paid by the employer.⁴⁵⁵

7.7 MAURITIUS

The social security system of Mauritius is made up of social assistance and social insurance schemes. Social assistance benefits include a basic universal old-age pension;⁴⁵⁶ a universal basic disability pension (including a caregiver's allowance);⁴⁵⁷ a universal child

450 Institute of Policy Research and Social Empowerment (IPRSE) Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community (SADC): Malawi country report (a report to the World Bank) (2007) 10.

451 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 120.

452 Pension Act 6 of 2011.

453 Malawi Pension Act of 2011.

454 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 120.

455 *Ibid.*

456 It is paid to all residents of Mauritius who are 60 and above. A caregiver's allowance is also paid to beneficiaries of the basic old-age pension who are assessed with at least a 60% disability and require the constant attendance of others to perform daily functions

457 It is paid to all residents aged 15 to 59 and assessed with at least a 60% disability that is expected to last for at least 12 months. A caregiver's allowance is also paid to beneficiaries of the basic disability pension who require the constant attendance of others to perform daily functions.

allowance;⁴⁵⁸ survivor pensions;⁴⁵⁹ a means-tested unemployment assistance benefit;⁴⁶⁰ and social aid.⁴⁶¹ In addition, there are subsidies on food and other services, free education up to tertiary level, free health care, and free transport for the elderly, disabled persons and students.⁴⁶²

The social insurance scheme provides retirement, occupational injury and disease, unemployment and survivors' benefits. Participation in the National Pensions Fund (NPF) is open to all residents of Mauritius working in the private sector, including non-citizens with valid work permits who have resided in Mauritius for at least two years. Persons who are not compelled to belong to the NPF can participate on a voluntary basis, including self-employed and non-employed persons.⁴⁶³ In addition to retirement pensions, a disability pension is paid to a person who has been assessed with at least a 60% disability that is expected to last for at least 12 months.⁴⁶⁴ Survivors' benefits are provided in the form of a widow's pension and an orphan's pension.⁴⁶⁵ There are special contributory retirement schemes for civil servants, employees of local authorities and employees of parastatal bodies.⁴⁶⁶

The employment injuries and diseases (Industrial Injury Benefits) scheme is open to all employees in insured employment, excluding self-employed persons and persons working exclusively on weekends or public holidays.⁴⁶⁷ There are special systems for public-sector employees and certain other occupations.⁴⁶⁸ The benefits are made up of the industrial injury allowance, a lump sum for permanent disablement of less than 20%, disablement pension for permanent disablement of at least 20%, a survivors' pension and allowances

458 It is paid for the first three children of a basic disability pensioner. The children must be younger than 15 years of age, although the age limits are 20 years if the child is a full-time student at secondary level and 23 years if the child is at tertiary level.

459 This consists of a basic widow's pension, a child allowance, an orphan's pension and a guardian allowance paid to the orphan's guardian.

460 The benefit is paid to heads of households and their dependants.

461 Social aid is paid to needy individuals and families with no income or limited income, where it is established that the head of the household is unable to earn a living because of ill health, sudden loss of employment, imprisonment or abandonment by spouse. It consists of a claimant allowance, spouse allowance, child allowance, compassionate allowance (paid to persons with a serious illness certified by a medical doctor), rent allowance, a funeral grant (a lump sum for the cost of the funeral for the claimant or his or her dependants) and an allowance for the purchase of rice and flour.

462 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 148-152.

463 *Ibid* 148.

464 *Ibid* 148.

465 *Ibid* 149.

466 *Ibid* 148.

467 *Ibid* 150.

468 *Ibid* 150.

for constant care attendance, medical expenses and provision of assistive devices.⁴⁶⁹ A constant-attendance supplement is also paid to a disability benefit recipient who requires the constant attendance of others to perform daily functions. Survivors' benefits (widow's or widower's pension, orphan's pension, a dependant's pension and funeral grant) are paid. A funeral grant is also paid. However, if there are no eligible survivors, the cost of the burial is paid by the Ministry of Social Security, National Solidarity and Reform Institutions.⁴⁷⁰

A transitional unemployment benefit is paid to persons laid off for economic, technological, or structural reasons affecting enterprises, or illegal termination of the employment agreement. It is provided for a maximum of 12 months at a rate of 90% of the insured salary for the first three months, 60% for another three months and at 30% for the next six months.⁴⁷¹

Sickness benefits are provided for in terms of the Employment Act.⁴⁷² This requires employers to provide up to 15 days of paid sick leave each year to employees who have been in their continuous employment for at least 12 months.⁴⁷³ Government clinics and hospitals provide free medical services.⁴⁷⁴

Maternity benefits are also provided for in terms of the Employment Act, which requires employers to provide 12 weeks of paid maternity leave (at least six weeks after the expected date of childbirth) and five days of paid paternity leave to employees who have been in their continuous employment for at least 12 months. Government clinics and hospitals provide free medical services.⁴⁷⁵

7.8 MOZAMBIQUE

The Mozambican security system is made up of basic social security (social assistance), mandatory social security (social insurance) and complementary social security (voluntary social insurance). Cash for work programmes, community development programmes, health and education fee waivers and drug subsidies are also part of Mozambique's social security system.⁴⁷⁶

469 *Ibid* 150.

470 *Ibid* 150.

471 *Ibid*,151.

472 Employment Act 33 of 2008.

473 Section 28 of the Employment Act 33 of 2008.

474 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2015)) 150.

475 *Ibid*, 150.

476 See the Social Protection Law (No. 4/2007 of 07 February 2007) and the Regulation for Basic Social Security of 2009.

Basic social security measures are provided by the basic social security system. The system covers citizens living in absolute poverty, without the means to satisfy their basic needs. These include children in difficult situations; the elderly (women from the age of 55 years and men from the age of 60 years); people with disabilities; people who are chronically ill and with degenerative diseases; and the working poor who are not able to earn a minimum income for their families.⁴⁷⁷ The system thus provides non-contributory transfers and other welfare services for the poorest households, the elderly, the disabled, those who are chronically ill, and households with orphans and vulnerable children.

There are various programmes under the Basic Social Security System, including the Basic Social Subsidy (*Programa Subsídio Social Básico (PSSB)*) (formerly known as Food Subsidy Programme);⁴⁷⁸ the Direct Social Support Programme (*Programa de Apoio Social Directo (PASD)*);⁴⁷⁹ the Productive Social Action Programme (*Programa de Acção Social Produtiva (PASP)*);⁴⁸⁰ the Social Assistance Services (*Programa de Apoio às Unidades Sociais (PAUS)*);⁴⁸¹ and the Food Subsidy Programme (*Programa de Segurança Alimentar (PSA)*).⁴⁸² These are administered by the National Institute of Social Action (*Instituto Nacional de Acção Social (INAS)*).⁴⁸³

Social insurance consists of the compulsory (mandatory) and complementary (voluntary) social security schemes. Membership of the Compulsory Social Security Scheme is made up of employees from the public and private sectors.⁴⁸⁴ The scheme is administered by the National Institute of Social Security (INSS) and provides old-age pensions, cash sickness and maternity benefits, hospitalisation, cash death grants and

477 Article 7 of Social Protection Law (No. 4/2007 of 07 February 2007) and article I of chapter I of the Regulation for Basic Social Security of 2009.

478 This is a monthly cash transfer for an unlimited period targeted at households without any adult who is able to work (e.g. households headed by an elderly person, person with disabilities or chronically ill, and without any able adult breadwinner).

479 This programme is for households temporarily without members able to work and emergency support in situations demanding direct intervention by the government to people who are in an absolute state of poverty, including transfers for households with members on anti-retroviral therapy.

480 This is a seasonal transfer scheme associated with participation in a labour-intensive public works initiative by poor and vulnerable households with limited labour capacity (households that are not entitled to receive support from the PSSB and PASD).

481 This programme includes residential care and institutional support to vulnerable and abandoned children and the elderly, victims of violence and the homeless who require intensive care services.

482 The Food Subsidy Programme provides a monthly cash transfer to people who are destitute and have no capacity to work, including the elderly, disabled, chronically ill (but excluding those living with HIV/AIDS and TB), and pregnant women who are malnourished.

483 See Ministry of Women and Social Action “Vision of the national institute for social action” accessed at www.ilo.org/gimi/gess/RessourceDownload.action?ressource...31935f (01 May 2014). sp of “ressource” OK?

484 Cunha N, Pellerano L, Mueller J, Lledo V, Xiao Y and Gitton P Towards a Mozambican Social Protection Floor (Consolidating a comprehensive social protection system in Mozambique: Analysis of policy alternatives and costs) (International Labour Office (2013)) 9.

allowances for burial expenses.⁴⁸⁵ There is also a subsystem for civil servants (including the military) under the responsibility of the Ministry of Finance. The complementary social security scheme offers additional benefits over and above the benefits of the compulsory scheme. It is managed by private or public entities and is designed for self-employed workers. Mozambique also operates a social insurance employment injury and disease scheme, administered by the INSS.

Section 24 of Law 5 of 2002 states that during any sick leave cycle an employee is entitled to one day's sick leave for every 26 days worked during the employee's first 12 months of employment, and thereafter to no less than 30 working days, if the employee works no more than five days a week, and no less than 36 working days, in the case of any other employee.

In terms of section 12 of Mozambique's Labour Law (Law Nr. 23/2007 of 1 August 2007), in addition to normal holidays, female employees are entitled to maternity leave of 60 consecutive days, which may commence 20 days prior to the expected delivery date and which may be enjoyed consecutively.

7.9 NAMIBIA

The Namibian social assistance system comprises an old-age pension, a war veteran's pension, a foster child grant and maintenance grants. The universal old-age pension (basic state pension) is paid to all resident citizens and permanent residents of Namibia. The benefit is paid to persons aged 60 and above, although persons aged 16 to 59 and blind or disabled and incapable of gainful activity are also covered.⁴⁸⁶ A universal basic state pension is also paid to war veterans who are resident citizens of Namibia.⁴⁸⁷ A person must be 55 years old or older and a veteran of the Namibian independence war. A funeral benefit is paid if a deceased person received or was entitled to receive the basic state pension.⁴⁸⁸ A foster parent grant is paid to all Namibian citizens and permanent residents who meet certain conditions. The grant, which is paid for the duration of the foster care period, amounts to N\$200 a month for the first child and N\$100 for each additional child.⁴⁸⁹ A means-tested maintenance grant is paid to Namibian citizens and permanent residents with children younger than the age of 18. It is paid for biological children to basic state pensioners, widows or widowers, or persons serving a prison sentence of six months or longer, and with an income of N\$1 000 or less.⁴⁹⁰ The grant is to the value of N\$200 a month for the first child and N\$100 for each additional child, up to a total

485 See ILO "Mozambique" accessed at <http://www.ilo.org/gimi/gess/ShowCountryProfile.do?cid=314> (01 May 2014).

486 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 139-140.

487 *Ibid* 139.

488 *Ibid* 139-140.

489 *Ibid* 141.

490 *Ibid*.

of six children.⁴⁹¹ A special maintenance grant of N\$200 a month per child is paid to all Namibian citizens and permanent residents younger than the age of 16 with a disability or illness.⁴⁹²

Social insurance consists of benefits provided by the Social Security Commission (retirement, disability, sickness, maternity and survivors' benefits)⁴⁹³ and workmen's compensation by the Employees' Compensation Fund.⁴⁹⁴ Access to Social Security Commission benefits is open to all employed persons working at least one day a week on a regular basis, including household workers, casual workers and part-time workers. There is also voluntary coverage for self-employed persons and special systems for civil servants.⁴⁹⁵

Retirement benefits by the Social Security Commission are paid to a worker who is aged 60 with six months of contributions and whose employment has ended.⁴⁹⁶ A survivor's benefit is paid to the dependants of a deceased worker who had at least six months of contributions. Eligible survivors include the deceased's spouse, children and persons who were financially dependent on the deceased. A funeral benefit is also provided.⁴⁹⁷

In terms of the Labour Act, the employer pays 100% of the insured's basic earnings for the first 30 days or 36 days (this is, respectively, if the worker works five days a week or works more than five days a week) of sick leave.⁴⁹⁸ In addition, the Social Security Commission pays a sickness benefit to a worker who has made at least six months of contributions.⁴⁹⁹ The Ministry of Health and Social Services provides free public health care services for workers and their dependants.⁵⁰⁰

Maternity benefits are also paid to a worker who has made at least six months of contributions.⁵⁰¹ The benefit is 100% of the worker's basic earnings paid for up to 12 weeks (four weeks before the expected date of childbirth and eight weeks after childbirth).⁵⁰²

491 *Ibid.*

492 *Ibid.*

493 See Social Security Act 34 of 1994.

494 See Employees' Compensation Act 30 of 1941.

495 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 139.

496 *Ibid* 139.

497 *Ibid* 139.

498 See section 24 of the Labour Act 11 of 2007.

499 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 140.

500 *Ibid.*

501 *Ibid.*

502 See section 27 of the Labour Act 11 of 2007.

Employment injuries and diseases benefits are available to all employees, including apprentices, with earnings up to a prescribed limit.⁵⁰³ However, self-employed persons, casual workers and persons employed temporarily outside of Namibia for more than 12 months at a time are excluded.⁵⁰⁴ Compensation is paid in respect of temporary disablement, permanent disablement (according to the degree of disablement) and death.⁵⁰⁵ Reasonable medical expenses are payable for a period of two years, or longer if further medical or surgical treatment may reduce the extent of the disablement. Survivors' benefits are paid to the spouse and dependent child(ren). A funeral grant is paid as a lump sum. In addition, a death benefit of a lump sum is paid to the spouse.⁵⁰⁶

7.10 SEYCHELLES

The Seychelles social security system is comprised of social assistance benefits provided by the Social Security Fund and social insurance benefits provided by the Seychelles Pension Fund. The Social Security Fund provides old-age, disability and survivors' benefits to all citizens residing in Seychelles.⁵⁰⁷ The old-age pension is paid to persons from age 63 and who have been resident Seychelles for at least five years immediately before the date of retirement.⁵⁰⁸ However, the residency requirement may be waived under special circumstances.⁵⁰⁹ A disability pension is paid to a person who is assessed with at least a 66.7% loss of earning capacity and has resided in Seychelles for at least five years.⁵¹⁰ As in the case of the old-age pension, the residency requirement may be waived under special circumstances.⁵¹¹ A dependant's supplement is paid to a family with income below the official family subsistence level. The supplement is paid under certain conditions for each dependent child and for one adult, who must be the spouse, a person caring for the insured person, or a dependent adult with a disability who is not receiving any other benefits.⁵¹² A survivors' pension is paid to the dependants of a deceased who had resided in Seychelles for at least five years.⁵¹³ Eligible survivors include a widow aged 45 or older or with a dependent child younger than the age of 16 (or younger than the age of 25, if the child is a student), a dependent widower, and full orphans.⁵¹⁴ The pension

503 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 140.

504 See Employees Compensation Act 30 of 1941.

505 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 141.

506 *Ibid.*

507 *Ibid* 161.

508 *Ibid* 161-162.

509 *Ibid.*

510 *Ibid.*

511 *Ibid.*

512 *Ibid.*

513 *Ibid* 162.

514 'Full orphans' refers to children who lose both parents.

ceases on remarriage or cohabitation.⁵¹⁵ A widow who does not qualify for a pension receives a limited benefit for up to 20 working days. A funeral grant is paid.⁵¹⁶

The Seychelles pension fund provides old-age, disability and survivors' benefits to all employed persons, including casual workers and self-employed persons.⁵¹⁷ An old-age settlement is paid if a worker does not qualify for the old-age benefit.⁵¹⁸ A migration allowance is paid if the worker leaves the country permanently.⁵¹⁹

A disability benefit is paid to a person younger than the age of 63 and assessed with an incapacity for work of 80 to 100%. A disability settlement in the form of a lump sum is paid where a worker does not qualify for the disability pension.⁵²⁰

A survivors' benefit is paid to eligible survivors (a widow or widower, or partner who lived with the deceased for at least three years, and children).⁵²¹ The surviving spouse must have resided in Seychelles for at least five years, although this may be waived in special circumstances.⁵²² Eligible surviving children must be younger than 18 years of age, or 26 years if he or she is a full-time student.⁵²³ A death benefit is paid to a named survivor, if there is no eligible surviving spouse or child and if the deceased received or was entitled to receive an old-age or disability pension.⁵²⁴

The Agency for Social Protection provides subsistence income for unemployed persons in terms of the Unemployment Fund Act of 1980. The Agency for Social Protection provides wages for registered unemployed and young persons who work on approved projects, including the unemployment relief scheme, youth training scheme, apprenticeship scheme and skill acquisition programme.⁵²⁵ The Agency for Social Protection also provides sickness benefit at 80% of the worker's full salary.⁵²⁶ The employer pays the remaining 20% of sickness benefits. Medical services are provided by state clinics and hospitals under the National Health Plan. In addition, a dependant's benefit is paid.⁵²⁷

515 *Ibid* 162.

516 *Ibid* 161-162.

517 *Ibid* 162.

518 *Ibid*.

519 *Ibid*.

520 *Ibid* 162.

521 *Ibid*.

522 *Ibid*.

523 *Ibid* 163.

524 *Ibid*.

525 Seychelles Unemployment Fund Act 10 of 1980 (as amended) and Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 164.

526 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 163.

527 *Ibid*.

A maternity benefit calculated at 80% of the worker's full salary or 2 120 rupees (whichever is lower) is paid for ten weeks.⁵²⁸ The employer pays the remaining 20% of maternity benefits. For a prolonged incapacity resulting from pregnancy or childbirth, a sickness benefit is paid.⁵²⁹ Medical services are provided by state clinics and hospitals under the National Health Plan.⁵³⁰ A dependant's supplement is also paid.⁵³¹

Occupational injury and disease compensation is also administered by the Agency for Social Protection. Compensation is available to all employed persons, excluding the self-employed. Benefits include disability, dependants', survivors' and medical benefits.⁵³² A dependant's benefit is paid.⁵³³ A dependant's supplement is paid where the family income is below the official family subsistence level.⁵³⁴

7.11 SOUTH AFRICA

In the area of social assistance the Social Assistance Act⁵³⁵ provides for, *inter alia*, the administration of social assistance and the payment of social grants in South Africa. It provides for the payment of a child support grant, care dependency grant, foster child grant, disability grant, older person's grant, war veteran's grant, and a grant-in-aid.⁵³⁶ The Act provides social assistance to South African citizens, permanent residents, or refugees residing in South Africa.⁵³⁷

A person is eligible for an old-age grant if he or she has attained the age of 60 years.⁵³⁸ A person is eligible for a war veterans grant if he or she has attained the age of 60 years and, owing to physical or mental disability, is unable to provide for his or her maintenance.⁵³⁹ A person is eligible for a disability grant if he or she is between 18 and 59 years old and, owing to a physical or mental disability, is unfit to obtain, by virtue of any service, employment or profession, the means needed to enable him or her to provide for his or her maintenance.⁵⁴⁰ A person is eligible for a grant-in-aid if he or she requires full-time attendance by another person owing to a physical or mental disability; is not be cared for in an institution that receives subsidy from the state for the care or housing of such

528 *Ibid.*

529 *Ibid.*

530 *Ibid.*

531 *Ibid.*

532 *Ibid* 164.

533 *Ibid.*

534 *Ibid.*

535 Social Assistance Act 13 of 2004.

536 Section 4 of the Social Assistance Act.

537 Section 2 of the Social Assistance Act.

538 Section 10 of the Social Assistance Act.

539 Section 11 of the Social Assistance Act.

540 Section 9 of the Social Assistance Act.

beneficiary; and is a social grant recipient.⁵⁴¹ A grant-in-aid is an additional grant awarded to persons who are in receipt of an old-age, disability or war veteran's grant, and who are unable to care for themselves.⁵⁴² The child support grant is paid to a child's primary care giver (a person older than 16 years who, whether related to the child or not, takes primary responsibility for meeting the daily needs of that child).⁵⁴³ The age limit for the eligibility of the grant is 18 years.⁵⁴⁴ The care dependency grant is a grant payable to the parents, foster parents, guardians or custodians in respect of a child between the ages of 1 and 18 years in their care, who due to severe mental and/or physical disability, needs full-time care.⁵⁴⁵ A foster parent is eligible for a foster child grant as long as the child is in need of care.⁵⁴⁶ A foster grant is usually paid out until the child turns 18. If, upon turning 18, the child is still in secondary or high school (but not a tertiary facility), the grant can be paid out until the end of the year in which the child turns 21.⁵⁴⁷ Social relief of distress programmes are aimed at the alleviation of both chronic and transient poverty. Social relief is provided for individuals in the event of an individual crisis or for whole communities where they face a crisis.⁵⁴⁸ This grant is usually offered for three months, but this period may be extended to six months in exceptional circumstances.⁵⁴⁹

Social insurance is provided in the form of Unemployment Insurance Fund benefits, occupational injury and diseases benefits, retirement benefits and medical benefits. The Unemployment Insurance Fund administers benefits for workers who become unemployed and funds the retention of contributors in employment as well as the re-entry of contributors into the labour market, and any other scheme aimed at vulnerable workers.⁵⁵⁰ The fund covers unemployment, maternity benefits, illness benefits, adoption benefits and dependants' benefits. The Fund is open to all employers and workers, except employees employed for less than 24 hours a month with a particular employer, and the employers of such workers, and members of parliament, cabinet ministers, deputy ministers, members of provincial executive councils, members of provincial legislatures and municipal councillors.⁵⁵¹

541 Section 12 of the Social Assistance Act.

542 *Ibid.*

543 Section 6 of the Social Assistance Act.

544 See section 6 read with section 1 of the Social Assistance Act.

545 Section 7 of the Social Assistance Act.

546 Section 8 of the Social Assistance Act.

547 Legal Aid South Africa "Foster Care Grants" accessed at <http://www.legal-aid.co.za/selfhelp/?p=166> (25 April 2017).

548 Section 13 of the Social Assistance Act.

549 South African Social Security Agency You and Your Grants 2016/2017 (2017) 6.

550 Section 5 of the Unemployment Insurance Act 63 of 2001, as amended by section 2 of the Unemployment Insurance Amendment Act 10 of 2016.

551 Section 3 of the Unemployment Insurance Act 63 of 2001, as amended by section 1 of the Unemployment Insurance Amendment Act 10 of 2016.

An unemployed contributor is entitled to unemployment benefits for any period of unemployment lasting more than 14 days, if the reason for the unemployment is the termination of the contributor's contract of employment by the employer of that contributor, or the ending of a fixed-term contract; the dismissal of the contributor, as defined by section 186 of the Labour Relations Act 66 of 1995; insolvency in terms of the provisions of the Insolvency Act 24 of 1936; or (in the case of a domestic worker) the termination of the contributor's contract of employment by the death of the employer of that contributor.⁵⁵²

A contributor is entitled to illness benefits for any period of illness if the contributor is unable to perform work on account of illness. A contributor is not entitled to illness benefits if the period of illness is less than 14 days, and for any period during which the contributor is entitled to unemployment or adoption benefits.⁵⁵³

A contributor who is pregnant is entitled to maternity benefits for any period of pregnancy or delivery and the period thereafter.⁵⁵⁴ Maternity benefits are paid at a rate of 66% of the earnings of the beneficiary at the date of application, subject to the maximum income threshold.⁵⁵⁵ The maximum period of maternity leave is 17,32 weeks.⁵⁵⁶ However, a contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a full maternity benefit of 17 to 32 weeks.⁵⁵⁷ A contributor is not entitled to benefits unless she was in employment, whether as a contributor or not, for at least 13 weeks before the date of application for maternity benefits.⁵⁵⁸

One contributor of the adopting parties is entitled to adoption benefits for each adopted child if the child has been adopted in terms of the Children's Act; the period that the contributor was not working was spent caring for the child; and the adopted child is below the age of two.⁵⁵⁹

The surviving spouse or life partner and dependent child of a deceased contributor are entitled to the dependant's benefits within six months of the death of the contributor.⁵⁶⁰

Different sets of legislation deal with employment injury and disease compensation in and outside the mining sector. These are the Compensation for Occupational Injuries

552 Section 16 of the Unemployment Insurance Act.

553 Section 20 of the Unemployment Insurance Act.

554 Section 24 of the Unemployment Insurance Act.

555 Section 12(3)(c) of the Unemployment Insurance Act, as amended by section 4(b) of the Unemployment Insurance Amendment Act 10 of 2016.

556 Section 24 of the Unemployment Insurance Act.

557 Section 24(5) of the Unemployment Insurance Act, as amended by section 9(a) of the Unemployment Insurance Amendment Act 10 of 2016.

558 Section 24(6) of the Unemployment Insurance Act, as inserted by section 9(b) of the Unemployment Insurance Amendment Act 10 of 2016.

559 Section 27 of the Unemployment Insurance Act.

560 Section 30 of the Unemployment Insurance Act.

and Diseases Act (COIDA)⁵⁶¹ and Occupational Diseases in Mines and Works Act (ODMWA).⁵⁶² In terms of COIDA, compensation for employment injuries and diseases is paid to employees and their dependants out of the Compensation Fund, to which employers contribute on the basis of industry-based risk assessments.⁵⁶³ Persons covered are employed persons, including contract workers, casual employees and certain military personnel. However, household workers, self-employed persons, volunteers and certain military personnel are excluded.⁵⁶⁴ Temporary and permanent disability cash benefits, medical benefits, survivors' benefits and a funeral grant are provided.⁵⁶⁵ Survivor benefits are paid to a widow or to a widower and to dependent children. A funeral grant is also paid.⁵⁶⁶

The Road Accident Fund, a non-employment-based social insurance scheme, pays out compensation to a third party for any loss or damage suffered as a result bodily injuries or death caused by the negligent driving of motor vehicles.⁵⁶⁷

Health care is provided through the public health care service and through medical insurance. Health care for the bulk of the population is provided through free primary health care in public hospitals, as well as free hospital care for women with young children and the aged. For the rest of the population, medical services are covered mainly by occupational- and insurance-based private schemes, which are regulated by the Medical Schemes Act.⁵⁶⁸

South Africa also does not have a national or public retirement insurance scheme. As a result, occupational-based and private retirement funds are the preferred vehicle for ensuring financial support in old age by workers. Retirement coverage is regulated mainly in terms of the Pension Funds Act.⁵⁶⁹

561 Act 130 of 1993.

562 Act 78 of 1973.

563 Established in terms of the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993.

564 See sections 22-24 of COIDA; Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 170; and <http://www.labour.gov.za/DOL/legislation/acts/compensation-for-occupational-injuries-and-diseases/compensation-for-occupational-injuries-and-diseases-act> (03 May 2014).

565 Sections 47, 48, 49 and 54(1) of COIDA.

566 Section 54(2) of COIDA.

567 See section 17 of the Road Accident Fund Act 56 of 1996.

568 Medical Schemes Act 131 of 1998.

569 Pension Funds Act 24 of 1956.

7.12 SWAZILAND

Swazi social assistance is provided in the form of an old-age pension and free or subsidised health care. An old-age pension is paid to persons aged 60 and above.⁵⁷⁰ It is a means-tested benefit, paid only to persons considered to be needy. Free health care services are provided to designated categories of persons and subsidised healthcare services for the rest of the population. The Swaziland National Health Policy states that “health services shall be provided free of charge to eligible children, elderly persons, orphans and persons with disability”.⁵⁷¹ In addition, the rest of the population receives subsidised health care.⁵⁷² The state also makes available a subvention to non-governmental and faith-based organisations that offer services that are deemed important according to established guidelines, subject to availability of resources.⁵⁷³

Social insurance benefits are provided by the Swaziland National Provident Fund, Public Service Pensions Fund, workers’ compensation scheme, Motor Vehicle Accident Fund and occupational schemes. Social insurance benefits available include retirement, disability and survivors’ benefits; occupational injury compensation; compensation to injured motorists, passengers and pedestrians, as well as survivor benefits to dependants; and sickness benefits.

The Swaziland National Provident Fund pays out retirement, disability and survivors’ benefits. The fund is open to all employed persons in Swaziland, with voluntary coverage for employees not compulsorily covered and for members of religious organisations.⁵⁷⁴ However, self-employed persons, persons employed in households, casual employees and non-citizens are excluded. A retirement benefit is paid from the age of 50, although an employee is eligible for old-age benefits at the age of 45 if the member’s employment terminates. The benefit is paid at any age if a member is emigrating permanently. A disability benefit is paid if the member is assessed with at least a partial permanent physical or mental disability.⁵⁷⁵ A survivors’ benefit is paid to dependants (spouse and, if there is no spouse, other dependants or persons named by the fund member) upon the death of the fund member before retirement.

The Public Service Pensions Fund covers public service employees. It provides retirement, survivors’, disability and withdrawal benefits as well as funeral cover for members and their dependants.⁵⁷⁶

570 Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 175.

571 Swaziland National Health Policy para 4.30.

572 *Ibid* para 4.29.

573 *Ibid* 4.31.

574 Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 175.

575 *Ibid*.

576 See Public Service Pensions Fund “Benefits” accessed at www.pspf.co.sz (21 May 2015).

The occupational injury compensation (workers compensation) system is an employer-liability system, involving compulsory insurance with a private carrier.⁵⁷⁷ Access is open to public and private sector employees, trainees and apprentices, but self-employed persons, household workers, certain types of contract workers, family labour and casual workers are excluded. Benefits are for temporary and permanent disability.⁵⁷⁸ A constant-attendance allowance is also paid to a permanent disability benefit recipient, if he or she requires the constant attendance of others to perform daily functions.⁵⁷⁹ Medical benefits include medical care, surgery, hospitalisation, medicine, dental and eye care, transportation, appliances and medical care abroad, if necessary.⁵⁸⁰ Survivors' benefits and a funeral grant are also paid.⁵⁸¹

The Motor Vehicle Accident Fund provides compensation for bodily injuries and/or death arising from a motor vehicle accident.⁵⁸² It pays out compensation to injured motorists, passengers and pedestrians, as well as survivor benefits to dependants of such persons.

Employers are required by the Employment Act to provide sickness benefits for those incapable of working because of ill health.⁵⁸³ The Act states that after three months' continuous employment with the same employer, an employee is eligible, in each year of employment with that employer, for a maximum of 14 days sick leave on full pay and a maximum of 14 days sick leave on half pay. Public service workers can also take up to six months of sick leave at full pay, and another six months at half pay.⁵⁸⁴

The Employment Act also guarantees maternity benefits (maternity leave of 12 weeks with at least two weeks full pay).⁵⁸⁵ However, this has been extended for workers in some sectors. As an example, section 12 of the Wages Order 2004 (Textile Industry) and section 13 of the Legal Notice No. 5, 2008 Wages Order (Manufacturing and Processing Industry) state that an employee who has completed the probation period is entitled to 30 days' maternity leave with full pay. The Regulation of Wages of Pre-Schools and Day-care Centres Order, 2006 also provides for six weeks' maternity leave with full pay.

577 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 176.

578 *Ibid.*

579 *Ibid.*

580 *Ibid.*

581 *Ibid.*

582 Motor Vehicle Accidents Act 13 of 1991.

583 Section 129 of the Employment Act 5 of 1980.

584 Haacker M "The Impact of HIV/AIDS on Government Finance and Public Services" in Haacker M (ed) The Macroeconomics of HIV/AIDS (International Monetary Fund (November 2004)) 204.

585 Sections 102 and 103 of the Employment Act.

7.13 TANZANIA

Social Assistance programmes in Tanzania are designed to provide assistance to a wide range of poor and vulnerable groups (persons with disabilities, children and the elderly).⁵⁸⁶ Social assistance is provided in terms of the third phase of the *Tanzania Social Action Fund* (TASAF III). The Fund has a productive social safety net (PSSN), enhancement of livelihoods and increasing incomes, targeted infrastructure development and capacity-building component.⁵⁸⁷ The Programme focuses on poor and vulnerable households. Targeted households are eligible for different programme components on the basis of their differing needs and capabilities. The targeted households receive safety-net support as well as the opportunity to participate in livelihood enhancing activities.⁵⁸⁸

Social insurance benefits are provided by the various statutory social security institutions: the National Social Security Fund (NSSF), Parastatal Pensions Fund (PPF), Local Authorities Provident Fund (LAPF), Government Employees Provident Fund (GEPF), Public Service Pensions Fund (PSPF) and the Political Service Retirement Benefits (PSRB) scheme. Access to these funds is open to all employees and to self-employed persons on a voluntary basis.⁵⁸⁹

Retirement benefits are paid by each of the statutory social security institutions. Retirement benefits are paid by the NSSF when a member attains the age of 60 and has contributed for 15 years.⁵⁹⁰ However, they can also be paid before the age of 60, if a member has contributed for 15 years.⁵⁹¹ The PPF offers retirement pensions when a member attains the age of 60 and has contributed for at least 10 years before retirement.⁵⁹² Where a member has less than 10 years' contributions, he or she is awarded a gratuity benefit.⁵⁹³ In addition, the PSPF provides retirement benefits at the age of 55 or 60, provided that a member has contributed for an aggregate of 15 years.⁵⁹⁴ Retirement benefits can also be paid to a member who has contributed for at least 10 years and whose employment ends because the member reaches the retirement age; retires on medical grounds; is redundant or retrenched to facilitate efficiency of the employer; retires on public interest; is terminated by presidential decree; transfers to public office; and

586 See ILO "United Republic of Tanzania" accessed at <http://www.social-protection.org/gimi/gess/ShowCountryProfile.do?cid=215> (02 May 2014).

587 See Tanzania Social Action Fund accessed at <http://www.tasaf.org/> (02 May 2014).

588 *Ibid.*

589 See generally Ackson T "Access to social services for non-citizens and the portability of social benefits in Tanzania" in Mpedi LG and Smit N (eds) *Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community* (SUN PRESS (2011)) 119-135.

590 Section 23 of the NSSF Act 28 of 1997.

591 Section 27 of the NSSF Act.

592 Sections 24 and 26 of the Parastatal Pensions Act 14 of 1978.

593 Section 28 of the Parastatal Pensions Act.

594 Sections 6, 9, 17, 22(1) and 25 of the Political Service Retirement Benefits Act 3 of 1999.

where the cessation of his or her employment entitles him or her to old-age benefits.⁵⁹⁵ The PSRB scheme offers retirement pensions for former presidents, vice-presidents, prime ministers and the speakers of the National Assembly.⁵⁹⁶ Other political leaders are only entitled to a lump sum gratuity, which is dependent on the number of years they have spent in service.⁵⁹⁷ Retirement pensions under the PSRB scheme are based neither on age nor contributory time, as they are non-contributory and political posts are not determined by age.⁵⁹⁸ The LAPF and GEPF do not offer retirement pensions but pay out lump sums. The GEPF offers a retirement package when a member reaches a prescribed retirement age,⁵⁹⁹ while the LAPF pays a member in the event of retirement.⁶⁰⁰

Disability or invalidity benefits are also offered by most social security schemes. Disability benefits are paid out by the NSSF when a member has contributed for at least 15 years or has made at least 36 monthly contributions, of which 12 months' contributions or more must have been made immediately preceding the date of incapacity.⁶⁰¹ A member must be suffering from a permanent invalidity and must be under the pensionable age. When a member of the NSSF does not satisfy the stated conditions, he or she is awarded a special lump sum.⁶⁰² The PPF provides disability benefits where an employee can no longer discharge his or her duties and the member has made at least 120 monthly contributions to PPF.⁶⁰³ Where these conditions are not met, a disabled member is awarded a gratuity.⁶⁰⁴ The PSPF offers a disability pension to a member who is 'unemployable' because of physical or mental disability.⁶⁰⁵ The employee must be unable to perform his or her duties because of infirmity.⁶⁰⁶ A disability benefit is paid to all members provided a member is unemployable, irrespective of duration of infirmity or contribution period.⁶⁰⁷ Disability benefits are also provided by the PSRB scheme. In terms of section 5(d) of the Political Service Retirement Benefits Act,⁶⁰⁸ a political leader is entitled to the benefits stipulated in the Act upon medical evidence that he or she is incapable of discharging his or her official

595 Section 28 (1) of the Political Service Retirement Benefits Act 3 of 1999.

596 Parts III, IV and V of the Political Service Retirement Benefits Act.

597 Parts IV, V and VI of the Political Service Retirement Benefits Act.

598 Ackson T "Access to social services for non-citizens and the portability of social benefits in Tanzania" 124.

599 Section 16(c)(iv) of the Revised Laws of Tanganyika, Cap 51.

600 Section 27 of the LAPF Act 6 of 2000.

601 Section 28 of the NSSF Act.

602 Section 31 of the NSSF Act.

603 Section 26(b) of Parastatal Pensions Act 14 of 1978.

604 Section 34 of the PPF Act provides payment of a gratuity benefit which arises as a result of cessation of employment because of retrenchment, retired in public interest, or removal from employment by a presidential decree or any other relevant authority. The member must have less than a 120-month contributing period.

605 Section 13 of Act 2 of 1999.

606 Section 16(e) of Act 2 of 1999.

607 *Ibid.*

608 Section 5(d) of the Political Service Retirement Benefits Act of 1999.

duties. In this instance, former presidents, vice-presidents, prime ministers and speakers of the National Assembly would receive a disability pension, while a gratuity will be paid to other political leaders.⁶⁰⁹ Disability benefits are awarded by the LAPF, GEFP and under the Workmen's Compensation Ordinance of 1949, where termination of employment is on medical grounds.⁶¹⁰ The disability benefits offered by these schemes are a monthly pension or a once-off lump sum.⁶¹¹

Workmen's compensation (occupational injury and disease) benefits are awarded by the NSSF to a person who sustains an occupational injury or contracts an occupational disease. Benefits are for temporary and permanent disability. Assistive devices (e.g. artificial limbs) are provided if deemed necessary to enable an affected member to resume work or gain improved rehabilitation.⁶¹²

Survivors' benefits are paid where a worker dies as a result of an employment injury before a claim for an employment injury benefit is filed. NSSF survivors' benefits are paid to a spouse and/or child(ren) of the deceased insured person, where the child(ren) is under 18 years of age, or 21 years if in full-time education. If a deceased insured person had no surviving spouse and children, the pension is paid to the parents. If there is no surviving spouse, children or parents, a family member will be paid in accordance with the inheritance law of Tanzania. If the survivors are eligible for another survivors' benefit under the NSSF Act, they will be entitled to receive a benefit that is higher of the two or more.⁶¹³

The PPF grants survivors' benefits to the dependants of a member who died while in service with at least 120-months contributing period. Section 39 of PPF Act provides that his or her legal personal representative is granted a gratuity of an amount not exceeding either his or her annual pensionable emoluments or his or her commuted pension gratuity, if any, whichever is greater. LAPF survivors' benefits are paid to the deceased's widows or widower, children (any child under the age of 21, or up to the age of 25 in case of a disabled child) or parents. Where a member has made less than 15 years' (180 months) contribution, only a survivors' gratuity is paid.⁶¹⁴

609 See sections 9(1)(a), 12(1)(a), 14(1)(a), 16(1), 18(b), 20(1) and 21(1) of Act 3 of 1999.

610 Section 27(c) of Act 6 of 2000 and section 16(c)(i) of Revised Laws of Tanganyika, Cap 51 and Cap 263.

611 LAPF "Invalidity benefits" accessed at <http://www.lapf.or.tz/index.php/en/page/InvalidityBenefits/145> (25 April 2017).

612 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 179-180 and NSSF "Employment Injury" accessed at <https://www.nssf.or.tz/index.php/benefits/english/employment-injury> (25 April 2017).

613 See http://www.nssf.or.tz/index.php?option=com_content&view=article&id=196&Itemid=200 (03 May 2014).

614 See <http://www.lapfz.org/index.php/en/page/SurvivorBenefits/144> (03 May 2014).

When a member dies, a funeral benefit or grant is provided by the LAPF to meet certain funeral costs. It is also paid by the NSSF as reimbursement to a family member who incurred burial expenses for a deceased insured person.⁶¹⁵

Sickness benefits are offered only by the PSPF and NSSF. PSPF members are entitled to receive sickness benefits when they are unable to work and earn their monthly salaries. Sickness benefits are based on the conditions that a member must be medically unable to perform his or her duties, and that the incapacity should have lasted for at least six months before lodging the application for the benefits.⁶¹⁶

Maternity benefits by the NSSF are payable to insured female members of the Fund who are expecting confinement.⁶¹⁷ The benefit is payable after every three years, unless the pregnancy ended with a stillbirth or if the child died within the first 12 months. Benefits are in cash and medical care.⁶¹⁸ The maternity cash benefit is payable for a period of 12 weeks at the rate of 100% of the average insurable daily earnings determined from the last six months of insurable employment immediately prior to the 20th week of pregnancy. The maternity medical care benefit covers medical treatment costs for ailments directly related to pregnancy.⁶¹⁹ The treatment period begins from the 24th week of pregnancy and ends 48 hours after confinement or seven days in case of a caesarean delivery.⁶²⁰ The LAPF also pays maternity benefits.⁶²¹

Health care is provided mostly by the public health care system, although health insurance is provided by the private sector. The public health care system is primarily subsidised by the government; all members of the public are only supposed to contribute a particular percentage to get medical services. In addition, some public social security schemes offer medical insurance services. As an example, the NSSF has a Social Health Insurance Benefit.⁶²² It is open to an insured person, his or her spouse and up to four children (including biological and legally adopted children below the age of 18, or 21 years if in full-time education).⁶²³

A Welfare Scheme for Tanzanians in the Diaspora (WESTADI) has been established by the NSSF. It extends services to Tanzanians living abroad through a special diaspora coverage scheme. It aims to cover all Tanzanians living abroad (including students) and

615 See http://www.nssf.or.tz/index.php?option=com_content&view=article&id=137&Itemid=201 (03 May 2014).

616 Section 12(1) of Act 2 of 1999.

617 See NSSF “Maternity benefits” accessed at <https://www.nssf.or.tz/index.php/benefits/english/maternity-benefits> (25 April 2017).

618 *Ibid.*

619 *Ibid.*

620 *Ibid.*

621 Section 26 of the LAPF Act.

622 See NSSF “Social Health Insurance” accessed at <https://www.nssf.or.tz/index.php/benefits/english/social-health-insurance> (25 April 2015).

623 *Ibid.*

four dependants selected by the insured person for Social Health Insurance Benefits (SHIB) in Tanzania. Benefits include health benefits in Tanzania for 4 dependants, repatriation services (transfer of deceased body to Tanzania and cost of return ticket for one accompanying person) and burial services for an insured person who opts to be buried in the diaspora country.⁶²⁴ The health benefit covers the insured person while in Tanzania and four dependants left at home.⁶²⁵

7.14 ZAMBIA

Zambia's social security system consists mostly of social insurance schemes and these are limited to the provision of protection against the loss of income resulting from retirement, disability and death.⁶²⁶ The Zambian social assistance system consists of assistance provided by the Public Welfare Assistance Scheme. Benefits are in the form of food, shelter, education, health, clothing and travel. Specifically targeted groups include households where the head is elderly, chronically ill, people with disabilities; households with no productive assets, relatives to provide assistance or adults capable of working; victims of natural disasters; people with unsatisfactory housing; and orphans and children not at school, including street children.⁶²⁷

Social insurance in Zambia is mainly provided by the National Pension Scheme Authority (NAPSA). Participation in NAPSA is mandatory for all formal sector workers who began work after 1 February 2000.⁶²⁸ Self-employed or informal sector workers can enrol on a voluntary basis. The National Pension Scheme provides protection against retirement, disability and death (survivors' benefits).⁶²⁹

The old-age pension is paid by NAPSA to a person aged 55 with at least 180 months of contributions whose employment has ended.⁶³⁰ An early pension can be paid at the age of 50 with at least 180 months of contributions. A retirement lump sum is paid to a person who is 55 years old and has less than 180 months of contributions.⁶³¹

624 NSSF "WESTADI" accessed at <https://www.nssf.or.tz/index.php/schemes/westadi> (25 April 2017).

625 *Ibid.*

626 See the discussion below.

627 Regional Hunger and Vulnerability Programme (RHVP) Social Cash Transfers, Zambia REBA case study Brief No. 2 (November 2007).

628 See National Pension Scheme Act 40 of 1996.

629 *Ibid.*

630 See NAPSA "Benefits and requirements" accessed at <http://www.napsa.co.zm/index.php/benefits-requirements> (01 May 2014).

631 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 192.

For a person to receive a NAPSA disability pension, he or she must be assessed as permanently incapable of any work as the result of a physical or mental disability.⁶³² A disability lump sum is paid to a person who is assessed as physically or mentally disabled and younger than the pensionable age with less than 60 months of contributions.⁶³³

NAPSA also pays survivors' pension where the deceased breadwinner received or was entitled to receive an old-age or disability pension, or had at least 60 months of contributions. Eligible survivors include the spouse and children younger than the age of 18 (although the limit is 25 if the child is a student, and there is no age limit if the child is disabled).⁶³⁴ A survivors' lump sum is paid where the deceased was not entitled to receive the old-age or disability pension, had less than 60 months of contributions, and was eligible for the old-age or disability lump sum.⁶³⁵

A funeral grant is paid if the deceased received or was entitled to receive an old-age or disability pension, or had at least 12 months of contributions in the 36 months before death. Where there is no survivor, the grant is paid to the person who paid for the funeral.⁶³⁶

There are also occupational pension schemes for civil servants and local authority workers. The Public Service Pensions Fund provides benefits for retirement, invalidity and survivorship. The Local Authorities Superannuation Fund also provides benefits for retirement, invalidity and survivorship. In addition, there are private occupational schemes and voluntary schemes mostly providing for retirement benefits, a disability or invalidity pension, survivors' or death benefits and funeral expenses.⁶³⁷

Sickness and maternity medical benefits are available to all resident citizens of Zambia in government hospitals, clinics and rural health centres at low cost. Selected medical institutions require the payment of fees for medical services.⁶³⁸

Occupational injury and disease protection is provided by the Workers Compensation Fund (WCF). It is a statutory scheme for the provision of compensation to formal sector workers who have been disabled or killed during an accident at work or who contract an occupational disease.⁶³⁹ It is an employer-liability social insurance system, involving compulsory insurance with a public carrier. It is open to all employed persons, including

632 *Ibid* 192.

633 *Ibid*.

634 *Ibid*.

635 *Ibid*.

636 *Ibid*.

637 Muyembe M "Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community (SADC): Zambia Country Report" (Report to the World Bank (June 2007)).

638 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 193.

639 See Workers' Compensation Fund Control Board (WCFCB) accessed at <http://www.workers.com.zm/> (01 May 2014).

casual workers, household workers and apprentices; self-employed persons; and public sector employees not covered under the special system for public sector employees. There is a special system for public sector employees.⁶⁴⁰

The WCF provides disability benefits (temporary and permanent), medical benefits, rehabilitation and vocational training, assistive devices, survivors' benefits and a funeral grant.⁶⁴¹ A constant-attendance allowance is paid if the worker is assessed with a total disability and requires the constant attendance of others to perform daily functions. A partial disability is paid if the worker is assessed with more than a 10% degree of disability.⁶⁴² The Workers' Compensation Fund Control Board refunds all employer expenses incurred as a result of hospitalisation, and for the treatment of occupational accidents and diseases at public and private health institutions.⁶⁴³

Survivors' benefits are a spouse's and an orphan's pension. The spouse's pension is 80% of the disability pension the deceased received or was entitled to receive. A remarriage settlement of a lump sum equivalent to 24 months of pension is paid when the spouse remarries and the pension is terminated. An orphan's pension of 15% of the disability pension the deceased received or was entitled to receive is paid for the first orphan and 5% for each additional orphan younger than the age of 18. However, where the children lose both parents (full orphans), 30% is paid to the first child and 10% for each additional child. The orphan's pension is paid for up to eight orphans.⁶⁴⁴

Where there is no surviving widow, widower or child, an amount is paid to other eligible dependent survivors according to their degree of dependency on the deceased. A funeral grant is paid for funeral expenses of workers who die while working.⁶⁴⁵

7.15 ZIMBABWE

Social assistance in Zimbabwe is mainly provided by the Ministry of Public Service Labour and Social Welfare (Department of Social Welfare) in terms of the Social Welfare Assistance Act.⁶⁴⁶ In terms of social assistance, limited public assistance is given to needy

640 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 193.

641 *Ibid* 194; and Workers' Compensation Fund Control Board "Compensation benefits" accessed at http://www.workers.com.zm/index.php?option=com_content&view=article&id=5&Itemid=8 (01 May 2014).

642 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 194.

643 See http://www.workers.com.zm/index.php?option=com_content&view=article&id=5&Itemid=8 (04 May 2014).

644 Social Security Administration Social Security Programs Throughout the World: Africa, 2013 (Social Security Administration and International Social Security Association (2013)) 194.

645 *Ibid.*

646 Social Welfare Assistance Act 10 of 1988 (as amended).

persons incapable of work and to persons aged 65 or older, or with a disability.⁶⁴⁷ The Ministry of Public Service Labour and Social Welfare (Department of Social Welfare) endeavours to provide assistance and support to the vulnerable through (*inter alia*) the development and implementation of effective policies and legal instruments and training in order to promote self-reliance and social security, and to reduce poverty and enhance self-reliance through the provision of social protection services to vulnerable and disadvantaged groups in society.⁶⁴⁸ This is achieved through the care and protection of minors, and adoption of children; the establishment of corrective institutions and rehabilitation of beggars, vagrants and prostitutes; provision of therapy and counselling services for the physically and mentally handicapped; counselling on alcohol and drug abuse; provision of protection and care of refugees; provision of rehabilitation services for the disabled, care for the aged and supervision of the services given by private old-people's homes; the administration of the National Heroes Act; the administration of the War Veterans Act; the administration of the Disability Act; distribution of drought relief in drought-stricken areas; and provision of material assistance to the destitute such as school, examination and health fees, and maintenance allowances.

In addition, various other forms of social assistance support are provided to vulnerable groups.⁶⁴⁹ These include provision for the welfare and rehabilitation of disabled persons (amongst others); provision for the protection, welfare and supervision of children and juveniles; and access by older persons (citizens aged 65 or above) to basic necessities as well as community, health and social services.⁶⁵⁰

Social insurance in Zimbabwe is provided mainly by the National Social Security Authority (NSSA). The NSSA administers the National Pension Scheme (Pension and Other Benefits Scheme) and Accident Prevention and Workers' Compensation Scheme.⁶⁵¹ Coverage in the National Pension Scheme is for persons above the age of 16 years and under the age of 65 years who are in permanent, seasonal, contract or temporary employment. However, domestic workers, self-employed persons and informal sector workers are excluded.⁶⁵² The National Pension Scheme offers retirement pensions and grants, invalidity pensions and grants, survivors' pensions and grants, and a funeral grant.⁶⁵³

647 See Social Welfare Assistance Act.

648 Ministry of Public Service Labour and Social Welfare accessed at <http://www.zim.gov.zw/index.php/ministries/ministry-of-public-service> (01 May 2014).

649 See the Older Persons Act 1 of 2012; Disabled Persons Act 5 of 1992; and Children's Act 22 of 1971.

650 *Ibid.*

651 See National Social Security Authority Act 12 of 1989, Statutory Instrument SI 393 of 1993, which implemented the National Social Security Authority Act, and Statutory Instrument 68 of 1990, which established the Accident Prevention and Workers' Compensation Scheme.

652 See NSSA "National Pension Scheme" accessed at <http://www.nssa.org.zw/index.php/template-features/national-pension-scheme-nps> (01 May 2014).

653 *Ibid.*

Occupational injury and disease compensation is covered under the NSSA's Accident Prevention and Workers Compensation Scheme. The scheme covers all employed persons in the private sector, local authorities, parastatals and non-governmental organisations. However, self-employed persons and household workers are excluded. There is also a special system for civil servants.⁶⁵⁴ The scheme provides both short-term and long-term benefits. Short-term benefits include periodical payments for loss of earning, medical costs and a funeral grant. Long-term benefits are provided in the form of a pension. Periodical payments for loss of earning are meant to provide compensatory income where this has been lost or stopped by work-related accidents, and to guarantee continual payment of normal monthly wages for the first 30 days following an accident, and a percentage thereof thereafter. A survivor pension of 66.7% of the old-age or disability pension the deceased received or was entitled to receive is paid to a dependent widow or widower. If there is more than one eligible widow or widower, the pension is split equally. A child's supplement of 12.5% of the insured's benefit is paid to the first child, and 5% each to the second to the fifth child. The General Manager of the NSSA determines the amount paid for each subsequent child.⁶⁵⁵ A dependant's allowance is also paid to dependent parents, brothers and sisters for the death of an unmarried worker. The NSSA pays all medical fees including transport, drug and hospital costs, and provides assistive devices.⁶⁵⁶ A funeral grant is paid where a member dies as a result of a work-related accident.⁶⁵⁷

Sickness benefits are regulated by the Labour Act.⁶⁵⁸ In terms of section 14 of the Act, if an employee is sick, he or she is entitled to sick leave of up to six months if he has a certificate from a qualified doctor. During any one-year period of service, the employer may provide paid sick leave at 100% of wages during the first three months of sick leave and 50% of wages for a further three months. For medical care, the national health care programme provides free primary health care for low-paid workers.⁶⁵⁹

Maternity benefits are also regulated by the Labour Act. Section 18 of the Act provides for 98 days of paid maternity leave (at least 21 days before and 77 days after the expected

654 See NSSA "NSSA's Accident Prevention and Workers Compensation Scheme" accessed at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (01 May 2014).

655 See Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 196.

656 See NSSA "NSSA's Accident Prevention and Workers Compensation Scheme" accessed at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (01 May 2014).

657 See Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 197 and NSSA "Accident Prevention and Workers Compensation Scheme" accessed at <http://www.nssa.org.zw/accident-prevention-and-workers-compensation-scheme/> (25 April 2017).

658 Labour Act (formerly Labour Relations Act) 16 of 1985 as amended.

659 Social Security Administration *Social Security Programs Throughout the World: Africa, 2013* (Social Security Administration and International Social Security Association (2013)) 196.

date of childbirth). The maternity benefit is 100% of the worker's wage. Medical care is also provided through the national health care programme.⁶⁶⁰

7.16 IMPLICATIONS OF THE STATUS OF SADC NATIONAL SOCIAL SECURITY SYSTEMS FOR THE ADOPTION OR CONCLUSION OF A SOCIAL SECURITY AGREEMENT

The status of SADC national social security systems affects the adoption or conclusion of a social security agreement. The following issues must thus be taken into account in considering the feasibility of such an agreement, as well as its design.

7.16.1 Focus of social security schemes on social insurance to formal sector workers

Most of the countries discussed above only have schemes that provide social insurance coverage to workers employed in the formal sector. Social security schemes in most of the SADC countries also focus on 'employees'. This means that all persons not employed in the formal sector (such as the informally or atypically employed, who are excluded from social security protection) (e.g. Botswana, South Africa and Zimbabwe). Therefore, a vast majority of workers in each of these countries are excluded and marginalised. In some cases there are special systems for some other workers (such as public servants). However, in some countries informal sector workers can participate in a social security scheme on a voluntary basis (e.g. Swaziland National Provident Fund, Tanzania's social insurance schemes and Zambia's National Pension Scheme Authority).

7.16.2 Further limited personal scope of coverage

In addition to the social insurance and formal sector focus of most SADC national schemes, the personal scope of coverage of these schemes is also limited (i.e. the categories of persons covered). Social security statutes normally delineate the categories of workers protected, leaving out some formal sector workers who should otherwise be eligible (such as casual workers and family labour in Botswana; employees earning below or above prescribed thresholds; employers employing fewer than five employees; seasonal workers, tenants and domestic workers in Malawi). As a result, a social security coordination agreement will only be able to benefit the categories of workers to which the social security laws in the respective countries are applicable.

7.16.3 Restriction of access to social security schemes for some non-citizens

In most of the SADC countries a person's eligibility for social security depends on their nationality or citizenship. For non-citizens, access to social security depends on

⁶⁶⁰ *Ibid.*

immigration status, length of residence or other conditions.⁶⁶¹ In the case of access to social insurance benefits, nationality or length of residence is often not a requirement, since the schemes are contributory and employment-based. Therefore, all non-citizens who are employed have access to such schemes (permanent residents, temporary residents, refugees and (in some cases) irregular non-citizens).⁶⁶² However, some national social security statutes exclude legal non-citizens from the personal scope of application of the social security schemes.⁶⁶³

This implies that any social security coordination agreement must take into account the personal scope of application of national social security laws for non-citizens (i.e. the categories of non-citizens who are covered by each of the national social security systems and thus eligible to be included in the agreement). On the other hand, since equality of treatment is one of the fundamental requirements of any social security coordination agreement, such provisions in national legislation may need to be repealed or outlawed.

7.16.4 Restricted material scope of coverage

A limited number of SADC countries have dedicated non-contributory or social assistance schemes (e.g. Botswana, Lesotho, Mauritius, Namibia, Seychelles, South Africa and Swaziland). In relation to social insurance, while some countries provide protection against a wide range of contingencies (e.g. Angola, Mauritius, Seychelles, South Africa, Namibia and Tanzania), other countries protect against a limited number of social risks. However, there are some risks that are protected in all of the SADC countries (such as retirement and occupational injuries and diseases, and survivors' benefits to dependants of beneficiaries).

661 See Mpedi LG, Smit N and Nyenti M "Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community: A synthesis" in Mpedi LG and Smit N (eds) *Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community* (SUN PReSS (2011)) 6.

662 *Ibid* 17.

663 As examples, South Africa's Unemployment Insurance Act excludes non-citizen fixed-term contract workers who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any other agreement or undertaking that such persons must leave the Republic, or that such person be repatriated upon termination of the contract (see section 3(1)(d) of the Unemployment Insurance Act 63 of 2001 and section 4(1)(d) of the Unemployment Insurance Contributions Act 4 of 2002). In addition, in Mauritius all non-citizens with less than two years' residence are not entitled to become insured persons under the National Pensions Scheme, although they may be in possession of a valid work permit and are lawfully employed (see Regulation 3 of the National Pensions (Non-Citizens and Absent Persons) Order of 1978). In Angola a foreign worker registered for compulsory social protection who meets the benefit eligibility conditions is also entitled to an old-age pension where there is an agreement between the respective states (see Decree No. 40/08 July 2).

Therefore, the focus should (at least initially) be on the social insurance schemes where commonality exists.⁶⁶⁴ Common social insurance schemes are also the schemes that are usually included in such agreements. As Vonk has stated:

“The international community has a long-standing tradition in protecting the social security of migrants through a network of instruments for the co-ordination of social security schemes. These instruments provide for the equal treatment of national and foreign subjects, for the exportability of certain types of benefits, and for the aggregation of insurance periods fulfilled under different national social insurance schemes. Furthermore, they establish a choice for the competent legislation which is applicable in transnational situations. However, it appears that these co-ordination instruments can do little to improve the position of migrants within minimum subsistence benefit schemes. Traditionally, they only cover social insurance schemes which are related to a number of internationally recognised social risks, such as sickness, unemployment, invalidity, and old age.”⁶⁶⁵

This is the case with the ECOWAS General Convention on Social Security, the CIPRES General Convention on Social Security, the CARICOM Agreement on Social Security, and the MERCOSUR Multilateral Agreement on Social Security, which focus on social insurance schemes. However, the EU Regulations on the coordination of social security systems apply to both contributory and non-contributory social security schemes.

7.16.5 Institutional framework for effective social security coordination

The current social security institutional and administrative framework in most of the SADC countries has an adverse impact on the effective coordination of social security in the region. Some social security schemes are administered by national public institutions (such as Angola’s National Institute of Social Security (*Instituto Nacional de Segurança Social (INSS)*), DR Congo’s National Institute for Social Security (*Institut National de la Sécurité Sociale (INSS)*), Madagascar’s National Social Insurance Fund (*Caisse Nationale de Prévoyance Sociale (CNaPS)*), Malawi’s National Pension Fund, and the National Social Security Authority of Zimbabwe). However, a sizeable number of the social risks are catered for by private or occupational schemes (as is the case with some schemes in Angola, South Africa and Zambia). There are also special schemes for some workers, such as public servants (e.g. Botswana, Lesotho, Mauritius, Namibia, Tanzania and Zambia). In

664 See Fultz E and Pieris B “Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions” (ILO/SAMAT Policy Paper No. 7 (1998)) 1 and Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present – Protecting the Future 565.

665 Vonk GJ De Coördinatie van Bestaansminimumuitkeringen in de Europese Gemeenschap (The coordination of subsistence allowances in the European Community) (Kluwer (1991)) 483-484. See also Sabates-Wheeler R ‘Social Security for Migrants: Trends, Best Practice and Ways Forward’ International Social Security Association Project on Examining the Existing Knowledge of Social Security Coverage Working Paper 12 (2009) 9, where Sabates-Wheeler states that social security coordination agreements usually cover only contributory long-term benefits like old-age, disability and survivor pensions. Health care benefits and purely tax-funded benefits such as social assistance or maternity allowances are usually not portable.

addition, in some countries protection for certain risks have been delegated to employers (e.g. sickness and maternity benefits in Botswana, Congo DR, Lesotho, Mauritius, Swaziland and Zimbabwe).

It has been held that occupational or supplementary schemes have limited portability between countries, which is why they have not been included in some coordination agreements.⁶⁶⁶ This is because of (among other reasons) the complexity and diversity of occupational schemes; the type of benefits they provide (annuities or lump sum transfers) and diversity in the way risk is shared among schemes and countries; fear of discouraging employers from providing pension schemes, as legislation that increases the portability of the schemes might impose a new burden on the sponsors of the schemes; and restrictions on international capital movements and operations with foreign exchange in some countries.⁶⁶⁷ This may explain why the absence of national insurance schemes in many of the SADC countries has been cited in the past as one of the reasons for the absence of social security coordination arrangements in the region.⁶⁶⁸

Therefore, a social security coordination agreement needs to focus on national social security schemes or risks covered by such schemes. In addition, SADC member states should be encouraged to convert their occupational and private schemes to national public schemes. In relation to occupational injury schemes, proposals for southern African countries to convert these schemes into social insurance schemes have been made earlier.⁶⁶⁹ However, a sizeable majority of the countries under review still operate an employer-liability system. On the other hand, some of the countries have recently converted their employer-liability schemes to social insurance schemes. An example is Ethiopia, which recently established the Public Servants' Pension Scheme and the Private Organisations Employees Pension Scheme. In addition, Malawi provided for the establishment of the Workers' Compensation Fund in 2000 to administer the compensation of workers and dependants for work-related injuries and diseases, although it has yet to be operationalised.⁶⁷⁰

666 Forteza A "The portability of pension rights: General principles and the Caribbean case" World Bank Social Protection Discussion Paper (May 2008) 3 and 6.

667 *Ibid* 18 and 28.

668 See Mpedi LG, Smit N and Nyenti M "Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community: A synthesis" in Mpedi LG and Smit N (eds) *Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community (SUN PReSS (2011))* 28.

669 See Fultz E and Pieris B *Employment Injury Schemes in Southern Africa: An Overview and Proposals for Future Directions (ILO/SAMAT Policy Paper No. 7 (1998))*.

670 See generally Mpedi LG and Nyenti MAT *Employment Injury Protection Schemes in Eastern and Southern African Countries Report to the International Labour Organisation and the Friedrich-Ebert-Stiftung (December 2014)*.

7.16.6 Inadequate administrative capacity for social security delivery

Adequate administrative capacity is important in the delivery of social security, including social security coordination. Administrative capacity includes the ability of countries and social security institutions to administer the schemes (and the coordination agreements), as well as cooperation and communication between social security institutions.⁶⁷¹

Administrative assistance and cooperation between member states or state parties and national social security institutions is one of the tenets of social security coordination. Institutional and administrative assistance and cooperation are necessary for the success of a social security coordination agreement. It is clear that in order to achieve effective social security coordination, some cooperation between the social security institutions of the country of origin and the host country is required (including cooperation to ensure a joint determination of benefit levels for a particular migrant).⁶⁷²

Such agreements usually require administrative assistance and cooperation between member states or state parties and national social security institutions. National social security institutions are obliged to 'lend one another their good offices and act as if implementing their own legislation', and have a duty of mutual provision of information and cooperation to ensure the correct implementation of the agreement. They may also communicate directly with one another and with the persons involved or their representatives.

In adopting or concluding a social security coordination agreement in the SADC region, administrative assistance and cooperation between social security schemes must be ensured. This is because administrative inertia and inefficiency are considered to be major obstacles to social security coordination.⁶⁷³ Commenting on the state of institutional and administrative cooperation by SADC social security schemes (particularly employment injury and disease or workers' compensation), Fultz and Pieris remark that:

"schemes typically offer little help to migrant workers who return home after being injured on the job or who develop an employment-related occupational disease caused by work in another country. The most developed employment injury payment arrangements exist in South Africa, where benefits may be remitted through government-to-government agreements or through the mines' major recruitment agency, The Employment Bureau of Africa (TEBA), in those countries where it has offices. In the former arrangement, government corruption in the receiving country has sometimes prevented payments from reaching beneficiaries. This has been a particular problem in Mozambique, where a small survey undertaken in 1996 by Rand Mutual, the private firm which administers workers compensation for the mining industry, showed that 70 percent of compensation payments remitted in this manner had not reached the beneficiary. In other countries,

671 Dupper O "Coordination of Social Security Schemes: The Case of SADC" (Kolleg-Forschergruppe (KFG) Working Paper Series, No. 60 (May 2014)) 21.

672 *Ibid* 9.

673 Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present – Protecting the Future (2002) 152.

some schemes will send benefits overseas and will sometimes transmit an application or medical evidence to a neighbouring scheme on behalf of a worker. In no case, however, will a scheme assist a worker in developing an application for another scheme, advocate on his or her behalf for a decision, help file an appeal, pay a worker on another scheme's behalf, or advance the worker funds while he is awaiting a payment."⁶⁷⁴

7.16.7 Harmonisation or coordination of SADC national social security systems or schemes

The above review of the status of SADC national social security systems reveals diversity in their nature.⁶⁷⁵ There is wide variety between countries and schemes on issues such as legislation, contribution formula, qualifying conditions, benefit packages, operational rules and applicable procedures.⁶⁷⁶ This makes it doubtful whether it will be easy to develop baseline standards for the region and/or to adopt measures to coordinate the various countries' social security systems.⁶⁷⁷ This raises the question of whether SADC social security systems should be harmonised or coordinated.

Harmonisation means establishing mechanisms through which social security systems can work together to achieve mutually agreed objectives by replacing the different definitions and rules of each system with common definitions and rules.⁶⁷⁸ On the other hand, coordination means establishing mechanisms through which social security systems can work together to achieve mutually agreed objectives, while maintaining and respecting the separate rules and definitions of each system.

It has been held that "[t]he difference between co-ordination and harmonisation is that when national schemes are coordinated, they are left intact, which implies that the differences between national schemes remain to exist."⁶⁷⁹ Coordination rules supersede national rules, although only those national rules which are disadvantageous for migrant workers and self-employed persons. Harmonisation involves changes to national legislation for all employees (sometimes for all residents), not only for migrants.⁶⁸⁰ According to the European Commission, the EU rules on social security coordination do not replace national systems with a single European system. All countries are free to

674 Fultz E and Pieris B "Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions" (ILO/SAMAT Policy Paper No. 7 (1998)) 19-20.

675 See also Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present – Protecting the Future (Draft Consolidated Report) (March 2002) 152.

676 See also Dupper O "Coordination of Social Security Schemes: The Case of SADC" (Kolleg-Forscherguppe (KFG) Working Paper Series, No. 60 (May 2014)) 15.

677 See Committee of Inquiry into a Comprehensive System of Social Security for South Africa Transforming the Present – Protecting the Future (2002) 152.

678 Cisse A "Coordination of social security systems" presentation at the conference on Regional economic integration and development of national migration policies: what challenges for the ECOWAS zone? (Abidjan, Côte d'Ivoire, 13-17 May 2014).

679 Pennings F European Social Security Law (Intersentia (2015)) 7.

680 *Ibid.*

decide who is to be insured under their legislation, which benefits are granted and under what conditions.⁶⁸¹

However, harmonisation of the various social security systems is not imperative to the conclusion of a multilateral social security agreement. All that may be required is a convergence of the social protection policies of the member states.⁶⁸² In relation to the EU Regulation on the coordination of social security systems (as emended), it has been remarked that the EU rules do not harmonise the national systems, since social security policy remains firmly within national competence; instead, they aim to ‘coordinate’ the national systems in order to allow the free movement of persons.⁶⁸³ A SADC social security agreement must thus aim at the ‘coordination’ of the various national social security systems.

681 European Commission “What is coordination?” accessed at <http://ec.europa.eu/social/main.jsp?langId=en&catId=850> (10 June 2015).

682 Liverpool NJO “Harmonising social security legislation in the English-speaking Caribbean” *ISSR* 1/96 (Vol. 49) 73-79 at 73.

683 More G “The European Union rules on social security coordination: internal and external aspects” Background Paper for the Meeting of Experts on the Social Rights of Migrants and their Portability under a Transnational Framework Rabat (Morocco), 31 March – 1 April 2011 (International Centre for Migration Policy Development (2011)).

CONCLUSIONS AND POLICY RECOMMENDATIONS FOR A REGIONAL MECHANISM FOR THE PORTABILITY OF SOCIAL SECURITY BENEFITS

The right to social security is a fundamental human right guaranteed to all persons without discrimination of any kind. This implies that non-citizens should have access to social security in their host countries. However, non-citizens are not always granted access to social security as provisions in national social security laws often discriminate between nationals and non-nationals. Even where non-citizens are eligible for social security, national systems require a claimant to be physically present in the country. The 'nationality or territoriality principle' of social security thus hinders the portability of social security benefits.

This is especially the case in the SADC region where the portability of social security benefits is limited because of the absence of a region-wide social security coordination or portability agreement. Internationally, these agreements regulate issues such as equality of treatment of citizens and non-citizens, aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits to other countries, choice of law applicable, etc. There is thus the need for the conclusion of a social security coordination agreement by SADC member states so as to extend social security protection to intra-SADC migrants. This need is recognised by SADC, since the cross-border portability of social security benefits (and the conclusion of a regional agreement in this regard) is high on its agenda.

SADC's institutional and regulatory frameworks facilitate the development of a social security coordination agreement. SADC's vision, mission, common agenda and objectives point towards the feasibility of concluding an instrument for the portability of social security benefits in the region. These indicate that the main objective of SADC is to create genuine and equitable integration in the region. SADC's regional integration agenda is confirmed by the milestones laid down in the Regional Indicative Strategic Development Plan (RISDP) such as Free Trade Area in 2008, Customs Union in 2010, Common Market in 2015, Monetary Union in 2016 and an Economic Union with a single currency in 2018.

The SADC Treaty and its subsidiary instruments point to the need for an instrument on the portability of social security benefits in the region. SADC's institutional framework (SADC's main organs and institutions) are also conducive to creating an instrument for the portability of social security benefits in the region.

In developing a social security coordination framework, there are many lessons that SADC can learn from comparative bilateral agreements that have been concluded in the area, and in labour supply and free movement of persons. Portability provisions in certain pieces of SADC national legislation are also instructive. These indicate that SADC member states have some experience in concluding coordination agreements. They also reveal an appreciation of the need for the portability of social security benefits from these countries so as to promote the free movement and social security rights of migrant workers.

SADC can also learn from the experiences of comparative regional communities which have concluded or adopted social security coordination instruments. The East African Community, Economic Community of West African States, Caribbean Community and Common Market, Association of Southeast Asian Nations, Southern Common Market (*Mercado Común del Sur*) and the European Union have all been established to achieve the objectives of regional integration and cooperation in their respective regions. As a result, these regional communities promote the freedom or facilitation of movement of persons within the region. The regional communities have either concluded or adopted instruments for the free movement or facilitation of movement of persons and for the right of residence. Furthermore, many of the regional communities have adopted an instrument for the coordination of social security or are in the process of adopting one.

This stems from the realisation that greater benefit would be derived from the instruments on free movement or facilitation of movement of persons if an instrument for the coordination of social security is concluded or adopted. The conclusion of social security coordination instruments by these regions, which are comparable to SADC, indicates the feasibility of southern African countries concluding or adopting a similar multilateral instrument.

The status of SADC national social security has an impact on the development of a regional social security framework. The scope of risks protected by the various countries also varies. In addition, only a limited number of countries have dedicated social assistance (non-contributory) schemes. However, as seen in most of the social security coordination agreements of comparative regional communities, the focus is on social insurance schemes.

Therefore, the diversity of national social security systems and schemes does not preclude the adoption of a regional instrument for social security coordination. SADC member states merely need to specify issues such as the social security risks or benefits (and scope of beneficiaries) to be covered; equality of treatment in the respective national systems; exportability of benefits; aggregation of insurance periods; determination of the legislation applicable; and institutional and administrative cooperation. As Fultz and Pieris suggest, all that is required is greater innovation in identifying mutual interests.⁶⁸⁴

684 Fultz E and Pieris B “The Social Protection of Migrant Workers in South Africa” (ILO/SAMAT Policy Paper No. 3, 1997) 15.

They also state that states have considerable latitude to link different types of benefits in negotiating agreements.⁶⁸⁵

The task of coordinating social protection in the SADC region is further enhanced by the presence of some similar schemes in all the countries. An example is employment injury and disease or workers' compensation schemes which are present in each of the countries, with some as public social security institutions (e.g. in Namibia, South Africa, Zambia and Zimbabwe) and others as employer-liability schemes (e.g. Botswana, Kenya, Lesotho, Malawi, and Swaziland).⁶⁸⁶ Fultz and Pieris are of the opinion that:

“To ensure that employment injury protection reaches eligible migrant workers and their families, schemes should develop reciprocal agreements for the acceptance of applications and payment of benefits across national borders ... The logical starting point is employment injury since it is the single form of social protection which exists throughout the region.”⁶⁸⁷

The large number of intra-SADC migrants who have worked or are currently living and working in SADC countries other than their own (especially in the mining sector), as well as the huge constraints they face regarding the portability of social security benefits when they return to their countries of origin, calls for such an agreement.⁶⁸⁸ As McGillivray remarks, the need to ensure protection for injured SADC migrant workers may make social security agreements between or among employment injury and disease or workers' compensation schemes a useful and promising approach.⁶⁸⁹

In addition to the issues arising from the status of SADC national social security systems that must be taken into account in the development of a social security coordination agreement, SADC must also review the exhaustive non-discrimination provisions in SADC Treaty. Article 6(2) of the SADC Treaty compels every member state not to discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability. The principle of non-discrimination in article 6(2) is a closed list, and does not include the prohibition of discrimination based on nationality or

685 *Ibid.* See also Fultz E and Pieris B “Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions” (ILO/SAMAT Policy Paper No. 7, 1998, 23-24), who state that “the recently-established SADC Technical Subcommittee on Social Security and Occupational Safety and Health could serve as a resource to governments in negotiating agreements and overseeing their implementation. Over the longer term as more schemes convert to social insurance, this Subcommittee could also provide a forum for harmonizing benefits across the region.”

686 See Mpedi LG and Nyenti MAT Employment Injury Protection Schemes in Eastern and Southern African Countries Report to the International Labour Organisation and the Friedrich Ebert Stiftung (December 2014).

687 Fultz E and Pieris B “Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions” (ILO/SAMAT Policy Paper No. 7, 1998) 23-24.

688 See Mpedi LG and Nyenti MAT Portability of Social Security Benefits in the Mining Sector: Challenges Experienced by Former Mineworkers in Accessing Social Security Benefits in Selected Southern African Countries Report to the South African Trust (October 2013).

689 McGillivray W Strengthening Social Protection for African Migrant Workers Through Social Security Agreements (International Labour Office (2010)) 45.

citizenship. Since the prohibition of discrimination based on nationality or citizenship is fundamental to the coordination of social security, it must be included under article 6(2) of the SADC Treaty.

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PORTABILITY OF ACCRUED SOCIAL SECURITY BENEFITS WITHIN THE REGION

(SADC/ELSM&SP/1/2016/3)

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
PORTABILITY OF ACCRUED SOCIAL SECURITY BENEFITS
WITHIN THE REGION
DRAFT POLICY FRAMEWORK

MAY 2016

PREAMBLE

NOTING that Member States recognise that the State and Social Partners must play an active role in the labour market;

ACKNOWLEDGING the need to place decent employment and social security at the centre of macro-economic and sectoral policies at global, regional and national levels;

CONSCIOUS of the different levels of development of labour markets, labour market regulation and social security in Member States of the Community and the need to achieve regional integration through harmonisation and co-ordination of labour and social security laws;

MINDFUL of the Principles, Objectives and SADC Common Agenda as set out in Articles 4, 5 and 5A of the Treaty;

NOTING Article 21 of the Treaty which enjoins Member States to cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit, including in employment and labour sector, and with reference to among others social and human development, and social welfare;

NOTING FURTHER the need to give further effect to African Union Ouagadougou Plus 10, Sustainable Development Goal 8, the International Labour Organisation Core Conventions, and to facilitate ratification of the Employment Policy Convention, 1964 (No. 122), Social Security (Minimum Standards) Convention, 1952 (No. 102) and other international instruments concerning labour and social security;

AWARE of the human rights principles as enshrined under the major international human rights instruments;

HAVING REGARD of the principles of SADC Protocol on Employment and Labour of August, 2014, signed and adopted by the Member States;

FURTHER HAVING REGARD to the SADC Protocol on the Facilitation of Movement of Persons adopted and signed in 2005;

ACKNOWLEDGING further that the SADC Labour Migration Policy Framework that guides Member States on issues of management of labour migration requires corresponding support on issues related to regional portability of accrued social security benefits;

DESIROUS of realising the aspirations of regional cooperation and integration in the employment and labour sector in line with the SADC Regional Indicative Strategic Development Plan (RISDP) and Industrialisation Strategy;

CONVINCED that this Framework will contribute to the process of preventing discrimination of non-citizens in social security systems and facilitate harmonization thereof;

HEREBY AGREE as follows:

GENERAL PROVISIONS

SECTION I DEFINITIONS AND ABBREVIATIONS

(1) In this Framework relevant terms and expressions defined in Article 1 of the SADC Treaty will bear the same meaning unless the context otherwise requires.

Treaty: means the Treaty establishing SADC

Region: means geographical coverage of Member States of SADC

Secretariat: means secretariat of SADC established under the Treaty

Member State: means a member of SADC

(2) In this Framework, unless the context otherwise requires:

“Accrued social security benefit” means benefits due to the beneficiary by virtue of legislation and/or contractual obligations which are defined and recognized as social security benefit within Member States;

“Competent authority” means SADC Ministers Responsible for Labour and Employment, and other relevant authority responsible for social security

“Competent institution” means institutions within Member States responsible for policy formulation, administration, and regulatory oversight of social security systems;

“Employment” means employment as defined in the SADC Labour Market *Information System policy document*;

“Framework” means this Policy Framework;

“Harmonisation” means the process of creating common standards across the SADC Community, notwithstanding that each Member State has the primary responsibility for the regulation of all social security matters and laws within its jurisdiction;

“Legislation” means laws, regulations and other statutory provisions and all other implementing measures in each Member State relating to social security benefits, inclusive of retirement, occupational injuries and diseases, unemployment insurance, health insurance, as well as survivors’ benefits where relevant;

“Portability” means the transfer of accrued social security benefits of an individual beneficiary;

“Residence” means the place where a person habitually resides;

“Social Partners” means representatives of Government, Employers and Workers;

“Social security” means social security as defined in Article 1.5 of the Code on Social Security in the SADC (2005);

“Survivors” means the spouse(s), child(ren), dependent(s), or such other persons defined or recognised as such by the national legislation, whose entitlement to benefits is premised on the death of the primary beneficiary;

“Tripartite social dialogue structure” means a structure consisting of representatives of Government, Employers and Workers;

SECTION 2 OVERALL OBJECTIVE

The overall objective of this Framework is to facilitate the development of policies and programs aimed at the progressive enhancement of the adequacy, efficiency and regional coordination of SADC Member States’ social security systems.

SECTION 3 GENERAL AND SPECIFIC PRINCIPLES

- (1) Member States agree to be guided by the following general principles:
 - (a) Recognition and respect for the equality of all Member States;
 - (b) Respect for fundamental and basic human rights enshrined in international, regional and national legal instruments;
 - (c) Recognition that labour is not a commodity and that decent work and social security can contribute to economic development, poverty eradication and the improvement of the standard and quality of life in the SADC Region; and
 - (d) Recognition of the challenges of precarious employment, underemployment and unemployment; and the need to promote decent employment as a priority in the SADC Region.
- (2) The following specific principles will guide the interpretation and implementation of this Framework:
 - (a) All matters related to the implementation of this Framework will be decided by consensus among Member States;
 - (b) Cooperation within this Framework will be strengthened and institutionalised by utilising national and regional tripartite and broader social dialogue structures;
 - (c) The Framework will focus on the progressive extension and enhancement of social security coverage commencing with vulnerable employment sectors such as mining, agriculture, domestic and informal workers; and
 - (d) Where relevant, the implementation of the Framework will be guided by the principles of the SADC Protocol on Employment and Labour, the SADC Regional Indicative Strategic Development Plan and other relevant SADC strategic plans and protocols.

SECTION 4 SPECIFIC OBJECTIVES

- (1) The specific objectives of this Framework are to:
 - a) Provide mechanisms to enable workers moving within and outside the SADC Region to keep the social security rights which they have acquired under the legislation of the one Member State;
 - b) Ensure that workers in the SADC Region enjoy equal rights under the social security legislation of the Member States;
 - c) Provide a regional platform for the progressive coordination and integration of social security systems in the SADC Region; and
 - d) Contribute towards the improvement of the standard of living and conditions of employment of persons in the SADC Region.
- (2) It will be the responsibility of each Member State to create the enabling environment in order to ensure that the objectives referred to in Section 3(1) of this Framework are implemented at national and regional level.

PART II

APPLICATION OF FRAMEWORK

SECTION 5 LEGISLATIVE SCOPE OF APPLICATION

This Framework applies to all general social security schemes, as well as to schemes consisting of obligations by legislation which include but not limited to:

- a) retirement benefits;
- b) occupational injury and disease benefits;
- c) unemployment insurance;
- d) health insurance; and
- e) survivors' benefits where relevant.

SECTION 6 EQUALITY OF TREATMENT

- (1) Each Member State will grant within its territory to the nationals of any other Member State equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits.
- (2) In the case of survivors' benefits, such equality of treatment will also be guaranteed to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals or residents of a Member State residing in one of the Member States.
- (3) Benefits payable under the legislation of one or more Member States will not be subject to any reduction, amendment, suspension, withdrawal or confiscation

on account of the fact that the primary beneficiary or his/her survivors reside in a Member State other than in which the competent institution responsible for providing benefits is situated.

SECTION 7 DETERMINATION OF BENEFITS

Each Member State will determine in accordance with the applicable legislation whether and to what extent an insured person or the survivor of that person, as the case may be, satisfies the conditions for entitlement to a benefit.

PART III

ADMINISTRATIVE MEASURES

SECTION 8 MAINTENANCE OF RELATIONS

Competent institutions within Member States responsible for policy formulation, administration, and regulatory oversight of social security systems will cooperate with one another and endeavour to establish and maintain relations with regional peers for the progression of the principles of this Framework.

SECTION 9 ESTABLISHMENT OF ADMINISTRATIVE MEASURES

The competent authorities of the Member States will establish the administrative measures necessary for the application of this Framework.

SECTION 10 COMMUNICATION ON MEASURES TAKEN TO IMPLEMENT FRAMEWORK

The competent institutions of the Member States will communicate to each other, all necessary information about the measures taken by them for the application of this Framework or about changes in their national legislation in so far as these changes affect the application of the provisions of this Framework.

SECTION 11 INSTITUTIONAL ARRANGEMENTS

The implementation of this Framework will be facilitated by the SADC Institutions as established in Article 9 of the SADC Treaty.

This publication is comprehensive and disseminates original research on an area of national and regional priority. The authors provide a detailed analysis of relevant International and Regional protocols and these are implemented in various countries. It gives the reader a thorough description of coordinating bodies that are similar to SADC such as EAC, ECOWAS, CIPRES, CARICOM, ASEAN, MERCOSUR and EU. The reader will benefit from a critical analysis of the strengths and weaknesses of each system as well as opportunities the system presents for the portability of social security benefits.



Centre for International
and Comparative Labour
and Social Security Law
(CICLASS)

The Centre for International and Comparative Labour and Social Security Law (CICLASS)

is a research centre attached to the Faculty of Law of the University of Johannesburg (UJ). It was established in 1994. The Centre's research and related activities fall under the jurisdiction of the Department of Mercantile Law. CICLASS' articulated mission is to drive the development of viable and sustainable labour law and social security (protection) systems to address inequality and bring about social justice in the

emerging economies. In its quest to fulfil its mission, CICLASS strives towards the stimulation and facilitation of high-quality research in the areas of labour law and social security, with emphasis on a comparative and applied approach; and the rendering of appropriate forms of policy support, in collaboration with a network of higher education institutions and colleagues, as well as public and private institutions and experts at the national, regional and international levels.



The Southern Africa Trust was established in 2005 to support civil society organisations in southern Africa to participate effectively and with credibility in policy dialogue so that the voices of the poor can have a better impact in the development of public policies. The Trust supports processes that deepen and

widen participation in policy dialogues with a regional impact on poverty.



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