THIRD WORLD APPROACHES
to INTERNATIONAL LAW Review

E. TENDAYI ACHIUME & TAMARA LAST ~ Decolonial Regionalism
FERNANDA BRAGATO & ALEX FILHO ~ Colonial Limits of Corporate Accountability
DOROTHY MAZAKA-GOEDE ~ State Immunity & (Non)Compliance with the ICC

Special Feature: The League of Nations Decentred
KATHRYN GREENMAN & NTINA TZOUVALA ~ Foreword: The League Decentred
PAOLA ZICHI ~ Clashes of Feminisms and Transnationalism in Mandatory Palestine
SOPHIE RIGNEY ~ Indigenous International Law at the League of Nations
SHAIMAA ABDELKARIM ~ Nuances of Recognition in the League of Nations & UN
PARVATHI MENON ~ The Political Economy of Protection in the Iraqi Mandate
RYAN MARTÍNEZ MITCHELL ~ Monroe’s Shadow & the Space of Asia
Decolonial Regionalism: Reorienting Southern African Migration Policy

E. Tendayi Achiume & Tamara Last*

Abstract
Southern African regional migration legal and policy frameworks and state practice poorly govern interconnection: lives lived through and across borders. Instead, contemporary approaches to migration governance in southern Africa, and the logics and capacity issues underpinning policymaking in this field, contribute to contemporary problems associated with migration, such as illegality, immobilised poverty and xenophobic violence. In effect, the existing regional and national regimes and their foreseeable trajectory undercut people’s capacity to sustain independent livelihoods and to enjoy the rights and privileges that the Southern African Development Community (SADC) has identified as entitlements of southern Africans. We examine the SADC’s migration governance framework, highlighting its competing normative commitments and making explicit the logics it facilitates, the forces that shape it, and how it allocates benefits among individuals and communities in the region. We situate our analysis within the colonial history of migration in the region, highlighting how colonially structured socio-economic interconnection and resulting migration patterns in the past have relevance for the present. We highlight continuities in the way that the contemporary migration governance regime facilitates historical patterns of exploitation and precarity, in a manner at odds with the decolonial movements and spirit that animated the SADC’s predecessor formation as the Frontline States. Finally, we propose reorientation of the reform momentum in the region, away from the inertia created by European Union-funded knowledge and policy production forces towards trajectories that are more decolonial in nature.

Key words
regional migration governance; decolonisation; policy development; borders; free movement

* E. Tendayi Achiume is Alicia Miñana Professor of Law at the UCLA School of Law, and a Research Associate of the African Centre for Migration and Society at the University of the Witwatersrand and of the Refugee Studies Centre at the University of Oxford. Tamara Last is a Research Associate of the African Centre for Migration and Society at the University of the Witwatersrand. The authors would like to thank Madina Thiam and Anita Vukovic for crucial research input, and the UCLA Luskin Center for History and Policy for the funding that made this collaboration possible. The authors would also like to thank Knowledge Mabhena for valuable research assistance.
1 Introduction

Ideally, migration legal and policy frameworks justly and effectively govern interconnection: lives lived through and across borders. Yet the reality is that southern African regional migration legal and policy frameworks and state practice poorly govern this interconnection, adopting frames and logics at odds with the needs and desires of socio-economically marginalised southern Africans especially. While recognising that formal law and policy do not fully or even mostly determine how and when people move in the region, it remains the case that law and policy play a significant role at the very least in conditioning the possibilities and terms of this movement directly and indirectly. In the Southern African Development Community (SADC), existing governance mechanisms contribute to contemporary problems associated with migration, such as illegality, immobilised poverty and xenophobic violence. We seek to demonstrate that the foreseeable trajectory of these regimes is to continue to undercut the capacity of migrants (and in some cases, citizens of receiving states) to sustain independent livelihoods, thereby undercutting even enjoyment of the rights and privileges that the SADC has itself identified as entitlements of southern Africans.

Critical assessment of southern African migration remains urgent from a law and policy perspective, and perhaps most urgent is scholarship that pursues the decolonisation of regional and national borders. A decolonial approach includes reimagining the borders of southern African communities on the basis of legal and policy regimes that promote individual and collective self-determination, and do so while recognising transnational political, economic and cultural interconnection as central to the project of self-determination. Without reducing the challenges of SADC migration governance to the region’s colonial past, we join others who have argued the necessity of attending to the coloniality of SADC borders. We use the term coloniality to refer to the tendency to reproduce colonial-era inequalities and axes of subordination, exploitation and benefit, notwithstanding the range of other functions they may simultaneously perform. Our goal is to contribute to the existing decolonial scholarship by identifying some of the regional migration laws and policies that sustain

---

1 Although our article focuses on southern Africa, the core disjunctures we identify are at play in other regions of the world, and even at the global governance level.

2 In this respect we join a number of other scholars who have offered postcolonial or decolonial critiques of SADC’s borders. See, e.g., Innocent Moyo, ‘On Decolonising Borders and Regional Integration in the Southern African Development Community (SADC) Region’ (2020) 9:4 Social Sciences 32; Sabelo J. Ndlovu-Gatsheni, ‘Decolonising Borders, Decriminalising Migration and Rethinking Citizenship’ in Hangwelani Hope Magidimisha, Nene Ernest Khalema, Lovemore Chipungu, Tamuka C. Chimambowa & Tinashe Lukas Chimedza (eds.) Crisis, Identity and Migration in Post-Colonial Southern Africa (Springer, 2018) 23; Christopher Changwe Nshimbi & Innocent Moyo (eds.), Borders, Mobility, Regional Integration and Development: Issues, Dynamics and Perspectives in West, Eastern and Southern Africa (Springer, 2020).
coloniality, and by offering concrete recommendations for decolonial reorientation of the regional migration regime. Our interventions fall far short of solving the problem of border coloniality in the SADC, but we view them as offering an important if modest contribution.

We examine the SADC’s migration governance framework, highlighting its competing normative commitments and making explicit the logics it facilitates, the forces that shape it, and how it allocates benefits among individuals and communities in the region. We situate our analysis within the colonial history of migration in the region, and then highlight continuities in the way that contemporary migration governance facilitates historical patterns of exploitation and precarity. This border coloniality is at odds with the decolonial orientation that animated the SADC’s predecessor anticolonial formation as the Frontline States. Finally, we propose reorientation of the reform momentum in the region, away from the inertia created by European Union-funded knowledge and policy production forces towards trajectories that are more decolonial in nature.

Of the sixteen SADC member states, our analysis gives particular attention to South Africa, relative to other states in the region, due to a number of factors. It is a leading destination for regional and continental migration, in part because it is the economic powerhouse of southern Africa. Contemporary labour migration to South Africa has distinct colonial precursors – colonial South Africa’s economy depended heavily on regional migrant labour, forging transnational migration pathways that eclipse others in the region. Additionally, South Africa plays a dominant political and policy-making role in the region, including with respect to migration. Despite colonial and precolonial histories of interconnection between what is today South Africa and the rest of the region, South Africa’s national immigration policy and its enforcement is arguably still based on apartheid and colonial logics. Its national immigration regime, which embeds national protectionism, exceptional inclusion and xenophobic positions, has far-reaching regional implications, and undercuts both long-standing

---

3 At least one reason for this dominance is the country’s relatively expansive administrative capacity. For instance, according to the ILO, who facilitate policy development in collaboration with the SADC Secretariat (see section on Capacity Dependence and Imported Legal and Policy Instruments), South African delegates are usually the most prepared for regional meetings and workshops, with particular knowledge of the policy area under development. This (relative) capacity reflects in the development of regional policy and Protocols. On South African influence on regional integration see, e.g., Innocent Moyo & Christopher Changwe Nshimbi, ‘Of Borders and Fortresses: Attitudes Towards Immigrants from the SADC Region in South Africa as a Critical Factor in the Integration of Southern Africa’ (2017) 35:1 Journal of Borderlands Studies 131, at 131-132; Vincent Williams & Lizzie Carr, ‘The Draft Protocol on the Facilitation of Movement of Persons in SADC: Implications for State Parties’ (2006) 18 SAMP Policy Brief 1, at 2.

interconnections with the region and contemporary dynamics of movement and mobility in the region.\(^5\)

This article proceeds as follows. Part 2 describes southern African migration in colonial context, context we believe is essential for understanding contemporary sociological, economic and governance dynamics. Part 3 provides a critical analysis of contemporary migration governance frameworks in the SADC. Two related features of the regional legal and policy frameworks that we focus on are: (i) the salience and influence of economic modes of production in shaping migration governance, typically in ways that expose those subject to these frameworks to precarity and exploitation; and (ii) the failure of these frameworks to ensure sufficient incorporation (and associated benefits) for migrants in the region, notwithstanding the economic, social, cultural and political ties that bind them to the countries to which they migrate. And finally, Part 4 reflects on possibilities for policy shift with a decolonial orientation.

2 SADC Migration in Colonial Context

Migration has long been a feature of southern African life and remains so today.\(^6\) Our analysis relies on the valuable work of historians of southern Africa, whose work has not sufficiently been brought to bear on regional migration policy-making.

2.1 Colonial Regional Labour Migration: Interconnection, Exploitation and Illegality

Movement of people has played a significant role in the region’s economic history. In the colonial era, virtually all colonies in southern Africa used migrant labour for economic growth. According to scholars, ‘there is little doubt that if large numbers of low-wage, unskilled migrant miners had not been recruited from throughout the subcontinent, there would never have been a deep-level gold mining industry in South Africa’.\(^7\) The mining industry influenced the direction and mode of movement both within South Africa and from the region into the country. Although South Africa and Southern Rhodesia (present-day Zimbabwe) were the main labour magnets, Africans also migrated to other places throughout the southern and central parts of the continent. In the 1920s and 1930s, tens of thousands of Nyasa migrants sought work


in the Katanga copper mines, Northern Rhodesian (present-day Zambia) Copperbelt, and Tanganyika (present-day Tanzania) Lupa goldfields.⁸

Nyasaland (present-day Malawi) also attracted immigrants: in the first half of the twentieth century, many Alomwe migrants from Portuguese East Africa (present day Mozambique) sought work on Nyasaland’s tea, cotton, or tobacco plantations.⁹ From the 1880s onwards, migration sustained mining industries, which in turn financed the industrialisation of South Africa and other colonial economic centres in the region. Migrants also helped grow the economies of the places from where they were recruited. By 1930, in the Mzimba district of Nyasaland, 80 percent of the hut tax yield was supplied by, or linked to, migrants.¹⁰ By the 1990s, over 50 percent of Lesotho’s national income and about a third of Mozambique’s were remittances from workers in South African mines.¹¹

It is important to note that often violent displacement and containment were ‘the precondition for the exploitation of [Africans’] labour’,¹² and this exploited labour enabled mass production and the accumulation of wealth in colonial metropoles. European colonisation of southern African territories led to the rise of a capitalist wage economy dependent on African labour. As they deepened their presence in the region, colonial administrators and corporations increasingly coerced Africans into the colonial labour and cash economy. The hut tax, in particular, triggered considerable movements of African men, who sought employment in colonial industries to earn the cash needed to comply. Introduced in 1849 in the Natal colony, the hut tax was a direct taxation, levied on each hut inhabited by the family of each man.¹³ Soon, the administration demanded cash, rather than grain or stock, as the exclusive means of payment.¹⁴ The primary aim was to raise revenue for the colonial state, and quell complaints from white settlers.¹⁵ Other colonies soon followed Natal’s example. The Cape colony also put in place a labour tax system that Cape colony Prime Minister and mining magnate Cecil Rhodes intended as a means of rendering African men into a

---

¹³ In many societies, huts were the domain of women, so a man was effectively taxed for the number of wives he had – a system that facilitated the work of missionaries to introduce Christianity and monogamous marriage.
¹⁵ Ibid, 6.
readily exploitable labour pool for mining and extractive industries. African taxation also went hand in hand with colonial racial segregation, and the creation of ‘native locations’. In Portuguese East Africa, all African men between the ages of 14 and 60 years old were forced to work, and all African adults were subjected to a head tax. Colonial fiscal policies thus boosted the emergence of a large-scale labour migration scheme throughout the region.

Colonial corporations organised a large-scale recruiting system run by multiple layers of actors and organizations, and built travel infrastructure to facilitate it. Corporate-issued permits and contracts effectively stood as legal travel documents. Each company ‘aggressively competed’ to ‘coerce and harness migrant labour’ towards their respective colonies. In addition to the Chamber of Mines, an umbrella association for all mine owners in South Africa, the Native Recruiting Corporation (NRC) oversaw recruitment within South Africa, and the Witwatersrand Native Labour Association (WNLA, or Wenela) operated throughout southern Africa. Other colonies emulated South Africa and launched their own agencies. In 1903, authorities in Southern Rhodesia created the Rhodesia Native Labour Bureau (RNLB). Southern Rhodesia also created the Free Migrant Labour Transport Service – commonly referred to as *ulere* (‘free’ in Chewa) – a conglomeration of ‘buses, trains, lorries, food depots, shelters and river barges/ferries’ designed to facilitate migrants’ transportation from the colony’s northern border with Nyasaland, through its southern border with South Africa, via the capital city of Salisbury.

In parallel, colonial governments in the region designed laws and policies to govern this colonial labour migration regime – facilitating it at times, and hindering it at others. Migration governance during the colonial period was by no means a coherent, monolithic regional regime. Legislatures in both labour-magnet and labour-supplying colonies put in place a number of laws to control and regulate incoming and outgoing flows of migrant workers, which at times clashed with the interests of corporations and labour agencies, and with the interests of other governments. As early as 1895, Nyasaland passed the Employment of Native Labour Regulations requiring employers to make ‘provisions for housing, food, sanitation, or medical care’

---

17 Ibid, 6.
18 Chirwa (1994) 535.
21 Ibid, 16.
for the workers they were recruiting, mostly from Portuguese East Africa.\textsuperscript{22} In 1899, Southern Rhodesia passed a Natives Employment Ordinance which prohibited Africans in the colony from being recruited for employment in another country.\textsuperscript{23}

In 1913, the South African government passed a controversial Immigrant Regulation Act banning the recruitment of workers from the area north of the 22nd parallel south latitude. This policy, which came to be known as the ‘ban on tropical workers’, came at the conclusion of a three-year long debate in parliament driven ostensibly by opposition parliamentarians’ concerns over how to resolve the issue of high mortality rates in South African mines.\textsuperscript{24} The ‘tropical ban’ went against both migrants’ interests in securing a monetary income and South African employers’ interests in maintaining a constant supply of migrant workers as a means of curtailing wages, and resulted in a surge in unauthorised migration, which South African employers tacitly supported.\textsuperscript{25} In his comprehensive study of the tropical ban and other colonial migration policy, Musoni shows the colonial origins of so-called illegal migration, and how legal and policy frameworks played significant roles in producing this illegality.\textsuperscript{26} He also documents how contemporary migration governance in SADC similarly produces illegality and the exploitation and precarity that result from the status of illegality.

The colonial regional labour regime disrupted African livelihoods, and divided lands between resource-extraction and labour-supply areas. It also disrupted societal and family dynamics.\textsuperscript{27} But it is important to note that African women and men were not mere passive victims of this system. They often fought back against it – transnational leaders were prominent in early southern African workers’ unions, and called for transnational labour organising to outflank corporate interests and empower localised wage struggles.\textsuperscript{28} In some cases southern Africans exercised economic agency within existing regulatory frameworks, finding creative ways to overcome constraints

\begin{itemize}
\item \textsuperscript{22} Chirwa (1994) 534.
\item \textsuperscript{23} Daimon (2018) 11.
\item \textsuperscript{24} Francis Musoni, ‘The Ban on “Tropical Natives” and the Promotion of Illegal Migration in Pre-Apartheid South Africa’ (2018) 61:3 African Studies Review 159, at 159-62.
\item \textsuperscript{25} Ibid, 165.
\item \textsuperscript{26} Francis Musoni, Border Jumping and Migration Control in Southern Africa (Indiana University Press, 2020).
\end{itemize}
on migration. At times, they took advantage of it to exercise economic agency and sustain their livelihoods. In the vast majority of cases, they circumvented regulation, migrating through unofficial channels outside of the colonial legal purview. Within the mining industry, workers sought to maintain their agency by refraining from entering into strict Wenela or other recruiting company contracts, which they deemed exploitative.

In 1925, only 5 percent of African employees in Southern Rhodesian mines had come through the official RNLB procedure; 95 percent had entered the territory and gained employment independently. Many would then continue to South Africa, where wages were higher. During the 1913-1932 ‘ban on tropical workers’, this trend was exacerbated, with the collaboration of South African employers. Passes were refused at the border, but many migrants continued with or without forged documents. Colonial labour migration regimes were gendered, to the disadvantage of women. Nonetheless, women and girls were engaged in informal employment and travelled clandestinely and usually by foot to avoid checks on public transportation infrastructure, sometimes for up to 400 kilometres. Tswana women from Bechuanaland discussing their migration to South Africa frequently declared ‘Re ne re ngwega [we ran away]’. Their migration was indeed a form of escape from both the economic burdens and increasing poverty affecting their homesteads due to the colonial economy, as well as from rigid patriarchal constraints. A 1945 census indicated that an estimated 9,446 Nyasa women were living abroad. From the 1920s through to the 1940s, women from Lesotho settled in Witwatersrand labour-intensive mining areas, and made a living engaging in ‘beer brewing, cooking, laundry and sex work’. Towards the end of colonial governance, more formal employment

29 Musoni (2020) 34-36 and 92-100.
32 Daimon (2018), 9 and 11.
opportunities became available to women;\textsuperscript{38} for instance, as nurses in mining compounds.\textsuperscript{39}

In sum, even as colonial capitalist economies depended on transnational labour migration, and thus facilitated certain forms of regional interconnection and mobility, colonial migration governance frameworks significantly produced illegality, precarity, exploitation and resistance.

2.2 The 'Post'-Colonial Present

The shortcomings of formal decolonisation in southern Africa are the subject of an important body of scholarship.\textsuperscript{40} In this section, we describe in brief some of the persisting challenges confronting southern African migrants, which include exploitation, abuse and precarity facilitated in part by failures to ‘decolonise’ migration governance and practice in the region.

Although some scholars take the position that ‘free migration does exist to a certain extent in SADC’,\textsuperscript{41} the Visa Openness Index published by the African Development Bank records an open reciprocity score in the SADC of only 56 percent in 2018.\textsuperscript{42} A fifth of citizens of SADC states\textsuperscript{43} must still officially pass through advance visa regimes in order to enter other territories in the region, even for a temporary visit. Moreover, these statistics reflect neither the many obstacles to obtaining documents needed for travel, nor the corruption among immigration officials and border guards.

Migration regimes founded on territorially-bounded, nationalised political affiliation reproduce and exacerbate unresolved struggles for place and rights in contemporary southern Africa. National migration laws and policies in southern Africa

\textsuperscript{38} Scholarly work on women’s formal sector migrations have focused on the post-colonial era. See e.g. Theresa Ulicki & Jonathan Crush, ‘Gender, Farmwork, and Women’s Migration from Lesotho to the New South Africa’ (2000) 34:1 Canadian Journal of African Studies 64.

\textsuperscript{39} Interview with Matilda Chibanda, conducted by Madina Thiam (April 2019).

\textsuperscript{40} See e.g. Moyo (2020); Ndlovu-Gatsheni (2017); Kenneth Omeje (ed.), \textit{The Crises of Postcoloniality in Africa} (CODESRIA, 2015).

\textsuperscript{41} Ottila Anna Maunganidze & Julian Formica, ‘Freedom of Movement in Southern Africa: A SADC (Pipe)Dream?’ (2018) 17 ISS Southern Africa Report 1, at 7. Oucho & Crush agree that ‘[t]he ground-level reality has been that for decades there has been a more or less effective “free movement” for thousands of people within the region’: John O. Oucho & Jonathan Crush, ‘Contra Free Movement: South Africa and the SADC Migration Protocols’ (2001) 48:3 Africa Today 139, at 146.

\textsuperscript{42} Of SADC’s 16 Member States, Seychelles, Comoros, Madagascar, Mozambique, Mauritius, Tanzania, Zambia, and Zimbabwe have no-visa or visa-on-arrival policies for nationals of SADC member states. Seychelles, Comoros, Madagascar and Mozambique operate such open border policies for all Africans; Mauritius and Tanzania for the majority of African nationals; while Zambia and Zimbabwe facilitate the movement predominantly of southern Africans. The remaining eight member states require advance visas for nationals of some SADC member states. Nationals of DRC and Madagascar have the least mobility in the region. Visa Openness Index, ‘Africa Visa Openness Index Measures which Countries are Facilitating Travel for Citizens of Other Countries and How’ (2020), https://www.visaopenness.org/ (accessed 26 May 2021).

\textsuperscript{43} Maunganidze & Formica (2018) 7.
‘are largely “protectionist” and discourage the movement of persons across borders. This places immigration laws and policies at odds with the historical reality of cross-border migration’.

44 Notwithstanding persisting economic, political, social and cultural ties with the rest of the region, pathways to residence, establishment and citizenship are restrictive and bureaucratic in South Africa. 45 Informal recruitment through networks enables undocumented people to gain employment, but outside the protection of labour laws. Recruitment in the agricultural sector for example is still largely informal, and exploitation has been directly linked to lack of protection for informally-recruited undocumented workers. 46

In some sectors (e.g. hospitality, mining, domestic workers), employers make use of both formal and informal recruiting networks, creating a parallel/shadow system in which undocumented people are able to find work but they are not protected by labour laws. 47 Issues with documentation and legal residence have inter-generational impacts: children of parents who lack documentation themselves have difficulty accessing documentation and socioeconomic rights that in reality are contingent on documentation, such as education. 48 Similar dynamics exist across the region. Mbiyozo and Manby note that Zimbabwe, Madagascar, DRC, Angola and Mozambique have not reformed colonial policies that render many people within their territories stateless over generations. 49 Unrecognised and undocumented peoples are systematically excluded, exploited and discriminated against. 50

Asylum provides one of the few possibilities for African migrants in South Africa to obtain legal status and has, as such, become a ‘surrogate immigration channel’. 51 Criminalisation, illegalisation and failure to incorporate people through other legal pathways has overburdened South Africa’s asylum system, which has been

45 African Centre for Migration and Society (ACMS), Free and Safe Movement in Southern Africa (ACMS, OSF, 2018); Moyo & Nshimbi (2020).
the subject of compelling critique,\(^{52}\) including for neglecting the people it is designed to protect.\(^{53}\) The literature describes congested reception centres,\(^{54}\) long delays, unlawful detentions and mass deportations,\(^{55}\) institutional failures in determining refugee status and issuing recognizable identity documents, and abuse at the hands of law enforcement agents.\(^{56}\) Although research on asylum systems in other SADC countries is limited, the available literature reports similar failures to implement international protection obligations and deprivation of legal status across the region.\(^{57}\) Failure to incorporate people creates precariousness and opportunities for exploitation with implications for people who do not have the documents to prove any or appropriate legal status in the country where they live,\(^{58}\) or to prove their connections to peoples and places outside of their countries of nationality. In the absence of policies to incorporate, many people in the region thus live in a ‘permanent temporality’.\(^{59}\)

George & Elphick and Khan have documented the limited nature of legal options that migrants, asylum seekers and refugees have at their disposal in the SADC region to achieve formal incorporation through citizenship.\(^{60}\) As Khan highlights, there are legal and practical gaps between international norms and national migration and citizenship laws that undermine the human rights of peoples on the basis of their contemporary or historical movements.\(^{61}\) Nationalist and nation-building projects


\(^{58}\) ACMS (2018).

\(^{59}\) George & Elphich (2013); Khan (2020).

\(^{60}\) Khan (2020).
target these groups for exclusion, deepening and mobilising xenophobic attitudes.\textsuperscript{62} The expensive, difficult-to-meet, inappropriate and frequently changing requirements for cross-border travel that differ from border to border\textsuperscript{63} undermine the SADC’s own goals of regional economic integration and make people vulnerable not only to criminal networks but also to ‘discrimination and exploitation from corrupt state officials’.\textsuperscript{64} The SADC’s 2008 Regional Poverty Reduction Policy Framework (‘Regional Poverty Framework’) also highlights ‘lack of recognition, criminalisation and harassment at border posts’, ‘inadequate transport and transport routes’, and ‘visa requirements’ among the challenges facing people who cross land borders regularly to access what they and their communities need.\textsuperscript{65}

With respect to gender, migration regimes continue colonial patterns of discrimination. The SADC Gender and Development Monitor 2016 reports, for example, that women, in particular, ‘are forced to pay bribes or subjected to harassment by police or customs and immigration officials, and [that] there is often a skewed perception of women traders’.\textsuperscript{66} In identifying persisting barriers to movement, migration and incorporation in the region, we do not mean to elide the movement and migration that is achieved – sometimes outside of the law.\textsuperscript{67} Indeed, movement occurs in spite of the legal and policy frameworks designed to contain it and migrants regularly find means of incorporation at other levels of society than the formal, national level.\textsuperscript{68} Informal cross-border traders, for instance – the majority of whom are women who are particularly excluded from formal commercial opportunities – play a vital role in improving food security and access to goods and opportunities sustaining livelihoods among some of the most socio-economically


\textsuperscript{63} Sandy Johnson & Antony Altbeker, South Africa’s Migration Policies: A Regional Perspective (CDE, 2011).

\textsuperscript{64} Maunganidze & Formica (2018) 9.


\textsuperscript{67} Hiroshi Motomura, Immigration Outside the Law (OUP, 2014).

marginalised communities in the region and the continent more broadly. The point, however, is that movement, migration and incorporation should not have to be achieved in spite of obstructionist legal frameworks that foster exploitative conditions for migrants.

In sum, migration and mobility within the SADC remain constrained by governing policy and practice in significant ways, reproducing colonial-era illegality, precarity and exploitation.

3 Contemporary Migration Governance in Southern Africa

How is SADC law and policy positioned to address the problems described above? Figure 1 presents an overview of regional migration governance in southern Africa.

<table>
<thead>
<tr>
<th>Migration-Specific Regional Policies</th>
<th>Year</th>
<th>Migration-Related Regional Policies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regional Guidelines for the Development of Bilateral Labour Agreements in the SADC</td>
<td>2015</td>
<td></td>
</tr>
<tr>
<td>Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region</td>
<td>2014</td>
<td></td>
</tr>
<tr>
<td>Southern African Strategic Plan of Action to Address Mixed and Irregular Migration 2015-2018</td>
<td>2013</td>
<td></td>
</tr>
<tr>
<td>10 Year Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children 2009-2019</td>
<td>2010</td>
<td>Harmonised Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation (SIPPO II)</td>
</tr>
<tr>
<td>Regional Poverty Reduction Policy Framework</td>
<td>2009</td>
<td></td>
</tr>
<tr>
<td>Protocol on Gender and Development</td>
<td>2008</td>
<td>Protocol on Science, Technology and Innovation</td>
</tr>
<tr>
<td>Protocol on the Facilitation of Movement of Persons in SADC</td>
<td>2007</td>
<td></td>
</tr>
<tr>
<td>Protocol on the Development of Tourism</td>
<td>2006</td>
<td></td>
</tr>
<tr>
<td>Protocol on Education and Training</td>
<td>2005</td>
<td></td>
</tr>
<tr>
<td>Protocol on Transport, Communication and Meteorology</td>
<td>2004</td>
<td></td>
</tr>
<tr>
<td>Declaration on Refugee Protection</td>
<td>2003</td>
<td>Charter of Fundamental Social Rights in SADC</td>
</tr>
<tr>
<td>1999-2002</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>Protocol on the Development of Tourism</td>
<td></td>
</tr>
<tr>
<td>1997</td>
<td>Protocol on Education and Training</td>
<td></td>
</tr>
<tr>
<td>1996</td>
<td>Protocol on Transport, Communication and Meteorology</td>
<td></td>
</tr>
<tr>
<td>1993-1995</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td>Protocol on Immunities and Privileges</td>
<td></td>
</tr>
</tbody>
</table>

Figure 1. Overview of regional migration policies in Southern Africa Relevant to Cross-border Movement of People


We view the SADC Protocol on the Facilitation of Movement of Persons adopted in 2005 (‘Movement of Persons Protocol’), and the respective labour instruments adopted between 2013 and 2016 as representative of southern African states’ vision for movement in the region – the ideal towards which regional governance momentum is oriented. Generally speaking, we have analysed migration-specific and migration-related SADC policy documents primarily in order to glean their approach, and the course they chart, in light of the contemporary realities of southern African migration highlighted in Part 2. We identify a number of governance orientations that we argue undercut decolonial futures for SADC migration governance that would better serve the patterns of economic, social and cultural interconnection of the region, and the agency of non-elite southern African migrants.

3.1 The Movement of Persons Protocol
The SADC’s founding Treaty in 1992 introduced a baseline goal for governance of movement in the region, and it clearly states that regional migration governance functions as a means of achieving the broader founding objectives of the SADC. These founding objectives include, among others, achieving development and economic growth; alleviating poverty; ‘enhancing the standard and quality of life of the people of Southern Africa and support[ing] the socially disadvantaged through regional integration’; ‘promot[ing] self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; … promot[ing] and maximis[ing] productive employment and utilisation of resources of the Region; [and] strengthen[ing] and consolidate[ing] the long standing historical, social and cultural affinities and links among the people of the Region’.71 Thus at least at the time of the SADC’s founding, ‘the free movement of … the people of the Region generally, among Member States’, was not narrowly presented as merely a neoliberal economic imperative or development imperative. The well-being of marginalised groups, as well as historical, social and cultural interconnection were named as priorities.

In 2005, the SADC finalised the Movement of Persons Protocol, after a fair amount of contestation.\(^\text{72}\) This Protocol is not yet in force\(^\text{73}\) and widespread ratification and implementation in the region seems unlikely in the foreseeable future.\(^\text{74}\) But the Movement of Persons Protocol remains the prevailing official vision of the future of migration governance in the SADC. As a formal matter, at least, it marks the ideal to which the region is striving, and indeed the SADC Executive Secretary recently repeated the call for Member States to ratify the Facilitation Protocol, in recognition of the need to facilitate movement of people in normal times as well as during pandemics such as Covid-19.\(^\text{75}\)

Although the Movement of Persons Protocol in its preamble recalls the free movement of peoples vision of the SADC’s founding treaty described above, its operative provisions advance a significantly thinner conception of free movement. Indeed, during the drafting of the Protocol, South Africa introduced its own draft, which largely replaced the language of rights with that of ‘facilitation’ through ‘cooperation’.\(^\text{76}\) While the SADC Secretariat did not adopt South Africa’s draft, that draft nonetheless influenced the development of the Movement of Persons Protocol as finally adopted.\(^\text{77}\)

Article 2 declares the Protocol’s objective as being ‘the progressive elimination of obstacles to the movement of persons of the Region’, which it defines as persons with citizenship of a State Party to the Protocol. Articles 3 and 5 delineate the free movement progression as entailing three phases: ‘entry, residence and establishment’. Facilitating free movement is then about removing obstacles associated with under-
development, out-dated technologies, policy incoherence, state incompetence and lacking transnational cooperation (see Articles 9, 11, 12 and 13). These obstacles – based on the substance of the Movement of Persons Protocol, but also other SADC policy documents such as the Regional Poverty Framework – are presumed to exist predominantly at national borders between Member States and in interactions with national institutions.

The Movement of Persons Protocol ultimately provides only for a conditional right to free entry (Article 14), procedural and grounds-based protection from expulsion (Articles 22, 23 and 25), and a ban on indiscriminate collective discrimination (Article 24). Under Article 19, each State Party is obliged to grant permission for establishment, but within the ‘terms of its national laws’. This allows for significant national discretion and variation in the terms of establishment. The only obligation arising from the provisions on residence is to ‘ensure that the processing of such application is not unduly delayed’ (Article 17). All other positive and negative obligations established by the Protocol concern security and bordering, which we describe in more detail below.

The Movement of Persons Protocol facilitates entry to visit (Article 14(1)), in keeping with the permanent temporality imposed by national legal systems. Visitors are required to incur no cost for the host state (evidence of self-sufficiency, Article 14(2c)) and leave fairly quickly (entry for up to three months per year with the possibility of extension only in accordance with national law, Article 14(2a)). No article provides for access to the labour market, health care, education or any other state-regulated facilities. The Protocol provides that visa requirements for entry should be abolished (Article 13f); but entry is nonetheless conditional upon presenting oneself at an official border post, the possession of valid travel documents, and evidence of sufficient means of support.

By restricting the definition of ‘peoples’ to mean ‘every citizen of a State Party’, the Movement of Persons Protocol significantly reinforces its coloniality. In southern Africa, the citizen/non-citizen binary disregards the realities of contested citizenship and statelessness facing many in the region and across Africa more broadly – contestation shaped by the colonial history of the institution of citizenship.

---

78 Article 14(2) provides for visa-free admission on the condition that the maximum visit period is 90 days (with the possibility of extension), and that the visitor possesses a valid travel document and sufficient means of support for the duration of the visit; is not a prohibited person under the law of the destination country; and enters via an official port of entry.


era dynamics have also been linked to the modern-day institutionalisation of ethnic entitlements, rights, and privileges, which further exacerbate the problem of differentiated and unequal citizenship on the continent. Ethnically discriminatory citizenship means that privileging citizenship in regional migration governance can have implicitly racialising or ethniciising effects, in terms of whose freedom of movement in the region is protected and whose is not. Although the Movement of Persons Protocol requires State Parties ‘agree to make travel documents readily available to their citizens’ (Article 12(1)), this does little to address concerns with the institution of citizenship itself. It also does little to ensure equitable principles for access to the necessary travel documents.

Furthermore, formal availability of documentation can exist alongside de facto unavailability. In his study of ‘border jumping’ – ‘border crossings that avoid officially designated channels of movement from Zimbabwe to South Africa’ – Musoni finds that most people surveyed ‘resorted to border jumping only after they were denied documents such as passbooks, visas, or permits that would have allowed them to use official channels’. Article 14(2), mentioned above, introduces financial barriers to mobility – even for those in possession of passports, by conditioning admission on proof of sufficient funds for the duration of stay in the destination country. The exorbitant – arguably exploitative – expense of obtaining certified documents as proof that one satisfies immigration requirements is among the reasons that people cross borders irregularly or are unable to take up educational and employment opportunities in the region. Moreover, in southern Africa (with the exception of South Africa), the majority of employed people are employed informally and many people (especially women) run informal businesses, creating particular challenges to


82 Musoni (2020) 3, 5 and 147.


85 International Labour Organisation, Women and Men in the Informal Economy: A Statistical Picture (ILO, 2018) Appendix B. Only in South Africa does informal employment make up less than half (34 percent) of total employment (and this statistic does not take into account the economic impacts of restrictions imposed to curb the spread of Covid-19). The average rate of informal employment in for Angola, DRC, Comoros, Madagascar,
providing ‘evidence of sufficient means’ (Article 14(2)), which usually entails formal documentation. The effect of this sort of formal documentation regime and the expenses it incurs is arguably that bribery of officials and informal pathways become the only viable means of crossing borders. Even for the people with passports, and who are able to afford and obtain all the necessary documents, this documentation does not guarantee protection from harassment and abuse by border officials.

The Movement of Persons Protocol introduces into regional law the concept of ‘illegal movement’, a concept it carries forward from the colonial past over into the postcolonial present. Under Article 11(2)(e), States Parties undertake to cooperate in ‘preventing illegal movement of persons into and within the Region’. Other provisions require enforcement of documentation at border posts, cooperation between security authorities, and bilateral agreements (Articles 11(2e), 12, 14(2b) and 14(3)) – all of which become sites of production of illegality. As mentioned in Part 2, migrant illegality originated in colonial migration governance regimes that sought to control movement, and instead produced precarious mobilities. Thus while the concept of ‘illegal movement’ might seem necessary or inevitable from a contemporary governance perspective, prior histories of migration in the region were unencumbered by this colonial concept, which the SADC could have rejected.

An emphasis on border securitisation within the SADC framework further reinforces illegalisation. Provisions of the Movement of Persons Protocol commit Member States to introduce border surveillance technologies (Articles 9 and 12); to cooperate on security and perceived risks of free movement (Article 11(2)); and to harmonise immigration infrastructure and administration, particularly at border posts (Article 13). Although investment in border crossing infrastructure may be necessary to overcome obstacles such as significant border crossing delays, increased border infrastructure and controls will inevitably be used at least as much to prevent as much as to facilitate movement. The Southern Africa Strategic Plan of Action to Address Mixed and Irregular Migration, for instance, acknowledges the role that ‘restrictive borders’ play in producing irregular migration, ‘forcing vulnerable migrants to seek entry through increasingly dangerous means’ and creating a ‘very lucrative’ market for

Malawi, Tanzania and Zambia is 90 percent informal employment, while Botswana and Namibia’s share of informal employment fall between 65 to 67 percent.

**References**


87 According to empirical research by Moyo & Nshimbi (2020, 140), the attitudes of immigration and border officials and police stationed near the border are not related to immigration status but to nationality and ethnicity.

88 Musoni (2020) 15 and 29 makes the persuasive argument that migrant illegality and unauthorised border crossings are an ‘understudied legacy of European partition of Africa’, showing how with respect to the border between Southern Rhodesia and South Africa, ‘state-based controls of Africans’ movement had the effect of classifying cross-Limpopo mobility into some movements that were legalized and others that were illegalized.’
‘exploitative facilitation of movement’. Yet, during negotiations for the Movement of Persons Protocol, Member States rejected the idea of establishing a Regional Standing Committee on Free Movement and, instead, designated free movement to ‘the domain of the security establishment in the region’ – the Organ on Politics, Defence and Security (OPDS) (Article 29) – thereby ‘reinforce[ing] a risk-based approach to migration’. The OPDS then amended its Strategic Indicative Plan to include ‘illegal immigration’ among its State Security Sector and Police Sector objectives.

Governing migration on the basis of security risk reinforces border coloniality, by constructing migrants primarily as threats to the countries they wish to enter. This risk and threat framing, which typically feeds into and is fuelled by nation-state sovereignty and territorial integrity discourses, undercuts regional integration. Instead it emphasises border policing with a nationalist orientation, and advances the criminalisation of migrants. Some have argued that non-ratification of the Movement of Persons Protocol is what results in the dominance of national over regional interests and regulation. On our assessment, however, adoption of the Movement of Persons Protocol would still reinforce the dominance of the national over the regional on many issues. The Movement of Persons Protocol’s preoccupation with bordering between Member States reinforces the significance of national borders in the region and divisions between interconnected peoples and economies.

Furthermore, ongoing regional processes continue to shore up national borders. The SADC Guidelines for Coordinated Border Management (‘the CBM Guidelines’) offer an example. The CBM Guidelines were adopted by SADC Member States in August 2011 as a SADC Technical/Thematic Report. It is presented as a

92 Ibid.
95 For instance, Moyo & Nshimbi (2020) 133.
96 For instance, of the phases outlined in Article 5, entry is dependent on whether a person is ‘prohibited’ under national law (Article 14(2d)); residence is exclusively determined by national ‘legislative and administrative provisions’ (Article 16); and establishment is prescribed, but only ‘in terms of [the host state’s] national laws’ (Article 18 and 19).
97 The definition of ‘border’ in Article 1(2) highlights: “Border” means any common land border between any two Member States, or any airport used for flights within the Region, or sea port used for trans-shipment connections exclusively within the Region.”
trade facilitation instrument, like many of the border projects in the region. The main components ('pillars') of CBM are facially relatively harmless: intra-agency cooperation, inter-agency cooperation and international cooperation. However, underpinning this coordinated system of border management are normative ideas of exclusion, containment, securitisation and militarisation of movement, and the supremacy of sovereign rights over human rights. The working definition of ‘border control’ makes clear that border control is justified on the basis of movement, behaviour and activities not explicitly authorised by nation-states (default containment). Checks and surveillance are mainstreamed and made integral to border control activities. Who has the authority to perform border control, both at and outside authorised border crossing points, is left undefined, keeping the door open to privatisation and out-sourcing to international or non-state actors.

Under the heading ‘Need for a Border Surveillance Agency’ – without demonstrating any region-specific assessment of this ‘need’ – the Guidelines push for the establishment of dedicated border agencies or specialised border units within Member State police forces to avoid ‘illegal border crossing or lack of allocation of resources to border patrols’.

3.2 The Labour Migration Framework

Notwithstanding the broad objectives to which free movement of people is tied in the SADC’s founding Treaty, Figure 1 above shows a shift in migration governance momentum in SADC in which free movement of labour dominates. Indeed, the recent SADC Regional Indicative Strategic Development Plan 2020-2030 presents the Labour Migration Policy Framework as having been ‘implemented in the broad context of facilitation of movement of persons’ and does not mention the Movement

---


99 ‘EU, DFID, JICA and USAID are funding programmes with components for transit transport facilitation and one stop border posts. The main objective of these programmes is Trade Facilitation, which is one of the objectives of CBM’: SADC Draft Guidelines for Coordinated Border Management (August 2011) https://www.sadc.int/files/7613/7415/0086/SADC_Coordinated_Border_Management_Guidelines__Aug_2011.pdf (accessed 31 May 2021), at 11, footnote 4.

100 Border control is defined as ‘an activity carried out at a border in response exclusively to an intention to cross that border, regardless of any other consideration. It covers: (a) checks carried out at authorised border crossing points to ensure that persons, their vehicles and the objects in their possession may be authorised to enter the territory of the Member States or authorised to leave it; and (b) surveillance of borders outside authorised border crossing points and fixed hours, in accordance with this regulation, to prevent persons from passing border crossing points in order to avoid checks and enter or leave the territory of Member States illegally’: SADC Draft Guideline for Coordinated Border Management (2011).

101 One example of partial outsourcing is the allocation of database and data collection design to IOM and ILO.
of Persons Protocol. The Labour Protocol, however, does address ‘labour migration and migrant workers’ specifically under Article 19. Article 19 begins with commitment by states to ‘endeavour to improve migration management and control, and strengthen mechanisms to combat smuggling and human trafficking’. Notwithstanding this securitised framing, it also commits states to ‘endeavour to ... ensure that fundamental rights are accorded to non-citizens, in particular labour/employment and social protection rights’, ‘provide for the special needs of migrant women, children and youth’, and facilitate remittances and the portability of accrued social benefits.

The Labour Protocol further obliges states to try to ‘reach an agreement on a common approach towards immigration within the region’ and to ‘harmonise national legislation and policies and adopt a regional migration policy in accordance with international conventions to ensure the protection of the rights of migrants’ (Article 19(I)). Reading the obligation to ‘improve migration management and control’ in light of the general objective to facilitate labour mobility and the principles of equal treatment, equality of opportunity and non-discrimination enshrined in Article 7, the improvement required is, arguably, the minimising of distinctions between citizens and non-citizens in relation to access to and protection in labour markets. Unfortunately, this is not reflected in the Labour Migration Policy Framework, which is supposed to operationalise the Labour Protocol.

The Labour Migration Policy Framework explicitly acknowledges the regional history of coerced labour migration towards mines and plantations in colonial economic centres, the self-determining shift in the nature of the mobility of peoples in postcolonial southern Africa and resulting diversification, and the contemporary limitations of poverty. Yet, the Framework does not do enough critically to address colonial history, marginalisation, poverty, or the racialised and hegemonic concept of ‘skill’ that it deploys. It highlights the ‘need to harmonize immigration and labour legislations for the low-skilled’, ‘to better understand the current distribution of low-skilled migrant workers across countries and industrial sectors’ and ‘to educate workers, governments and employers’ organizations to low-skilled migrant workers’ rights’. But without – at a minimum – common baseline social protection or a rights


framework that can protect people against the power of states to exclude people from its territory and deny legal status to those present, harmonisation can in practice lead to a race to the bottom. Monitoring or emphasising people’s foreign status and lack of ‘skill’ can be a precursor to intensified and targeted exclusion.

Although the Labour Migration Policy Framework does less to emphasise the citizen/non-citizen distinction than the Movement of Persons Protocol, its policies reinforce at the regional governance level the simplistic distinctions based on ‘skill’ that are pervasive in national immigration policies. For example, section 3.3(iii) aims to ‘develop an integrated and evidence based strategy aimed at retaining existing skills within the sub-region, improving and expanding the skills pool within SADC and attracting new skills from outside the region that will contribute to the development of the region’s economy’. But, as has been shown elsewhere, notwithstanding the popularity of ‘skilled immigration’ among governments all over the world on the assumption that ‘skilled’ is ‘clearly definable and easily differentiated’ from ‘unskilled’ or ‘low-skilled’, the reality is rather different. In fact, for example, a review of ‘skill’ in immigration policies in five major Western jurisdictions revealed ‘gendered and racialised biases of existing approaches to skills definition’. Immigration policies based on ‘skill’, without any critical engagement with the meaning and classification of this term, can lead to discrimination and contribute to inequality.

The Labour Migration Policy Framework recognises that legal status of non-national workers is a significant issue and that informalisation and illegalisation facilitate vulnerability and exploitation. Yet, its proposed interventions consist of mapping inconsistencies in legal and policy frameworks regulating and sanctioning informal and illegal work, presumably with a view to correcting inconsistencies and strengthening enforcement. But informalisation and illegalisation are symptomatic of state failure to appreciate transnational interconnection, the absence of

108 Ibid.
109 Labour Migration Policy Framework (2013) 18
110 Labour Migration Policy Framework (2013) 19
opportunities for regularisation,\textsuperscript{112} and a general lack of incorporation of African people into formal citizenship\textsuperscript{113} and formal economies.\textsuperscript{114} In other words, correcting inconsistencies between national legal systems is insufficient to address problems that inhere in institutions and policies shared in common across these systems.

On the one hand, the Labour Protocol emphasises in Article 2 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'. But at the same time, the prevailing regional approach to migrant workers significantly commodifies them. The terms of their movement and incorporation are ostensibly subject primarily to national determinations about domestic labour needs, though in reality for many migrants it is the needs and whims of private corporations and employers, as well as capricious immigration enforcement that continue to determine their lived experiences. It remains the case that often the terms of employment of migrant workers (either legally through contracts and visa policies or an unauthorised basis) subject them to exploitation, or terms of living and working that deny their full humanity.

In sum, the dominant vision and approaches to regional migration governance offer little to empower people in southern Africa meaningfully to overcome the obstacles to movement and incorporation imposed by states and national borders. Emphasising binary distinctions between citizen and non-citizen, high-skilled and low-skilled, legal and illegal, permanent and temporary, and forcing those who move to ‘perform’ to legal categories such as asylum that serve national interests, produces and reproduces vulnerability,\textsuperscript{115} especially of marginalised groups, and feeds xenophobic politics. These categories also contribute to the filtering work that borders do, channelling people into different relationships with the host state and the communities they enter. Obstacles to movement and incorporation, weak and conditional rights, and illegalisation all remain tools by which national states can pick and choose between peoples of the region, boosting inequality and injustice. Securitisation of the regional governance frameworks also reinforces prejudice against movement, and results in severe consequences for marginalised groups and overuse of exceptional legal pathways, such as asylum.

\textsuperscript{112} Zanker & Moyo (2020).

\textsuperscript{113} Manby (2018); Khan (2020); Mbiyozo (2019).


\textsuperscript{115} See e.g. Loren B. Landau, ‘Southern Urbanism, Legalisation and the Limits of Migration Law’ (2017) \textit{111 AJIL Unbound} 165.
4 Rethinking Reform

Having outlined contemporary migration dynamics in the SADC, and the shortcomings of the prevailing regulatory regime, we turn now to the question of alternative, decolonial possibilities and what the pursuit of these possibilities might entail. Importantly, efforts to reform migration governance in the region already exist, but we begin by explaining how the prevailing reform momentum threatens to reproduce interventions that sustain the troubling patterns of exploitation and subordination we have highlighted above.

4.1 The Prevailing Momentum

A dominant reform trajectory in the region continues to prioritise and laud free movement of labour, which we argue is likely to reify inequality and subordination of groups who rely on migration for their livelihoods. Supporting the prominence of free movement of labour as a fundamental regime commitment, as outlined above, is policy scholarship and analysis that reproduces capitalist assumptions that link labour mobility to economic development.116 Typically, however, neoliberal emphasis on freedom of labour movement has tended to privilege certain forms of migration and cross border activity while undermining forms of cross border movement that are characteristic of the region. Emphasis on freedom of movement in the neoliberal frame has tended to undermine forms of migration central to economic survival strategies of some of the most marginalised groups in the region, including those predominantly undertaken by women as we discuss in more detail below.

In prior sections we highlighted the colonial influences that structure contemporary labour migration regimes, and even the institution of citizenship. SADC migration instruments draw heavily from European frameworks, and thus de facto maintain European influence on reform momentum. In significant respects, the Movement of Persons Protocol recalls the European Schengen Agreement, which facilitated free movement of EU nationals across EU Member State borders. For instance, the phasing of removal of national barriers, the emphasis on harmonisation, security and technological development and differential treatment of non-nationals from the region as compared to non-nationals from further afield. In fact, its Schengen-like nature was one of South Africa’s objections to the SADC’s first Free

---

Indeed, the SADC’s first Free Movement Protocol – as well as subsequent versions after this was rejected by Member States – were drafted by a Belgian expert on the European Schengen Agreement together with a prominent Zimbabwean lawyer.\(^{118}\)

Certain SADC policy instruments are not only modelled on EU equivalents, but blatantly copy-pasted from them, through drafting processes driven by European institutions. The CBM Guidelines represent, perhaps, the clearest example. The Guidelines, as they state themselves, are explicitly ‘largely based on the European Commission EuroAid Guidelines for Coordinated Border Management in EC External Cooperation, which themselves are based on best practices of the EU Member States and other countries, and have been used with great success in Eastern Europe’.\(^{119}\) The copy-paste approach to drafting is clear from an overlooked reference to the Schengen Convention in the working definition of ‘surveillance at external borders’ that was never removed from the SADC version.\(^{120}\) The use of European models is justified in the CBM Guidelines on the basis that the European regional border regime represents international best practice, because ‘[s]ome countries, like those of the European Union and of the Western Balkans, have developed a holistic and coordinated approach to border management which is the most effective way of achieving all state border objectives’.\(^{121}\)

The above assessment ignores the continuing violence exacted by the EU’s border regime and others based on the same principles and mechanisms (e.g. the American and Australian border regimes) since their emergence in the late 1980s, and the racialised, anti-African nature of the EU’s border regimes. Whereas for some, Schengen represents the ideal of regional free movement, it is free movement that has come at the price of deadly exclusion of non-EU nationals. Adopting the EU approach risks, at best, implementing a ‘Fortress SADC’ akin to the much-criticised ‘Fortress Europe’. Furthermore, as we discuss in Part 2, the current governance frameworks and the vision for reform in the SADC reify securitised national borders within the SADC. If EU external border surveillance and other practices are brought to bear on internal SADC borders, the risk becomes not only a world of ‘Fortress SADC’ but one

\(^{117}\) Oucho & Crush (2001) 141.

\(^{118}\) Oucho & Crush (2001) 143.

\(^{119}\) SADC Draft Guidelines for Coordinated Border Management (2011) 12. The success of the EU border management system is lauded in spite of evidence that EU border policies are violent and contrary to human rights principles and international law. The paragraph even mentions that the success of the guidelines in Eastern Europe resulted in similar guidelines being drafted for the Western Balkans, which were the site of a border crisis between 2014-2017, with devastating consequences for thousands of lives and communities in the border region.

\(^{120}\) SADC Draft Guidelines for Coordinated Border Management (2011) 9.

\(^{121}\) Ibid, 14.
of national fortresses within the region that even further undermine the decolonial mobility and migration that ought to be the priority for the region.

The extremely detailed, technical guidance and seemingly benign benefits of ‘coordinated border management’, such as ‘remov[ing] inter-agency rivalry and duplication of resources’, ‘facilitat[ing] implementation of the regional integration agenda’ and ‘clarify[ing] responsibilities and accountability of border agencies’,\textsuperscript{122} belie and are part of the transfer of normatively-laden problematic ideas and mechanisms that underpin violent First World border regimes. Such technical and normative reliance on uninterrogated European models implicitly results in those in the ostensible driving seat of migration governance in the SADC – southern African politicians, public servants and electorates – defining borders and measuring development against European or ‘Western’ standards and employing imported principles, categories and mechanisms to govern regional movement.

European development agencies also exert influence through donor-funded projects. The CBM Guidelines, for instance, were ‘prepared by the EU-funded Customs Modernization and Trade Facilitation project as one of the deliverables which will contribute to the integration agenda of the region’ and ‘greatly leverage the success of … various donor-funded regional projects’ related to ‘facilitating cross-border movements of people, transport and investment’.\textsuperscript{123} The SADC Secretariat requested the Guidelines be based on international best practices as well as the specifics of the SADC context. But most examples are drawn from the EU and those drawn from the region are drawn from sites that the consultant visited, all of which are donor-funded projects that implement CBM concepts.\textsuperscript{124} Thus the process of developing the CBM Guidelines seemingly did not incorporate examples of governance approaches developed to respond to germane, region-specific cross-border movement and instead relied on lessons drawn from how successfully EU-based approaches had been implemented in the region.

International organizations are also influential in shaping the SADC’s reform momentum. Due to the small size of the SADC institutions and limited funding from Member States, the SADC – like many of its Member States\textsuperscript{125} – is financially and normatively dependent on international organisations such as the International Labour Organisation (ILO) and the International Organisation for Migration (IOM). International organisations facilitate policy-making by (a) funding and facilitating

\textsuperscript{122} Ibid, 17.
\textsuperscript{123} Ibid, 11.
\textsuperscript{124} Ibid, 12-13: E.g. the one-stop border post between Zambia and Zimbabwe, CBM implementation in Zambia, and bilateral cooperation between Zimbabwe and South Africa at Beitbridge.
\textsuperscript{125} ACMS (2018) 3
meetings for Member State delegates on particular topics, (b) providing background information on issues in the region and examples (mostly from outside the region) of possible policy solutions, and (c) drafting legal and policy instruments for deliberation by Member States.

For example, the ILO played a key role in developing the 2020 Guidelines on Portability of Social Benefits, and the Guidelines for Bilateral Labour Agreements (BLAs) were drafted in 2016 by IOM and funded by IOM’s Development Fund Project on South-South Labour Mobility. The IOM and ILO have also been closely involved in the initiation and development of the Labour Migration Policy Framework and Action Plans. Indeed, these first emerged through the regional consultative process, MIDSA, which is sponsored and administered by the IOM. It is thus no surprise that these instruments adopt the frames of these organizations, and emphasise unidirectional knowledge transfer from international organizations to regional and national actors with no requirement that international organizations transform their operational and institutional assumptions to fit regional context.

Furthermore, the significant roles assigned to the ILO and IOM in executing the Action Plans demonstrate their influence in shaping labour migration governance in southern Africa. As data collectors and norm-setters that then inform policy-makers on the nature, scale and scope of cross border movements in the region, international organisations also contribute significantly to the process of framing regional understandings of migration. Migration policymaking in southern Africa is neither transparent nor democratic. For instance, bilateral agreements pertaining to

---

126 MIDSA is a regional consultative process sponsored and administered by the IOM and involving southern African states as well as SADC institutions. It was established in 2000 to promote a regional approach to migration management and to facilitate informal discussions about migration between ministries and governments of southern Africa. Technical meetings are held every few years around a chosen theme. Initially, these meetings involve the ‘technical’ level of governance, but in 2010 the first of three ministerial meetings were held. The outcomes of these meetings typically take the form of reports on proceedings and action plans, some of which are later legitimised through SADC processes. See IOM Regional Office for Southern Africa, ‘Regional Cooperation’ (2019), https://ropretoria.iom.int/regional-cooperation (accessed 26 May 2021); IOM UN Migration, ‘Migration Dialogue for Southern Africa (MIDSA)’, https://www.iom.int/migration-dialogue-southern-africa-midsa (accessed 26 May 2021).

127 Examples include the incorporation of ‘decent work’, ‘well-management migration policies’ and an emphasis on international frameworks, especially ILO Conventions.

128 For example, the Labour Migration Action Plan 2016-2019 makes frequent references to the need to ‘sensitise’ the public, national officials and state representatives to labour migration concepts and benefits. There is no similar mention of ‘sensitizing’ ILO/IOM to regional/national/local concepts and interests.

129 For instance, following the decision taken in 2017 that SADC meetings should begin with a symposium sharing country experiences on selected themes, IOM and ILO jointly presented on ‘Labour Migration in SADC’ at the 2018 Meeting of the SADC Ministers of Employment and Labour.

130 This is not a challenge unique to SADC, and indeed, democritisation of migration governance under certain conditions can lead to ascendance of xenophobic or otherwise discriminatory frameworks.
migration and border control are not readily available and, instead of consulting directly with migrant worker organisations, the SADC Secretariat invited the Geneva-headquartered, largely US-funded, IOM to present the perspective of migrant workers at a policy development meeting on portability of social benefits. Furthermore, the influence of these organizations extends beyond the regional to the national level – they are also playing a significant role in developing national migration policies in many southern African countries. Our point is not blanket condemnation of the financial, administrative and expert assistance provided to the SADC by international organizations and the European Union. Rather it is to highlight the normative and governance implications of this assistance, which ultimately orients the SADC’s governance framework and reform momentum toward the agendas and priorities of these international and European entities.

4.2 *De-Colonial Possibilities*

An important literature exists advocating for a decolonial approach to migration governance in southern Africa. To date, arguments and proposals for a decolonial approach, however, have not sufficiently been pursued in the law and policy scholarship. Our aim is to propose new strategies and priorities for realising decolonial governance alternatives, with an eye towards a different politics and momentum than those implicit in the reigning dynamics discussed above.

We view the most urgent decolonial intervention to be a fundamental change in the source of reform momentum in the region, and along with it, an epistemic shift – a shift in the knowledge producers and knowledge production interests represented in the design and implementation of regional migration governance. As we highlighted above, since the inception of SADC’s migration governance regime, expert knowledge has often meant European legal and policy expert knowledge or the reproduction of European and other First World interests through the propagation of transplanted policy such as CBM. At the centre of reimagining and building a regional migration governance framework, should be knowledge production expertise capable of and invested in decolonial futures.

Our argument here is not a call for rote ‘indigenisation’ of migration knowledge production in the SADC that would see contracts for research and policy

---

131 For example, national government websites have, at best, partial lists of these bilateral agreements and no guidelines for how the actual agreements might be obtained.

132 ACMS (2018) 2. ILO and IOM have also formally agreed to collaborate on assisting member states to develop labour migration policies, particularly in Namibia, Swaziland, South Africa, Zimbabwe and Lesotho: *Labour Migration Action Plan 2016-2019*, 2.2c.

133 Mhembe (2018); Mbiyozo (2019); Manby (2011).
proposals granted exclusively to southern African elite policy and legal experts. Among such elites and across the field of policy-oriented international law, formalism dominates and is colonially productive in that it reproduces the status quo. Rather we argue for a shift in power and perspective that would allow for the incorporation of the needs and interests of those most disenfranchised by the status quo into the process of developing a regional migration regime. This would need to include not only mobile populations but also those immobilised and trapped by poverty, displacement and dependency on second-tier, exploitative employment. This intersectional work is important, but, of course, profoundly complex. What might SADC law and policy look like if, rather than relying on European and other First World expertise through the IOM or ILO, policy-makers recognised and resourced relevant mobilisations, historians and other social scientists of the region to envision alternative institutions and logics of incorporation? Our point is not to presume an idealised precolonial past whose restoration would be a panacea, but rather to advocate for epistemological diversity in the conception of migration governance institutions, including by drawing inspiration from prior political histories of the region and the continent.

At a minimum then, a decolonial approach to regional migration governance should be rooted in developing and drawing upon knowledge production more capable of destabilising the status quo, which would involve investment in marginalised transnational peoples in the region such that they might mobilise to participate in reform initiatives. It would also require investment in national

134 Such formations would have to be structured and mobilised in ways that avoided the influence of local and national and political entrepreneurs of exclusionary polities and even violence, who have been shown to be instrumental, for example, in xenophobic violence in South Africa. See Jean Pierre Misago, ‘Political Mobilisation as the Trigger of Xenophobic Violence in Post-Apartheid South Africa’ (2019) 13 International Journal of Conflict and Violence 1.


137 Participation of populations impacted by SADC policies in the development of those policies is not unheard of in the region. The SADC Protocol on Transport, Communications and Meteorology, which entered into force in 1998, promotes inclusive, participatory development of regional development corridors aimed at ‘facilitating unimpeded access and travel between the territories of Member States’: Article 3.5(1). Article 3.5(5) provides for the establishment of ‘Corridor Planning Committees’ which shall be made up of a wide ranging, non-exhaustive list of representatives, including *(a) all modal transport operators … (b) border post authorities; (i) immigration authorities … (j) tourism groups; (k) users of corridor systems and facilities; and (l) any other stakeholders*. We have in mind, however, more central participation, especially of marginalised groups in the development of migration governance policies affecting them.
movements that are in tune with the regional political and socio-economic interconnection of the region rather than invested in reinforcing nationalist hierarchies. We recognise that this is a call for fundamentally different politics, but it would be disingenuous to propose shallow fixes for existential problems, which is what border problems are – not only in southern Africa but the world over.\textsuperscript{138}

Our proposal above amounts for a shift in method or process – a call for a reorientation towards presently epistemically and politically marginalised groups, as an important strategy for developing different, more emancipatory migration governance outcomes.

In addition to recommending this shift, we propose two substantive goals for reform. The first is that the SADC’s future migration governance regime should eschew tethering regional mobility and migration to the capacity to secure national passport and identity documents. As mentioned above, national documentation requirements reify inequality in access to mobility and migration, excluding marginalised ethnic and gender identities and socio-economic groups. Right now, the vision of free movement in the SADC builds into it the prerequisite of documented nationality but the regional regime should instead begin from a new and different template that rejects the coloniality of national borders. An alternative, for example, would be to use residence in the region (rather than citizenship of a SADC member state), proved through means available to marginalised groups such as membership in a local church rather than home ownership.\textsuperscript{139}

Repudiating the centrality of citizenship or nationality to regional governance must go hand in hand with an approach to this governance that begins from a baseline which recognises – and regards with suspicion – the colonial nature of the national borders of the region. This would require a sharp break from the current momentum, which implicitly and explicitly reifies national borders, both through fortification of territorial frontiers and retention of the significance of political borders through national passport and related requirements. As outlined in Part 2 of this article, and as historians such as Musoni have painstakingly shown, the logics that lay of the foundations of the national borders in the region were logics of capitalist exploitation

\textsuperscript{138} An important literature exists on the fundamentally flawed nature of national borders all over the world. See e.g., E. Tendayi Achiume, ‘Migration as Decolonization’ (2019) 71 Stanford Law Review 1509; Nadine El-Enany, (B)ordering Britain: Law, Race and Empire (Manchester University Press, 2020); Harsha Walia, Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism (Fernwood Publishing, 2021).

and socio-economic inequality. The strong enforcement of national borders in the region historically was pursued to advance settler colonial or apartheid projects in the region, and the most effective advocacy and implementation of greater transnational mobility was connected to the agricultural and mining needs of corporations and individuals that belonged to settler colonial classes.

Postcolonial initiatives to double down on national borders, including through the contemporary national security frame typically do not deliver the national or even regional benefits that are used to justify them. Just as anticolonial and anti-apartheid struggle in the region often involved contestation and rejection of the immobility imposed by colonial borders as freedom fighters illicitly crossed borders, contemporary decolonial strategy should involve contestation and subversion of the inherited national borders of the region. The subversion of these borders may seem inconceivable and unrealizable in a governance regime comprised of national governments, but it bears remembering that the history of anticolonial activism on the continent includes a commitment to transnational liberatory political formations. Reanimating these transnational liberatory ideals is admittedly a momentous project, but our aim here is simply to mark this reanimation as a priority with significant bearing on migration governance. To be clear, undoing border coloniality, from our perspective, would not be about redrawing national borders per se, but instead about remaking their meaning and effect, and more fundamentally, remaking the economic and political systems that give borders meaning. This is the mammoth task of decolonisation.

Where alternatives to territorial nationhood and contemporary national borders are concerned, the pre-colonial history of the region could better serve as a source of institutional inspiration. The history of the Lozi in Zambia, points to citizenship conferred through one’s primary residence in a ‘mound village’, with which was granted the right to garden land, as ensured by the king. At the same time, and given the transhumant nature of Lozi social and economic life, citizenship was to be enjoyed wherever a Lozi chose to live and move. As Paul Landau has argued, early states were ‘historically well equipped to embrace and absorb strangers. Hybridity lay at the core of their subcontinental political traditions’: traditions ‘related to ancient ideas informing people in southern, eastern, and central Africa more generally, had

143 Transhumance is a type of pastoralism or nomadism, a seasonal movement of livestock between fixed summer and winter pastures.
144 Meyer Fortes (1969).
amalgamation as [their] central strength’. History also offers alternative models of incorporation. Military states controlled by kings, such as the Zulu, Ndebele and Shona peoples, fully and socially incorporated conquered peoples into their kingdoms. Among the Mthethwa, Thuli, and Cele kingdoms of KwaZulu-Natal, for example, subordinated groups were incorporated into the body politic on broadly equal terms in order to foster closer identification between rulers and ruled in a layered and shared landscape, wherein ‘the ancestors of the most ancient inhabitants and the ancestors of more recent incomers are all present’. In sum, ‘what mattered was not so much where you lived [or moved] as to whom you acknowledged allegiance’. The point is not to idealise indigenous pasts as panaceas, but rather to consider them closely as viable epistemic sources for possible decolonial futures.

A second recommendation would be to abandon the neoliberal free movement of labour in favour of the free movement of persons because of the former’s neocolonial construction of labour and of movement. The alternative we propose is a movement and migration regime more in tune with the socio-economic and cultural interconnection manifest in the transnational livelihood and familial patterns of movement in the region today. Decolonised conceptions of socio-economic mobility would, for example, ensure the privileging of women cross border traders marginalised under the current regime. Indeed, existing SADC policies outside of migration governance offer possible starting points for alternatives, and are more aligned with the decolonial dimensions of SADC’s origins, which we highlight in the Introduction.

For instance, the Regional Poverty Framework explicitly identifies the removal of existing obstacles to crossing borders as both a pro-poor and women-empowerment policy. The Regional Poverty Framework critiques the Movement of Persons Protocol for failing to cater to the needs of informal cross-border trade or ‘unskilled’ circular/seasonal labour, which – if ‘promoted under transparent, supportive, consistent and credible policy frameworks at national and regional levels’ – could be key to addressing poverty challenges in the SADC. In particular, the Regional Poverty Framework highlights that informal cross-border traders contribute to employment, income, food security, for the traders as well as their families, communities and local and regional economies, with a multiplier effect for other markers of human development. Moreover, a significant proportion of informal cross-

border traders are women, yet ‘the majority of trade programmes, policies and frameworks are blind to women traders, especially those in the informal sector’ and ‘often undermine the livelihoods and well-being of women’. These criticisms hold true for the SADC’s emerging migration regime described above in Part 3.

We thus advocate developments towards a vision of free movement that has at its core the promotion and instantiation of self-determination among deeply interconnected peoples. As Achille Mbembe has remarked, ‘the aspiration to move unchained’ has ‘always been intertwined’ with African struggles for self-determination, because loss of sovereignty under colonialism went hand-in-hand with the loss of free movement—a loss that most Africans, including southern Africans, still feel today as they seek to move about the world, including within their own continent. Such a vision of free movement is arguably compatible with the idea of the SADC – the existing Movement of Persons Protocol states that free movement of persons in regional communities is a ‘stepping stone’ towards free movement of persons across the continent, which Solomon argues is a step towards the United States of Africa envisioned by Nkrumah and other Pan-African philosophers committed to anti-colonial transnational interconnection. Regionalism offers supranational opportunities for decolonisation, especially regarding cross-border issues such as international movement of people.

However, the issue of capacity, and the consequential influence that international organizations – and their donors – have over the direction, framing and practices of migration governance in southern Africa, must be acknowledged and moderated by alternative knowledge systems. Expertise within the region and from other regions with similar colonial history should inform policy development and be prioritised over that of international organisations and Western donors.

~

149 SADC & SARDC (2016) 54.
154 Aaron Kamugisha, Beyond Coloniality (Wits University Press, 2019).