

# The Right to Social Protection in Africa: From CCCCCDFPRTs to CLSPPPs

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## Abstract

The right to social protection has been enshrined in international law since the Universal Declaration of Human Rights in 1948, but only an estimated one in four people in the world, and less than one in ten in Africa, have effectively realised this right. A review of global declarations, covenants and conventions reveals that, while most countries have ratified these instruments, there are substantial gaps between ratification and implementation. Often this is explained by ‘progressive realisation’ and ‘variable geometry’, but there are other reasons why international law is rarely domesticated. In Africa, where many Constitutions include socio-economic rights, these are often not justiciable, because unaccountable international agencies drive and finance the social protection agenda, and because governments are resistant to rights-based approaches. Realising the right to social protection in Africa requires building a social contract between accountable states and citizens and residents, and an activist civil society to ensure compliance with national and international law.

## 1. Introduction

Rights-based approaches to social protection are increasingly regarded as normatively and instrumentally desirable. Ethically, a right to social protection is inclusive and promotes social justice (Barrientos, 2016; Hickey, 2014). Instrumentally, attaching rights to social services enables citizens and residents to claim benefits, and extends coverage to all who need assistance from the state, not only the ‘deserving poor’. ‘From a rights perspective there are no ‘undeserving poor’. All people, by virtue of their humanity, are deserving and entitled to

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the enjoyment of an adequate standard of living and a minimum level of social protection, at the very least" (Sepúlveda, 2014: 8).

In practice, however, global coverage of social protection remains extremely limited. According to the International Labour Organisation, only one in four (27%) of the world's population enjoyed access to comprehensive social protection as of 2012 (ILO, 2014: 2). Justiciable rights to social protection are even less widespread. In Africa, cash transfer programmes and other social protection instruments have proliferated rapidly since the late 1990s, but only an estimated 5–10% of Africa's population is covered (Fombad, 2013: 4) and most of these programmes are discretionary; very few are rights-based.

Social protection has no internationally agreed definition, but is generally understood as having two core components: social assistance (non-contributory social grants or social welfare) and social insurance (contributory social security schemes). "Together, social assistance and social insurance make up a country's social protection system" (Ferreira and Robalino, 2010: 2). This definition is sometimes criticised as being too narrowly focused on 'economic' rather than 'social' protection (Sabates-Wheeler and Devereux, 2007). Broader definitions typically add a third component: either labour market policies (favoured by the World Bank), access to social services (favoured by UNICEF), or social inclusion (favoured by the European Union).

What is the relationship between social protection and social security? In Africa, social protection typically refers to social assistance – unconditional cash transfers or social grants, labour-intensive public works, school feeding schemes – whereas social security refers to contributory social insurance schemes for formal sector workers – such as unemployment insurance and pension funds. Conceptually, however, social security generally covers both social assistance and social insurance. This is important because the relevant right in international law is usually expressed as the right to social security, not social protection, but for practical purposes the two terms can be regarded as interchangeable (ILO, 2014: 162).

This paper prefers a simple definition of social protection, from Zambia's National Social Protection Policy:

*"Policies and practices that protect and promote the livelihoods and welfare of people suffering from critical levels of poverty and deprivation and/or are vulnerable to risks and shocks" (Republic of Zambia, 2014: ix).*

Establishing a right to social protection implies that the state (as duty-bearer) is legally obligated to protect the welfare of all people under its jurisdiction (rights-holders) against poverty and vulnerability (Ulriksen and Plagerson, 2014). This right derives, at least partly, from international law. So how does the human right to social protection get cascaded and translated from the international level to the national level, and ultimately to households and individuals? At international level, numerous instruments – Conventions, Covenants, Charters, Codes, Declarations, Frameworks, Protocols, Recommendations and Treaties (CCCCDFPRTs) – have been drafted, signed and ratified by governments (State Parties), in

globally representative forums such as the United Nations General Assembly and the International Labour Conference. At national level, social protection is interpreted in government documents and actions – Constitutions, Laws, Strategies, Policies, Programmes and Projects (CLSPPPs) – and is delivered to citizens on either a rights-based or a discretionary basis.

But what is the causal pathway from the global recognition of a human right to social protection, to the individual person realising that right? Assuming that the ‘cascade model’ of policy adoption has some credibility, the implicit theory of change has four steps:

1. A country signs and ratifies various international instruments concerning the right to social protection.
2. The country imports and codifies these provisions into its Constitution.
3. Each national government implements policies, programmes and projects to realise these rights, underpinned by legislation to make them justiciable.
4. Civil society holds the government to account to deliver on the right to social protection, by invoking both national and international law.

Is this actually what happens in practice? This paper reviews the key instruments pertaining to the right to social protection in international law, then examines the application of this right at national level, drawing on several case studies from Africa.

## **2. International level: Conventions, Covenants, Charters, Codes, Declarations, Frameworks, Protocols, Recommendations and Treaties (CCCCDFPRTs)**

Most of the relevant international law comes from the United Nations (UN), on human rights, and from the International Labour Organisation (ILO) on social security and social protection. In terms of its application in Africa, relevant law derives from the African Union (AU) and regional bodies, notably the Southern African Development Community (SADC).<sup>1</sup>

Two major contributions to international law, and two ILO documents, are typically invoked whenever the human right to social protection is discussed: (1) the Universal Declaration of Human Rights (1948); (2) the International Covenant on Economic, Social and Cultural Rights (1966); (3) the Social Security (Minimum Standards) Convention (1952); and (4) the Social Protection Floors Recommendation (2012). In Africa, the main relevant document is the African Union’s Social Policy Framework for Africa (2009). However, many other instruments from the United Nations (including the ILO), African Union and SADC are relevant. The most important of these are listed in Table 1.

<sup>1</sup> SADC is only one of several regional bodies within Africa, but has been most active in terms of producing its own social protection instruments covering its 15 member states.

*Table 1. Key global and African instruments on social protection*

Decade	United Nations human rights – global	ILO social security – global	African Union + SADC social security – Africa
1940s	1948 Universal Declaration of Human Rights	1944 Income Security Recommendation	
1950s		1952 Social Security (Minimum Standards) Convention 102	
1960s	1966 International Covenant on Economic, Social and Cultural Rights	1964 – 2000: Specific Conventions and Recommendations relating to: Employment Injury Benefits (1964); Invalidity, Old-Age and Survivors Benefits (1967); Medical Care and Sickness Benefits (1969); Maintenance of Social Security Rights (1982); Employment Promotion and Protection against Unemployment (1988); Maternity Protection (2000)	
1970s	1979 Convention on the Elimination of All Forms of Discrimination against Women		
1980s	1989 Convention on the Rights of the Child		1981 African Charter on Human and Peoples' Rights (OAU)
1990s	1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		1992 Treaty of the Southern African Development Community (SADC)
2000s	2006 Convention on the Rights of Persons with Disabilities		2003 Charter of Fundamental Social Rights in SADC 2007 Code on Social Security in SADC 2008 Social Policy Framework for Africa (AU)
2010s	2015 Sustainable Development Goals	2012 Social Protection Floors Recommendation 202	

Source: author, compiled mainly from Mpedi and Nyenti (2015)

### 2.1. United Nations – human rights law

The United Nations (UN) is an international association of member states with wide-ranging objectives, from maintaining international peace and security to promoting “respect for human rights and for fundamental freedoms for all” (United Nations, 1945). The UN has

produced several seminal instruments – declarations, covenants and conventions – that speak directly or indirectly to social protection from a rights-based approach.<sup>2</sup>

### 2.1.1. Universal Declaration of Human Rights (UDHR) [1948]

The term ‘social protection’ did not feature prominently in the lexicon of international law until the Social Protection Floors Recommendation (202) of 2012. However, the right to ‘social security’ has been included in international human rights law since the Universal Declaration of Human Rights (UDHR) of 1948, which proclaimed that “everyone, as a member of society, has the right to social security” (Article 22). By ‘social security’, the UDHR appears to cover social assistance, social insurance and social services, as it refers – implicitly or explicitly – to all three of these components:

*“Everyone has a right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (Article 25(1)).*

The term ‘social protection’ itself appears twice in the UDHR:

*“Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other forms of social protection” (Article 23(3)).*

*“Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection” (Article 25(2)).*

How binding is the UDHR? “Although the UDHR, as its name suggests, is not a treaty and thus not binding … its provisions have been extensively incorporated into numerous international and regional instruments as well as national constitutions and there have been numerous affirmations of its special status in judicial decisions, there is no longer any doubt that the principles contained in the UDHR are rules of customary international human rights law” (Fombad, 2013: 8).

How universal is the Universal Declaration of Human Rights? The General Assembly of the UN had less than 60 member countries in 1948, and only 48 voted for the UDHR, while none voted against and eight abstained. Of only four African member states of the UN General Assembly in 1948, Egypt, Ethiopia and Liberia voted in favour, but South Africa abstained. However, since the UDHR has become customary international law, all countries, even those that were not UN members or independent states in 1948, are bound

2 Many of the most directly relevant instruments have been produced by the International Labour Organisation (ILO), a United Nations specialised agency. These are discussed separately in the following sub-section.

by the main principles of the UDHR, unless they explicitly state that they do not feel bound by it.<sup>3</sup>

### 2.1.2. International Covenant on Economic, Social and Cultural Rights (ICESCR) [1966]

The ICESCR, along with its companion the International Covenant on Civil and Political Rights (ICCPR), aimed to establish pragmatic mechanisms at national level for realising the rights enshrined in the UDHR. The ICESCR is more relevant for this paper, because it focuses on economic, social and cultural rights and includes specific provisions for social policy. Several Articles in this Covenant are very similar to Articles in the UDHR, notably: “The State Parties to the present Covenant recognise the right of everyone to social security, including social insurance” (Article 9).

State Parties undertake to “take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (Article 2(1)). ‘Progressive realisation’ is an important qualification because it allows governments to sign up to international commitments without being duty-bound to deliver on these commitments immediately – it depends on available economic and technical resources. This Article also recognises that low-income countries might need international aid to finance the costs of delivering rights that are fiscally expensive, such as the universal right to social security.

As of October 2016, 43 of 48 countries in Africa had ratified the ICESCR. Botswana, Mozambique and South Sudan have neither signed nor ratified the ICESCR. The Comoros and São Tomé and Príncipe have signed but not ratified the ICESCR.<sup>4</sup> Nelson Mandela signed the ICESCR in 1994, but South Africa did not ratify the ICESCR until 2015.

### 2.1.3. Group-specific Conventions

Several international Conventions are designed to protect and promote the human rights, including the right to social protection, of specific vulnerable groups: notably women, children, persons with disabilities, and migrant workers.

The **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**, adopted in 1979, aims “to eliminate discrimination against women in order to ensure to them equal rights with men” (Article 10). CEDAW refers specifically to women enjoying “the same rights” as men to “social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave” (Article 11(1e)); and that women should “benefit directly from social

3 Markus Kaltenborn, *pers. comm.*

4 <http://indicators.ohchr.org/>.

security programmes" (Article 14(c)). No mention is made of social protection, social assistance or social welfare programmes, only to gender equality in respect of "The right to family benefits" (Article 13(a)). Some gender-specific social protection measures are provided for, notably that: "States Parties shall take appropriate measures [to] introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances" (Article 11(2b)). CEDAW has been ratified by all African countries except two: Somalia and Sudan.

The **Convention on the Rights of the Child (CRC)**, adopted in 1989, recognises the right of every child to benefit from social security, and obligates State Parties to take the necessary measures to realise this right. The CRC recognises that the social protection needs of children are contingent on the circumstances of their parents or caretakers: "The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child" (Article 26(2)). This right is placed adjacent to "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" (Article 27(1)). This suggests that social protection is regarded as one mechanism for achieving child development. The CRC has been ratified globally by all 196 state parties except one – the United States – and by all African countries.

The **Convention on the Rights of Persons with Disabilities (CRPD)**, adopted in 2006, recognises "the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability" (Article 28). 39 African countries have ratified the CRPD. Four African countries have signed but not ratified the CRPD (Cameroon, Central African Republic, Chad, Libya), and five African countries have neither signed nor ratified the CRPD (Botswana, Equatorial Guinea, Eritrea, Somalia, South Sudan).

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**, adopted in 1990, aims to protect access to social protection for migrant workers in both their home country and their destination country. "State Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their State of origin" (Article 61). "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" (Article 27).

The objective is to ensure that migrant workers do not lose access to social protection while they are working abroad, while at the same time preventing 'double-dipping': "State Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect" (Article 61).

#### 2.1.4. Sustainable Development Goals (SDGs) [2015]

Social protection was not mentioned at all in the Millennium Development Goals (2000), but is included in three of the 17 Sustainable Development Goals (SDGs). Under SDG 1

(end poverty), target 1.3 commits states to: “Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable”. Under SDG 5 (gender equality), target 5.4 commits states to “Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies”. Under SDG 10 (reduce income inequality), target 10.4 commits states to “Adopt policies, especially fiscal, wage and social protection policies, and progressively achieve greater equality”.

The SDGs are not legally binding and cannot be enforced, though progress towards achieving the goals will be monitored at national and global levels. Nonetheless, the United Nations argues that they are “morally binding” and that governments should be held accountable to deliver them.

*“Commitments such as ending abject poverty, and freeing the human race from want, are often referred to as “imperfect duties”, as non-fulfilment of such commitments cannot be easily attributed to a specific duty holder. At the national level, imperfect duties are not justiciable. At the international level, commitments such as those of the Millennium Declaration are largely voluntary and, therefore, not enforceable … The above notwithstanding, these imperfect obligations are morally binding. Governments are accountable to the peoples to whom these commitments are being made”* (United Nations Department of Economic and Social Affairs, 2015: 5).

Some critics have argued that, while the SDGs represent a laudable set of global social policy aspirations, they fail to strengthen the architecture of global social governance, and might even undermine these institutions. “The SDGs document embodies a reversal in policy-making away from a concern to construct improved global governance institutions back to an era of strengthening national sovereignty” (Deacon, 2016: 116).

## 2.2. ILO – global social security law

The International Labour Organisation (ILO) is a specialised United Nations agency with a unique tripartite structure, with representatives from governments, employers and workers’ groups. The ILO establishes international standards for labour, including social security.

### 2.2.1. Income Security Recommendation (ISR) [1944]

Although most analyses of the history of social protection in international law start with the Universal Declaration of Human Rights of 1948 and the Social Security (Minimum Standards) Convention of 1952, the Income Security Recommendation (ISR), adopted by the International Labour Conference in 1944, actually predated and laid the foundations for both.

The Income Security Recommendation (ISR) drew a clear distinction between ‘social insurance’ and ‘social assistance’. These are the two pillars of all contemporary definitions

of ‘social protection’. As a tripartite organisation representing employees, employers and the state, it is logical that ‘income security’ should be defined in relation to contributory social insurance schemes for formally employed workers. But the ‘Preamble’ emphasises the need for “the extension of such schemes to all workers and their families, including rural populations and the self-employed”, an ambition that has preoccupied the ILO ever since.

The ‘Preamble’ to the ISR refers to familiar employment-related insurance schemes, such as “workmen’s compensation … and provision for unemployment”. The ‘Guiding Principles’ assert that income security schemes should restore “income which is lost by reason of inability to work … [or] the death of a breadwinner”, and that: “Income security should be organised as far as possible on the basis of compulsory social insurance”. However, it is recognised that compulsory contributory schemes do not reach all categories of workers. “Self-employed persons should be insured against the contingencies of invalidity, old age and death under the same conditions as employed persons as soon as the collection of their contributions can be organised.”

Importantly, however, the ‘Guiding Principles’ also recognise the need for income security to be provided on the basis of ‘social assistance’ to “other persons in want” who are “not covered by compulsory social insurance” – “particularly dependent children and needy invalids, aged persons and widows”. The ISR then specifies the range of contingencies for which social insurance should be paid, mostly related to loss of earnings due to temporary or permanent inability to work (sickness, maternity, invalidity, old age, death of breadwinner, unemployment, emergency expenses, and employment injuries). Social assistance is prescribed for all “persons in want”, but special attention is paid to children, invalids, aged persons and widows who are not receiving social insurance benefits. Children should receive “[p]ublic subsidies in kind or in cash”, school meals, low-cost housing, and/or children’s allowances.

## 2.2.2. Social Security (Minimum Standards) Convention 102 [1952]

This Convention established minimum standards for the provision of nine branches of social security: medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit; and survivors’ benefit. The Convention also prescribed rules for setting benefit payments, and for equal treatment of non-national residents. Between 1964 and 2000, separate Conventions and Recommendations were adopted for eight of these benefits (all except family benefit). Only 54 countries worldwide have ratified Convention 102, only seven of which are in Africa: Chad, Democratic Republic of Congo, Libya, Mauretania, Niger, Senegal and Togo.<sup>5</sup> It might be questioned whether these seven countries – among the poorest in the world – have

5 Source: NORMLEX (ILO).

the fiscal and administrative capacities required to effectively implement these social security provisions.

### 2.2.3. Social Protection Floors Recommendation 202 [2012]

In 2012 the International Labour Conference adopted Recommendation 202, ‘concerning National Floors of Social Protection’. The Recommendation affirms that “the right to social security is a human right”, and it exhorts Members to establish “basic social security guarantees” over the life-cycle, comprising access to essential health care and basic income security for children, working-age adults, and older persons. The social protection floor can be built progressively, and it has two dimensions: horizontal (coverage should extend to all residents) and vertical (adequacy of benefits and quality of services).

Recommendation 202 is not a convention, so it is not binding and does not require ratification. However, the ILO monitors whether the Recommendation has been submitted to competent authorities country by country. According to the ILO’s NORMLEX database, Recommendation 202 has been submitted in the following 18 African countries: Algeria, Benin, Cabo Verde, Cameroon, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Kenya, Mauritania, Morocco, Namibia, Senegal, South Africa, Tanzania, Uganda and Zimbabwe.

### 2.3. *Africa – social security law*

The African Union (AU) was established in 2000 as a successor to the Organisation of African Unity (OAU). According to Mpedi and Nyenti (2015: 50): “The establishment of the AU puts human rights firmly on the African agenda”. The Constitutive Act of the AU affirms a commitment by African states “to promote and protect human and peoples’ rights”.

#### 2.3.1. African Charter on Human and Peoples’ Rights (ACHPR) [1981]

There is no explicit mention of social protection or social security in this OAU Charter. However, the right to social assistance from the state is implicit for designated vulnerable groups. “The State shall have the duty to assist the family ... The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs” (Article 18).

In 2015 the African Union took a decision that Member States should actively pursue a rights based approach to social protection for all citizens, which would be codified by the African Union Commission developing an additional protocol to the African Charter on Human and Peoples’ Rights – the Protocol on the Rights of Citizens to Social Protection and Social Security (Strijdom, 2016: 5).

### 2.3.2. Social Policy Framework for Africa [2008]

The Social Policy Framework “guides African countries in promoting the rights and ensuring the welfare of their people, especially marginalised and excluded categories” (Mpedi and Nyenti, 2015: 73). Social protection is identified in the Framework as a key thematic social issue. Suggested measures to achieve comprehensive social protection include extending or subsidising social insurance schemes, strengthening community-based insurance schemes (building on African solidarity principles), employment guarantee schemes (following India’s National Rural Employment Guarantee Act (NREGA)), and social welfare schemes (including non-contributory cash transfers). A minimum package of essential social protection is identified that is very similar to the Social Protection Floor components – access to essential health care for all, and “benefits for children, informal workers, the unemployed, older persons, and persons with disabilities” (Mpedi and Nyenti, 2015: 73).

### 2.4. SADC – social protection

The Southern African Development Community (SADC) is one of eight Regional Economic Communities of the African Union, with 15 member states. Its objectives include achieving development and poverty reduction across southern Africa, through regional integration and the coordination of national socio-economic policies.

#### 2.4.1. Treaty of the Southern African Development Community [1992]

The SADC Treaty is legally binding on all SADC member states. Although there are no explicit references to social protection in the Treaty, it is implicit in several articles, notably the ambition to alleviate poverty and support socially disadvantaged people through policy harmonisation. For example, “member states need to develop and coordinate their social security systems and ensure that SADC citizens do not forfeit their social security entitlements as they move about in the region” (Mpedi and Nyenti, 2015: 90)

#### 2.4.2. Charter of Fundamental Social Rights in the SADC [2003]

The Charter advocates for “the establishment and harmonisation of social security schemes” (Article 2) and asserts that “every worker in the Region shall have a right to adequate social protection” and that persons who have “no means of subsistence shall be entitled to receive sufficient resources and social assistance” (Article 10). Other articles make specific provision for gender equity in access to social protection (Article 6), protection of children (Article 7), pensions or social assistance for older persons (Article 8), and “additional concrete measures” for persons with disabilities (Article 9).

#### 2.4.3. Code on Social Security in the Southern African Development Community [2007]

The Code on Social Security guides SADC member states in the development and progressive improvement of social security schemes, to a level where everyone in the region is covered, including immigrants. The code defines the following terms: social assistance (“minimum income support”), social insurance (“income maintenance”), social security (protection against income insecurity), and social protection (“social security and social services, as well as developmental social welfare”) (Article 1).

The Code is explicitly rights-based: “Everyone in SADC has the right to social security” (Article 4). Persons with insufficient means of subsistence “should be entitled to social assistance” (Article 5), social insurance should be extended to the entire working population and the informal sector (Article 6), and social protection should be availed to migrant workers and refugees (Article 17).

Many provisions to the Code on Social Security append this clause – “in accordance with the level of socio-economic development of the particular Member State” – which effectively allows governments to defer implementation of the right to social security in favour of ‘progressive realisation’, until resources become available. Mpedi and Nyenti (2015: 94) explain this clause in terms of “the principle of variable geometry … where a group of member states could move faster on certain activities and the experiences learned replicated in other member states.”

### 3. National level: Constitutions, Laws, Strategies, Policies, Programmes and Projects (CLSPPPs)

Most African countries have ratified the major international instruments on social protection discussed above, many have included the right to social security in their Constitution, and a handful have enacted relevant legislation and implemented rights-based social protection policies. Mozambique, for instance, passed a Social Protection Law in 2007, “which defined social protection as a right for all citizens and established the legal basis for the social protection system” (United Nations in Mozambique, 2015: 7).

However, the theory that international CCCDFPRTs on social protection drives the adoption of a rights-based approach to national social policies is apparently contradicted by countries such as Ethiopia, which has ratified, *inter alia*, the African Charter on Human and Peoples’ Rights and is a signatory to the African Union Social Policy Framework for Africa, but implements one of the largest social protection programmes in Africa, the Productive Safety Net Programme (PSNP), on a purely discretionary rather than entitlement basis.

In fact, most African countries display large gaps between their international and national commitments to social protection rights on paper, and their realisation, institutionalisation and accountability in practice. In aid-dependent countries, the extent to which social protection policies and programmes exist is driven largely by influential donors. In coun-

tries where resources for social protection are mobilised locally rather than externally, social protection policies and programmes are driven mainly by domestic political agendas, not by international law.

Six country case studies are briefly reviewed here, illustrating what Fombad (2013: 6) has described as “severe backlogs in the delivery of social security rights in Africa”.

### *3.1. Zimbabwe*

Zimbabwe’s National Social Protection Policy Framework (NSPPF) of 2016 adopts multiple approaches, one of which is ‘social protection as a human right’: “people have rights and entitlements to social protection and the State has an obligation to provide minimum essential services that can ensure an adequate standard of living” (Government of Zimbabwe, 2016: 24). This is grounded in the Constitution of Zimbabwe, which affirms that “the state must take all practical measures within the limits of the resources available to it, to provide social security and social care to those who are in need” (Section 30).

Moreover, “Zimbabwe is a signatory to a number of international and regional conventions, covenants and declarations which refer to various aspects of social protection, although it is still to ratify some of the conventions. None the less Zimbabwe’s social policies and social legislation are informed by these instruments” (Government of Zimbabwe, 2016: 16). These include the Universal Declaration of Human Rights, the ICESCR, the UN Conventions on the Rights of the Child and of Persons with Disabilities, and the African Union’s Social Policy Framework.

Despite this plethora of rights-based instruments, Zimbabwe is a paradigmatic case of a country that has failed to translate its international and national commitments into social protection entitlements for its citizens. The NSPPF concedes that less than 20 per cent of Zimbabwe’s population are currently covered by social security schemes (Government of Zimbabwe, 2016: 20). Most Zimbabweans work in the informal economy where they have no access to social insurance, and very limited access to social assistance.

Zimbabwe’s protracted economic crisis has also severely curtailed the government’s ability to deliver the right to social security and social care, as promised in the Constitution. For example: “The Older Persons Act provides for the care and support of elderly persons. However, the government is struggling to fulfil its obligations under the Older Persons Act because of resource constraints” (Government of Zimbabwe, 2016: 22).

### *3.2. Tanzania*

The Constitution of the United Republic of Tanzania, adopted in 1977, affirms some basic human rights, but very few social rights other than “the right to access education” (Article 11(2)) and that “Every person has the right to work” (Article 22(1)). However, Tanzania has ratified the ICESCR, CEDAW, CRC and CPRD, and more recently it has submitted Recommendation 202.

In 2010 the Social Security Regulatory Agency (SSRA) was established, to strengthen the legal framework and coverage of social insurance schemes in Tanzania. The government also adopted “the National Policy Framework for Social Protection … with the aim of undertaking reforms of existing social protection measures to reach the poor and vulnerable better. The framework shall progressively extend coverage of social protection measures to all” (United Republic of Tanzania, 2014). The government reaffirmed its commitment to social protection by issuing the ‘Arusha Declaration on Social Protection in Tanzania’ in 2014.

In reality, social protection coverage in Tanzania is extremely low and is implemented in ways that are antithetical to a rights-based approach. Over 40% of the population lives in poverty, and only 12% of the economically active population have jobs in the public or private sector, with access to social security.

The largest social assistance scheme is the Productive Social Safety Net (PSSN), a conditional cash transfer programme that targets extremely poor households, who are required to undertake certain behavioural ‘co-responsibilities’ as a precondition for receiving regular cash transfers. The design and financing of the PSSN has been led by the World Bank, which advocates for conditionalities, public works and poverty targeting, all of which contradict a rights-based approach and universal access to social protection. As a consequence, “the majority of Tanzanians have no access to social protection provisions and rely instead only on informal systems of support” (Ulriksen, 2016: 5).

### *3.3. Zambia*

There is little recognition of relevant international law in most ‘first generation’ national social protection policies or strategies in Africa, but some ‘second generation’ policies or strategies are exceptions to this rule. Zambia’s National Social Protection Policy of 2014, for example, notes that Zambia is a signatory to several global and regional instruments, including the Universal Declaration of Human Rights, the UN Conventions on the Rights of the Child and of Persons with Disabilities, and the African Union’s Social Policy Framework. The Policy commits the Zambian Government to enact a Social Protection Act, and to “domesticate social protection-related International Conventions” (Republic of Zambia, 2014: 18-19).

Zambia’s National Social Protection Policy of 2014 asserts that: “All Zambian citizens have the right to Social Protection” (Republic of Zambia, 2014: 11). However, in a revealing reflection on the legislative framework for social protection, the Policy acknowledges that the Constitution and existing legislation are inadequate for ensuring that poor people in Zambia can effectively claim their right to social protection from the state.

“In the current legislative framework, no explicit provisions exist for Social Protection. The Constitution as the supreme law of the land does not recognise economic, social and cultural rights in a way to make them justiciable. Provisions for social protection are reflected very narrowly to provide for these rights. This does not guarantee the provision of

social protection for life contingencies in its entirety, to explicitly include social assistance, social security, social health insurance, livelihoods and empowerment and protection. This leaves out the majority poor who are unable to support themselves and are entitled to government protection" (Republic of Zambia, 2014: 5).

### *3.4. Kenya*

In 2011 the Ministry of Gender, Children and Social Development in Kenya finalised the National Social Protection Policy (NSPP). A number of programmatic interventions are identified, including social assistance (cash transfers, food aid, affordable health care), social security (health insurance schemes, pensions, unemployment, healthcare, sickness and maternity benefits), livelihood promotion (conditional cash transfers, public works, school feeding), and transformative measures (statutory minimum wages, anti-discrimination legislation and fee-free education policies).

The right to social protection in Kenya is assured by its progressive recently adopted Constitution (2010), which obligates the state to "provide appropriate social security to persons who are unable to support themselves and their dependents" (Article 43). In practice, however, under-coverage remains a major challenge for both social assistance and social insurance. Many social assistance programmes are pilot projects that are intended to scale up, but currently reach only a fraction of poor Kenyans. Similarly, social security schemes cover formally employed people in Kenya, but the NSPP recognises the urgent need to extend social security coverage to some eight million informal sector workers who are not protected.

The NSPP also states that the government is "planning longer-term programmes in accordance with the UN/ILO Social Protection Floor (SPF) Initiative" (Omilola and Kaniki, 2014: 8). As discussed above, the Social Protection Floor is a rights-based approach – governments should guarantee access to basic health care and basic income security for all. The Government of Kenya is gradually extending coverage of social assistance programmes, but at present no access to social protection in Kenya is rights-based.

### *3.5. Lesotho*

Lesotho's National Social Protection Strategy (NSPS) adopts the life-course approach, a needs-based rather than rights-based framework. "This life-course approach recognises that all citizens are exposed to different vulnerabilities through the course of their lives, and that social protection has to be responsive to these differing vulnerabilities" (Government of the Kingdom of Lesotho, 2014: v).

On the other hand, one of the ten 'Principles' of Lesotho's NSPS asserts that the Strategy is rights-based. "Social protection should promote the progressive realisation of human rights as articulated in Lesotho's constitution and other relevant national and international legal instruments" (Government of the Kingdom of Lesotho, 2014: 10). The NSPS also

refers to the need for legislation and to Recommendation 202, as underpinning its rights-based approach. “Lesotho’s rights-based social protection framework should be grounded in a national legislative framework. This follows Recommendation 202 of the ILO on national social protection floors” (Government of the Kingdom of Lesotho, 2014: 28).

The core social protection interventions identified in Lesotho’s NSPS include some that are discretionary (poverty-targeted) and some that are rights-based (universal). Discretionary programmes include a monthly child grant targeted to all extremely poor households, and a monthly public assistance grant to anyone who requires temporary support. Rights-based programmes include a universal monthly cash grant for all infants under 2 years old, a disability grant to all citizens with severe disabilities, and a universal social pension to all citizens over 68 years old.

“The Old Age Pensions Act was passed in January 2005, making it politically almost impossible to revoke and giving all eligible citizens a legal basis for claiming their entitlement” (Devereux and White, 2010: 70). This social pension became ‘positively politicised’ during the election campaign of 2007, when the governing party and the main opposition both promised to increase the pension amount substantially if they were elected. Post-election surveys confirmed that this pledge was a factor that influenced the voting behaviour of many voters (Devereux and White, 2010: 71). This provides an exemplary case study of how rights-based approaches can empower poor people, encourage active citizenship<sup>6</sup> and strengthen the social contract between states and citizens.

### 3.6. *South Africa*

South Africa is often applauded as a paradigmatic example of how economic and social rights should be realised. Since the democratic transition in 1994 South Africa has introduced progressive rights-based legislation to underpin its social policies; the right to social security is specified in the 1996 Constitution; the government is implementing a wide range of social protection policies and programmes, delivering benefits to millions of citizens and residents; and civil society has played a constructive activist role, holding the government to account and ensuring that these rights are delivered by the state.

The (implicit) theory of change is this:

1. After 1994 South Africa ratified several CCCCCDFPRTs pertaining to the right to social protection.
  2. South Africa also codified these provisions into its post-apartheid Constitution (which is widely and justifiably applauded as one of the world’s most progressive constitutions).
- 6 Following Ulriksen and Plagerson (2014: 760), in this paper “[w]e do not understand active citizenship as part of neo-liberal trend in Western welfare states that prizes self-reliance and where active citizenship is arguably promoted to decrease citizens’ dependence on public welfare provisions. Instead, we emphasize here the idea that citizens are capable and active agents that already fulfil a range of obligations.”

3. The ANC government then implemented a number of measures to realise these rights, notably the extensive social grants system, which now reaches more than a quarter of the population.
4. Whenever the government was slow or reluctant to act on the promises of the Constitution, civil society intervened to ‘nudge’ the government into doing the right thing.

But is this an accurate analysis of what happened in South Africa, and why? Recall that South Africa never ratified the UDHR.<sup>7</sup> Also, South Africa did not ratify the ICESCR in 1966, only signed it in 1995, and finally ratified it in 2015 – after a lengthy and protracted campaign by civil society. In the meantime, South Africa’s new Constitution was enacted in 1996, the Child Support Grant was introduced in 1998, and the Social Assistance Act was promulgated in 2004.

*“In 1996, a new Constitution for the Republic was enacted providing for justiciable socio-economic rights (SERs). The public’s belief in the new Constitution, and the government’s commitment to promoting and defending it, might explain the initial delays in not ratifying the ICESCR immediately. South Africa’s experiment in democracy had just begun and the country could be forgiven for grasping the opportunity to chart its own constitutional course” (McLaren, 2015).*

So the theory of change is flawed. The rapid evolution of a rights-based approach to social protection in South Africa does not reflect adherence to, domestication and application of international law, but was rather the outcome of the post-apartheid political settlement – an entirely domestic policy process.

South Africa now has the most extensive social protection system in Africa, most of it entitlements-based and underpinned by legislation. The Social Assistance Act (2004) regulates the administration of 7 social grants: the child support grant, older person’s grant, disability grant, foster child grant, care dependency grant, war veteran’s grant, and grant-in-aid. All these grants are means-tested rather than universal, but they are rights-based: anyone who meets the eligibility criteria can claim their benefits as an entitlement from the state. Moreover, the Act extends eligibility not only to South African citizens, but also to permanent residents and refugees residing in South Africa (Mpedi and Nyenti, 2015: 163).

Social insurance is regulated by the Unemployment Insurance Act (2001), the Pension Funds Act (1956), the Medical Schemes Act (1998), the Compensation for Occupational Injuries and Diseases Act (COIDA) (1993), and the Road Accident Fund Act (1996).

Another powerful domestic driver in South Africa is civil society, which has driven substantive reforms to social protection programmes, often by resorting to litigation – taking the government to court – to expand eligibility and access on the basis of the justiciable right to social security. For example, civil society successfully campaigned for raising the

7 Only eight countries did not ratify the UDHR. South Africa’s abstention has been explained as being “for the protection of the system of *apartheid*, which clearly violated any number of articles in the Declaration” (Danchin, n.d.).

age eligibility threshold for the Child Support Grant (CSG) from 14 to 18 years, based on the legal definition of a child: “if the state has adopted a measure, such as the CSG, to give effect to the social assistance rights of children, it cannot discriminate against older children by withholding that measure from them. Such discrimination amounts to a violation of the right to equality in s9 of the Bill of Rights” (Proudlock, 2011: 156).

#### 4. Discussion

At the international level, most CCCDFPRTs are not legally binding in international law. However, they have become widely accepted as the basis of ‘customary international human rights law’. Nonetheless, the right to social protection is not justiciable internationally, and it is highly unlikely that it will ever be enforced by intergovernmental bodies such as the International Criminal Court (ICC), for at least two reasons. Firstly, although there is no legal distinction between different categories of human rights, in practice there is clearly a hierarchy: violations of economic, social and cultural rights rank much lower than violations of civil and political rights. No government has yet been prosecuted for failing to uphold, for example, Article 26(1) of the UDHR, which states unambiguously that “Education shall be free”.<sup>8</sup> Secondly, even in the most extreme cases of crimes against humanity – war crimes and genocide – it has proved extremely difficult for the international community to successfully prosecute national governments or even named individuals for such gross violations of international law.<sup>9</sup>

At the continental level, the right to social protection is far from being realised in most African countries, where the majority of the population work in the informal economy or as self-employed smallholders – sectors that remain “largely uncovered by social protection provisions” (Strijdom, 2016: 4). Social security systems cover formally employed workers against employment-related risks, while social assistance programmes such as cash transfers and public works projects provide patchy but incomplete coverage to poor families, mainly in rural areas and very rarely rights-based.

The African Union has been criticised for its failure to ensure that human rights, including the right to social protection, are realised in Africa. Many explanations have been advanced for this, mostly related to implementation constraints:

- 8 The main mechanism for censuring countries is ‘naming and shaming’ by the UN Committee on Economic, Social and Cultural Rights, in its ‘observations’ on the periodic reports submitted by countries on their implementation of the International Covenant on Economic, Social and Cultural Rights (see, for example, CESCR 2016).
- 9 Ultimately, states participate in international organisations on a voluntary basis, and they can ignore judgements against them with impunity, or even withdraw from such organisations. In 2016, Burundi withdrew from the ICC following international condemnation of President Nkurunziza’s decision to stand for a third term in violation of Burundi’s Constitution, and subsequent election-related violence and alleged abuses of human rights. South Africa also attempted to withdraw from the ICC in 2016, after being censured for failing to arrest Sudanese President Al-Bashir, who was indicted for war crimes by the ICC in 2009, when he visited South Africa in 2015.

*“lack of the necessary resources and political backing by human rights institutions and mechanisms to compel the respect of human rights; organisational and financial challenges faced by the AU; the fragmented and uncoordinated nature of human rights institutions, which affects their effectiveness; the challenges of endemic poverty, unemployment, corruption, disease and conflicts; the varying levels of development and governance by African countries; toothless implementation and enforcement mechanisms; varying approaches to the domestication of international and regional instruments; failure of countries to comply with requirements to report on the domestic implementation of ratified instruments; and a lack of political will” (Mpedi and Nyenti, 2015: 85).*

At the national level, three questions must be asked. (1) Does the right to social protection exist (in the Constitution, in ratified Conventions, in national law, etc.)? (2) If so, can the right to social protection be enforced (is it justiciable)? (3) Is the right to social protection actually enforced (e.g. through case law) and realised?

The primary recourse for advocates of the right to social protection is each country’s Constitution. As Proudlock (2011: 168) asserts, “an explicit justiciable constitutional right to social assistance provides the ultimate protection”. Many African Constitutions do explicitly provide for the right to social protection or social security.<sup>10</sup> However, even if a constitutional right to social protection exists, translating this into a justiciable right for which governments can be held accountable requires clarity on which specific entitlements are provided for, and who is eligible to claim these entitlements. “Without clarity on what people have a right to and how such rights translate into specific entitlements or endowments it becomes difficult to push a social protection agenda” (Taylor, 2012: 13). Also essential are mechanisms for making the right enforceable. “The right to social security can be meaningful and effective only if there is a mechanism provided, ideally in the constitution, for ensuring that it can be enforced and violations of it sanctioned” (Fombad, 2013: 16).

In terms of justiciability based on the Constitution, Fombad (2013: 16-18) identifies two patterns across 30 African countries. In the first cluster are countries with Constitutions that make socio-economic rights explicitly non-justiciable, by labelling them as ‘fundamental objectives’ or ‘principles of state policy’, which are not enforceable by the courts (e.g. Lesotho, Nigeria, Sierra Leone, Tanzania). Alternatively, the right to social security is not legally enforceable because it is mentioned only in the preamble to the constitution (e.g. Cameroon, Uganda). In most francophone countries in Africa, violations of constitutional rights can be reviewed by an administrative or judicial body, but not by the courts, which also makes the right to social security essentially non-enforceable.

10 Fombad (2013) reviewed 30 Constitutions in Africa, and found that the right to social security is included in 14 of them, but only two of these – South Africa (1996) and Kenya (2010) – specify this right in detail.

In the second cluster are countries with Constitutions that make socio-economic rights justiciable, by allowing disputes about rights to be brought before the courts. This is more common in anglophone Africa. The Constitutions of South Africa and Kenya place the onus for progressive realisation of the right to social security on the State, by taking appropriate legislative, policy and other measures. So the right exists and is justiciable in theory. Kenya's Constitution even includes provisions to make it justiciable in practice. Recognising that poor and marginalised people are most vulnerable to having their rights violated, but are least able to resort to the courts because they do not have knowledge of the law and cannot afford legal representation, the Constitution of Kenya requires the state to minimise access barriers to legal recourse (Article 22(3)).

## 5. Conclusion

Why do some governments introduce progressive legislation, such as the human right to social protection, while others do not? Three drivers of these policy processes can be identified, at international, national and sub-national levels.

From the international community, the CCCCCDFPRTs that governments have ratified exert some moral pressure, but this is implicit and weak, because these instruments are not enforceable and because the principle of progressive realisation allows governments to defer the realisation of economic and social rights almost indefinitely. If the provisions in CCCCCDFPRTs are incorporated into national CLSPPPs, this is most likely because they provide useful guidelines, not because governments fear prosecution or global censure if they fail to do so.

Domestic political processes need to be closely scrutinised on a country by country basis, to understand what drives decisions around social policies at national level. On the one hand, governments could benefit politically from introducing progressive social protection policies, because delivering transfers makes them popular and garners votes ('positive politicisation'). So political self-interest – not 'what's right' or 'what works', but 'what's popular' (Devereux and White, 2010) – is one important driver. On the other hand, many governments are apprehensive of the fiscal costs and potential legal challenges that are associated with rights-based approaches. While the former point explains the recent proliferation of social protection programmes throughout Africa, the latter point might explain why the overwhelming majority of these programmes have been discretionary rather than rights-based.

A complicating factor is the role of international development partners – multilateral and bilateral donors, United Nations agencies, international financial institutions (World Bank, International Monetary Fund) and international non-governmental organisations (NGOs) engaged in service delivery and advocacy in African countries. As Barrientos (2016: 161) observes: "International advocacy for social protection often offers social rights as an imperative for developing countries". On the other hand, these international actors are not directly accountable to citizens in the developing countries to which they provide tech-

nical and financial assistance, and programme participants or beneficiaries cannot claim entitlements from the external actors who fund these projects. In fact, “in aid-dependent countries, the influence of donors militates against domestic political ownership of social assistance programmes” (Barrientos, 2016: 161), which compromises the implementation and realisation of a right-based approach to social protection.

At the sub-national level, civil society activism can play a catalytic role in ensuring that rights-based approaches are on the political agenda, and in holding the government accountable to deliver these rights. However, this requires an enabling political environment: government must be tolerant of an adversarial civil society, and must be amenable to the demands of citizens mobilised through civil society campaigns to claim their rights. Although the ongoing expansion of social protection throughout Africa is an encouraging trend that must be supported, too few African governments meet both these tests of bottom-up democratic accountability.

Building a ‘social contract’ for the right to social protection that is underpinned by legislation and actively realised by an accountable state requires civil society to exert constant pressure and scrutiny from below, challenging political self-interest at national level and complementing international law from above.

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