

Social Protection Instruments and Women Workers in the Informal Economy: A Southern African Perspective

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Abstract

The world of work has changed and in some instances a realisation now exists that certain forms of work are a reality and not a passing occurrence, and it is of the utmost importance that international regulation provides for this, including work in the informal economy. Specific vulnerable groups and challenges have been identified by international regulators and must now be addressed to extend protection to these workers. International regulation must promote freedom through the enhancement of the capabilities of these workers. International instruments can function as key strategic tools to address inequalities in the workplace by increasing the capabilities of vulnerable groups such as women through empowerment initiatives. The purpose of this contribution is to identify and critically consider the relevant international social security instruments of the ILO and the UN, the impact of international standards, and other global initiatives directed at the social protection of women workers in the informal economy.

Keywords

Women; informal economy; international instruments; social protection; equality.

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1 Introduction

International institutions are playing an increasingly important role in the empowerment of women, in the promotion of equality and decent work for all women, and in providing countries with technical assistance to achieve these goals.¹

In South Africa international standards play a particularly important role in the development of labour law and are also a source of customary international law.² After 1994 the new constitutional dispensation recognised the importance of international labour standards as an intrinsic part of a democratic country.³ In *S v Makwanyane*⁴ the Constitutional Court stated that for the purpose of section 39(1)(b) (then section 35(1) of the interim Constitution of 1993) public international law includes binding and non-binding law. The Court then specifically refers to the reports of

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¹ See for example UN Millennium Goals, such as the eradication of poverty, the promotion of gender equality, decent work and economic growth and reduced inequalities (UN 2015 <http://www.un.org/millenniumgoals>). Also see the Sustainable Development Goals (UN 2015 <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>).

² Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution) provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law, and s 39(1)(c) provides for the consideration of foreign law. S 233 as follows: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

³ See s 39(1)(b) of the Constitution. The South African Constitutional Court, in line with the interpretation clause and an explicit purposive approach, has used ILO conventions and recommendations as benchmarks and as important interpretative tools in a number of labour law judgments, to extend protection to workers. See *SA National Defence Union v Minister of Defence* 1999 20 ILJ 2265 (CC) paras 26 and 30, where the Court refers to art 2 of the *Freedom of Association and Protection of the Right to Organise Convention* 87 (1948); *NUMSA v Bader Bop (Pty) Ltd* 2003 3 SA 513 (CC) paras 29-31 where the Court refers to the *Freedom of Association and Protection of the Right to Organise Convention* 87 (1948), the *Right to Organise and Collective Bargaining Convention* 98 (1949) and the two key supervisory bodies, namely, the Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee. In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 26 and 45 reference is made to the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) as a guide to the interpretation of s 26 of the South African Constitution. This judgment was delivered before South Africa ratified the Covenant.

⁴ *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

specialised agencies such as the International Labour Organisation (ILO) to provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.⁵ The specific status accorded to international law by the Constitution and the application of international law when interpreting legislation and the Bill of Rights can play a very important role when considering the extension of labour and social protection to vulnerable workers and when promoting decent work for all in South Africa.⁶

South Africa also re-joined the ILO on 26 May 1994 and has since ratified all eight of the fundamental conventions.⁷

The purpose of this contribution is to identify and critically consider the relevant international social security instruments of the ILO and the United Nations (UN), the impact of international standards, and other global initiatives directed at the social protection⁸ of women workers in the informal

⁵ *S v Makwanyane* 1995 3 SA 391 (CC) para 35. The Court also refers to comparable human rights instruments such as those drawn up by the United Nations Committee on Human Rights. Binding international instruments applicable to social protection and labour protection will thus form part of binding laws, and courts interpreting fundamental rights will be obliged to take these instruments into account. Various international conventions relevant to social protection measures have been ratified by South Africa, among them the *Convention on the Rights of the Child* (1990) (ratified in 1995) and, recently, one of the most important instruments, namely, the ICESCR. This document was initially signed by President Nelson Mandela in 1994; however, South Africa ratified the ICESCR only in 2015, making it the 164th state party to the ICESCR. South Africa has ratified 27 ILO conventions of which 23 are currently in force. South Africa has ratified all 8 of the fundamental conventions of the ILO (see ILO 2020 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO::>).

⁶ Van Niekerk *et al Law@work* 32. Furthermore Van Niekerk *et al* state the following: "First, the *Constitution of the Republic of South Africa*, 1996 expressly recognises international law as a foundation of democracy ... Secondly debates on the social dimensions of globalisation have emphasised the importance of international labour standards not only as a benchmark for the evaluation of domestic legislation, but also as a basis for regulating global trade and establishing norms to guide actions of companies ..." (Van Niekerk *et al Law@work* 23). S 1(b) of the *Labour Relations Act* 66 of 1995 (the LRA) describes a purpose of the act as to give effect to the country's obligation as a member state of the ILO.

⁷ Before rejoining, South Africa was a member state from 1919 to 1966. It must also be noted that in s 1 the LRA provides in specific terms for the purpose to give effect to the country's obligations as a member state of the ILO. A link is then provided between its primary objects and the interpretation of the Act in s 3, which provides for an interpretation of the Act in compliance with public international law obligations. The *Employment Equity Act* 55 of 1998 (the EEA) also contains an interpretative clause in s 3; furthermore, in s 2 the *Basic Conditions of Employment Act* 75 of 1997 (the BCEA) shares the purpose of the LRA in terms of South Africa's international obligations but contains no express interpretative clause. Also see Du Toit *et al Labour Relations Law* 78-79.

⁸ In 2002 the Taylor Committee stated the following: "Moreover, the development paths of African economies and developing countries require a fresh look at social

economy. These considerations will assist in drawing up recommendations on how to meet the many challenges that women in the informal economy face.⁹ International and regional instruments can function as key strategic tools to address inequalities in the workplace by increasing the capabilities of vulnerable groups such as women through empowerment initiatives.¹⁰ However, the aim of the contribution is to focus on relevant international instruments.

2 The United Nations

The UN is an international organisation established in 1945 and based on the principle of sovereign equality. The purposes of the UN include the maintenance of international peace; the development of amicable relations between nations; the achievement of international cooperation in solving problems of an economic, social, cultural and humanitarian nature; and the promotion of human rights and fundamental freedoms without discrimination.¹¹ Article 7 of the *Charter of the United Nations and the Statute of the International Court of Justice* (1945) (UN Charter) makes provision for the main organs of the UN, namely, a General Assembly,¹² a

protection systems more appropriate to their environment and needs. The reality is that in the developing world, formal sector employment may never become the norm it is in Europe ... The European concept, primarily that of contributory social insurance, took its basic assumption that social security would develop around formal sector employment. As a result, social security is often described as measures to protect against 'loss of (formal wage) income'. Such a conception is therefore of limited relevance to Africa and the developing world, where the risk of 'insufficient' income (formal or informal) is invariably more prevalent than 'loss' of income" (Committee of Inquiry *Transforming the Present* 101). For the purpose of this study social protection is used as the wider concept and must be distinguished from social security. Social protection can be seen as a system of social support, not linked to the regular employment relationship. The wider notion is particularly important to workers in the informal economy, where a regular employment relationship is absent. The term refers to a system of general welfare support and protection (Olivier "Concept of Social Security" 26).

⁹ See Kalula, Okorafor and Bamu "Towards an Effective Regulatory Framework" 15.

¹⁰ Kolben "Labour Regulation, Capabilities and Democracy" 70.

¹¹ Article 1 of the *Charter of the United Nations and the Statute of the International Court of Justice* (1945) (the UN Charter). The UN currently has 193 member states. The preamble reaffirms faith in human rights, in the dignity of people and in equal rights for all. Unlike its predecessor, the League of Nations, the UN has a larger focus on socio-economic matters (see Davies and Woodward *International Organizations* 119).

¹² The General Assembly consists of members of the UN and may discuss issues on any matter within the scope of the UN Charter. The functions and powers of the General Assembly are set out in arts 10-22.

Security Council,¹³ an Economic and Social Council,¹⁴ a Trusteeship Council,¹⁵ a Secretariat¹⁶ and an International Court of Justice.¹⁷

2.1 UN instruments

2.1.1 *The Universal Declaration of Human Rights (1948)*

The aim of this discussion is to consider the core UN human rights instruments applicable to women workers in the informal economy. The *Universal Declaration of Human Rights* forms the corner stone of the UN's protection and promotion of human rights. The Declaration contains certain important provisions in respect of women workers in the informal economy, such as the right to equality;¹⁸ the prohibition of discrimination;¹⁹ freedom of movement;²⁰ the right to own property;²¹ the right to peaceful assembly and association;²² the right to equal access to public service;²³ the right to work; protection against unemployment; equality in the workplace; the right to social protection, including social security;²⁴ and the right to education.²⁵ Human rights are protected and promoted through the High Commission for Human Rights,²⁶ the Human Rights Council,²⁷ and human rights treaty bodies.²⁸ The *International Covenant on Civil and Political Rights* (1966) and

¹³ The main function is the maintenance of peace. The functions and powers are discussed in arts 24-26 of the UN Charter.

¹⁴ The Council can initiate studies and reports in respect of international economic, social, cultural, educational, health and other related matters, make recommendations in respect of human rights and fundamental freedoms, and draft conventions in this regard. The functions and powers are set out in arts 62-66 of the UN Charter.

¹⁵ The functions and powers are discussed in arts 87-88 of the UN Charter.

¹⁶ See arts 97-100 of the UN Charter. Nearly half of the UN Secretariat is devoted to socio-economic matters (see Davies and Woodward *International Organizations* 116).

¹⁷ This is the main judicial organ of the UN and members undertake to comply with the decisions of this court in any case to which they are parties. See arts 92-96 of the UN Charter.

¹⁸ Articles 1 and 7 of the *Universal Declaration of Human Rights* (1948) (the UDHR).

¹⁹ Article 7 of the UDHR.

²⁰ Article 13 of the UDHR.

²¹ Article 17 of the UDHR.

²² Article 20 of the UDHR.

²³ Article 21(2) of the UDHR.

²⁴ Article 24 of the UDHR. This article also recognises that mothers and children need special care and assistance.

²⁵ Article 26 of the UDHR.

²⁶ This office is responsible for the protection and promotion of human rights, and comments on human rights situations around the globe.

²⁷ The Council is the main independent UN governmental body responsible for human rights.

²⁸ These are committees of independent experts that monitor the implementation of core international human rights treaties. Provision is also made for independent

the *International Covenant on Economic, Social and Cultural Rights* (1966) are together referred to as the International Bill of Human Rights.

2.1.2 *The International Covenant on Economic, Social and Cultural Rights (1966)*

The *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR) entered into force in 1976.²⁹ Important provisions for women workers in the informal economy include the equal right of women and men to the enjoyment of all economic, social and cultural rights in the Covenant and the fact that state parties must ensure this equal enjoyment.³⁰ Article 6 provides for the right to work,³¹ and takes cognisance of the importance of an integrated approach to support this. This integrated approach obliges governments to provide technical and vocational guidance, training programmes and policies to achieve the economic, social and cultural development necessary to attain the full realisation of this right.³² This approach supports the empowerment of vulnerable workers to ensure sustainability. Article 7 lists factors that contribute to decent work for all and equal treatment in the work place.³³ It is important to note that the wider concept of "workers" is used, thereby including vulnerable workers in the informal economy that would fall outside the scope of the traditional notion of "employee". Social security,³⁴ the social protection for women during and after child birth,³⁵ the right to an adequate living and the right to enjoy the highest attainable standard of physical and mental health are also recognised.³⁶ There is a flexibility clause in respect of developing countries which allows for developing countries to consider their economies in determining the extent to which they can guarantee economic rights to non-

experts to work on a voluntary basis to monitor, report and advise on human rights issues from a country or report from a thematic perspective.

²⁹ This Covenant was ratified by the following SADC countries: Angola; the Democratic Republic of the Congo; Lesotho; Madagascar; Malawi; Mauritius; Namibia; Seychelles; South Africa; Swaziland, the United Republic of Tanzania; Zambia and Zimbabwe (UN 2017 <http://indicators.ohchr.org>; also see Mpedi and Nyenti *Key International, Regional and National Instruments* 14).

³⁰ Article 3 of the ICESCR.

³¹ This includes the opportunity to freely choose a living.

³² Article 6(2) of the ICESCR.

³³ These include fair wages, equal remuneration, safe and healthy working conditions, equal opportunities and regulations in respect of working time.

³⁴ Article 9 of the ICESCR.

³⁵ Article 10 of the ICESCR. Provision is made for paid leave or adequate social security benefits.

³⁶ Article 11 of the ICESCR. State parties must take steps to ensure the realisation of the right to an adequate standard of living. In respect of health, provisions are made for the reduction of the still-birth rate and infant mortality.

nationals.³⁷ Article 2(1) requires state parties to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of their available resources, with a view to progressively achieving the full realisation of the rights recognised in the present Covenant by all appropriate means, including in particular the adoption of legislative measures. See the internal limitation in section 27(2) of the South African Constitution, which provides as follows: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights." Reference is made to the rights to health care, food, water and social security. With reference to this flexibility clause, the governments of Madagascar and Zambia have postponed the implementation of Article 13(2) with reference to primary education as a result of its financial implications and other challenges, in particular in respect of implementation.

The abovementioned rights are thus not absolute, since provision is made for state parties to subject the rights to limitations determined by national laws.³⁸ For developing countries or middle-income countries this principle in international instruments can often create budgetary and implementation challenges. However, the flexibility clauses allow these countries to exclude certain groups, and often vulnerable groups such as women and children, from its scope.³⁹

2.1.3 The Convention on the Elimination of All Forms of Discrimination against Women (1979)

The *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) entered into force in 1981 and is important to all women. This Convention recognises that discrimination against women violates the principle of equality and respect for human dignity, and neglects the contribution of women to the family and society.⁴⁰ This Convention has

³⁷ Article 2(3) of the ICESCR. Also see Mpedi and Nyenti *Key International, Regional and National Instruments* 14.

³⁸ See art 4 of the ICESCR. The limitations are determined by law only in so far as this may be compatible with the nature of these rights for the purpose of promoting the general welfare of a democratic society (see Mpedi and Nyenti *Key International, Regional and National Instruments* 12).

³⁹ Olivier "Gender Discrimination in Labour Law and Social Security" 233.

⁴⁰ Discrimination is defined in art 1 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW) as "any distinction, exclusion or restriction made on the basis of sex which has the purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

been ratified by all Southern African Development Community (SADC) countries except Angola. India and Brazil have also ratified this instrument; but both countries have indicated that they are not bound by article 29(1). Mauritius has also indicated this and Lesotho noted that the country is not bound by article 2, with specific reference to the law of succession to the throne of the Kingdom of Lesotho, and the law of succession to the chieftainship. Article 29(1) refers to the resolution of disputes between state parties with reference to the interpretation and application of the Convention. If a dispute remains unresolved it may be submitted for arbitration, and if the parties cannot reach an agreement the matter can be referred to the International Court of Justice.

The recognition of women's contributions to the family and society is important for women workers in the informal economy as their work is often undervalued and their contributions are not recognised in societies with particular reference to their contributions to economies.⁴¹ The Convention calls for state parties to prohibit discrimination in policies and provide constitutional and legislative protection to ensure equality between men and women and to eliminate discrimination in all matters.⁴² Important policy considerations in the Convention include the obligation on state parties to take measures to modify social and cultural patterns of conduct between men and women, to eliminate stereotyping, and to ensure a proper understanding of the role of women in respect of maternity as a social function.⁴³ CEDAW calls for equal rights in respect of education,⁴⁴ employment (including employment opportunities, remuneration and benefits), social security, health and safety in the work place,⁴⁵ and health care, specifically during pregnancy, confinement, and postnatal care.⁴⁶ Like the instruments of the African Union (AU), the Convention takes cognisance of the importance of the empowerment of women in the quest for gender equality and supports an integrated, sustainable approach by providing for equal treatment in respect of access to bank loans, mortgages and other

⁴¹ Care work and domestic work are often seen as the everyday duties of women workers in the informal economy, disregarding their contribution to families, society and the economy of the country. Domestic workers in return allow many women for whom they work to enter or re-enter the work force since they take care of the household chores of a family.

⁴² Articles 2 and 16 of CEDAW.

⁴³ Article 5 of CEDAW.

⁴⁴ Article 10 of CEDAW.

⁴⁵ Article 11 of CEDAW. This article also calls for the prevention of discrimination on the grounds of marriage and maternity.

⁴⁶ Article 12 of CEDAW.

financial services.⁴⁷ These provisions mean that women in the informal economy who require financial services, such as self-employed street vendors, should have equal access to these essential services. Article 14 explicitly deals with the challenges that rural women face, and addresses these challenges in a comprehensive manner by obliging state parties to ensure that these women participate in planning at all levels. This article promotes substantive equality by recognising the particular vulnerabilities of rural women and specifically addressing these challenges. State parties should ensure that these women have access to adequate health care, training and education, are allowed access to financial services, receive equal treatment in land issues and have the right to organise self-help groups and cooperatives.⁴⁸ The Convention recognises that women can benefit from other organisations, such as cooperatives, which may more effectively represent their needs.⁴⁹ Social protection measures include housing, sanitation, electricity and water supply, and state parties must ensure that women have an equal right to decent living conditions.⁵⁰

The Convention provides extensive protection against discrimination to all women and promotes equal treatment in all respects. However, the actual implementation by state parties remains problematic.⁵¹ This instrument also addresses many of the challenges faced by women workers in the informal economy and provides sustainable solutions,⁵² although many of these challenges persist in numerous countries that have ratified the Convention.⁵³ These challenges often exist in developing countries due to

⁴⁷ Specifically with regard to self-employed women in the informal economy, equal treatment in this respect can promote their standard of living and assist them in reaching more sustainable solutions. See arts 13 and 14 of CEDAW.

⁴⁸ Article 14(2)(e) of CEDAW.

⁴⁹ Other workers' organisations such as co-operatives, and member-based organisations are often better equipped to provide a voice for these workers

⁵⁰ Article 14(2)(h) of CEDAW.

⁵¹ South Africa, for example, has a constitution that provides for equal rights (s 9 of the Constituion) for all and supports the notion of substantive equality. However, domestic workers remain excluded from the provisions of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 and the enforcement of their labour rights through labour inspectors remains problematic.

⁵² The Convention recognises that discrimination against women is often deeply rooted at various levels, including at a societal level, and that in order to overcome this, issues must be addressed at this level within communities. Art 5 of CEDAW places an obligation on state parties to take appropriate measures to create an understanding of the social function of women. Participation by women on all levels is encouraged (see arts 7 and 8). Sustainable solutions also include equal access to education, including educational information on health and family well-being (art 10) and access to vocational training (art 11).

⁵³ See Kalula, Okorafor and Bamu "Towards an Effective Regulatory Framework" 18-19.

a lack of resources and economic constraints. In the SADC, the challenges include extreme poverty, income inequality and the HIV pandemic.

One then needs to question the effectiveness of the Committee on the Elimination of Discrimination against Women in monitoring the progress made by countries in implementing these rights.⁵⁴

2.1.4 Other UN instruments

In respect of women workers, other UN instruments and provisions that may have an impact on the social protection of these workers include the equality principle in the *Convention on the Rights of Persons with Disabilities* (2006) (CRPD);⁵⁵ the *Convention on the Rights of the Child* (1989) (CRC);⁵⁶ the *International Covenant on Civil and Political Rights* (1966) (ICCPR)⁵⁷ and the *Declaration of Commitment on HIV and AIDS* (2001).⁵⁸ Racial discrimination is condemned in the *Convention on the Elimination of All Forms of Racial Discrimination* (1965) (CERD).⁵⁹ Many women workers in the informal economy represent a previously disadvantaged racial group and are vulnerable as a result of this. In South Africa most domestic workers, informal traders and waste pickers are African women, and thus

⁵⁴ See art 17 of CEDAW.

⁵⁵ This Convention requires the equal treatment of people with disabilities by state parties as well as their right to social protection. Brazil and India are state parties to this Convention. Botswana is the only SADC party that has taken no action with reference to this instrument.

⁵⁶ The best interests of the child are of paramount importance and provision is made for social security benefits for children. This Convention has been ratified by all state parties except for the US, which is the only state party that is only a signatory.

⁵⁷ Forced labour and slavery are prohibited (art 8 of the *International Covenant on Civil and Political Rights* (1966) (ICCPR)). State parties to this instrument include all SADC countries.

⁵⁸ This Declaration deals with care, support and treatment, human rights, the reduction of vulnerability, vulnerable children, alleviating the socio-economic impact of HIV and AIDS, the value of research and development, conflict and disaster-affected regions, resources and monitoring. Core principles include the elimination of all forms of discrimination as well as all forms of violence against women. Under the notion of "violence" is included abuse, rape and the trafficking of women and girls; see art 61 of the *Declaration of Commitment on HIV and AIDS* (2001). Poverty and the lack of empowerment among women are recognised as specific causes that add to the vulnerability of women and girls in respect of HIV and AIDS, as well as the need for policies to address the gender dimension of this epidemic (see art 62). In 2017 StatsSA released statistics indicating that male-headed households had an average annual income of R165 853 compared to the income of female-headed households of R98 911 (Stats SA 2017 <http://www.statssa.gov.za/?p=9922>).

⁵⁹ This Convention obliges state parties to eliminate and prohibit racial discrimination (see art 8 of the *Convention on the Elimination of All Forms of Racial Discrimination* (1965) (CERD)).

represent a previously disadvantaged group. Most SADC countries are state parties to the CERD; however, Angola is only a signatory.

These Conventions can function as important tools in the achievement of equality for workers in the informal economy as many of these workers are women and, in many countries, such as South Africa, domestic workers predominantly represent a previously disadvantaged racial group and often are particularly vulnerable to exploitation and discrimination. The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990) regulates the protection of the interests of migrant workers and members of their families.⁶⁰ Only three SADC countries are signatories to this instrument, namely Lesotho, Mozambique and Seychelles. Even developed countries such as Germany and France have not taken action to ratify this instrument.

Several of the treaties are supported by optional protocols.⁶¹

2.1.5 UN Women as an international entity

UN Women is a UN organisation dedicated to gender equality and the empowerment of all women and is important to women workers in the informal economy.⁶² UN Women endeavours to make the vision of the Sustainable Development Goals (SDGs) a reality for all women and girls.⁶³ The 17 Sustainable Development Goals⁶⁴ have replaced the eight Millennium Development Goals (MDGs) with a new 2030 Agenda for Sustainable Development and calls for countries to build on the Millennium Development Goals with this new agenda. These 17 goals function as a new 2030 global roadmap and set concrete deadlines. The goals balance the economic, social and environmental dimensions of sustainable development and seek to achieve what the MDGs could not, in reaching the

⁶⁰ The preamble to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990).

⁶¹ The *Optional Protocol to the Covenant on Economic, Social and Cultural Rights* (1966); the *Optional Protocol to the International Covenant on Civil and Political Rights* (1966); the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Woman* (1979); and the *Optional Protocol to the Convention on the Rights of People with Disabilities* (2006). These Protocols aim to supplement the treaties.

⁶² UN Women date unknown <http://www.unwoman.org>. UN Women became operational in 2011 after the adoption of Resolution 64/289.

⁶³ UN Women date unknown <http://www.unwoman.org>.

⁶⁴ The 17 goals can be found at UN 2015 <http://www.un.org/millenniumgoals/>.

poorest and most vulnerable.⁶⁵ Poverty is recognised as the greatest global challenge.

Gender equality, the empowerment of women and decent work for all are important goals for all women.⁶⁶ Goal 5, gender equality, is a stand-alone goal that recognises the importance of equality for women.⁶⁷ Early in 2016 the UN Secretary-General established the High-Level Panel on Women's Economic Empowerment to ensure that these goals become a reality for all women and girls.⁶⁸ The panel demonstrates the importance of various role players in support of a participatory and integrated approach to ensure the empowerment of women, and includes representatives of state parties, governments, academics and various international organisations.⁶⁹ These partnerships at regional, national and international levels are crucial when considering the empowerment of women. In 2016 Ban Ki Moon, the UN Secretary-General, stated the following:

The empowerment of [the] world's women is a global imperative. Yet despite important progress in promoting gender equality, there remains an urgent need to address structural barriers to women's economic empowerment and full inclusion in economic activity.⁷⁰

Although 143 state parties constitutionally guarantee equality between men and women, this still means that 50 do not do so.⁷¹ Constitutional guarantees often do not translate into gender equality for all in real life, as discrimination continues to exist. Goal 8, which deals with decent work and

⁶⁵ These goals came into effect in January 2016.

⁶⁶ Empowerment and gender equality for all women and girls include equal access to education, economic resources, political participation, and equal opportunities with men and boys for employment, leadership and decision making at all levels (UN 2015 <http://www.un.org/millenniumgoals/> para 20). Countries such as Jamaica showed a commitment to Goal 5, gender equality and Goal 8, decent work, by signing the *ILO Domestic Workers Convention 189* (2011) in September 2016. This clearly indicates how various international campaigns and instruments can be integrated to achieve decent work and equality for all, even when implemented progressively, for a category of workers such as domestic workers, and that the co-operation between these organisations can make decent work a reality for all (UN Women date unknown <http://www.unwomen.org/en/about-us/about-un-women>).

⁶⁷ This goal includes the elimination of all forms of discrimination; the recognition and value of unpaid care and domestic work; the effective participation of women at all levels; and equal access to economic resources. The achievement of equality in this regard is supported by engendering public services, infrastructures, policies and legislation. Without a specific gendered approach at all levels to address the inequalities faced by women, the notion of substantive equality will not be realised. Thus, a mere extension of existing provisions will not achieve this goal.

⁶⁸ Klugman and Tyson *Leave No One Behind* 1.

⁶⁹ Klugman and Tyson *Leave No One Behind* viii.

⁷⁰ Klugman and Tyson *Leave No One Behind* 11.

⁷¹ UN 2016 https://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/5_Why-It-Matters-2020.pdf.

economic growth, includes the protection of labour rights, the eradication of child labour and the promotion of a safe working environment for all workers, particularly in respect of migrant women workers and those in precarious employment.

The UN Resolution on Transforming our World: the 2030 Agenda for Sustainable Development also recognises the value and positive contribution of migrants to inclusive growth and sustainable development.⁷² The eradication of poverty requires policy frameworks at national, regional and international levels and policies must have gender-sensitive developmental strategies. These universal goals are applicable to developed, middle-income and developing countries. However, national realities are taken into account and developing countries require special attention.⁷³ Developing and middle-income countries face various challenges with regard to the implementation of these goals, such as financial limitations and limited resources. Regional and sub-regional frameworks are recognised as important building blocks in the realisation of the goals on national level.⁷⁴ By recognising the challenges in these countries and with the proposed support, the goals can become a reality for many of the targeted vulnerable and poor. Developing countries can strive to achieve this through various programmes, policies and partnerships. The notion of global solidarity created by the Sustainable Development Goals and country endeavours to achieve 2030 Agenda are powerful instruments to motivate countries to extend protection to the vulnerable and poor across the world. UN Women endeavours to make these goals a reality for all women and girls through various programmes. Through UN programmes supported by the Women's Fund for Gender Equality they have, for example, assisted poor women in the United Republic of Tanzania to have

⁷² The Resolution was adopted on 25 September 2015. See *Resolution on Transforming our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A/RES/70/1 (2015) para 29.

⁷³ UN Department of Economic and Social Affairs 2015 <https://sustainabledevelopment.un.org/post2015/transformingourworld> para 5. The goals will be implemented on national, regional and global levels. A notion of global solidarity exists and aims to improve the lives of the poorest and most vulnerable. The challenges that developing and middle-income countries face are recognised and support structures on various levels involving multiple stakeholders are envisaged.

⁷⁴ Specific regional programmes are also recognised and supported, such as the African Union's Agenda 2063 and the New Partnership for Africa's Development (UN Department of Economic and Social Affairs 2015 <https://sustainabledevelopment.un.org/post2015/transformingourworld> para 21).

access to financial services, social protection and other livelihood programmes.⁷⁵

It is important to consider the means of implementation of these goals. A key principle for the successful implementation is the concept of "global partnerships" that includes governments, the private sector, civil societies, institutions from the UN system and other relevant actors as well as the mobilisation of available resources.⁷⁶ Successful implementation also depends on concrete policies, programmes, actions and targets. Country progress must also be reviewed and monitored at all levels.

2.1.6 Social security instruments and the International Labour Organisation

The concept of social security and the first international standard-setting activities of the ILO can be traced back to 1919.⁷⁷ The preamble to the ILO constitution refers to the prevention of unemployment, the protection of workers against sickness, disease and injury arising out of employment, and provision for old age and injury. In the preamble to the constitution specific mention is made of particularly vulnerable groups, such as women and children. During the first 20 years the ILO adopted 14 conventions and 11 recommendations setting international standards in respect of social security.⁷⁸ In 1944, near the end of World War II, the *Declaration of Philadelphia* stated that economic, financial and social policies should be integrated and the concept of social security was included among the fundamental principles of work. The Declaration actually embraced the wider notion of social protection, as it provides for world programmes that will achieve the following:

- a) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
- b) adequate protection for the life and health of workers in all occupations;
- c) the provision of child welfare and maternity protection;
- d) the provision of adequate nutrition, housing and facilities for recreation and culture; and

⁷⁵ UN Women 2014 <http://www.unwomen.org/en/news/in-focus/end-violence-against-women/2014/poverty>.

⁷⁶ *Resolution on Transforming our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A/RES/70/1 (2015) para 39.

⁷⁷ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 6.

⁷⁸ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 6.

e) the assurance of equality of educational and vocational opportunity.⁷⁹

The Declaration was the first international instrument to recognise social security as a human right.⁸⁰ The rights-based approach to social security increases accountability of states, thereby also "legitimising a more progressive and humanistic approach to development".⁸¹

In 1999 the Decent Work Report highlighted the large number of workers who remain without social security in a global economy, and a campaign to extend coverage also to developing countries was initiated. In 2001, embedded in the decent work concept, the International Labour Conference prioritised the extension of social security coverage and emphasised the importance of national strategies to include employment and social policies.⁸² In 2002 the Supiot group (a multidisciplinary group chaired by Professor A Supiot) considered the concept of decent work in relation to social security and the increasing informal economy. They recommended that the current standards be adapted and reviewed in line with the concept of decent work.⁸³

This global campaign continued in 2003 and in 2008. In the *ILO Declaration on Social Justice for Fair Globalisation* social protection was one of the four strategic objectives. The importance of voice and representation remained throughout this evolution of the ILO's mandate in respect of social security, as did the value of promoting international standards in this field. So far, the ILO has adopted 31 conventions and 24 recommendations in respect of social security, illustrating the importance of social security in respect of the ILO's mandate and activities.⁸⁴ The development of the concept of social security in respect of the ILO can be seen in three stages, starting out with social insurance, progressing to the concept of social security as reflected in the *Social Security (Minimum Standards) Convention 102* (1952) and, finally moving on to the broader concept of social protection.⁸⁵ In 1944 the

⁷⁹ See para III f-j of the *Declaration of Philadelphia* (1949).

⁸⁰ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 65, 68, 69, 70.

⁸¹ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 73.

⁸² ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 7.

⁸³ Tapiola "Global Standards" 46.

⁸⁴ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 8.

⁸⁵ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 9.

Declaration of Philadelphia mentioned additional forms of social benefits and support.⁸⁶

In 2011 two main problems were identified with existing social security instruments, namely that certain provisions are outdated, and that existing instruments are not in line with the ILO's objective of providing social security to all, as a large number of workers in the informal economy were excluded.⁸⁷

The exclusion of those outside the formal economy who continued to live in poverty without adequate social protection placed the extension of coverage to those workers at the "heart of the ILO's mandate and mission".⁸⁸ The ILO recognises that social protection includes social security, conditions at work, occupational safety, migration, and HIV and AIDS policies. Social protection floors are defined as sets of basic social security guarantees that secure protection aimed at preventing or alleviating poverty, and eliminating vulnerability and social exclusion.⁸⁹ Extending social protection to workers is vital in realising the fundamental right to social security. A new global partnership formed for universal social protection aims to help countries to extend social protection to the poor and vulnerable.⁹⁰

The limited scope of social protection schemes, in particular the specific exclusion of workers in the informal economy, may be ascribed to factors such as bias in favour of the formal sector in social insurance schemes, the requirement for the existence of an employer-employee relationship, the low contributory capacity of workers in the informal economy, and the incompatibility of priority needs.⁹¹ These factors marginalise women

⁸⁶ The provision of adequate nutrition, housing and facilities for recreation and culture is included in part III of the Declaration.

⁸⁷ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 19; Becker, Pennings and Dijkhoff *International Standard Setting* 26.

⁸⁸ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 13.

⁸⁹ Rodgers *et al International Labour Organization and the Quest for Social Justice*. The preamble to the ILO's constitution recognises the need to improve labour conditions through the prevention of unemployment, the protection of workers against sickness, disease and occupational injuries, and provision for old age. The *Declaration of Philadelphia* (1949) recognises social security as a fundamental principle of work (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 8).

⁹⁰ This global partnership includes the ILO, the World Bank Group, the African Union, and the European Commission (ILO 2016 http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_525544/lang--en/index.htm).

⁹¹ Mpedi "Informal Sector" 289.

workers in particular, if one considers their representation in the informal economy as well as their lack of access to work in the formal economy.⁹²

Women in Informal Employment Globalising and Organising (WIEGO) recently highlighted the most pertinent challenges that women workers in the informal economy face in respect of social protection, namely, access to high-quality and affordable health care, including occupational health and safety; support for caring roles, particularly childcare; and income support for the elderly.⁹³ Certain categories of women workers in the informal economy may face greater challenges in respect of access to social protection.⁹⁴ An informal trader or waste picker may have more difficulties in accessing social insurance schemes than a domestic worker with an identifiable employer-employee relationship.⁹⁵

The ILO's strategy to attain social security coverage for all includes a horizontal dimension, namely the extension a set of core social security guarantees by establishing a social protection floor, as well as a vertical dimension that seeks the provision of a wider range of benefits and the extension of coverage in line with the existing social security conventions, through a gradual approach.⁹⁶ This has led to the adoption of the *Social Protection Floors Recommendation 202* (2012), which is an important instrument when considering the extension of social protection to vulnerable (women) workers in the informal economy. A principal aim of this instrument is the social inclusion of those in the informal economy.⁹⁷ The recommendation promotes innovative measures to be implemented in a national framework rather than concrete standards. This is considered a better approach to the extension of social security for all and a more realistic approach for developing countries, as the recommendation provides guidance to member states on establishing and maintaining social protection floors.⁹⁸ In this regard, developing and middle-income countries

⁹² Olivier "Gender Discrimination in Labour Law and Social Security" 227.

⁹³ WIEGO date unknown <http://www.wiego.org/wiego/core-programmes/social-protection>.

⁹⁴ Yasmeen 2016 <http://www.wiego.org/blog/%E2%80%9Cexpression-%E2%80%98social-protection%E2%80%99-didn%E2%80%99t-really-exist-20-years-ago%E2%80%9D>.

⁹⁵ Yasmeen 2016 <http://www.wiego.org/blog/%E2%80%9Cexpression-%E2%80%98social-protection%E2%80%99-didn%E2%80%99t-really-exist-20-years-ago%E2%80%9D>.

⁹⁶ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 124.

⁹⁷ *Social Protection Floors Recommendation 202* (2012) para 1(e).

⁹⁸ See art 1 of the *Social Protection Floors Recommendation 202* (2012). Also see Dijkhoff and Mpedi "Recommendation on Social Protection Floors" 6.

with limited resources, including limited financial resources, may progressively establish tailor-made lower cost schemes to provide for vulnerable workers in the informal economy.⁹⁹ Nevertheless, an integrated approach is required and this will require, for example, that apart from merely providing cash transfers to women as mothers, empowerment and skill development programmes must be established to develop skills and enhance women's opportunities for access to labour markets.¹⁰⁰

The preamble recognises the value of social security as a tool in the prevention and reduction of poverty, inequality, social exclusions, social insecurity, the promotion of gender and racial equality, and in support of the transition from informal to formal employment. This is pertinent to women workers in the informal economy as often they are excluded from coverage and face discrimination on multiple grounds such as race and gender. The preamble also undeniably recognises the link between sustainable social security systems and the transition to formal employment. Article 3 recommends that member states apply important principles such as non-discrimination and gender equality and that they demonstrate a responsiveness to special needs. This requirement to be responsive to special needs is an important principle for these workers, as it has been highlighted that specific groups of workers in the informal economy, such as domestic workers and home workers, have very specific needs in respect of social protection.

Social protection floors should include basic social security guarantees, including essential health care, which encompasses maternity care; basic income security for children, including access to nutrition, education and care; income security for persons who are unable to earn sufficient income;¹⁰¹ and a basic income for older persons.¹⁰² When extending social protection to these workers, consideration must be given to their diverse working circumstances and different needs in this regard. Hence this diversity should include diverse methods and approaches in respect of financing mechanisms and delivery systems.¹⁰³ Article 15 specifically mentions the social inclusion of persons in the informal economy. The recommendation calls for social security strategies to support the growth of

⁹⁹ Olivier "Expanding the Boundaries of Social Protection".

¹⁰⁰ Also see Dijkhoff and Mpedi "Recommendation on Social Protection Floors" 6.

¹⁰¹ This includes persons of active age who are unable to earn an income as a result of sickness, unemployment, maternity and disability. See art 5 of the *Social Protection Floors Recommendation 202* (2012).

¹⁰² See art 5 of the *Social Protection Floors Recommendation 202* (2012).

¹⁰³ See art 3 of the *Social Protection Floors Recommendation 202* (2012).

formal employment and the reduction of informality. Member states are responsible for monitoring, and limited scope is provided for supervisory bodies to monitor progress.¹⁰⁴ Through technical assistance the ILO has supported the development of social protection floors in several countries.¹⁰⁵

Even without its having the binding nature of a convention, the recommendation has led to a number of important initiatives in the extension of social protection to those previously excluded. These initiatives include the following:

- a pilot maternity benefits scheme for women in the informal economy in Ghana;¹⁰⁶
- Lesotho considered national health care (see their *National Health Insurance Bill*);¹⁰⁷
- Madagascar initiated a project to extend coverage to workers and their families in agriculture and fisheries in the informal economy by extending coverage in respect of unemployment and sickness; and
- in Namibia the establishment of basic guarantees for income security and access to health care for all is being considered.¹⁰⁸

¹⁰⁴ Pennings "Historical and Theoretical Background" 28.

¹⁰⁵ The ILO has supported social protection floors in more than 136 countries, including a national social protection scheme in Columbia, a non-contributory pension scheme in Peru, the extension of health, pension and child benefits in Uruguay and a universal child benefit scheme in Argentina (ILO *Building Social Protection Floors for All*).

¹⁰⁶ The objective of also promoting maternal health and childcare is linked to the Millennium Development Goals. This is a high priority in Ghana, as in 2005 the World Health Report indicated that 75% of all neonatal deaths could be prevented if women and children were receiving adequate care during pregnancy, childbirth and thereafter. The extension of social protection measures to the most vulnerable in Ghana is characterised by the involvement of member-based organisations (MBOs) and other international organisations such as the Rockefeller Foundation.

¹⁰⁷ Lesotho is characterised by poverty and various vulnerabilities of its people, including the endemic nature of HIV and AIDS in the country. It is categorised as a least developed country. Nevertheless, this SADC member state has launched a number of initiatives to extend social protection. These measures include a universal old age pension (OAP); a child grants programme; food security programmes; and the Free Primary Education programme. The latter programme aims at the provision of universal free primary education and currently has an enrolment of 84%, one of the highest rates found in sub-Saharan Africa (Olivier 2013 DSA 99, 101-102, 108).

¹⁰⁸ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 125-128.

Other SADC countries currently considering legal measures to extend protection include the United Republic of Tanzania¹⁰⁹ and Zimbabwe.¹¹⁰ These examples highlight that health care is an important consideration for these countries in their endeavours to extend protection to all and is often a starting point in the extension of social protection.

In the ILO's quest to adopt a text that is flexible and that will appeal to developing countries, they have neglected to provide general criteria to evaluate progress and monitoring, nor is there an obligation to report on this to the ILO.¹¹¹ An attempt to find a balance between flexibility and minimum standards means that the effect of the recommendation on the extension of social protection to all remains questionable. However, it certainly illustrates the predicament in which the ILO finds itself when balancing the various interests of member states and vulnerable workers in setting international standards. In countries such as South Africa, where the Constitution¹¹² provides imperatives for the consideration and application of international law, international social security instruments are more effective.¹¹³

In addition to the international instruments, there is also a number of international social security agreements, both bilateral and multilateral. The aim of these agreements is often to extend coverage to non-citizens and to assert the fundamental principles of equality of treatment. The maintenance of acquired rights, the payment of benefits abroad, the determination of acquired rights and the maintenance of rights in the course of acquisition and reciprocity are found in these agreements.¹¹⁴ Bilateral and multilateral agreements can play an important role where ILO instruments are not ratified or where universal coverage is not possible due to economic constraints in a country. These agreements can provide a more realistic approach to coverage with consideration of national resources. They can also allow for the development of specific concepts pertaining to vulnerable groups of workers in countries and regions.

¹⁰⁹ Introduction of a universal old age pension scheme and access to medical care for all is considered (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 128).

¹¹⁰ The introduction of a universal healthcare scheme is considered (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 128).

¹¹¹ Pennings "Historical and Theoretical Background" 28.

¹¹² See ss 39(1), 232 and 233 of the Constitution.

¹¹³ Pennings "Historical and Theoretical Background" 44.

¹¹⁴ Mpedi and Nyenti *Towards an Instrument for the Portability of Social Security Benefits* 2, 34, 36, 37.

2.1.6.1 Key social security conventions applicable to women workers in the informal economy

2.1.6.1.1 The *Social Security (Minimum Standards) Convention 102*

The *Social Security (Minimum Standards) Convention 102* (1952) is a comprehensive instrument which includes the nine classic contingencies of social security, namely, medical care benefits; sickness benefits; unemployment benefits; old age benefits; employment injury benefits; family benefits; maternity benefits; and invalidity and survivors' benefits.¹¹⁵ This Convention sets quantitative standards for minimum protection and targets for social progress; it furthermore promotes equality of treatment of all.¹¹⁶ For developing countries it is important that this Convention contains flexibility clauses for the realisation of these provisions according to national economic development. Article 3, for example, allows for temporary exemptions in respect of persons covered and the rate and duration of benefits, to members whose economy and medical facilities are insufficiently developed.

This Convention has not been successful in extending protection to workers in the informal economy and is therefore not achieving the objective of social protection for all or reducing poverty. The Convention allows member states to adhere to minimum standards, but permits the exclusion of persons from the scope of the coverage.¹¹⁷ The Convention does not address social risks such as poverty or new risks such as HIV and AIDS.¹¹⁸ The classic nine risks are not always risks that women in the informal economy experience. With reference to the traditional categories of contingencies and workers in

¹¹⁵ The *Income Security Recommendation 67* (1944) provides for income security during these contingencies. Provision must be made through social insurance and where this is not available, social assistance should be provided. The recommendation is premised on the employment relationship and although provisions are made for the self-employed, most informal economy workers will not benefit from these principles due to the lack of an employer-employee relationship, low contributory capacity and incompatible priority needs (Mpedi "Informal Sector" 290).

¹¹⁶ ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 102.

¹¹⁷ Article 15 part III of the *Social Security (Minimum Standards) Convention 102* (1952). Art 67 applies to periodical payments of benefits and art 3, for example, allows for temporary exemptions in respect of persons covered and the rate and duration of benefits, to members whose economies and medical facilities are insufficiently developed. This allows member states to limit the scope of coverage accordingly (Dijkhoff "Guiding Role of ILO Convention No 102" 57).

¹¹⁸ Tapiola "Global Standards" 45. Risk-creating conditions are not considered. These include natural disasters and crop failure. Other risks, in particular in sub-Saharan countries, include wars (Mpedi "Informal Sector" 291).

the informal economy, such as informal traders and waste pickers, Sankaran states the following:

For the self-employed in the informal economy, the loss of assets, loss of access to markets and exposure to risks are often reasons for their economic insecurity.¹¹⁹

A better approach for developing countries would be to depart from a list of social risks to policy instruments promoting objectives.¹²⁰ Such an approach would allow for innovative and tailor-made designs in the extension of social protection measures to informal economy workers. The *Social Protection Floors Recommendation 202* (2012) endeavours to fill certain of these gaps in providing for the basic needs of all and extending coverage to all. Olivier comments on the narrow conceptual framework of this instrument and other international social security standards of the ILO as follows:

[T]he conceptual framework emanating from ILO social security standards, with particular reference to the most eminent and comprehensive instrument, namely the ILO Convention 102 of 1952 on Social Security (Minimum Standards), is reminiscent of an era of conceptual protectionism vis-à-vis females, of male preference and female subordination – this flows amongst others from reliance in the Convention on the essentially male comparator (employment) and (male) breadwinner concepts as a yardstick for determining compliance with the Convention and regulating access to social security benefits, the constant reference to widows and children (as dependants), and the absence of coverage for widowers.¹²¹

As a result of the low ratification rate of social security conventions, social security was placed on the 2011 ILO agenda.¹²² The informal economy was mentioned as being a major obstacle against the ratification of this Convention for many countries, and the ILO recognised that for developing countries, where most workers are in the informal economy, ratification of the Convention remains a challenge.¹²³ It must also be noted that for workers in the informal economy in developing countries, living in poverty is a reality, and providing them with adequate social protection measures would also require improving their standard of living.¹²⁴

¹¹⁹ Sankaran 2012 *CLLPJ* 90.

¹²⁰ Smit "Institutional Framework, Legal Instruments and Legal Techniques" 199.

¹²¹ Olivier "Gender Discrimination in Labour Law and Social Security" 220.

¹²² Becker, Pennings and Dijkhoff *International Standard Setting* 25. Also see ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 19.

¹²³ Becker, Pennings and Dijkhoff *International Standard Setting* 25.

¹²⁴ Olivier "Expanding the Boundaries of Social Protection".

2.1.6.1.2 *Maternity Protection Convention 183* (2000)

The principles of this Convention¹²⁵ should include women workers in the informal economy, as the definition of “woman” is “any female person without discrimination whatsoever”, and as the Convention applies to all women, including those in atypical forms of dependent work.¹²⁶ The wording of the Convention contains no language that limits its application to the formal economy. It provides for health protection,¹²⁷ maternity leave,¹²⁸ leave in the case of illness¹²⁹ and other benefits.¹³⁰ It must be noted that the *Domestic Workers Convention 189* (2011) provides that domestic workers enjoy conditions not less favourable than other workers in respect of maternity.¹³¹ The *Maternity Protection Convention* does not contain restrictive eligibility criteria. Restrictive criteria such as minimum working hours or a period of continued employment would hinder accessibility and once again exclude a number of vulnerable women workers.¹³² The insecurities and often irregular employment conditions associated with work in the informal economy would make it difficult to collect social insurance contributions in respect of maternity benefits. It is suggested that in such cases these workers may benefit from public funds and social assistance. Workers in the informal economy such as domestic workers are clearly included under the scope of this Convention. However, the actual enforcement of often existing national legislative provisions remains problematic due to the complex and diverse nature of their employment and the lack of adequate enforcement mechanisms. Pregnancy thus often results in job loss.¹³³

In 2017 alone 300 000 women globally died from causes related to pregnancy and childbirth,¹³⁴ highlighting the importance and value of this

¹²⁵ This Convention has been ratified by 54 countries. South Africa has not ratified the Convention; the only SADC country that has ratified the Convention is the Democratic Republic of the Congo. Also see *Maternity Protection Recommendation 191* (2000).

¹²⁶ Article 1 of the *Maternity Protection Convention 183* (2000).

¹²⁷ Article 3 of the *Maternity Protection Convention 183* (2000).

¹²⁸ Article 4 of the *Maternity Protection Convention 183* (2000). The period of maternity leave is subject to the specification by member states.

¹²⁹ Article 5 of the *Maternity Protection Convention 183* (2000).

¹³⁰ Article 6 of the *Maternity Protection Convention 183* (2000). Provision is made for cash benefits during this period and regulations through social insurance or public funds in accordance with national laws. Art 6(6) provides for social assistance where women do not qualify for cash benefits in terms of national laws.

¹³¹ Article 14(1) of the *Maternity Protection Convention 183* (2000).

¹³² ILO *Domestic Workers Across the World* 86.

¹³³ ILO *Domestic Workers Across the World* 85.

¹³⁴ UN *Millennium Development Goals Report 2014* 8.

Convention. Worldwide fewer than 40 per cent of women in employment are covered by law under mandatory maternity cash benefits. Moreover, due to ineffective enforcement and implementation, effective coverage is even lower.¹³⁵ Ensuring effective access to quality maternal health is of particular importance in developing countries, where the informal economy accounts for a large proportion of employment, and is an essential prerequisite for the achievement of gender equality.¹³⁶ Governments should endeavour to provide universal access to maternal health care, specifically for those most vulnerable. Vulnerable women workers in the informal economy also need access to basic services, such as shelter, power, water, basic infrastructure and sanitation. This Convention certainly has the potential to be a powerful tool in the protection of women workers. Unfortunately, ratification of the Convention remains low, as only 29 countries have ratified it.¹³⁷ The objectives of the Convention are to ensure the safety of pregnant women and their new-born babies during maternity and pregnancy and to ensure job security during this time.¹³⁸ Protection against dismissal and the right to return to work are also necessary elements of maternity protection.¹³⁹ The *Social Protection Floors Recommendation*¹⁴⁰ also urges member states to provide free prenatal and postnatal medical care to the most vulnerable.¹⁴¹ In 2019 statistics indicated that 45 per cent of women in employment were protected by law under mandatory cash benefit schemes.¹⁴² Extending maternity protection to vulnerable women workers in the informal economy would improve their working conditions, income security, and gender equality and simultaneously strengthen their rights as workers, including the right not to be unfairly dismissed.¹⁴³

2.1.6.1.3 *Occupational Safety and Health Convention 155*

Although the *Occupational Safety and Health Convention 155* (1981)¹⁴⁴ was designed to provide for workers in the formal economy, strong arguments exist for the extension of national policies to workers in the informal economy. This Convention is of particular importance to workers in the

¹³⁵ ILO *Social Protection for Maternity* xi.

¹³⁶ ILO *Social Protection for Maternity* xi. Countries such as South Africa, Bangladesh, Brazil, India and Indonesia have extended coverage to previously excluded groups.

¹³⁷ ILO *Domestic Workers Across the World* 86.

¹³⁸ ILO *Domestic Workers Across the World* 85.

¹³⁹ ILO *Domestic Workers Across the World* 91.

¹⁴⁰ *Social Protection Floors Recommendation 202* (2012).

¹⁴¹ Article 8 of the *Social Protection Floors Recommendation 202* (2012).

¹⁴² ILO *World Social Protection Report* 58.

¹⁴³ ILO *Domestic Workers Across the World* 86.

¹⁴⁴ There are 66 countries that have ratified this Convention (ILO 2020 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO::>).

informal economy as their place of work determines the risks they face, which often include unsafe and hazardous conditions. They often find themselves exposed to poor conditions of work, lacking sanitary facilities and access to running water, and with low or non-existing health and safety standards.¹⁴⁵ As occupational accidents in this sector are seldom reported, policy-making becomes problematic without accurate statistics. Existing mechanisms can be used by extending the provisions of the Convention. The role of the labour inspector could be revisited and labour inspectors could assist with the training and education of workers in respect of health and safety standards.

The importance of universal social protection on the global agenda must not be underestimated. On 21 September 2016 the World Bank Group and the International Labour Organization inaugurated the Global Partnership for Universal Social Protection. This partnership aims to realise a number of benefits, such as pensions, maternity, disability, and child benefits to all.¹⁴⁶ This is in line with the 2030 Agenda, and Goal 1.3 that requires appropriate national social protection systems and measures for all, including floors, and goal 8 of the then Millennium Developmental Goals to promote sustained, inclusive and sustainable economic growth, full productive work and decent work for all.¹⁴⁷

2.1.7 Decent work and the informal economy

The ILO has adopted the concept of decent work,¹⁴⁸ which has set four objectives for all, namely, employment opportunities,¹⁴⁹ workers' rights, social protection and representation.¹⁵⁰ These four objectives must be seen as integrated and intrinsic to this concept and should not be viewed

¹⁴⁵ ILO *Domestic Workers Across the World* 86.

¹⁴⁶ ILO 2016 http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_525544/lang--en/index.htm.

¹⁴⁷ ILO 2016 http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_525544/lang--en/index.htm.

¹⁴⁸ According to the ILO, decent work is based on the idea that work is "a source of personal dignity, family stability, peace in the community, democracies that deliver for people and fuels economic growth that expands opportunities for productive jobs and enterprise development." The goal is to promote decent work along the entire continuum from the informal to the formal end of the economy, and in development-orientated, poverty-reduction and gender-equitable ways (ILO *ILO at Work*).

¹⁴⁹ For the informal economy this means access to information that improves the capacities of these workers to find employment opportunities, and integrated policies that promote their economic activities and growth strategies (ILO *Informal Economy and Decent Work* 11).

¹⁵⁰ ILO *Resolution Concerning Decent Work and the Informal Economy* (2002) para 2.

independently.¹⁵¹ Tensions naturally exist between these objectives, for example, between the creation of employment opportunities and the provision of protection to these workers.

The concept of decent work could be used to provide impetus to the improvement of the precarious position of workers in the informal economy. The notion of "decent work" is an expression of the ILO's integrated approach and provides for a comprehensive foundation which brings all the programmes together and allows developing countries to develop more effective strategies for the achievement of their labour and social goals.¹⁵² However, Theron¹⁵³ argues that the concept of decent work is vague and conceptually incoherent, and therefore unable to create a new paradigm for workers. Moreover, he¹⁵⁴ describes the adoption of the concept of decent work by the ILO as a response to its own legitimacy crisis following the defeat of the contract labour convention and the persistently low ratification rate of conventions by developing countries. Le Roux¹⁵⁵ argues that against the backdrop of a transformative constitution, the decent work paradigm may be seen as an issue of social justice, as the concept of decent work poses many questions of social justice rather than questions of labour law. The concept of decent work and the framework of transformative constitutionalism may be the basis for vulnerable workers in the informal economy in South Africa to be empowered to challenge the injustices they face arising from their poverty.¹⁵⁶

The 2002 *Resolution Concerning Decent Work in the Informal Economy* reached important conclusions about the informal economy such as the "conceptual difficulties" arising from the extreme diverse nature of the informal economy; the variation of challenges across national, rural and urban areas; the lack of protection and representation contributing to the poverty of many of these workers; the degrees of vulnerability of these workers; the importance of governance in the proper regulation of the informal economy; the fact that women are among the most vulnerable groups in the informal economy; and the challenges in respect of the legal and economic empowerment of these women workers. The successful

¹⁵¹ Theron 2014 *ILJ* 1833.

¹⁵² Rodgers *et al International Labour Organization and the Quest for Social Justice*.

¹⁵³ Theron 2014 *ILJ* 1833.

¹⁵⁴ Theron 2014 *ILJ* 1833.

¹⁵⁵ Le Roux "Advancing Domestic Workers' Rights" 55.

¹⁵⁶ Le Roux "Advancing Domestic Workers' Rights" 56.

implementation of any decent work programme is dependent on an in-depth understanding of the nature of the informal economy.

The ILO Director at the time, Juan Somavia, stated the following:

It is in the informal economy and among the poor that needs are the greatest. If we claim universality (that) "all those who work have rights at work" then we are obliged to tackle these issues.¹⁵⁷

It is important to link decent work initiatives to other social protection initiatives. The ILO is committed to make decent work a reality for all and this is clearly illustrated by the adoption of the ILO *Domestic Workers Convention 189* (2011) and the supporting Recommendation 201.

The ILO has developed an integrated framework to facilitate a transition to formality and decent work. The decent work strategies for the informal economy are as follows:

- a) growth strategies and quality employment generation;¹⁵⁸
- b) a regulatory environment, including labour standards and core rights;¹⁵⁹
- c) organisation, representation and social dialogue;
- d) equality and the informal economy;¹⁶⁰
- e) entrepreneurship, skills, finance, management, access to markets;
- f) extending social protection, including social security and social transfers; and
- g) local (rural and urban) development strategies.¹⁶¹

The International Labour Conference prefers a progressive approach which, according to them, implies starting with the informal economy (as this is where most new job creation has recently taken place, and as the decent work deficits are most pronounced in this sphere).¹⁶² The adoption of the ILO *Recommendation Concerning the Transition from the Informal to the*

¹⁵⁷ ILO 2002 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_080105.pdf 10.

¹⁵⁸ An integrated approach is of the utmost importance to achieve this strategy and should include skills training, access to financial markets and market information (ILO *Resolution Concerning Decent Work and the Informal Economy* (2002) 11). According to the ILO, economic growth is a key factor in reducing informality; but in some instances informality can persist despite economic growth (ILO *Informal Economy and Decent Work* 64).

¹⁵⁹ This includes the enforcement of international labour standards and core rights.

¹⁶⁰ This includes equality based on gender, ethnicity, race, caste, disability and age.

¹⁶¹ ILO *Growth, Employment and Decent Work*.

¹⁶² See para 1.4 above.

*Formal Economy*¹⁶³ reflects this progressive approach of the ILO. Through the concept of decent work an integrated framework is provided to analyse the challenges facing the informal economy and decent work.¹⁶⁴ The strategy adopted is to achieve the goal of decent work first and in the immediate term through giving priority to reducing decent work deficits in the informal economy by ensuring that those who are currently working in that sphere are recognised in the law and have legal and social protection, representation and voice; second, and in the short and medium term, to encourage and enable a movement upwards from the informal economy to the more formal, protected and decent parts of the economy; and third, and in the longer term, to create adequate employment opportunities that are formal, protected and decent for all workers and employers.¹⁶⁵

This third long-term strategy may be viewed as controversial. The premise of this strategy is that new jobs should not ideally be created in the informal economy. In other words, decent work entails more than a job at any price or under any circumstances, the focus being rather on better-quality employment in the upper end of the continuum. This requires that the "root causes" of informality, informalisation and externalisation are to be tackled. It focusses less on extending protection to those in the informal economy and concentrates more on a process of legalisation to bring informal workers and undertakings into the legal framework to be registered, recognised and protected. The adoption of the *Recommendation Concerning the Transition from the Informal to the Formal Economy* formalises this third long-term strategy, and although this transition may be possible in certain instances, the recommendation does not consider the fact that there are workers who are in the informal economy by choice and through preference. When considering the precarious position of workers in the informal economy, an integrated approach is of paramount importance. This approach must consider measures to extend social protection through innovative measures. The legal and economic empowerment¹⁶⁶ of these workers is essential when considering sustainable solutions and the strengthening of support services that are important to workers. It is submitted that this third pillar of a decent work strategy could be realised, and then only in the long term, if the root causes were accurately identified and analysed. The root causes include national policies that constrain employment creation in the formal economy, legal and institutional

¹⁶³ *ILO Recommendation Concerning the Transition from the Informal to the Formal Economy* 204 (2015).

¹⁶⁴ *ILO Resolution Concerning Decent Work and the Informal Economy* (2002) 12.

¹⁶⁵ *ILO Resolution Concerning Decent Work and the Informal Economy* (2002) 2.

¹⁶⁶ This includes investment in the knowledge and skills of these workers.

obstacles that prevent this transition to the formal economy or continuous employment in the formal economy, the absence or lack of access to effective market and non-market institutions, demographic trends, the HIV pandemic, gender inequality and discrimination against women, and the lack of voice and representation of workers in the informal economy.¹⁶⁷ This would require far more statistical and empirical research and reporting than what is currently available, and the lack of reliable data is hindering the effort to extend both labour and social protection to workers in the informal economy.

3 Conclusion

The world of work has changed and in some instances a realisation now exists that certain forms of work are a reality and not a passing occurrence. It is important that international regulation provides for this, including work in the informal economy. Specific vulnerable groups and challenges have been identified by international regulators and must now be addressed to extend protection to these workers.¹⁶⁸ International regulation must promote freedom through the enhancement of the capabilities of these workers.¹⁶⁹ International instruments can function as a key strategic tool to address inequalities in the workplace by increasing the capabilities of vulnerable groups, such as women, through empowerment initiatives.¹⁷⁰

The ILO should prioritise a campaign focussed on ratification related to the protection of non-standard workers. The international standards set by the ILO could serve as a roadmap to direct policy and legislative responses. The ILO *Employment Relations Recommendation* highlights important principles in terms of international standard setting, but if it is to be effective, member states must include relevant principles in their national legislation, policies and codes. Such implementation must always occur in consultation with representative organisations. The effectiveness of the ILO depends on the inclusion of standards in domestic legislation.¹⁷¹ This would enable the progressive move from soft law and merely prescriptive regulations to binding provisions. The translation of international standards into binding provisions would promote and strengthen the enforcement of these

¹⁶⁷ ILO Resolution Concerning Decent Work and the Informal Economy (2002) 5.

¹⁶⁸ ILO Resolution Concerning Decent Work and the Informal Economy (2002) 5.

¹⁶⁹ Kolben "Labour Regulation, Capabilities and Democracy" 60.

¹⁷⁰ Kolben "Labour Regulation, Capabilities and Democracy" 70.

¹⁷¹ The 1969 Nobel prize citation lauded the ILO for its impact on legislation in countries (Davies and Woodward *International Organizations* 206).

standards. Without this legislative base, the ILO relies solely on soft law, prescriptive regulations and codes.¹⁷²

The ILO's 2010 Report provides a number of important principles to be considered when extending the scope of protection to workers in the informal economy.¹⁷³ These principles recognise that tailor-made approaches and innovative designs must be initiated on national level but also on local levels such as municipalities, and must include dialogue with social partners, and that the focus of these approaches must include vulnerable groups in the informal economy, such as women.¹⁷⁴ The report indicates that international standards for the informal economy should function as a road map for countries to guide their policies.

International standards must not become mere symbolic statements with no reflection of or enforcement in national legislation, policies and programmes.¹⁷⁵ If this is allowed to continue, these standards will remain ineffective and a mere showcase for international organisations and member states. The purpose of regulation must be to improve the lives of workers with reference to the concept of work and, specifically, decent work.¹⁷⁶ The implementation of ILO standards for workers may be more problematic in developing countries as they may be unable to fulfil the obligations placed on them. However, governments can start by removing all obstacles to the free organisation of such workers. Their participation in the planning and implementation of programmes to extend protection is vital for the success of such programmes. Certain ILO conventions allow ratifying countries to enact standards in a manner applicable to national conditions.

It is important that international labour standards should not be unrealistic but should be connected to the new world of work.¹⁷⁷ Although there are those who call for a "radical change" in the activities of the ILO, there have been a number of reform strategies to align the organisation with the new world of work and to extend protection to those who are particularly vulnerable, such as women workers in the informal economy.¹⁷⁸ The ILO is

¹⁷² Davies and Woodward *International Organizations* 206.

¹⁷³ ILO *Extending the Scope of Application of Labour Laws* 6.

¹⁷⁴ ILO *Extending the Scope of Application of Labour Laws* 6.

¹⁷⁵ For example, Mexico has ratified 70 conventions, but none of these have been implemented (Moreno "Informal Sector in Mexico" 301).

¹⁷⁶ See Langille 2010 *CLLPJ* 525.

¹⁷⁷ See Langille 2010 *CLLPJ* 535.

¹⁷⁸ Weiss "International Labour Standards" 7.

also playing an increasingly important role in providing technical assistance to developing countries supported by country offices.

The specific focus of UN Women on gender equality and the empowerment of women, combined with efforts to reach the Sustainable Developmental Goals, has improved the lives of various groups of women globally. A part of this success may be ascribed to the fact that in their quest for equality, they have formed links with various role players at different levels, such as governments, international and national organisations, trade unions and other workers' organisations and civil societies. When considering the global imperative of the empowerment of women, partnerships on regional, national and international levels are of paramount importance to ensure sustainability. UN Women strengthens these linkages on various levels through advocacy campaigns that highlight the challenges women face across the world and create an awareness of the plight of women. Important features of these campaigns are the recognition that structural inequalities must be addressed as well as inherent gender norms and campaigns that highlight challenges such as violence against women, child marriages and female genital mutilation.¹⁷⁹ The overarching theme is gender equality, and this is a pre-condition for the attainment of all other goals.

The success of international institutions and instruments depends on the cooperation and support of all role players to end poverty and to ensure prosperity for all.

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¹⁷⁹ UN Women 2015 <https://progress.unwomen.org/en/2015>.

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List of Abbreviations

AU	African Union
BCEA	Basic Conditions of Employment Act 75 of 1997
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CLLPJ	Comparative Labour Law and Policy Journal
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DSA	Development Southern Africa
EEA	Employment Equity Act 55 of 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
MDGs	Millennium Development Goals
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations

WIEGO

Women in Informal Employment Globalising
and Organising