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in Africa”***

**AU GUIDELINES ON DEVELOPING BILATERAL
LABOUR AGREEMENTS (BLAs)**

2021

TABLE OF CONTENTS

| | |
|---|----|
| Introduction | 3 |
| 1. Bilateral Labour AGREEMENTS (BLAs)..... | 3 |
| 2. Guiding principles for development and implementation of BLAs | 5 |
| 3. A Standard Model Template for BLAs applicable also to all African BLMAs..... | 6 |
| 4. Core content for rights-based and gender-responsive BLAs..... | 7 |
| 5. Operational guidelines for the different stages of the BLA process..... | 16 |
| 5.1. Preparatory and drafting process | 16 |
| 5.2. Negotiation process | 18 |
| 5.3. Implementation and follow-up | 20 |
| 5.4. Monitoring and Evaluation..... | 22 |
| 6. Measures to support BLAs AND ENABLING FACTORS | 25 |
| ANNEX: Normative foundations of Bilateral Labour Agreements | 27 |

INTRODUCTION

Migration is a key global challenge today for economic growth, sustainable development, social cohesion and governance. Development imperatives, regional integration and needs for labour and skills mobility have made migration an urgent challenge across Africa. The African Union (AU) Migration Policy Framework for Africa and Plan of Action highlighted that “migration (is) a major topic in the 21st Century and therefore poses certain social, economic and political challenges for policy makers...for the betterment of African societies”.

The importance of well-governed migration including free and facilitated movement of people throughout the African continent is featured in the 2063 Agenda “The Africa We Want” and is *flagship project 5* in the execution of the Agenda. The African Union at its 24th Assembly in 2015 reaffirmed its determination “to step up our regional cooperation for smooth labour migration in the continent, including through effective implementation of our treaties, charters, protocols and other relevant policy instruments in view of free movement of people and workers...” (Assembly/AU/Decl.6 (XXIV)). The AU 2015 *Ouagadougou + 10 Declaration and Plan of Action on Employment, Poverty Eradication and Inclusive Development in Africa* sets as one of six priority outcomes: “labour migration governance, policy and administrative responsibilities effectively carried out by capable Labour Market Institutions in Regional Economic Communities-RECs and Member States,”

A key concern requiring attention by the African Union and a common approach across the AU membership is promoting rights-based bilateral labour agreements (BLAs) and other bilateral labour migration arrangements (BLMAs) that ensure protection and decent work for all Africans. The AU wished to develop guidelines that will assist the Member States and the RECs in concluding appropriate BLAs.

Objectives of the AU Guidelines

1. Provide a model template and guidelines for policy makers and practitioners to develop BLAs and MOUs based on international (including African) instruments on human and labour rights, global frameworks (SDGs and GCM), existing African protocols/legal instruments on free movement, and migration policy frameworks, as well as relevant tools and good practices.
2. Address gaps in existing BLAs in migrant protection and labour migration governance and propose steps to enhance the promotion and protection of migrant workers’ rights.
3. Propose an African template and guidelines that complement where needed and promote implementation of the AU Protocol on Free Movement and the respective REC free movement and labour mobility systems and are aligned with regional integration objectives/considerations.

Sources for the Guidelines

- Universal human rights and international labour standards
- AU and RECs’ human rights and migration legal instruments, including free movement instruments
- International, African and REC policy frameworks on migration, social protection and development
- The ILO 1949 Model Bilateral Labour Agreement
- The draft AU Model Bilateral Labour Agreement
- The draft Guidelines for a Common IGAD *approach* on BLAs
- Perspective from government and social partner stakeholders in AU member countries.
- Views of migrant workers/representatives, and civil society.
- Insights from review of actual implementation of bilateral labour agreements.
- UN Migration Network draft Global Guidance on BLMAs

1. BILATERAL LABOUR AGREEMENTS (BLAs)

“Anchored on the principles of human and labour rights, bilateral labour migration agreements (BLMAs) are flexible tools for governing migratory flows, and improving the protection of labour and

human rights, recruitment needs and labour shortages in various socio-economic contexts and labour market conditions.”¹

These *Guidelines* address Bilateral Labour Agreements (BLAs) that are generally binding treaty agreements between two States: this term is generally used by African Union Member States. The generic term Bilateral Labour Migration Arrangements (BLMAs) is also mentioned to refer to a range of types of agreements, understandings, and arrangements on, or that include provisions on, the recruitment, placement and employment of migrant workers between two countries other than binding BLAs, such as memoranda of understanding (MOUs) between States as well as a range of other types of arrangements between governments and also between non-State actors.

Bilateral arrangements were utilized in colonial times to move labour from one jurisdiction to another in Africa. Largely superseded post-independence by mobility regimes between several European powers and former colonies, Africa-Europe bilateral migration arrangements have seen a resurgence in recent years as other pathways became more restrictive. Today, there are a number of broad framework agreements between countries in Africa and Europe and a considerable number of bilateral labour agreements with countries of the Middle East. With European countries, there has been a shift to broad frameworks of cooperation addressing a wide range of migration issues including irregular migration, legal pathways, readmission, and development.

However, migrants from a considerable number of African countries are employed in Middle East and other countries where no multilateral or bilateral agreements are in place to provide effective protection for migrant workers rights and decent work and living conditions.

In Africa, REC free movement systems are operational in EAC and ECOWAS: these regimes appear to have superseded BLAs between countries within those RECs. Other African RECs have established free movement accords pending further ratifications to become effective (COMESA, ECCAS) or are in process of adoption (IGAD). SADC established a Protocol on the Facilitation of Movement of Persons, not yet in force. Some use has been made of bilateral labour migration arrangements in Southern Africa; South Africa still has bilateral labour agreements with a few other SADC countries to procure mineworkers and farmworkers. MOUs or other *cooperation* arrangements are currently used in the SADC region in view of their relative flexibility, including bilateral arrangements for *regulation of movement* across borders.

However, BLAs have not often resulted in improving migration governance and migrant protection. The unequal negotiating power between destination and origin countries resulting in relatively poor terms for the latter and poor implementation of agreements are major factors. As well, BLAs have often been developed in a gender-blind or gender-biased way, reinforcing and perpetuating inequalities. Some destination countries seek bilateral partners willing to accept inferior conditions in exchange for employment opportunities.

There is extensive documentation on abusive and exploitative conditions faced by African migrant workers, notably in countries in the Middle East and Europe. Major issues of concern include the lack of labour and *decent work* protections for migrant workers in countries of employment, as well as high levels of exploitation and abuse in sectors such as agriculture, construction, cleaning and maintenance, and domestic work, along with lack of complaint and redress mechanisms in case of abuse. Women migrant workers employed in domestic work in private households are especially at risk. Lack of job security, sub-standard pay, non-payment of wages, employment contract substitution, are among work-related challenges often cited. Migrant workers commonly experience substandard living conditions while facing not only discrimination but, in some cases, racist/xenophobic violence. Health care and social assistance is often restricted or qualified, while access to and portability of social security may be lacking or absent.

¹ African Union (2020). *The Future of Human Mobility: Innovative Partnerships for Sustainable Development*. Thematic Area 4: Addressing Gaps in Migrant Protection, Technical Paper by the African Union, GFMD Regional Consultations (online), GFMD and the African Union, 23 April 2020, p.5

Experience shows that to be effective in protecting migrant workers' rights and ensuring decent work, BLAs need to set out clear goals and objectives referring to protection of migrant workers in line with African and international normative standards; provide for legally binding rights and obligations; describe in detail the specific responsibilities of, and actions to be taken by, each of the parties; and, address implementation gaps through a series of enforcement measures. BLAs must be complementary to a range of measures including: adoption of legislation and regulations domesticating African and international standards; adoption of national migration policies; regulation of private recruitment agencies; extension of labour law to all migrant workers including domestic workers; adoption of bilateral social security agreements; unilateral measures such as minimum wages, extension of national insurance and social security schemes to migrant workers, and establishment of migrant welfare funds. At the same time, BLA achievements will be limited if not linked to efforts, measures and instruments to ensure mutually-reinforcing coherence of national and regional migration policies with other policies including those on employment, labour, technical education and vocational training (TVET), non-discrimination/equality, development and regional integration, among others.

The need is clear for support to AU Member countries' effective development, negotiation, implementation and monitoring of bilateral labour agreements consistent with full respect for and protection of migrant rights, as well as for advocating and negotiating with migrant destination countries to respect binding standards of rights and decent work for all migrant workers and to ratify relevant regional and international conventions if they have not done so.

2. GUIDING PRINCIPLES FOR DEVELOPMENT AND IMPLEMENTATION OF BLAs

The following guiding principles should be applied when developing, negotiating, implementing, monitoring and evaluating Bilateral Labour Agreements (BLAs) and other bilateral labour migration arrangements (BLMAs) and realising their potential in the African context.

➤ Rights-based

All bilateral and multilateral agreements, policies and programmes should be rights-based in the sense of respecting the human and labour rights of women and men migrant workers and their families, including those in irregular situations, in line with African regional and other international instruments. Non-discrimination and equality of treatment irrespective of grounds such as sex, race, colour, ethnic origin, religion, social origin, disability, and/or nationality are key principles embodied in the African Charter on Human and Peoples' Rights, International Human Rights Conventions and international labour standards, including in particular fundamental principles and rights at work.

➤ Gender-sensitive and gender-responsive

All agreements, policies and programmes should be gender-sensitive and gender-responsive.

➤ Covering all stages of the BLA process

The Guidelines should be comprehensive in covering each stage of the BLA cycle: preparation; development and drafting; negotiation and adoption; implementation, enforcement and follow up; and monitoring and evaluation.

➤ Social partner and multi-stakeholder participation

Involvement of employers' and workers' organizations and relevant civil society organizations in the development, negotiation and implementation of bilateral labour agreements is essential. Migration governance demands multi-stakeholder cooperation in designing and implementing BLAs, involving central and local governments, social partners, relevant civil society entities, migrant workers, returned migrant workers, migrant workers' associations, private employment agencies (PEAs), and other concerned agencies.

➤ Shared responsibility between origin and destination countries

BLAs should reflect the principle of shared responsibility between countries of origin and destination, particularly to ensure that Country of Destination (CoD) responsibilities to provide for the protection of migrant workers be formally recognized to ensure respect by employers and government, as well as

enforceability. Country of origin (CoO) responsibilities may be referred to in provisions for pre-departure training, employment contracts, recruitment regulation and consular representation.

➤ **Knowledge-based**

Bilateral agreements should be based on solid evidence generated through accurate, valid, timely, and comparable gender disaggregated data on migrants’ skills and employment profiles, labour and skills demand, migrant stocks and flows, migrant working and living conditions, social protection coverage, legal and labour supervisory mechanisms as well as normative, legislative and regulatory frameworks. Data collection and treatment should respect personal privacy rights and data protection standards.

3. A STANDARD MODEL TEMPLATE FOR BLAS APPLICABLE ALSO TO ALL AFRICAN BLMAS

A core ‘common approach’ African bilateral labour agreement contains 31 articles, several with specific applicability in accordance with African regional Protocols and instruments on free movement and/or social security. While all articles are important for consideration in a comprehensive Agreement, all elements may not apply in specific contexts or circumstances. This template can be adapted for other bilateral labour migration arrangements.

| Num-ber | Article Title |
|----------------|--|
| | Title (specific title of the agreement) |
| | Preamble |
| A.1 | Scope of the agreement: (Coverage: migrant worker categories, employment sectors and skills; time periods; etc.) |
| A.2 | Purposes/Objectives |
| A.3 | Definitions of key terms used |
| A.4 | Applicable laws and standards |
| A.5 | Competent authorities and division of responsibilities between the two parties |
| A.6 | Exchange of information between the parties |
| A.6 bis | <i>Exchange of data between parties with and participation in the African labour migration data system</i> |
| A.7 | Organization of recruitment, introduction and placement |
| A.8 | Information and assistance to migrant workers |
| A.9 | Contract of employment, including (where applicable) a Standard Employment Contract (SEC) attached as a binding annex |
| A.10 | Rights to entry, residence, employment/work, and establishment, including permit modalities, in accordance with applicable legislation, free movement regimes and regional integration instruments |
| A.11 | Change of employment and facilitating mobility including during loss of employment |
| A.12 | Equality of treatment and non-discrimination |
| A.13 | Ensuring decent conditions of work including occupational safety and health |
| A.14 | Protection of wages |
| A.15 | Decent living conditions: housing, nutrition and leisure |
| A.16 | Access to and portability of social protection/social security including health coverage; protection during pandemics |
| A.17 | Employment and treatment of women workers |
| A.18 | Protection against violence and harassment, particularly against women migrant workers |
| A.19 | Supervision of working and living terms and conditions, and role of labour inspection |
| A.20 | Freedom of association and collective bargaining rights and access to civil society support |
| A.21 | Dispute settlement, access to justice and effective remedies (worker/employer) |

| | |
|------|---|
| A.22 | Access to training and skills development and skills recognition |
| A.23 | Facilitation of transfer of savings and remittances |
| A.24 | Admission, residence and establishment of family members, in accordance with applicable standards |
| A.25 | Return, repatriation and reintegration |
| A.26 | Provisions for emergency and force majeure situations including pandemics |
| A.27 | Joint Committee/Joint Technical Group/ Joint Working Group |
| A.28 | Dissemination, Implementation, Monitoring and Evaluation procedures |
| A.29 | Amendment and settlement of disputes relating to the Agreement |
| A.30 | Language versions and signature |
| A.31 | Effective date and termination clause |

4. CORE CONTENT FOR RIGHTS-BASED AND GENDER-RESPONSIVE BLAS

The basic content for each of the template elements is drawn from African and international instruments including ILO Conventions and Recommendations applicable to labour agreements, decent work and migrant workers. African countries can draft appropriate text based on the guidance provided below. While bilateral labour agreements are treaties independently established between sovereign States, the ILO can provide normative based guidance in drafting, reviewing text, negotiating and/or implementing BLAs, upon formal request by one or both government parties.

Title of the Agreement

While the agreement title may be general, it is preferable for it to be specific and clearly indicate: the type of accord (BLA or MOU, or other); its purpose (for example, cooperation in the field of human resources or labour matters); coverage (type of sectors or workers – all, or specific categories such as domestic service/workers, construction workers, etc.). Any particular migration scheme covered should be specified.

Preamble to the Agreement

The Preamble usually explains the spirit of cooperation underlying the agreement and serves as an introduction. It should briefly explain the context and motivations/reasons for the agreement. The Preamble must also carry a reference to the basic objectives and goals without going into details. References to relevant AU/REC instruments as well as universal human rights instruments, ILO fundamental Conventions, international migrant worker instruments and the principle of gender equality are essential here. Clauses could be included on cooperation and collaboration between the parties to prevent and prohibit exploitation and abuse in the workplace and on consultation with representative workers'/trade union organizations and employer's organizations in both the CoO and CoD.

Intra-African BLAs between member states of the African Union

Mention in the Preamble of conformity with relevant African Protocols and Conventions is essential for agreements between States members of the African Union. Specific mention should be made of the African Charter on Human and Peoples' Rights and the AU Protocol on Free Movement of Persons, Right of Residence and Right of Establishment. Account also must be taken of specific standards binding on African member countries of RECs with legal provisions on freedom of movement, protection of rights, access to and portability of social security and related norms.

A.1 Scope of the agreement: (Coverage: migrant worker categories, employment sectors and skills, time periods, etc.)

The scope of the agreement should be clearly indicated at the outset of its text. This would normally include mention of the time period for the agreement, the migrant workers categories and/or employment sectors covered, and may include more specific designation of skills and skills levels expected, specific jobs, employers, and/or work sites, whether reciprocal or unilateral migrant worker movement, etc.

A.2 Purposes/Objectives of the Agreement

It is important to spell out the specific objectives of the agreement as a separate item going beyond the

general references in the Preamble and definition of the scope of the agreement in Article 1. These objectives for origin and destination countries can be a combination of the following: Addressing labour/skill demand and/or meeting labour and/or skills needs of employers; Regulating international recruitment, placement and migratory flows for better protection of workers; Ensuring human and labour rights protection and welfare of migrant workers employed abroad; Improving overseas employment opportunities for nationals; Enhancing the development benefits of regulated labour mobility for origin and destination countries; Providing better options for regular migration as an alternative to irregular migration; and Enhancing accountability and transparency among parties involved in overseas employment.

A.3 Definitions

The definition of key terms used in the agreement serves to avoid subsequent ambiguity in interpretations among parties to the agreement. Definitions should be mutually agreed upon by the two State parties, use internationally accepted and neutral terms to the extent possible, and avoid terms that are not gender-sensitive. Most terms to be included are defined in international labour standards, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), and the ILO General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs.

A.4 Applicable laws and standards

This article should state or refer to main national laws and regulations applicable to pre-departure and recruitment phases in the country of origin (CoO) of migrants and, in the country of destination (CoD), to national laws and regulations applicable to protection and treatment of migrant workers and specifically to their employment and residence, including for domestic workers. This article should reiterate the general applicability of international and regional human rights as well as international labour standards to the protection and treatment of migrant workers and would also refer in the intra-African context to applicable AU/REC standards. The article could specify that, in case of differences between labour standards applicable in the employment country and those in the country of origin, and/or in the absence of specific national laws and regulations or equivalent legislation applying to migrant worker situations, the baseline standard of protection of migrant workers applicable in the CoD shall be the minimum relevant international labour standard.

A.5 Competent authorities and division of responsibilities between the two parties

The roles and responsibilities of each party to a BLA must be spelled out in the agreement, including concerning the implementation, enforcement and review of each of the provisions. A specific substantive clause early in the agreement will specify the roles and division of responsibilities for each party as well as common or shared responsibilities. Agreements often mention the responsible unit in each country for implementation, designating them as the “first party” and the “second party”. Agreements should also assign second levels of responsibility to ensure credibility of enforcement. This would include designation of national agencies with monitoring and enforcement responsibilities in the CoD, for labour inspection for monitoring workplaces, and the public health authority and/or others for monitoring living, housing and healthcare. It should also assign joint monitoring responsibilities to social partner workers and employers organisations in both CoO and CoD as another level to ensure credibility of enforcement.

A.6 Exchange of information between the parties

The exchange of information between the CoO and the CoD on a regular basis should be indicated in the agreement. It can be specified that the exchange takes place through a Joint Committee and consular services. Article 1 of the ILO Model Agreement contains detailed provisions² relating to this exchange of information. The agreement can specify the expectations for different types of information, such as characteristics of demand for migrant workers, job opportunities in specific sectors and skills, information on conditions of life and work and customs and culture in the destination country in the CoD. From the CoO side, information on labour and skills availability, recruitment procedures and regulations, etc. should be indicated. From both sides, information on applicable laws, regulations and procedures may be required. An important provision to include in this Article is avoidance and suppression of *misleading propaganda* by any party, whether recruitment

² The ILO Model Agreement covered permanent as well as temporary migration. At the time, transfers of labour were mostly arranged by public employment services of the two parties.

agencies, promoters, employers or others about migration possibilities or working and living conditions abroad.

A.6 bis (intra-African Specific)

A second part of Article 6 for intra-African BLAs should include a commitment by both parties to share relevant information with, and participate in the Africa Labour Migration Data system as a means to facilitate exchange of information between the parties utilising a common regional system.³

A.7 Organization of recruitment, introduction and placement

The Article should specify the regulations and mechanisms for oversight of recruitment of migrant workers -- consistent with upholding fundamental principles and rights at work. The term “recruitment” should be understood to explicitly refer to the “advertising, information dissemination, selection, transport, placement into employment and – for migrant workers – include provisions for return to the country of origin, where applicable”.⁴ The Article should specify what constitutes fees and costs.⁵ It is recommended that this Article specify that: “Prospective employers, public or private, or their intermediaries, and not the workers, should bear the cost of recruitment”. The article should define roles of both the CoO and CoD in ensuring fair recruitment, by: identifying the entities authorized to undertake recruitment and placement activities (for example, registered/licensed PEAs and public employment services of both parties); including a stipulation that migrant workers will be given free, accurate and gender sensitive information about their recruitment conditions; and providing for joint action to minimize recruitment malpractices. strengthen regulation of recruitment agencies, and reduce migration costs. A joint monitoring mechanism should be identified to ensure compliance with fair recruitment processes. It will be helpful to include an acknowledgement of limits on the liability of recruitment agencies in the CoO for occurrences in the destination country, including actions by employers, beyond their knowledge and control.

A.8 Information and assistance to migrant workers

This Article should specify that migrants will be provided with free or affordable gender- and rights-based information and assistance, including pre-departure training and post arrival orientation. That information should include all information required on the work for which the migrant worker is engaged, travel arrangements and the conditions of life and work including health and related matters in the country of destination. On arrival migrant workers should receive all documents needed for work and residence as well as further orientation and advice on conditions of life and work and other assistance needed to adapt to conditions in the country of employment.”⁶ This Article should specify that such information will include: labour law governing the employment relationship; employers’ obligations, including occupational health and safety (OSH) regulations; obligations of employers’ and/or recruitment agencies regarding migration costs; prohibition of confiscation of travel and identity documents; and dispute resolution mechanisms and access to justice. This article can usefully specify that normally, employers are expected to facilitate workers' travel to place of employment and provide for supplemental costs -if any in transit. The same principle may apply in the event that a migrant worker whose employment has been terminated is in transit to the CoO, depending among others on the reason for termination of employment.

A.9 Contract of employment, including as applicable a Standard Employment Contract (SEC)

This Article provides for an employment contract for the migrant worker and terms of employment (wages and other remuneration) and the conditions of work. This Article should specify that the employment contract is concrete and enforceable in the country of destination and is provided to the migrant worker in a language he/she understands. A widely utilized practice with BLAs is to attach a

³ Statistics on international migration in Africa, including labour migration, are collected by the organisations that make up the African Statistical System, with the main contributors reporting at the national and regional level: African Union *Report on labour migration statistics in Africa (Second edition, 2017)* 13.

⁴ ILO General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs.

⁵ The ILO Definition of Recruitment fees and Costs provides a useful and appropriate guide for this.

⁶ ILO Model Agreement

detailed **Standard employment contract (SEC)**⁷ as an annex to the agreement that formalizes the employment relationship between the worker and the employer, provides specifics on work expected, and sets the applicable terms and conditions of employment. (A model SEC is annexed to this document.) With or without a SEC, this Article should specify that the individual employment contract shall include the details of the employer's obligations concerning the worker's wages and remuneration including overtime pay and paid annual leave; working hours including overtime; rest periods; accommodation and its type, or the payment of accommodation allowance; and the medical treatment and access to social security coverage. Application of minimum international standards for conditions of work and occupational safety and health (OSH) should also be specified. The Article should mandate joint verification of contracts by authorities of the CoO and CoD and specify that migrant workers are "informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner," and the contract be delivered to migrant workers and signed before departure from the country of origin to impede contract substitution.

A. 10 Rights to entry, residence, employment/work, and establishment, including permit modalities

This article necessarily specifies the recognition of rights to entry, residence, employment/work and establishment as specified in the AU and RECs Protocols, as well as in certain bilateral Free Movement agreements and the modalities of application of these rights to persons covered by the BLA, as well as terms and modalities of arrangement for relevant permits and authorisations if and where needed to enter, reside and work in the destination country.

A.11 Change of employment and facilitating mobility

This article establishes conditions to change employment during the period of employment and after the end of the contract of employment, usually differentiating legitimate situations for change of employment, such as loss of employment before expiry of contract or for workers who suffer premature termination of contract, abuse, exploitation or discrimination on the job, completion of the normal contract or when the job for which the worker was recruited does not correspond to their physical capacity or occupational qualifications. This BLA Article should specify that both the employer and the worker are able to terminate the employment contract, provided a sufficient notification period is given. The SEC can stipulate conditions under which a change of employment is possible without prior permission of the employer. Provision should be included regarding employee rights to recover own contributions to social security as well as portability of accumulated benefits.

A.12 Non-discrimination and equality of treatment

A specific provision on non-discrimination is essential for a BLA as well as for all BLMAs. Non-discrimination and equality of treatment on these grounds are key principles embodied in African, international and ILO instruments. The Article should specify that: equality of treatment applies, without discrimination, to migrant workers and that migrant workers should at least enjoy equality of treatment in respect of wages, working and living conditions, social security, and trade union rights, on par with national workers in the destination country. The Article should uphold application of the principle of equal treatment without discrimination based on nationality, race, religion or sex, between different groups of migrant workers; it should also specify the fundamental principle of equal remuneration between men and women for work of equal value. The detailed application of the principle of equality of treatment in social security should be regulated through a separate bilateral social security agreement concluded between the CoD and the CoO.

A.13 Protection of decent working conditions, including occupational safety and health

This provision of the BLA should specify the application to all migrant workers of minimum standards for conditions of work, and occupational safety and health (OSH) in the country of employment. In complement, it should specify terms of protections for specific categories of workers that may be employed in the context of the BLA. It may be guided by relevant ILO Conventions that define minimum standards concerning working conditions and OSH, including for specific sectors of agriculture, construction, hotel and restaurants, mines, nursing and plantations. Specification of working environment protections should include measures to protect workers from heat stress in countries

⁷ A domestic worker-specific SEC has been developed and is used in several BLAs with GCC countries.

characterized by extremes of high temperature, humidity and/or dryness. Provisions may also be included to ensure migrant workers are covered by minimum standards relating to working time, rest time, vacation and night work, such as those delineated in specific ILO Conventions. A specific clause should call for gender-specific protection for women migrant workers, including arrangements to address specific risks at work faced by female workers, and protection against violence, threats, and physical and/or sexual abuse, as well as appropriate privacy for female workers including a separate accommodation room for live-in domestic workers.

A.14 Protection of wages

A specific provision should be included spelling out the payment of decent wages to migrant workers, including providing for minimum wages for migrant workers in all sectors where applicable and feasible, and spelling out allowable deductions and provision for overtime pay based on guidance in relevant ILO Conventions. A clause should be included on equal remuneration for work of equal value, ensuring that wages set or offered in the context of the BLA are based on objective criteria determining the value of the work and not based solely on local “market value” that may be subjectively set in/by the destination country and may contribute to driving down wages and perceived competition between migrant and 'local' workers. The BLA should also specify wage payment by the employer into a bank account controlled by the migrant worker, issuance of payment slips showing amount of pay and allowable deductions, and payment periodicity (usually monthly). Wage protection should provide for recovery of wages in arrears or unpaid wages, even after the worker has returned home. Measures should be specified to ensure that migrant workers have effective control over their own bank accounts.

A.15 Decent living conditions, including housing, nutrition and cultural integrity

The BLA should include a provision specifying minimum standards and modalities of living conditions for migrant workers, including reference to housing, food and nutrition; access to leisure and rest; and possibilities to maintain their own national and ethnic identity. This would facilitate supervision of living conditions mentioned under A.19 below. This would include mention of/clauses on: specification of minimum decent accommodation including sleeping and personal space and respect for privacy – for which international guidelines are specified in ILO Recommendations; supply of adequate healthy nutrition for migrant workers and access to culturally appropriate food; and equality of treatment with respect to accommodation. A clause should specify that the respective parties will “take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin”. Intra-African BLAs should specify any other rights applying under African regional instruments and relevant REC Protocols.

A.16 Access to and portability of social protection/social security including health coverage.

This Article should elaborate as precisely as possible provisions on social protection consistent with international standards; the principle of equality of treatment – not less favourable for migrant workers than national workers with respect to social protection including healthcare; and migrant worker access to national social protection schemes with reference to the relevant branches of social security in the Social Security (Minimum Standards) Convention, 1952 (No. 102).⁸ It should further reference what *social protection floor* coverage is available to all migrants. Specific delineation should be made for health insurance/coverage, that it should be provided as a function of employment, and that the employer should contribute to the cost of health insurance/health coverage, with inclusion of coverage for accidents and sickness “off the job” as well as at work, and work injury compensation and benefits, in accordance with the ILO Conventions on accident compensation. Portability of social security entitlements (acquired or in course of acquisition) should also be spelled out and reference made to separate bilateral Social Security Agreements as may exist and, in the case of intra-African agreements, rights and modalities of access to, enrollment in and portability of social security coverage should be spelled out in conformity with continental and regional standards and, where applicable, AU and REC Conventions, Protocols and other instruments regulating social security provisions. The Article should specify that migrant worker claims to and disbursement of social security benefits and assistance will be facilitated, including after return to the CoO. Language should be included in this Article specifying that, in the case of a pandemic or other major health emergency, migrant workers will be treated equally with nationals in access to health care, prevention (such as vaccination), protection (such as protective equipment), and medical treatment.

⁸ The nine branches of social security identified in ILO C-102 and detailed in other instruments are: medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors' benefits.

A.17 Employment and treatment of women workers

This Article provides for explicit gender responsive measures and gives particular attention to women migrant workers facing particular risks, notably migrant domestic workers, in line with the ILO Convention on Decent Work for Domestic Workers, 2011 (No. 189), ILO Convention on Violence and Harassment, 2019 (No. 190) and the International Convention on the Elimination of Discrimination Against Women (CEDAW) and its treaty body's General recommendation No. 26 on women migrant workers as well as the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol). It should specify that all aspects of preparation for and of employment and living abroad are addressed in non-discriminatory gender responsive policy, regulations, employment terms and conditions, wage protection, living arrangements, supervision, access to gender sensitive services and remedies and access to justice, as well as equal rights and treatment for women migrant workers. It should include specific reference to gender-sensitive medical testing and health care services, prohibition of mandatory pregnancy testing, and for access, entitlements and portability of social security for women migrant workers. Reference can be made to a specific SEC for women domestic workers appropriately addressing issues of: equality of treatment, wage protection, rest periods, leave days, hours of work, privacy, right to communication, complaints mechanisms, prohibition of passport confiscation, maternity protection, and freedom from harassment and violence, in line with international instruments.

A.18 Protection against violence and harassment, particularly against women migrant workers

This Article specifies protection of migrant workers from violence, harassment and/or abuse in the workplace and outside it. A specific prohibition against violence and harassment at work and in the host locality is an essential element in a BLA, along with indication of access to procedures for complaint and remedy for victims. Provision must be made for legal, psychological and medical assistance services for victims of abuse provided independent of their immigration status, as well as for multilingual hotlines accessible by domestic workers and other women migrant workers in the CoD, to be established within a short, specified timeframe if not already existent.

A.19 Supervision of working and living conditions and role of labour inspection

This article designates responsibilities and modalities of supervising the working and living conditions of migrant workers by the competent authorities of the CoD. This provision should explicitly provide for diligent labour inspection of – and jurisdiction to pursue labour standards violations at – all workplaces where migrant workers are employed, by the competent national authority, normally the national Labour Inspection authority. Reference should be made to the terms and parameters for labour inspection, and the roles and responsibilities of labour inspectors as laid out in the ILO Labour Inspection Convention, 1947 (No. 81). This Article text could usefully include mention of: commitment of the CoD to intensify labour inspection services as warranted by the agreement; briefing of labour inspectors and employers on obligations under the agreement; provision of additional training on labour and OHS (Occupational Health and Safety) inspection regarding migrant/foreign workers and workplaces with migrant workers allocation of supplemental funds for the service; and monitoring of commitments. The appropriate authorities competent to inspect housing, health, and other aspects of migrant worker living conditions should be identified and provision made for their training on human rights and gender responsiveness in this Article. The Article should provide authorization for consular officials of the country of origin to visit workplaces and places of accommodation of their nationals to review working and living conditions with prior arrangement. As relevant, specific measures should be included in this Article for monitoring workplaces and accommodation for women migrant workers, by women inspectors, especially in domestic work, having due respect for privacy where law or agreements allow for inspection of private households.

A.20 Freedom of Association and collective bargaining rights and access to civil society support

Freedom of association, the right to form and join worker organisations and rights to collective bargaining are universal rights for all migrant workers guaranteed in binding customary international law as well as in ILO fundamental Conventions No. 87 on Freedom of Association and Protection of the Right to Organise (1948) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) applicable in all Member States of the ILO, whether or not ratified. Given many obstacles to respect for these rights in countries employing migrant workers, explicit provisions upholding these rights are needed in any BLMA. Provisions should also be made for migrant worker access to NGOs concerned

with migrant welfare, diaspora organizations, and faith-based organizations that can provide support. BLA provisions that facilitate functioning of migrant worker organisations including support to organization of women migrant workers are also advisable. A good practice by trade unions is MOUs between unions in origin and destination countries to mutually support and assist migrant workers.

A.21 Dispute settlement and access to justice and to effective remedies (Worker/Employer)

All BLAs need to include a section on dispute settlement or resolution concerning grievances between the migrant worker, the employer and/or the recruitment agency. A general provision foresees procedures for an amicable settlement between parties in dispute (worker-employer, worker- PRAs in CoD or CoE or other), failing which access to judicial means is allowed. Clear guidelines on complaint and settlement should recognize means for access to justice and to remedies for migrant workers, including for rights violations, fraudulent recruitment, wage issues, workplace grievances and other disputes. The BLA could specify the process by which workers can initiate a complaint, seek assistance and obtain remedy in line with the national laws and regulations. A separate annex or protocol may be developed for detailed provisions on:

- information and access to legal aid to courts;
- rights and access to complaint mechanisms, procedures and hearings;
- use of a language the migrant worker understands or provision of free interpretation services;
- informing and permitting the involvement of consular representatives of the migrant's origin/citizenship country in such procedures;
- accessible and gender-responsive grievance/complaint and resolution mechanisms and procedures including hotlines;
- enforceable compensation where applicable;
- application of remedies including after the migrant worker has returned/been returned to CoD prior to or after resolution of claims and/or complaints in the CoD, etc.

A.22 Access to training and skills development and skills recognition

This Article specifies provision of pre-departure orientation of migrant workers for employment in the destination country as well as vocational training for selected jobs. The Article text should specify that the “The parties shall co-ordinate their activities concerning the organisation of educational courses for migrants, which shall include general information on the country of immigration, instruction in the language of that country, and vocational training.” The text should also specify equality of access to training by women migrant workers. While the costs and organisation of pre-departure orientation are expected to be borne by the CoO, there is considerably justification for specifying that the CoD and/or beneficiary employers contribute to costs of training that they will benefit from. At a minimum, it is important for employers in CoDs to provide training in occupational safety and health (OSH) matters, especially when workers are involved in hazardous occupations such as construction. This Article should include provisions on skills recognition for migrant workers and allowance for their access to skills development in the country of employment, as well as for recognition in the CoO of skills acquired abroad.

A.23 Facilitation of transfer of savings and remittances

This Article should reiterate that migrant workers have the right to transfer their earnings and savings, in particular those funds necessary to support their families, from the country of employment to the country of origin or any other country. The Article should specify that such transfers be made in conformity with procedures established by applicable legislation of the States concerned and in conformity with applicable international law and agreements, and that States concerned shall take appropriate measures to facilitate such transfers. The ILO Model Agreement calls upon both parties to support the “simplification and acceleration of administrative formalities regarding the transfer of funds so that such funds may be available with the least possible delay to those entitled to them.” In view of the UN 2030 Sustainable Development Agenda target of reducing remittance transaction costs to 3 per cent by 2030,⁹ the text can state that the two parties would facilitate transfer of remittances at a low cost by providing information on remittance options and commit to providing all migrant workers with information on and access to formal financial institutions. It is also important to make it explicit that remittances will

⁹ UN 2030 Agenda for Sustainable Development SDG target indicator 10.c: “By 2030, reduce to less than 3% the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5%.”

not be taxed at origin or destination, and mention can be made of facilitating access to bank accounts for migrant workers, to encourage utilization of formal (rather than informal) mechanisms for remitting.

A.24 Return and repatriation

Provisions covering return and repatriation are essential components of any BLA, specifying migrant workers' rights – regardless of migration status – to outstanding remuneration, severance pay, compensation for holidays not taken, and reimbursement or transferability of social security contributions under certain conditions. This Article should cover: procedures and treatment in cases of death, disability, serious injury or illness, including care-in-place and repatriation as needed; situations in which a migrant worker ends up in an irregular situation, including regarding rights arising out of past employment in respect of remuneration, social security and other benefits; prohibition of arbitrary deportation and mass expulsions, with provisions that the cost of expulsion shall not be borne by the migrant worker and their family; negotiation of measures and solutions in emergency situations, as elaborated in Article A.26.

A standard provision (of the agreement or employment contract) is that return travel/repatriation costs should be paid by the employer, except under certain conditions. Specific provisions can provide for paid leave for return to the home country at the end of two years' service. This Article should specify that the CoD issues exit visas for the repatriation of workers upon contract completion, emergency situations or as the need arises. A provision can be made for compensation and repatriation as needed in case of serious illness, work accidents or disability of the worker. In the event of the death of a worker, the funeral or the repatriation of the remains should be arranged at the expense of the employer in line with CoD laws, with specification that any back pay and all remaining dues should be transferred to the next of kin. This provision should reiterate recognition of the migrant worker's right to return and that return should be effected in any case without coercion.

References to reintegration are absent in most agreements because it is generally a sovereign national competence of the country of origin, although there are examples of country of employment providing support to post-return employment reintegration as well as examples of countries of origin providing information and advice on reintegration to migrants abroad prior to return.

A.25 Admission, residence and establishment of family members

This article would specify the rights to entry, residence, and establishment for family members of migrant workers without discrimination on the basis of sex or other grounds, according to applicable international and regional law as well as legislation of the States parties. This is particularly relevant for intra-African arrangements, consistent with applicable REC Free Movement Protocols and/or other relevant agreements. This Article would usefully spell out any necessary modalities of application, including for permits and authorisations to enter, reside, and work as applicable in the CoD.

A.26 Provisions for emergency and *force majeure* situations including pandemics

In view of situations of crisis, civil/military conflict, disasters or health emergencies (notably the COVID-19 pandemic), an Article should provide for negotiation of mutually agreeable measures and solutions in the absence of relevant pre-determined responses. The Article should mandate voluntary and systematic exchange of information and knowledge for preventing and mitigating crises, and cooperation to ensure that migrant workers are provided with information on crisis-related impacts. This Article should include a commitment by both parties to implement crisis response measures that are consistent with applicable labour standards covering either “stay in place” options or return options (when return is warranted). The article can reiterate the parties' commitment to maintaining and strengthening bilateral and international cooperation, to taking appropriate steps through bilateral or multilateral arrangements, including through regional mechanisms, and to making full use of existing arrangements, institutions and mechanisms. In cases where a disaster or emergency prevents migrant workers from returning to their country of origin and/or prevents them from continuing employment in the CoD, the BLA should commit the CoD to equality of treatment of migrant workers and national workers in relation to emergency income support measures, healthcare and other special measures to sustain the welfare of workers. Cooperation is also essential to facilitate the voluntary return of migrant workers and family members to their country of origin in safety and dignity, while international law also

foresees options for settlement in the CoD. It is also essential to specify that migrant workers have the right to unpaid wages for work already performed.

A.27 Joint Committee/Joint Technical Group/ Joint Working Group

An integral part of any agreement is the establishment of a Joint Committee (JC) to monitor and implement the agreement, also referred to as Joint Working Group or Joint Technical Working Group. Agreements should mention the functions of the committees and the frequency of meetings. Common practice is to establish a committee with a combination of senior officials of the two signatory parties. International norms suggest including a participant from a representative employer and a worker organisation from each party to the JC, at least in a consultative role. Care should be taken to include officials familiar with gender issues where the BLA concerns women migrant workers. Meetings annually or more often should be specified, including virtually if/when travel is impeded, and also when circumstances demand, with venues alternating between the CoO and the CoD. Section 5.3 below provides more details on functions and working of the JCs. Detailed terms of reference for the JCs during implementation could be added as an annex. All records of meetings should be shared with stakeholders.

A.28 Dissemination, Implementation, Monitoring, and Evaluation

Given the obligations and responsibilities laid out in BLAs directly concerning employers, recruitment agencies and social partners as well as the rights protections specified for migrant workers, this article delineates the modalities of dissemination of the Agreement, or at a minimum public information on the rights, obligations and responsibilities bearing on concerned actors outside as well as in government. This Article also designates responsibilities for implementation as well as division of costs for implementation, monitoring and evaluation. It is important to specify inclusion of representatives from workers' organizations, employers' organizations, and civil society, where possible, in the implementation, monitoring and evaluation processes in both the CoO and CoD. The two States parties to the agreement should include a monitoring and evaluation system in the BLA. Monitoring is a continuous process, while evaluation can be periodic. Independent evaluation should be made mandatory before renewal of the BLA.

A.29 Amendment and settlement of disputes relating to the agreement

It is best to include at least minimal language in a BLA providing for its operationalisation and amendment or revision, as well as a procedure if not mechanism for settlement of any dispute or differences that might arise in the course of implementation. This will serve to avoid problematic situations that may arise in interpretation and implementation.

A.30 Effective date and termination clause

Agreements usually have a validity period of three to five years. Most mention automatic renewal in the absence of a termination request by either party. Specific provisions in the BLA are essential to ensure periodic review of implementation, for amendment of the agreement, and for renewal or termination by the parties. The BLA should specify that any renewal or extension would be established contingent on a thorough joint review of the agreement, its terms, the implementation, and assessment of success and of costs and benefits arising, lessons learned, and any specific lacunae in application and/or disputes that may have arisen over the period of the agreement.

A.31 Language versions and Signature

Agreements also specify the applicable language versions. This is generally inserted in a final article mentioning the signing of the contract in different languages. Destination countries generally establish a version in at least one official national language when different from origin country official language version. It is important to clarify which version/s would be considered authoritative in the case of settlement of disputes. This Article should include a clause specifying the procedure and modalities for signature by both parties, validation, and entry into effect. It may be appropriate to obtain endorsement of the BLA by workers and employers' organisations, in both CoO and CoD. As a treaty, a BLA may be subject to Parliamentary review (although not necessarily to debate, vote or amendment), in line with national statutory provisions.

5. OPERATIONAL GUIDELINES FOR THE DIFFERENT STAGES OF THE BLA PROCESS

The BLA process consists of several stages: (i) preparation; (ii) negotiation and adoption; (iii) implementation and follow up; and (iv) monitoring and evaluation. The last item overlaps with implementation and follow-up. Operational guidelines below elaborate on each stage.

5.1. Preparatory and drafting process

Effective preparation is the key to successful outcomes in bilateral negotiations. Required steps include:

Institutional setup for BLA support

For effective coordination of BLM arrangements, it is important for the lead ministry to establish or revitalise mechanisms for internal coherence and with other government machinery. These institutional mechanisms will be useful for support to all stages of the BLA process.

a. Establish a coordination unit for bilateral labour agreements in the lead ministry

The establishment (if not already present) of a coordination unit within the responsible ministry for labour agreements – usually the Ministry of Labour – facilitates the systematic development of agreements. The coordination unit should be responsible for all BLMA-related matters, and coordinate development of new agreements as well as revision of existing agreements. The unit should also be the repository for all agreement documentation, including copies of agreements, related protocols and minutes of Joint Committee meetings. The presence of a dedicated unit also ensures that transfers of responsible officials do not lead to loss of institutional memory.

b. Institute or revitalize a Steering Committee on labour migration including bilateral labour agreements for inter-ministerial coordination

Since several government ministries and agencies may be dealing with different aspects of migration, inter-ministerial coordination and consultation are important. This will ensure policy coherence among government development, employment and migration agendas and activities on migration across ministries. The 2018 revised Migration Policy Framework for Africa highlights the need to align agreements with broader policy areas.¹⁰ The steering committee can be drawn from different ministries and agencies with mandates on migration-related matters. Members are usually the Ministry of Labour as the lead technical ministry, along with the ministries/agencies for Foreign Affairs, Home Affairs/Interior, Justice, Social Affairs (if distinct ministry), Women, Education/training, Social Security, and Development/cooperation, among others. This coordinating mechanism would usefully include representatives of social partners, concerned civil society organizations including women's groups, migrant organisations and recruitment/employment agency associations. The Steering Committee can appoint technical working groups to conduct preparatory assessment and study draft BLAs.

Existing frameworks for inter-agency coordination should be utilized to cover BLMAs, for example expanding the scope and agendas of any existing national coordination mechanisms on migration.

c. An Advisory Committee on Labour Migration representing all important stakeholders

While the ultimate responsibility for migration policies and inter-State cooperation lies with the government, these policies and practices are likely to be more effective when based upon social dialogue involving social partners and broader civil society. A consultative advisory committee on labour migration with broader representation including from employers' and workers' organizations, the private recruitment sector, and civil society including migrant and women's organizations should be convened if it does not already exist: it can advise, provide inputs and monitor progress on development, negotiation and implementation of BLMAs, among other tasks it may have.

¹⁰ “Ensure coherence at the national level between bilateral and regional agreements pertaining to the movement of workers, national labour market policies, migration policies and other relevant policy areas, such as health or agriculture, in line with international human rights law, norms and standards” African Union Commission (2018). *Revised Migration Policy Framework for Africa and Plan Of Action (2018 – 2030)*, Addis Ababa .

Needs assessment for a BLA or other BLMA and baseline informationA needs assessment for a BLMA can be carried out by the focal or coordination unit for BLAs, which may usefully engage specialists to carry out the assessment. Obtaining an accurate assessment will need to draw on social partner employer and worker organisations as well as research/academic intuitions, recruitment agencies, human rights and gender specialists and others. The context of BLAs or other arrangements – whether intra-African, Middle East or EU migration movements – will obviously determine the relative emphasis on different objectives listed below.

The rationale for establishing a BLA or MOU should be elaborated at the outset. These can include:

- Open up a new market for workers or expand existing markets and promote employment and remittances
- Better regulate existing labour flows by addressing recruitment problems and/or irregular migration including informal movements common to all contexts.
- Address protection gaps and promote the welfare of workers in overseas employment
- Ensure compliance by recruitment agencies/PEAs with applicable laws in both countries
- Streamline and regulate an existing flow of migrant workers to prevent abuses and improve governance
- Promote cooperation in the areas of skills development, vocational training and capacity building

In assessing the justification for a new or revised agreement, the following questions are relevant. In short, the origin country must be convinced about the value added by the agreement.

- Is the planned action consistent with other government priorities in the areas of development and poverty alleviation, employment and labour market policies, and skills development?
- What are the critical issues of the current migration situation – governance of flows, protection of workers, promoting development benefits, and reduction of irregular migration?
- Will the proposed agreement able to address the above critical issues?
- Can the origin country adequately meet the labour market and skills needs of the country of destination?
- Does the government have the capacity to administer the planned agreement?

The authorities must be convinced that the planned agreement can address the above issues. If the needs assessment exercise indicates a strong case for an agreement, the government should launch the process.

Collect baseline migration situation information prior to the agreement

Baseline information (prior to the agreement) is essential for the needs assessment as well as for monitoring and evaluation; it will enable assessing what changes have emerged following the agreement. Many countries, however, do not have access to this type of comprehensive information, nor do they have the capacity to collect such information in a short time when they start developing a BLMA. As a compromise, they have to identify essential information on which to base the agreements. A rapid assessment can collect the following information:

- Demand for migrant workers from the destination country; skills and sectors or occupations in demand; and the availability of workers in the CoO with the requisite skills to match this demand with consideration of retaining adequate numbers of trained workers to meet domestic needs .
- Basic information on existing flows and stocks of migrant workers: numbers and profile involved by gender, channels of migration used, average recruitment and migration costs, migration status (regular and irregular), the protection status of migrant workers, and profile of diaspora populations. These will help identify issues to be addressed in the agreement.
- Applicable legal and regulatory frameworks relating to labour migration in both countries.
- Challenges and issues in existing migration arrangements between the two countries: e.g., protection status and gaps, complaints and redress, and incidence of irregular migration.
- Information on wages, especially applicable minimum wages, if any, is crucial for wage negotiations.
- International and regional instruments, other BLAs and MOUs on migration, multilateral agreements signed by either party and regional and international frameworks on migration (e.g. GCM).

Other required steps

- The CoO should decide on the type of agreement to be negotiated: a BLA, an MOU or a framework agreement. While this cannot be unilaterally decided, preliminary contacts and other agreements signed by CoDs may provide some indication on possible options. For a CoO, a BLA is usually a better option, since it is a legally binding instrument, in principle assuring that its provisions and protections will be respected.
- The CoO should consider how terms of a proposed agreement may influence or be affected by other existing agreements and/or the situations of other migrant workers in the CoD.
- It is a good practice for the origin country to have its own template ready for discussion. Relying on a blueprint provided by the country of destination already constrains discussion of key concerns and compels more contentious bargaining. The present Guidelines provide a standard template oriented to the situation of the African Union Member States. Having a heading for each article makes it easier to follow and to easily detect missing items.
- Once the basic structure of the BLA is decided, it is important to develop appropriate text for each element, including the Preamble. Section 4 of the Guidelines provides relevant information for development of the BLA text. Review of the contents of other agreements entered into by CoOs and CoDs with other countries, any draft agreement sent by the CoD and international good practices may also provide some guidance. Specific objectives and cooperation priorities may be mentioned in the Preamble of the agreement.
- The draft agreement should be circulated for legal review to the concerned ministry/agency. Following clearance, the draft can be discussed at the Steering Committee and the Advisory Committee on Labour migration. It is strongly recommended that other key stakeholders outside the government also be involved in the review if there is no advisory committee with their representation. In most countries, it is usually the Ministry of Foreign Affairs that initiates the negotiation.
- A *gender assessment* of the BLA is recommended, especially for agreements concerning women migrant workers.

5.2. Negotiation process

The negotiation process is a critical part of the BLA process, which deserves special attention by both parties. Generic guidelines on negotiation strategies can be found in the ILO International Training Centre Online Training Toolkit “Developing and Implementing Bilateral Labour Migration Agreements in Africa”.¹¹

Selection of the negotiation team

Negotiation teams play a crucial role in conclusion of an agreement. The Steering Committee may advise on the selection of the negotiation team. The negotiating team should represent key ministries with the Ministry of Foreign Affairs taking a lead role. Senior officials with authority, technical specialists including skilled negotiators and a gender specialist (where women workers are important) should be part of the team, among others. The team should include women and men from both parties. The lead role in the negotiations may also depend on the type of parties – whether negotiations are with the Middle East or with the EU. They should be supported by competent interpreters to facilitate the discussions.

It will also be necessary to provide orientation and capacity building for the negotiating team on: negotiation skills; broader political, economic and trade relations between the two countries; relevant international human rights and labour standards; international relations; legal and regulatory framework of the destination countries, including their other BLAs; existing BLAs and mobility partnerships, and their own capacity to administer agreements.

The same team should follow up from the inception to the signing of the agreements to ensure success. Advisory support by representative national social partner organizations, recruitment agency association representatives, migrant associations, trade unions and concerned NGOs is very important even if they are not part of the formal negotiation team. The ILO can arrange technical expertise during bilateral discussions with the agreement of both parties and can reply to specific technical questions.

¹¹ ITCILO, 2020. <https://www.itcilo.org/resources/developing-and-implementing-bilateral-labour-migration-agreements-africa>

Launching the negotiation process

Agreement on a timeframe

Deciding on a timeframe for the conclusion of negotiations is essential. Rushing a bilateral agreement or MOU is likely to be disadvantageous to one party, even if another party insists on a fast-track process. However, negotiations cannot go on for too long because the context for initiating the agreement may change during a protracted period. Various factors may influence the timeframe for negotiations, including whether a first-time agreement is being established between the two countries, or whether there is a history of previous agreements and/or other current agreement(s) between the countries. The priority accorded to the conclusion of an agreement also may affect the timeframe. The timeframe for negotiations can shift – or even be suspended – if there is a change in government on either side or a major global emergency, such as the COVID-19 pandemic.

Exchange of drafts and rounds of interactions

It is common for the first drafts to be exchanged through courier or diplomatic pouch or email, and for feedback to be similarly received without formal person-to-person meetings in the initial stages. The embassies or consulates in the destination countries may also be involved in the initial interactions. Once some common understanding has been reached, there will be a need for face-to-face negotiations to identify priority areas of the agreement text with regard to: objectives and mutual benefits; categories of workers; sharing of responsibilities; protections to include, follow up arrangements; and other key issues. Review of similar agreements with other countries by the CoO or CoD should provide some guidance in this respect.

Conduct of negotiations

Bilateral agreements partly reflect the usually disproportionate forces of CoD demand for and CoO supply of human resources. The bargaining power in the negotiation process is obviously affected by role of the country – whether an origin or a destination country and the type of agreement – whether intra- African, or with EU or Middle East destinations. There are gains and benefits to be derived from agreements for both parties.

Adequate preparation and prior homework are crucial for successful negotiations, as is the selection of a balanced team of negotiators (with gender representation) with requisite skills and experience. Non-negotiable and bottom-line positions versus flexible positions where concessions can be made should be identified in advance. Accredited negotiators should have a mandate/authority to agree on draft text according to predetermined parameters, while referring back to HQ on critical issues only. The CoO should not compromise on bottom line/non-negotiable positions, such as protection of rights of migrant workers, just to get a deal through. It is important to place major issues on the table at the beginning, but start with negotiating on easy-to-agree provisions. Throughout the process, a cordial atmosphere with mutual respect should be maintained.

There will usually be several drafts and counter-proposals during the negotiation process; each one should be carefully reviewed by the Steering Committee or focal point for legal and technical issues. It is essential that social partners and other stakeholders also be consulted on the evolving agreement text.

5.2.4 Final text, adoption and dissemination

When both sides have agreed to a final text, a formal signing event usually occurs. BLAs may in some cases have to be approved by the legislative body (e.g. Parliament). Signed copies of the agreement must be deposited in the repositories of the respective countries. Both countries should disseminate copies and content of the agreement to employers, workers, recruitment agencies and other directly implicated stakeholders.

5.3. Implementation and follow-up

Follow-up and implementation are often the weakest link in the BLA process. Therefore, both parties have to be pro-active following the signing of an agreement.

Challenges for follow-up and implementation

Poor follow up and implementation of BLAs and other BLMAs is common across all regions – within Africa, with the Middle East and Europe. There are various reasons for poor follow up and implementation. In most cases, the political will to implement the agreement seems to be missing from at least one if not both parties. The CoO is often faced with a dilemma between promoting overseas employment for citizens for relieving local unemployment and earning higher remittances, and ensuring adequate protection for higher number of workers employed abroad. The CoD may have signed the agreement for publicity reasons and boosting international image without serious intent to follow up on same.

Other important reasons for poor implementation of BLAs include: stipulated changes to laws and procedures not carried out following entry into force of the agreement; changing economic situations in the CoD during the implementation period; insufficient resources allocated for implementation and follow up; limited diplomatic and consular presence by the CoO in the CoD; non-engagement of other major stakeholders particularly employers of migrant workers; absence of informing workers and their unions, recruitment agencies, labour inspection, etc. on rights and responsibilities; lack of competent staff in government for follow up as well as transfer of responsible personnel to unrelated posts. In the case of MOUs and other non-binding arrangements, absence of legal requirements for actions means little or no compelling reason to implement constraining measures.

Dissemination of agreements

A dissemination plan should be included as part of any agreement, as noted in the model template Article 28. The CoO should have the text of all agreements translated into national languages and easily accessible on websites and via other means to ensure availability to all migrant workers concerned, and also disseminate the texts to migrant workers and their employers in the CoDs. As well, dissemination of information of Joint Committee minutes and agreement amendments will improve the implementation of and follow up as well as encourage and guide the engagement of all stakeholders. It is crucial to adequately brief the concerned major stakeholders in implementation of the agreement, notably workers and employers organisations and private and public recruitment agencies as each party needs to know their rights and responsibilities, and what obligations are specifically incumbent on them.

The follow up mechanism – Joint Committee of the two Parties

Given that most agreements are poorly implemented, it is particularly important to build in concrete implementing, monitoring and evaluation procedures. An integral part of any agreement is the establishment of a Joint Committee (JC) to monitor and implement the agreement. The most common practice in this regard is to establish a small committee with a combination of officials of the two signatory parties. The committees usually consist of senior officials from both parties, and the agreements mention the functions of the committees and the frequency of meetings in general. All agreements and MOUs contain some variation of this mechanism. It is desirable to represent women in the JC, especially where the agreement concerns women migrant workers. The agreement provides for periodic meetings, usually annually. The JCs should draw on and facilitate inputs from social partners and other stakeholders that can inform the committee on monitoring, review and evaluation.

Functions of Joint Committees include:

- Periodic review, assessment and monitoring of the implementation of the agreement;
- Ongoing review employment opportunities and availability of corresponding skills for better cooperation;
- Proposing amendments and improvements of the agreement and related documents; and
- Addressing disputes in interpretation of provisions of the agreement and proposing solutions.

Good practices on Joint Committees based on experiences from Asia, Middle East and Africa. These are important because Joint Committees may not be active as expected:

- Mentioning a timeframe for setting up the Joint Committee;
- Specifying composition of the Committee;
- Clear timelines for frequency of meetings, validity, renewals and extensions;
- Elaboration of functions and terms of reference of JCs;
- Elaboration of implementation plans, and implementing guidelines;

- Designation of focal points in both countries and at the embassy/consular level;
- Appointment of subcommittees, or technical working groups;
- Provision for mutually agreed protocols and amendments to the agreement;
- Consultative processes involving social partners and other stakeholders;
- Publicity for the agreement contents and the Joint Committee meeting minutes and recommendations;
- Spelling out cost sharing arrangements for Joint Committees, monitoring and evaluation;
- Provision for evaluation of agreements, including proposing criteria and process;
- Urging capacity building of concerned government staff and partners for effective follow-up.

Elements for an implementation plan for agreements

An effective implementation plan may consist of the following items:

- Estimated targets or range of the numbers of migrant workers to be recruited/deployed under the BLA;
- Registration of movement under the agreement: the CoO informs and registers women and men workers migrating under the agreement; the CoD also registers workers arriving following the agreement.
- Supervision of recruitment agency operation and approval of employment contracts;
- Pre-departure and post-arrival orientation procedures;
- Plans and targets for supervision of working and living conditions of migrant workers including labour inspection targets, particularly for those at high risk such as domestic workers, by designated CoD authorities;
- Effective implementation of monitoring of complaints and dispute resolution procedures as per agreement.
- [Annual reports on progress of implementation](#)

Effective follow up and implementation of bilateral agreements may require changes to CoD laws and procedures. This is to ensure adherence to the terms of the agreement and enforcement of provisions. Existing laws may not be adequate or could conflict with agreement content. Some categories, like domestic workers, may not be covered by labour law. Recent amendments by CoDs to immigration and labour laws affecting foreign workers, including domestic workers, have implications for existing as well as new agreements, and should be monitored by the CoO. The Joint Committee can discuss modification of the agreements to take account of changed laws or situations as required.

Follow up and implementation of agreements may suffer from inadequate budget allocations. Each government should therefore, plan and set aside resources for this purpose for the duration of the agreement. A major expected impact of a bilateral agreement is strengthened protection of workers in the workplace and improvement of their living conditions. It is essential to include provision of resources for this purpose. The CoD should commit and allocate additional resources to ensure compliance with labour and other laws and procedures as provided under the agreement, such as for labour inspection. Joint Committee meetings should decide on transparent and fair cost sharing between the two countries for follow up meetings, workplace monitoring and inspection for labour law enforcement, and data collection and research for monitoring and evaluation, among others. The general practice is for travel costs to be borne by the visiting party and local hosting expenses to be paid by the hosting government.

Revision of Agreements

Countries may need to consider revision of agreements when circumstances demand it. It is one of the specified functions of Joint Committees. However, revisions are not common in practice due to probably the reluctance of both parties to start a fresh round of negotiations, and also the common practice of auto renewal of BLAs and MOUs. CoOs may also hesitate to demand revisions if they think that it may lead to the risk of lower concessions than in the original agreement.

Revisions of BLMAs may be needed for several reasons.

- When the context has changed – changing economic conditions, particularly in the CoD affecting demand for migrant workers;

- In situations where original objectives of agreements not being met: e.g. limited impact on outflows; continued exploitation of workers; and usually following bans;
- Major gap and shortcomings of the original BLMA has been exposed;
- Previous agreements no longer active.

There are not many documented examples of revision of agreements.¹² However, revisions of BLMAs in the light of changing conditions are needed, and both parties should be pro-active to modify agreements. AU and RECs should document such revisions and draw lessons from them..

5.4. Monitoring and Evaluation

Monitoring should be integrated into all stages of the agreement/arrangement process. A major issue in implementation is obtaining data and information to track progress of the arrangements, often coincident with lack of effective monitoring and evaluation systems. Monitoring and evaluation should be explicitly spelled out in the agreement, as per template Article A.28.

Monitoring of agreements

Monitoring is a continuous and routine procedure usually carried out by programme administrators to ensure that the project is on track and/or the necessary corrective measures are taken in time. Applied to agreements, monitoring provides continuous information collection, analysis of progress and reporting for decision-making by the Joint Committee and programme coordinators or focal points. Labour attachés in consular offices would be an important source of information.

Steps involved in monitoring processes:

1. Assign responsibility for monitoring by each party: Focal point for agreements.
2. Gather needed data for monitoring of agreements from both parties.
3. Issue quarterly or ad hoc reports on the working of the agreement to the Joint Committee.
4. Annual reports on the agreement and its working.
5. Compare with baseline data to identify changes.

Sources of information for monitoring

- Migration-related statistics from administrative processes – such as registered migration outflows, recruitment fees and migration costs to secure jobs overseas; information on returnees, volume of remittances and transfer costs, complaints by migrant workers, workplace accidents, compensation, among others.;
- As possible, data should be disaggregated by sex, age and occupation at a minimum, and include key variables on migrant workers concerned such as type of jobs, actual pay, education level, ethnicity, etc.
- Labour inspection reports: workplace conditions of work, especially OSH; inspection reports on monitoring of accommodation and living conditions;
- Changes in policy, legal and regulatory frameworks in CoO or CoD on migration;
- Proceedings of Joint Committee meetings and meeting minutes;
- High level missions between the two parties;
- Additional protocols and exchange of notes between the two parties;
- Media reports on migration issues in CoO and with CoD.

Evaluation of agreements

An evaluation requires research and in-depth analysis and differs from routine monitoring.

¹² The Government of Qatar has been adopting Protocols to its initial BLAs signed in the 1980s with some countries. In the IGAD region, Somalia is negotiating for revision of the initial agreement with Qatar. The Government of India revised the 2006 MOU with the UAE in 2011.

Objectives of evaluation and types of evaluation

Evaluations are carried out with the following objectives: to ascertain the extent to which objectives of the agreement has been achieved; demonstrate accountability to responsible parties; to improve implementation of the agreement and its management; to identify successful strategies and policies for extension/expansion – what worked and did not; and to justify renewal or termination of an agreement or its replication.

Evaluations can be classified in terms of the following:

Time-frame: Interim (provisional), mid-term and final evaluation: Interim and mid-term evaluations are useful to guide both the CoO and CoD to make adjustments to the agreement to ensure that it fulfils the original objectives. The evaluation process attempts to document what has changed after the agreement in relation to major indicators. The “before” and “after” situation is compared, and the baseline situation data can be used to assess changes.

Mode of evaluation: Self-evaluation versus independent evaluations

A *self-evaluation* is undertaken by those who are entrusted with the design and implementation of an agreement. However, an internal evaluation may not adopt a critical approach or may fail to identify failures on the part of concerned officials. An *independent evaluation* is conducted by an entity external to governments of the parties, preferably by an expert evaluator or consultancy, and findings may be more objective.

The major issues to be raised in an evaluation are:

Relevance - Does the agreement continue to meet the original objectives?

- Effectiveness - Has the agreement been effective in achieving the original objectives and desired outcomes?
- Efficiency - Are the outcomes achieved at a reasonable cost? Do the gains from the agreement over-weigh the costs in terms of new procedures such as registration, enforcement and conduct of joint committee meetings? Were resources used efficiently to benefit both male and female migrant workers?
- Sustainability - Will the achievements/improvements gained as a result of the agreement continue without extra investment?
- Impact - What are the positive or negative, direct or indirect changes impacts on migration flows, remittances, meeting labour demands, improving migrant protection levels, and achieving skills gains, among others.

Particular attention should be given to gender responsiveness in posing and answering these questions.

Steps to be followed in undertaking an evaluation

1. Prepare a concept note explaining reasons for evaluation; select the type of evaluation (self- or independent; interim, mid-term or final) and how it will be done; get approval by the JC.
2. Prepare detailed terms of reference for the evaluation team and issue call for proposals.
3. Select an evaluation team – internal or external – based on a careful review of the proposals.
4. Monitor the evaluation and provide information as needed. Oversight may be by the BLA coordination units and/or by the concerned ministries and/or the Steering Committee.
5. The evaluation team should identify evaluation indicators that are gender-responsive (in order to assess possible different impacts of the BLA on women and men), carry out the analysis and present a first draft report.
6. Management (JC or focal points) to review the first draft report and provide comments.
7. Review and acceptance of the final evaluation report
8. Dissemination of the evaluation report to concerned stakeholders, especially the Joint Committee, to follow up recommendations for improvements and changes.

An agenda for evaluation of BLMAs for AU Member States

African countries should review their existing agreements/BLAs to identify areas of gaps and weaknesses that can be relevant in proposing revisions to existing agreements or developing new ones given the importance attached to BLAs by the African Union and RECs. Components can include rigorous comparative survey techniques on the situation before and after the agreement, desk review and key informant interviews, comparative review of different bilateral agreements and types of arrangements, all preferably with rights-based evaluation criteria, measurement and indicators.

A country can start with a pilot rapid assessment exercise of selected agreements in force, to complete the assessment in a short period. These reviews should be accompanied by collection of qualitative and quantitative data and a rapid stocktaking of the status and proposed content of new BLAs. Findings of rapid assessments can identify where concerns should be raised with CoDs and where terms of existing BLAs may have been – and may continue to be – disrespected or violated.

Following a review of the outcome of the above rapid assessments, the methodology could be refined towards conducting comprehensive evaluations of existing agreements. A selection of the agreements for evaluation may be decided on the basis of their duration, importance for migration flows, and successful features or problems experienced. At this stage, more emphasis can be laid on systematic data collection. An in-depth evaluation of the outcomes and impact of an agreement before its renewal should be mandatory.

An immediate priority is to assess the COVID-19 impact on migration as it concerns existing BLAs and MOUs/other BLMAs. These should assess the situation of migrant workers in CoDs with which BLAs are in effect – including both CoO nationals addressed by the BLAs and those who are not – regarding: dismissals from work; provision or not of basic sustenance and healthcare for those remaining; health and safety situation of workers; whether dismissals and returns respected workers' rights and proper procedures; whether returned migrants obtained earned wages and entitlements prior to departure; whether conditions and protections in existing BLAs have been respected for migrant workers deployed under those BLAs; whether the Joint Committees met during the crisis period; and whether the BLAs were actually invoked at any stage. The AU Labour Migration Advisory Committee (LMAC) has called on African governments in the context of Covid “to carefully look at and renegotiate the different Labour Migration Agreements that they may have signed with the view of ensuring the enjoyment by migrant workers of adequate health and safety, social protection and portability, and other human and labour rights protections”

6. MEASURES TO SUPPORT BLAs AND ENABLING FACTORS

Bilateral labour arrangements are only one among several instruments available to African member states for promoting governance of migration and protection of migrant workers.

Democratic traditions, respect for rule of law, constitutional guarantees of the rights of all residents including migrants/non-nationals, strong labour institutions, and compliance with international human and labour rights instruments contribute to good governance, and thus provide protection to both national and migrant workers in both country of origin and country of destination.

The existence of credible national development, employment and migration policies, ratification of relevant migrant worker instruments and effective regulation of private recruitment agencies in both CoC and CoD provide an enabling environment for the successful operation of BLAs.

African countries should engage at international processes and forums including relevant AU, REC, ILO and UN treaty monitoring bodies as well as implementation reviews for the Global Compact for Migration, the 2030 Sustainable Development Agenda, and lobby for protection of migrant workers, provision of social protection floors to migrant workers, minimum standards for BLAs and other arrangements, as well as effective implementation of agreements.

The African Union has stated: “The future for Africa is to engage on regional multilateral labour migration cooperation mechanisms and inter-regional labour migration multilateral cooperation platforms.¹³ Inter-regional dialogue on migration and BLAs should developed when Africa has convergent regional perspective.

The African Union with its member states could develop a regional mechanism for consultation on BLAs to share experiences and lessons learned, practices on overseas employment and issues faced by migrant workers overseas. The forum can propose practical solutions for the wellbeing of overseas workers, and adopt common approaches in negotiating with destination countries in Europe and the Middle East. For example, the mechanism could also develop minimum standards for protection of migrant workers including minimum wages, adopt standard employment contracts for different categories of workers, agree on effective implementation of BLMAs, and also work towards promotion of skills and mobility partnerships.

At the same time, the potential of inter-regional forums also needs to be explored. The African Union and some IGAD countries have participated as observers in the Abu Dhabi Dialogue (ADD).¹⁴ The ADD may not be able to consider African-specific issues given its broader membership with Asia as well. In this context, a separate GCC/Middle East Arab States-AU origin country forum may offer more promise and could be explored.

At the same time, African origin countries may have to supplement BLAs with unilateral initiatives as well. These relate to specification of minimum wages for selected categories of workers, extension of national social security cover to migrant workers, mobilisation of social partner and civil society support, and selective bans to countries with persistent abuse & exploitation.

Improvement of technical capacity of all stakeholders involved in BLA processes is also important, notably for labour and migration administration, officials of JCs, labour attaches, the BLA coordination unit of the central ministry, members of the inter-ministerial steering committee, the advisory committee on labour migration, social partners, civil society including migrant women organisations, private recruitment agencies, and other stakeholders. Technical assistance may be sought from international organisations such as ILO and IOM.

Improving the information and knowledge base constitutes a key factor for successful operation of BLAs by highlighting glaring gaps on baseline information and knowledge base on migration and BLAs relating to treatment of women and men migrant workers, their working and living conditions and OSH and patterns of complaints and redress, among others. This applies to policies on BLMAs as well. Conducting assessments and evaluations of BLAs with cooperation of both parties also means generating essential components of a good information base.

¹³ African Union (2020b). *The Future of Human Mobility: Innovative Partnerships for Sustainable Development*, Technical Paper, Thematic Area 4: Addressing Gaps in Migrant Protection, Thematic Contributions from the African Union to the 13th Session of the Global Forum on Migration and Development, April 2020.

¹⁴ <http://abudhabidialogue.org.ae/>

ANNEX: NORMATIVE FOUNDATIONS OF BILATERAL LABOUR AGREEMENTS

African Union and REC instruments, International Labour Standards, and African and UN Human Rights Conventions widely ratified by AU Member States establish human and labour rights for migrant workers and members of their families and provide specific protections for *decent work* and *rights at work* for all migrants.

Normative foundations of bilateral labour agreements

- The **African Charter on Human and Peoples' Rights** ratified by all 55 AU Member States, defining and committing to upholding individual and collective human rights for all persons in Africa.
- Protocol to the African Charter on Human and People's Rights on the **Rights of Women in Africa** (Maputo Protocol), ratified by 42 AU Member States, setting comprehensive human rights for women.
- The **AU Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment** (*AU Free Movement Protocol*) which lays out the continental legal regime for freedom of movement, and attendant rights of residence and establishment with certain protections for persons concerned under the rule of law.
- **The REC free movement legal instruments in force:** the EAC Common Market Protocol and the four ECOWAS Protocols concerning Free Movement, Rights to Residence and Right to Establishment.
- **The 9 Universal human rights instruments and associated Protocols** which apply to all persons including all migrant workers and members of their families.
- **The 8 Fundamental ILO Core Conventions** enshrined in the 1999 ILO Declaration on Fundamental Principles and Rights at Work – applicable to all workers including migrant workers.
- **The 4 ILO Governance (priority) Conventions** crucial to the functioning of the international labour standards system and the most important instruments for governance.
- **3 international Conventions on migration for employment and rights of migrant workers and their families**¹⁵
- **All other international labour standards** which apply (with a few specific exceptions) to all workers in the workplace including migrant workers.

African and International Policy Frameworks Especially Relevant to BLMAs

- The **2006 AU Migration Policy for Africa**
- The **2018 revised Migration Policy Framework for Africa and Plan of Action (2018 – 2030)**.
- The **UN 2030 Agenda for Sustainable Development**
- **ILO Non-binding normative frameworks:** the ILO Multilateral Framework on Labour Migration (2006) and General principles and operational guidelines for fair recruitment and definition of recruitment fees and related costs (2016/2019).
- The **Global Compact for Safe, Orderly and Regular Migration, 2018**

¹⁵ The three international Conventions are: the ILO Convention on Migration for Employment, 1949 (No. 97); the ILO Migrant Workers Convention, 1975 (No. 143); the UN International Convention of the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990. ILO Convention 181 on regulation of recruitment agencies and Convention No. 189 on Decent Work for Domestic Workers can also be considered key migration governance conventions given their relevance to regulation of *fair recruitment* and protection of migrant domestic workers.