1. OVERVIEW

This paper reflects on social protection, in the sense of employment and social security protection, for migrant workers from Malawi, from various contextual and comparative perspectives. It first deals with the broader international and SADC perspectives on migration, with reference specifically to SADC migration characteristics and trends, as well as the applicable legal and policy framework. It then discusses challenges facing migrant workers from Malawi in terms of both the general framework applicable to migrant workers and the specific experience with regards to Malawi workers in South Africa. Bilateral arrangements are then addressed, as far as both bilateral labour treaties (also with reference to labour export agreements, such as those contemplated by Malawi) and social security treaties are concerned. Specific reference is made to best practice examples, also within the Southern African context. Some remarks are then made as regards the role that unilateral measures play to extend social protection, which could in principle potentially also be considered by Malawi. The importance of (an eventual) multilateral agreement framework within SADC is then reflected on, followed by some conclusions.

2. INTERNATIONAL AND SADC PERSPECTIVES

2.1 SADC migration data, nature and trends

According to the 2009 UNDP Human Development Report, South-South migration (i.e. migration between developing countries) represents 45 per cent of international migration,
exceeding South-North (37 per cent), North-South (4 per cent) and North-North (14 per cent) respectively. Also significant is the fact that most migration (almost 60 per cent) occurs within countries of the same or similar levels of development and also intra-regionally: the majority of migrants that have settled in Europe, Asia and Africa (who together generate about 80 per cent of global migrants) have moved within their own region. It has been reported that except for the Latin American and Caribbean region, intra-regional migrants constitute the highest share of all migrants.

Economic migration appears to be by far the most prevalent form of migration in the world: "The chief motive for the majority of migrants is without doubt the pursuit of better living standards for themselves and for their families." While there is a dearth of information on the extent and nature of migration from Malawi, it is evident that Malawi would fit this general picture. Migration from Malawi for employment purposes has to be seen against the background of the exposure of its people to fragility and precarious livelihoods, reflected in among others rising youth unemployment and (worsening) social indicators. According to the 2011 UN Human Development Index, Malawi ranks 171st out of 187 countries. As noted in the recent (2012) World Bank Country Assistance Strategy for Malawi, poverty in Malawi remains widespread and concentrated in rural areas – noting that according to the recent report of the Third Integrated Household Survey (IHS3 2010/11), the absolute poverty rate is still 50.7%. The proportion of the ultra poor stands at 24%. The Strategy also indicates that inequality is increasing. Furthermore, according to a 2013 report from the International Labour Organisation (ILO) entitled Global Unemployment Trends for Youth 2013: a generation at risk, over 70 percent of young Malawians aged between 15 and 29 are employed in the informal economy. Also, Malawi has one of the highest rates of working poverty, which stands at around 60 percent on $2 per day.

Given these conditions, the Government of Malawi has been considering the conclusion of labour export agreements with some countries outside Africa. Of course, within the SADC context, Malawi entered into a labour agreement as far back as 1967. The appropriateness

Working Paper 102, 2007) 37. Depending on whether UN development status, World Bank income level or UNDP Human Development Index (HDI) is used as the basis of the classification system, South-South migration either amounts to 33, 42 or 45 per cent of worldwide migration flows (Bakewell 6).


5 Overcoming Barriers 21.

6 Bakewell (calculated from the "Global Migrant Origin Database (Version 4)", Development Research Centre on Migration, Globalisation and Poverty, University of Sussex).

7 This is primarily due to the fact that the number of intra-regional migrants within CARICOM is relatively low – 12 per cent – compared to, for instance, MERCOSUR, where intra-regional migrants constitute 40% of the total migrant stock.


of this agreement in the current era has been questioned, in view of its being a 46 year old agreement which is regarded by some as obsolete, and given its (one-sided) emphasis on regulating the flow of labour to South Africa: employment rights and social security protection are not highlighted in the agreement. This is further reflected on below.

From the available evidence, subject to some exceptions, it appears that most of the migration from SADC is actually to other SADC countries: intra-SADC movement is therefore the prevailing characteristic of migration from SADC countries. In fact, migration has been a longstanding feature of the labour market framework in Southern Africa, particularly as far as work on the mines and in agriculture is concerned. Apart from informal cross-border trade-related migration, work on the mines, particularly in South Africa, served as a magnet for both internal and external migrants. As a result, as indicated by Crush et al, it could be argued that the industrial development of some countries in the region was made possible only by the use of labour from other countries. From a historical perspective, as is supported by data on modern-day migration movements within SADC, it can be said that systems of labour migration in Southern Africa are deeply entrenched and have become part of the generations-long movements of people, primarily in search of better living and working conditions.

In fact, a recent five-country migration study in SADC indicated that migration is now clearly regarded as a career rather than as a passing phase in the working lives of migrants, despite the fact that they maintain strong links with the home country. This also flows from the fact that more migrants from the respective countries are older, married and, in most cases, heads of households. In addition, the same study indicates that many migrant-sending households have a migration ‘tradition’ which is passed on from one generation to the next – parents and even grandparents worked outside the home country.

The importance and role of migration in SADC countries is also demonstrated by the extent and significance of remittances to recipient households. Remittances play a vital role in

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14 Only 7 per cent of the migrants covered in the survey were under the age of 25; in contrast, 41 per cent were over the age of 40: ibid 2. See further J Crush et al *Migration in Southern Africa* (note 12) 21-23.

15 As many as 62 per cent of the migrants covered by survey were married: ibid 2.

16 Just over half the migrants were actually household heads rather than ordinary members of the household, although the pattern differed in the respective countries: ibid 2-3.

17 About 50 per cent of the migrants covered in the survey indicated that their parents had been cross-border migrants: ibid 3.
supporting Southern African households, as they are fundamental in enabling families to meet their everyday needs.\textsuperscript{18} For most migrant-sending households, migrant remittances comprise the main source of household income. Lesotho is one of the most migration-dependent countries in the world. A recent study indicates that formal remittance transfers constitute 28.6\% of Lesotho’s GDP. It is now, in relative terms, the second leading recipient country in the world, after Tonga:\textsuperscript{19} remittance income in Lesotho surpasses other sources of external financial inflows.\textsuperscript{20}

For Malawi, according to a 2009 World Bank report, workers’ remittances to Malawi amounted to $16 139 126.44 in 2009.\textsuperscript{21} Apparently, the National Statistical Office (NSO) figures show that remittances only contribute a fraction to the country’s Gross Domestic Product (GDP).\textsuperscript{22} A recent World Bank report indicates that Malawi is one of the most expensive countries to send remittances to; similarly, banks in African countries constitute the most expensive remittance channel.\textsuperscript{23}

A recent study undertaken in five SADC countries found that 85 per cent of migrant-sending households receive cash remittances\textsuperscript{24} – these are sent on a regular basis and ’easily outstrip agriculture in relative importance as a household income source.’\textsuperscript{25} Remittances are primarily used for consumption spending, in particular for household food security and other basic needs.\textsuperscript{26} However, they also play a significant role in the economic development of SADC countries. As remarked in a recent study, and echoing the international experience in this regard: \textsuperscript{27}

"For national economies, cross-border remittances are a source of foreign exchange and taxes, contribute to the balance of payments, and provide capital for enterprises and valuable household incomes.”\textsuperscript{28}

SADC governments and even international organisations have therefore started to integrate remittances as a tool for development in their poverty reduction strategies.\textsuperscript{29}

\begin{flushleft}
\textsuperscript{18} B Dodson et al Gender, migration and remittances in Southern Africa (2008) 8.
\textsuperscript{19} Nalane et al The remittances framework in Lesotho (2012) xiii-xiv, 1, 7
\textsuperscript{20} Ibid.
\textsuperscript{21} http://www.tradingeconomics.com/malawi/workers-remittances-receipts-bop-us-dollar-wb-data.html (accessed on 13 November 2013). Workers’ remittances are current transfers by migrants who are employed or intend to remain employed for more than a year in another economy in which they are considered residents.
\textsuperscript{23} Ibid.
\textsuperscript{24} W Pendleton et al (note 8) 4.
\textsuperscript{25} Ibid 5.
\textsuperscript{26} Ibid 6-7.
\textsuperscript{27} See C Thouez "The impact of remittances on development" in UNFPA International migration and the millennium development goals (2005).
\textsuperscript{28} Crush et al 18.
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2.2 SADC legal and policy framework

From a regional perspective, the policy and instrumental framework for dealing with the plight of migrants, including migrant workers from Malawi, in relation to social security, is weakly developed. Limited provision is made in SADC instruments for SADC-wide social security coverage for citizens and residents of the different member states. An obligation is imposed in the Charter of Fundamental Social Rights (the Social Charter) (2003) on member states to provide an enabling environment for workers and those outside the labour market to have access to adequate social protection and to sufficient resources and social assistance respectively. No distinction is drawn between citizens and non-citizens. Such a distinction is also not contemplated, given the SADC Treaty emphasis on regional integration and Charter focus on harmonisation of social security schemes.

More explicit are the provisions of the Code on Social Security in SADC (2007), which do not allow disparate treatment of foreigners, and encourage member states to ensure that all lawfully employed immigrants and self-employed persons are protected through the promotion of certain core principles. In terms of two of these principles migrant workers should be able to participate in the social security schemes of the host country and enjoy equal treatment alongside citizens within the social security system of the host country. Member states are further encouraged to introduce, by way of national legislation and bi- or multilateral arrangements, cross-border coordination principles, such as maintenance of acquired rights, aggregation of insurance periods and exportability of benefits. Illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country. The Code stipulates that social protection should be extended to refugees in accordance with the provisions of international and regional instruments.

There is, therefore, a clear tendency in both these essentially non-binding documents to create a regime within SADC which ensures minimum levels of social protection on the basis of equality, regardless of, inter alia, citizenship. The same can, however, not be said of the

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30 M Olivier "Social security developments in the SADC Region and future prospects for coordination" in Social Security and Migrant Workers: Selected studies of cross-border social security mechanisms (eds: R Blanpain, P Ortiz, G Vonk & M Olivier) (Kluwer, 2013) 81-115 at 86-89, on this this part is partly based.
31 Art 10. Art 3.2 requires of member states to observe the basic rights referred to in the Social Charter.
33 Social Charter, art 2.1(e).
34 The Code on Social Security in the SADC art 17.2(b) provides: "Migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country." See also art 4.1.
35 Art 17.2, read with art 17.2(f).
36 Art 17.2(a).
37 Art 17.2(b).
38 Art 17.2(d) (e) and (in relation to pension arrangements) art 10.5.
39 Art 17.3.
40 Art 17.4.
Draft Protocol on the Facilitation of Movement of Persons (2006), which does not guarantee freedom of movement in any way which is potentially significant for purposes of enhancing the social security position of intra-SADC, including Malawi migrants. The reason is that this instrument does recognise visa free travel for up to 90 days, but renders the right to residence and establishment (in the occupational sense of the word) subject to restrictions contained in national laws.\textsuperscript{41} In this area, unlike in other areas such as trade,\textsuperscript{42} education\textsuperscript{43} and transportation,\textsuperscript{44} there has been considerable reluctance to develop a SADC-wide policy on the free movement of people.\textsuperscript{45} Also, in the absence of a binding rule outlawing nationality discrimination, the SADC Treaty and, with the exception of the Code on Social Security in the SADC, other SADC multilateral instruments do not display strong incentives for the development of social security coordination measures. The principle of non-discrimination contained in article 6(2) is a closed list, and does not include the prohibition of discrimination based on nationality or citizenship. A supportive migration policy framework is clearly lacking.\textsuperscript{46} SADC has yet to develop a policy which streamlines cross-border movement and guarantees free movement of labour.\textsuperscript{47} It has to be noted that there are indications of important new developments which may impact on the situation outlined above. Firstly, a (draft) Protocol on Employment and Labour, which contains extensive provisions on labour migration and migrant workers, including provisions on the coordination on social security schemes and portability of benefits, has been adopted in SADC. Secondly, a regional policy on migration is being contemplated.\textsuperscript{48} This is, thirdly, strengthened by the development of migration policies at country level – recently, such policies have been developed for Lesotho\textsuperscript{49} and Zimbabwe,\textsuperscript{50} while Tanzania is reportedly in the process of doing so. In fact, in the case of one country, South Africa, a policy for the inclusion of non-citizens in the South African social security system is currently being developed.\textsuperscript{51} Finally, the development of a memorandum of

\textsuperscript{41} Own emphasis. See article 17.4 and 17.5 (in respect of right of residence) and article 19 (in respect of the right of establishment) of the Draft Protocol respectively. See also article 20.

\textsuperscript{42} Free Trade Protocol of 1996 which envisages, \textit{inter alia}, the establishment of a free trade area in SADC (see art 2.5).

\textsuperscript{43} Protocol on Education and Training of 1997: see art 3(a) in relation to free movement of students and staff within the region.

\textsuperscript{44} Protocol on Transport, Communications and Meteorology of 1996.

\textsuperscript{45} Crush, Williams and Peberdy \textit{Migration in Southern Africa} 24.

\textsuperscript{46} The Regional Indicative Strategic Development Plan (RISDP) (2003) does not explicitly identify migration as a key area for intervention, even though the importance of migration is highlighted for cross-cutting areas such as informal trade and mobility of factors of production: Crush, Williams and Peberdy 26-27.

\textsuperscript{47} See Crush, Williams and Peberdy 28: "Cross-border migration in the region is, therefore, governed by national migration and refugee legislation".

\textsuperscript{48} See in this regard P Mudungwe \textit{Migration and Development in the Southern Africa Development Community: The Case for a Coherent Approach} (Intra-ACP Migration Facility, 2011).

\textsuperscript{49} See M Olivier \textit{Draft Lesotho National Migration and Development Policy} (ACP Migration, May 2013).

\textsuperscript{50} Cf IOM \textit{Draft National Labour Migration Policy for Zimbabwe} (drafted by P Mudungwe, Jan 2011). See also Government of Zimbabwe \textit{draft National Migration Management and Diaspora Policy} (July 2010).

\textsuperscript{51} M Olivier (assisted by A Govindjee) \textit{Developing a policy for the inclusion of non-citizens in the South African social security system} (Prepared for the Department of Social Development, South Africa, March 2013).
understanding on the facilitation of the movement of business people and professionals in five SADC countries (Malawi, Mauritius, Mozambique, Seychelles and Zambia) is presently being considered, on the basis of an Accelerated Program for Economic Integration (APEI).

Overall, it is evident that there is a need for specific and concrete measures to be adopted to deal with the social security plight of migrants to SADC countries, in particular intra-SADC migrants, including migrant workers from Malawi. The conclusion of appropriate inter-country arrangements, in particular via bilateral and multilateral agreements, based on accepted international law principles, as contained in the Code on Social Security in the SADC as well, but adapted for the specific SADC context (as discussed later in this contribution) provides a method and mechanism to achieve this result. Also, it appears necessary to introduce changes to national law and practice, which is the theme of the next part.

2.3 International standards and instruments

Various UN and ILO instruments regulate the employment and social security rights of migrant workers. Relevant ILO Conventions and Recommendations protect the rights of all workers irrespective of citizenship.$^{52}$ As remarked, "All current ILO social security standards define personal scope of coverage irrespective of nationality and almost all contain similar clauses on equality of treatment between nationals and foreign workers in the host country, and most of them contain special non-discrimination clauses, such as, for example, Convention 102 of 1952."$^{53}$ Specific ILO instruments protect migrant workers and their families,$^{54}$ although only a few SADC countries have ratified some of these instruments. Mention should in particular be made of ILO Convention 97 of 1949 on Migration for Employment, read with the later ILO Convention 143 of 1975 (the Migrant Workers (Supplementary Provisions) Convention). These two instruments, together with their accompanying Recommendations, Recommendation 86 of 1949 (Migration for Employment (Revised) Recommendation) and Recommendation 151 of 1975 (Migrant Workers Recommendation) essentially provide for:

- a framework for the basic components of a comprehensive migration policy;
- the development of migrant workers' potential, and measures to facilitate as well as to control migration movements;

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$^{54}$ E.g. Convention 118 of 1962 on Equality of Treatment (Social Security) and article 10 of Convention 143 of 1975 on Migrant Workers (Supplementary Provisions).
provisions to regulate the conditions in which migration for employment occurs, to control irregular migration and labour trafficking, and to detect the informal employment of migrants in order to prevent and eliminate abuse;

information and certain free services to assist migrants, taking steps against misleading propaganda, and transferring earnings;

definitions for parameters for recruitment and contract conditions;

participation of migrants in job training and promotion;

family reunification, and appeals against unjustified termination of employment or expulsion;

policies to promote equality of treatment and opportunity in employment; and,

equality between migrant workers in regular status and nationals in the areas of access to employment, remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes, and access to legal proceedings.

Malawi ratified – in 1965 – only one of these instruments, i.e. ILO Convention 97 of 1949 on Migration for Employment. Mention should also be made of the helpful ILO Multilateral Framework on Labour Migration confirms that minimum access to emergency health care should be provided to irregular migrants, while regular migrants should benefit from all medical care services.\(^{55}\)

The UN International Convention on the Protection of All Migrant Workers and Members of Their Families (the UN Migration Convention) of 1990, which has not been ratified by Malawi, protects all migrant workers and their families, safe particular categories of workers, most of whom are protected in terms of other specific international instruments.\(^{56}\) This Convention amongst others provides for non-discrimination,\(^{57}\) equality of treatment between nationals and migrant workers as to work conditions and pay,\(^{58}\) equal access to social security,\(^{59}\) and the right to repatriate earnings, savings and belongings.\(^{60}\) The Convention confers specific rights on documented workers,\(^{61}\) and sets out core rights\(^{62}\) for both documented and undocumented/irregular migrant workers.

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\(^{56}\) Namely international organisation employees, foreign development staff, refugees, stateless persons, students and trainees: articles 1 & 3.

\(^{57}\) Article 7.

\(^{58}\) Article 25.

\(^{59}\) Article 27.

\(^{60}\) Article 32.

\(^{61}\) E.g. access to social services, unemployment benefit, and freedom to choose one’s occupation: see FIDH (International Federation of Human Rights) Surplus People? Undocumented and other vulnerable migrants in South Africa (2008) 22.
Other United Nations human rights instruments, treaties and conventions, which also confer protection on migrants have been ratified to/are subscribed to by Malawi and, one would believe, the main destination countries for Malawi migrants. These include the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, the Convention on the Rights of the Child of 1989, the Convention on the Elimination of all Forms of Racial Discrimination of 1965, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and the Convention on the Elimination of All Forms of Discrimination against Women of 1979 confer protection on migrants as well.

3. CHALLENGES FACING MIGRANT WORKERS FROM MALAWI

Migrant workers from Malawi, as is the case with SADC migrant workers generally, invariably find themselves in a precarious position, especially in relation to social security.63 They face seemingly insurmountable difficulties due to the operation of several legal restrictions, inappropriate and inchoate policies, and at times the poor treatment they receive in the host country. The legal principle of the territorial application of national laws generally prevalent in country such as Malawi implies that Malawian migrant workers are usually excluded from social security laws that operate in their home country, while nationality and residence requirements often exclude them from the operation of social security laws in their host country. Other legal restrictions, for example, in relation to the (ex)portability of benefits, also exist. In short, in the absence of legal and policy frameworks and special measures that respond adequately to their precarious position in social security, and in the absence of suitable bilateral treaties or enforceable regional standards in addition to an overarching multilateral framework, Malawian migrant workers are effectively discriminated against in law and practice.64

The mistreatment of Malawian migrant workers, as is the case with many intra-SADC and African migrants, also in the form of xenophobic actions, especially in South Africa, has been widely reported.65 This affects in particular specific vulnerable groups, including women

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62 Including the right to life, the right to a fair trial, treatment equal to that of nationals in matters of working conditions, the right to urgent medical care and treatment equal to that of nationals for children's access to education: articles 8-35; FIDH (International Federation of Human Rights) Surplus People? Undocumented and other vulnerable migrants in South Africa (2008) 22.

63 M Olivier Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC) 100-106. See also Mudungwe 50.


involved in informal cross-border trade, and irregular migrants. In fact, several UN supervisory bodies have been critical of South Africa's ill-treatment of categories of non-citizens,\(^{66}\) including the lack of adequate access to all social services for refugee and asylum-seeking children and the absence of appropriate family reunification measures.\(^{67}\) In addition, the lack of access to South African social security benefits, in particular pension benefits, to which Malawian migrant workers became entitled to but which have not yet been paid to them, is yet a further unresolved matter.\(^{68}\)

It might be that issues such as the following might contribute to the challenges facing migrant workers from Malawi:

- the absence of or weakly developed policy, legal and operational framework ensuring the (social) protection of migrant workers from Malawi,
- the apparent lack of institutions that are sufficiently capacitated to provide assistance to migrant workers prior to departure from Malawi, while they work/remain abroad, and upon return, and
- the apparent absence of bilateral labour and social security agreements/treaties regulating migration and providing for employment and social security protection.

Also, labour market realities in SADC and other destination countries contribute to the precarious position of those who migrate. For migrant workers from Malawi, working and living conditions are often, and have often been, inadequate. These migrants are mostly unskilled or semi-skilled,\(^{69}\) and are typically found at the lower end of the labour market in receiving countries. Irregular migrants in particular are exploited, and their workers' and human rights are infringed. Migrants are especially affected by the restructuring of, and the conditions prevailing at, the environments where they are usually employed, for example, the mining industry. As a result of labour market flexibility, among other things, the mining industry in South Africa shed a large number of regular jobs between 1989 and 2000, causing a decrease in mining jobs from almost 422 000 to about 231 000. Little effort was made to ameliorate the effects of retrenchments. This affected Malawian migrant workers

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\(^{67}\) UN Committee on the Rights of the Child Concluding Observations of the Committee on the Rights of the Child: South Africa, 28 January 2000 (CRC/C/15/Add.122) par 35.


\(^{69}\) Pendleton et al 3.
too. Also, it has been noted that the mining sector in particular has a stubbornly high rate of disabilities and deaths.

4. BILATERAL ARRANGEMENTS

4.1 Bilateral labour agreements (BLAs)

Under the influence of the widely recognised core labour rights developed under the auspices of the ILO, recent bilateral labour agreements often effectively endorse the notion of extending core protection in labour law terms to at least lawfully employed migrants. In addition, modern agreements regulating the exporting of migrant labour to countries in search/need of certain categories of skilled/unskilled labour, invariably contain explicit guarantees of labour rights in the host country. While there are different kinds of BLAs, with varying objectives, it has been suggested that the following 25 core elements are invariably provided for/covered in these agreements.

1. the competent government authority;
2. exchange of information;
3. migrants in an irregular situation;
4. notification of job opportunities;
5. drawing up a list of candidates;
6. pre-selection of candidates;
7. final selection of candidates;
8. nomination of candidates by the employers (possibility for the employer to provide directly the name of a person to be hired);
9. medical examination;
10. entry documents;
11. residence and work permits;
12. transportation;
13. employment contract;
14. employment conditions;
15. conflict resolution mechanism;
16. the role of trade unions and collective bargaining;
17. social security;
18. remittances;

71 Kanyenze 16, 17.
19. provision of accommodation;  
20. family reunification;  
21. return and reintegration;  
22. activities of social and religious organisations;  
23. establishment of a joint commission (to monitor the agreement’s implementation;  
24. validity and renewal of the agreement; and  
25. applicable jurisdiction.

According to Rispoli, these 25 core elements can be grouped into the following five areas:

- Admission
- Recruitment and departure
- The employment contract and other provisions concerning the migrant’s legal status in the destination country
- Return to the country of origin
- Administration of the agreement and its implementation

As has been remarked, for destination countries, the primary aim of BLAs is to address the skill gaps in the local labour market, be they for seasonal workers or low-skilled labour or for higher-skilled workers in sectors such as health or information technology. For sending countries, BLAs can be "a means to increase the access of their workers to international labour markets and to promote the development of their human capital through the acquisition of occupational skills. Agreements can also ensure that workers who have acquired new skills actually return to their country of origin, avoiding 'brain drain'. Sending countries can use bilateral labour agreements to secure the rights and welfare of their workers abroad." These agreements can lead to an orderly migration process, and thereby curb reliance on irregular migration. There are of course challenges:

- It often requires a lengthy and time-consuming process to reach a BLA;  
- Some migrant-receiving countries have little interest in concluding BLAs;  
- Funds and institutional capacity-building of institutions and agencies in the sending countries are required, in addition to the acquisition of know-how to negotiate and conclude such an agreement;  
- There may be need for the development and implementation of databases for the effective implementation of BLAs (e.g. for pre-selection purposes and monitoring);  
- Follow-up of migrant workers after arrival in the host country require additional human resources;  
- Indicators have to be developed to monitor and evaluate the implementation and performance of BLAs; and

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Specific efforts and capacity are needed to integrate return migrants after the expiration of their contracts.⁷⁴

Rispoli further indicates that the successful implementation of BLAs requires that:
- They target specific sectors in the destination country with a severe labour shortage;
- There is a quota or ceiling;
- Recruitment is organised;
- Institutional coordination is ensured and employers in the destination country are engaged; and
- The implementation phase of the BLA is organised with sufficient flexibility.⁷⁵

Also, dedicated institutional frameworks, especially within the country of origin, and consultative mechanisms need to be put in place, such as Joint Commissions of Labour, or Round Table Meetings, or Working Groups and Study Committees.⁷⁶

Malawi has had the experience of such an agreement with South Africa.⁷⁷ The agreement was effectively terminated when South Africa required mineworkers from Malawi to be tested for HIV. Nevertheless, it is suggested that from the perspective of both employment rights and the social security protection of Malawian migrant worker the agreement must be regarded as incomplete/unsatisfactory:

- It imposes obligations mostly on employers, and not on the South African government;
- The agreement is not reciprocal in nature, as it stands to regulate the position of nationals of Malawi only;
- Repatriation regulation is dealt with together with labour migration;
- As a rule the agreement does not cover public social security transfers, but only employer- and occupational-based payments.

The recent experience of Mauritius with circular migration agreements may be cited as a better example to consider. Since 2006 Mauritius, which is incidentally also a country of destination for overseas migrant workers, has concluded such agreements with three Canadian provinces, France and (lately) Italy, partly as a result of rising unemployment; sharp cuts in the sugar price and the dismantling of the Multi-Fibre Agreement in 2005. The IOM has been rendering comprehensive assistance, in terms of, among others, recruitment, selection and preparation, reviewing and approving employing agencies, worker contracts, medical forms. The NEF (National Empowerment Foundation) has been established as the Implementation Agency; the NEF in turn set up a multi-stakeholder Circular Migration Committee (CMC). Distinct responsibilities are carried out by the Government of Mauritius,

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⁷⁴ Ibid.
⁷⁵ J Rispoli Bilateral Labour Agreements (IOM Training Workshop on Labour Migration and Labour Market Information Systems, Kampala, Uganda, 16-18 July 2013)
the NEF/CMC, recruitment agencies in the destination country (where applicable), and the government partner in the foreign country. Skilled and low-skilled migrant workers (e.g. in the areas of fishing, hospitality, mechanical and plumbing work, health care workers, IT workers) have been accommodated via these programmes: to date 400 migrant workers from Mauritius have been to Canada, within the framework of the relevant BLA. Extensive arrangements exist regarding the recruitment/selection, familiarisation, care, and reintegration upon return of these workers. The development link via remittances and involvement of the diaspora is emphasised (it is reported that on average workers are sending approximately 760 Euros per month to Mauritius). The extensive scope of these agreements and ancillary arrangements appears from the objectives of the Government of Mauritius in this regard – as has been noted.

- "Objective 1: to widen the scope of opportunities for our citizens to take up employment abroad for a specific period, learn new skills, save part of their income, before returning to the country to set up a small and medium enterprise (SME) or invest in other economic activities;
- Objective 2: to encourage remittance flows and enhance their development impact;
- Objective 3: to harness the intellectual and financial resources of the Mauritian Diaspora."

Much can be learnt from these and other developing country experiences. Of course, the sheer magnitude and complexity of the measures to be adopted may require the assistance of international organisations such as the IOM and the ILO. Mention should be made of the fact that Malawi became a member of the International Organization for Migration in 2013.

4.2 Bilateral social security agreements

It is often said that bilateral social security treaties (in particular when supported by an overarching multilateral agreement) constitute universal world-wide best practice. These agreements focus on appropriate social security arrangements for migrant workers, as BLAs usually only make partial provision for such arrangements. The first such agreement

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79 Kokil Managing Migration for Development.


81 See R Holzmann, J Koell & T Chernetsky Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices (World Bank: Social Protection Discussion Paper No. 0519, 2005) 32, where they remark: "The administrative approach to achieve the portability for both pension and health care benefits seems to be reasonable cost-effective after a bilateral or multilateral agreement has been successfully concluded."
(between France and Italy) of 1904, recognising the principle of equal treatment in the area of employment injury benefits, implied a radical departure from the territorial restriction on access to welfare, and supported the notion of a personal entitlement to benefits, which follows the person/worker concerned, irrespective of his/her geographical location. Pursuant to the 1904 agreement, bilateral agreements have extended their scope to cover a range of social security benefits for a variety of beneficiaries, on the basis of certain social security principles (often referred to as coordination principles). Especially since the Second World War the number of bilateral social security agreements expanded significantly, totalling more than 2000 today.

The general principles which constitute the content of bi- and multilateral arrangements in this regard, usually relate to:

- The choice of law principle, identifying the legal system which is applicable;
- Equal treatment (in the sense that discrimination based on nationality is prohibited);
- Aggregation of insurance periods (in that all periods taken into account by the various national laws are aggregated for the purposes of acquiring and maintaining an entitlement to benefits, and of calculating such benefits);
- Maintenance of acquired benefits;
- Payment of benefits, irrespective of the country in which the beneficiary resides (the “portability” principle);
- Administrative cooperation (between the social security institutions of the parties to the agreement); and
- Sharing of liability to pay for the benefit (i.e. pro-rata liability of the respective institutions).

The experience with bilateral treaties focusing on social security in SADC, as is the case with Malawi, is restricted in scope and impact. This follows from limited use being made of this mechanism to improve and streamline the social security position of migrant workers, and an insufficient regulatory environment. As regards the latter issue, incomplete provision for bilateral social security agreements and the portability of social security benefits is made in the legal frameworks of SADC countries: legal provisions mandating and regulating the conclusion of bilateral social security treaties are either absent or limiting in terms of the

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82 Ibid.
83 Sabates-Wheeler & Koettl 127.
scope and effect of such agreements. As regards the former issue, mention should be made of the labour agreement which South Africa concluded Malawi, reflected on above.

There is an evident need for an improved bilateral and portability regime in Southern Africa, also in relation to Malawian migrant workers. However, it is also clear that there are several matters that need to be factored in and attended to in order to arrive at contextualised, informed and integrated arrangements (to be) contained in bilateral treaties and possibly a limited multilateral agreement capable of successful implementation. An incremental approach may be called for. First and foremost, the focus and orientation of these agreements should be on access to social security benefits of the host country, linked with suitable portability arrangements. Secondly, it has to be considered how extensive the scope of the agreement(s) should be, with reference to (a) the range of benefits covered, (b) the categories of persons to be covered, and (c) the extent to which social security cross-border coordination principles other than mere portability arrangements should be included in the agreement(s). Furthermore, such agreements should cover lawfully residing and employed migrant workers, to be gradually extended to other categories of workers, such as self-employed persons. And, finally, while portability of benefits requires priority attention, other social security coordination principles should also find their way into the relevant treaties. This applies in particular to the principle of equal treatment, given the reciprocal nature of such agreements. For this reason also, the current nationality restrictions, which may be contained in social security, labour and/or immigration laws need to be revisited.

Thirdly, in order to achieve full portability, some cooperation between the social security institutions of the origin and the host counties is required. Cooperation is required to ensure a joint determination of benefit levels for a particular migrant. However, the administrative and technological capacity to achieve this may be lacking. It may also be that there may be compatibility problems as regards similar social security schemes in the countries concerned – a matter discussed further in the last section, dealing with multilateral frameworks.

Finally, access by current and ex-migrant workers from Malawi to South African social security benefits, involves a range of related issues, which need to be reflected in a bilateral social security agreement with South Africa. These include:

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85 See M Olivier "Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part II)" vol 2 SADC Law Journal (2012) 149-152 for relevant details.

86 See Olivier "Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part II)" vol 2 SADC Law Journal (2012) 152-158 for a detailed discussion.

87 Sabates-Wheeler & Koettl 132.

88 See in this regard a study undertaken by the ILO, regarding access to South African social security benefits by migrant workers from Lesotho, Mozambique, Swaziland and Zimbabwe: M Olivier Reflections on the feasibility of a multilateral SADC social security agreement involving South Africa and Lesotho, Mozambique, Swaziland and Zimbabwe (report submitted to the ILO, Nov 2010) 179-180.
a) confirmation of the social security entitlements of these migrant and ex-migrant workers;

b) the undertaking, desire and resolve, expressed jointly by South Africa and Malawi, to comprehensively and effectively deal with the various issues on the basis of mutual efforts;

c) agreement on institutional structures, communication channels and operational entities in South Africa and Malawi intended to be instrumental in streamlining and facilitating access to South African social security benefits and services;

d) modalities of cooperation, liaison and interaction with regards to specific thematic areas, such as data exchange and information sharing; documentary evidence required and forthcoming from, among others, institutions from Malawi and South Africa; medical assessments; lodgement of claims; verification of information and of compliance with conditions for accessing benefits; payment of benefits; and other relevant areas;

e) an operational framework for the range of portability issues, also dealing with issues relating to tax payments and tax directives, transfer costs and portability mechanisms;

f) specific arrangements re access to benefits which should have been accessed but were not accessed, due to inability on the part of the beneficiaries to access same and/or due to administrative or other reasons;

g) the setting up of joint consultative structures to agree on specific interventions and arrangements that may be required subsequent to the entering into of the agreement;

h) reporting to the respective governments and feedback to relevant stakeholders;

i) possibly, special funding arrangements to deal with historical claims and, to the extent required, payments to surviving ex-migrant workers and their families;

j) review of the agreement(s) and structures and mechanisms provided for under same, from time to time; and

k) an appropriate dispute resolution framework.

5. UNILATERAL ARRANGEMENTS

Given the lack of social security coordination arrangements involving many migrant-sending countries of the global south and the absence of sufficient (social security) protection and coverage being extended by host countries, some migrant-sending countries in Asia and elsewhere in the developing world have taken stock of the vulnerable social and economic position of their citizens living and working in other countries. As a result they have sought to extend some form of protection in social security terms to their citizens employed as migrant workers and also created a supportive framework for the employment of these workers in host countries. These migrant-sending countries (i.e. home countries/countries of origin) seek to protect the rights and interests of migrant workers abroad through specific

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89 See M Olivier "Social security developments in the SADC Region and future prospects for coordination" in Social Security and Migrant Workers: Selected studies of cross-border social security mechanisms (eds: R Blanpain, P Ortiz, G Vonk & M Olivier) (Kluwer, 2013) 102-104, on this this part is based.
interventions. The interventions are guided either by the countries’ constitutions, or a statutory framework providing for such protection. The extension of protection of migrant workers abroad via unilateral arrangements has among others been achieved through –

- the adoption of constitutional guarantees and statutory frameworks facilitating the protection of migrant workers abroad – such as the 1987 Constitution of the Philippines and the Migrant Workers and Overseas Filipinos Act of 1995; see also the wide-ranging provisions of the Constitution of Ecuador
- provisions in bilateral treaties providing for continued coverage of certain categories of migrant workers in the social security system of the labour-exporting country – e.g., the India-Belgium agreement of 2006
- the establishment of Special Overseas Workers Welfare Funds by national and even (in the case of India) state governments, extending protection to workers and at times also their families – e.g. India, Philippines and Sri Lanka
- voluntary affiliation in national social insurance schemes – e.g. Philippines, Jordan, Albania, Mexico, Mozambique, South Korea
- measures and schemes aimed at supporting the flow of remittances and social insurance contributions to the sending country
- exportability of social security benefits and provision of related services (e.g. medical care) abroad

These extension mechanisms are often undergirded by a range of complementary measures introduced and supporting institutions set up by governments of sending countries, such as –

- the establishment of a dedicated emigrant Ministry and/or specialised statutory bodies to protect the interests of their citizens/residents in the diaspora (e.g. India, Philippines, Bangladesh, Ecuador)
- information on recruitment contracts and consular support
- generally, providing support services to migrant workers at three stages: pre-departure, at destination (i.e. in the host country) and upon return (e.g. via return settlement programmes)
- lobbying for the protection of migrant workers


The unilateral measures are of relatively recent origin, but seem to be growing in extent and popularity. They cover sizeable numbers of migrant workers – in the case of Philippines, 8 million and in the case of Sri Lanka, 2 million migrants. International standards instruments do not regulate this particular phenomenon; yet, it is of interest to note that reference to this is increasingly being made in what can be regarded as soft law and explanatory/implementing instruments – for example, in the 2008 UN General Comment No 19 on the right to social security (in relation to the UN International Covenant on Economic, Social and Cultural Rights) and the 2007 ASEAN Declaration on Protection and Promotion of the Rights of Migrant Workers (DPPMW). Of particular relevance is also the ILO Multilateral Framework on Labour Migration, which provides a comprehensive overview of principles and guidelines as to how labour protection for such migrant workers can be improved. As has been noted, and of particular relevance in the Southern African context, such promotional measures would principally affect those involved in circular and temporary migration, and could be defined and strengthened through international migration agreements.

Limited arrangements exist in the SADC home country law and policy domain for the extension of protection to migrating citizens/residents. These include the setting up of legal and institutional frameworks to receive social security benefits on behalf of beneficiaries, as well as deferred pay and remittances. Also, at times provision is made for the social security coverage of workers who are not covered by the relevant social security regime of the host country – as in the case of recent (draft) legislation in Swaziland and Lesotho, and in Mozambique and, to some extent, Namibia. Also, a few examples exist of public social security institutions that are competent to deal with the affairs of citizens/residents abroad.

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94 In Lesotho, for example, the Workmen’s Compensation Trust Fund Regulations, 1985 ((see Legal Notice No. 42 of 1985, issued in terms of section 23(5) of the Finance Act of 1978) provides for the receipt and disbursements of workmen’s compensation and occupational pension payments from South Africa. The Deferred Pay Act 19 of 2008 provides for the repatriation of part of the salaries of Basotho mineworkers, earned in South Africa, to Lesotho.
95 Mozambican workers abroad who are not covered by the compulsory social security system of the host country may register for compulsory social security in Mozambique, but the more limited scheme for self-employed persons will be applicable to them: Article 14.4 of the Law on Social Protection 4 of 2007, read with article 18.2.
96 The Social Security Act 34 of 1994 (Namibia) provides for the coverage of Namibian citizens and permanent residents who work for a Namibian employer outside Namibia: see the definition of "employee" in s 1 of the Act.
97 E.g., INAME of Mozambique looks after the well-being of Mozambican nationals in South Africa and elsewhere: J Klaaren & B Rutinwa "Towards the harmonisation of immigration and refugee law in SADC" in Crush, J MIDSA Report No 1 (IDASA & Queens University 2004) 75.
It is clear that much more can be done by SADC countries of origin to unilaterally extend social security coverage and related support to migrant workers abroad. In the case of Malawi this may pose particular challenges, also in view of the fact that the Malawian social security system is for all intents and purposes still underdeveloped. However, it might be that innovative measures to unilaterally extend social security protection to Malawian migrant workers who are not covered by the social security system of the host country may be adopted. For example, migrant workers could – either voluntarily or (eventually) on a compulsory basis – contribute to particular social security arrangements, such as contributory pension schemes.

6. MULTILATERAL ARRANGEMENTS

Would an overarching multilateral agreement in SADC on social security portability and coordination be of assistance to Malawian migrant workers who move to other SADC countries? Much can be gained from the comparative experience in this regard. According to Baruah and Cholewinski, multilateral agreements "[h]ave the advantage that they generate common standards and regulations and so avoid discrimination among migrants from various countries who otherwise might be granted differing rights and entitlements through different bilateral agreements." A multilateral approach also eases the bureaucratic procedures by setting common standards for administrative rules implementing the agreement.99

Furthermore, while entering into bilateral social security agreements is generally seen as the preferred way to guarantee social security entitlements of migrants, this practice, as noted by Holzmann et al, "[n]ecessarily results in a highly complex and hardly administrable set of provisions on the portability of social security benefits" – unless there is a primary legal source which serves as the model for bilateral agreements entered into in, for example, a regional framework. This is the case within the EU as far as bilateral agreements between EU Member States are concerned, as they are all based on a central EU instrument, namely Regulation 883/2004.101

There is therefore a need for a standardised framework. This could be achieved by entering into a multilateral agreement, as happened in the Caribbean and, more recently, South America. This latter agreement has since been extended to include Spain and Portugal – the Ibero-American agreement on social security coordination. In Africa, a now defunct but successful multilateral agreement operated in the Great Lakes area. Most recently, the EAC has commenced with developing a framework for a multilateral agreement, within the

99 Ibid.
100 Holzmann et al (2006: 8, 12, 25).
context of the EAC Common Market. Also, a multilateral agreement involving several Central and West African countries – the (CIPRES) Inter-African Convention on Social Security – has been developed to provide for social security coordination of a wide range of social security benefits. Apparently this agreement is not yet in force. ECCOWAS has also developed a Convention on Social Security.

Such a multilateral instrument which draws its principled framework from international and regional standards, should from an overall perspective and in framework fashion stipulate the overarching and generally applicable principles, standards, institutional mechanisms and channels to guarantee entitlements, rights and obligations, and facilitate and streamline portability of benefits and the implementation of other common arrangements. A multilateral agreement therefore effectively undergirds bilateral agreements, which should contain specific and appropriate cross-country arrangements.

It also has to be noted that another important advantage of a multilateral agreement is that it can provide for a phased and incremental approach in relation to

- benefits provided for;
- categories of persons covered;
- introduction of the principle of aggregation/totalisation of insurance periods/contributions; and
- countries included in the agreement.

In this sense of the word, a multilateral agreement which is essentially and initially limited, and which envisaged incremental expansion, could be foreseen.

7. CONCLUSIONS

From the discussion above and from the perspective of international standards and comparative best practice, it is evident that Malawi has a range of (interrelated) measures, mechanisms and interventions at its disposal to address the employment and social security plight of its migrant workers. The options need to be carefully considered, and the enabling policy, legal, institutional and operational frameworks need to be appropriately appreciated. Much can be gleaned, to the extent that they exist, from international and regional standards. In fact, specific mention should be made of the AU Migration Policy Framework (2007), which provides useful guidelines and direction. The most suitable measures aimed at ensuring employment and social security protection of Malawian migrant workers should be selected. The technical advice of experts and specialists institutions, such as the IOM and the ILO, may have to be relied on, and steps to adjust/create the relevant policy, legal, institutional and operational frameworks need to be embarked on. Capacity-building will be sorely needed, but is readily available. Finally, certain associated overarching objectives have to be borne in mind – with reference to, among others, the harnessing of migration for
the development of Malawi, and the mainstreaming of migration into Malawi’s national development planning.