

PUBLICATION 1

Challenges in the enforcement of ILO Migrant Workers Convention No. 97 in SADC Member States having ratified it (Comoros, Madagascar, Malawi, Mauritius, Tanzania (Zanzibar) and Zambia):

Summary of Comments made by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) from December 2018 to June 2022

Christina Holmgren, Dr.
PRETORIA, OCTOBER 2022



International
Labour
Organization



Funded by the
European Union

Challenges in the enforcement of ILO Migrant Workers Convention No. 97 in SADC Member States having ratified it (Comoros, Madagascar, Malawi, Mauritius, Tanzania (Zanzibar) and Zambia):

**Summary of Comments made by the ILO
Committee of Experts on the Application
of Conventions and Recommendations
(CEACR) from December 2018 to June 2022**

Christina Holmgren, Dr.
PRETORIA, OCTOBER 2022

Table of Contents

I.	General Introduction	4
II.	Brief Introduction to the ILO Main Supervisory Body of International Labour Standards: the CEACR	7
III.	Brief Overview of the Provisions of Convention No. 97 Commented Upon by the CEACR	11
	1. Article 1: National Migration Framework	12
	2. Article 2: Adequate and Free Services	15
	3. Article 3: Protection Against Misleading Propaganda	17
	4. Article 4: Facilitation of Travel of Migrant Workers	19
	5. Article 5: Medical Services	19
	6. Article 6: Equality of Treatment	20
	7. Article 7: Cooperation between Employment Services	24
	8. Article 8: Right of Residence in Case of Work Incapacity	24
	9. Article 9: Transfer of Remittances	25
	10. Article 10: Entering into Bilateral Agreements	26
	11. Article 11: Definition of Migrant Worker	26
	12. Annexes	26
IV.	Enforcement and Implementation	28
	1. Statistics	29
	2. Labour Inspection Reports	30
	3. Judicial Decisions	30
V.	Conclusion	32

I. General Introduction

The Southern African Development Community (SADC) adopted in 2021 an Employment and Labour Policy Framework for the period 2020–2030, which includes the recognition that improved labour migration governance is crucial for a sound regional integration and smooth development of socio-economic relations among its Members. Labour migration is reflected in **Strategic objective 5**: “To enhance labour migration governance for safe, orderly and regular labour migration through a whole of government/whole of society approach to effectively leverage labour mobility as a development enabler.”

In addition, the SADC Labour Migration Action Plan (LMAP) (2020–2025) intends to promote safe, orderly and regular migration in the region, based on amongst others, the ratification and domestication of relevant ILO Conventions: the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). These Conventions (commonly referred to as the two ILO Migrant Workers Conventions Nos. 97 and 143) were specifically tailored to improve labour migration governance and protect migrant workers labour and human rights. All ILO Standards apply to Migrant Workers except where explicitly excluded, with some ILO Conventions being particularly relevant, namely the ten Fundamental Conventions and the 2014 Protocol to the Forced Labour Convention.¹

1 The ten ILO Fundamental Conventions comprise the following:

- Forced Labour Convention, 1930 (No. 29),
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98),
- Equal Remuneration Convention, 1951 (No. 100),
- Abolition of Forced Labour Convention, 1957 (No. 105),
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111),
- Minimum Age Convention, 1973 (No. 138),
- Occupational Safety and Health Convention, 1981 (No. 155),
- Worst Forms of Child Labour Convention, 1999 (No. 182).
- Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

The CEACR comments of relevance to migrant workers under these Conventions are subject to a second publication.



SADC countries that have ratified ILO Conventions Nos. 97 and 143 on Migrant Workers

- ILO: [Migration for Employment Convention \(Revised\), 1949 \(No. 97\)](#)
 - Six SADC countries (Comoros (2021), Madagascar (2001), Malawi (1965), Mauritius (1969), Tanzania-Zanzibar (1964)), and Zambia (1964) have ratified this Convention as of 1 September 2023.
- ILO: [Migrant Workers \(Supplementary Provisions\) Convention, 1975 \(No. 143\)](#)
 - Comoros (2021) and Madagascar (2019) are the only two SADC countries that have ratified this Convention as of 1 September 2023.

SADC's LMAP pursues three strategic objectives, including the protection of migrant workers rights and the strengthening of labour migration policies and regulatory systems for a better labour migration governance. For this purpose, the above mentioned ILO Conventions and their accompanying Recommendations ²play a key instrumental role as they lay down common rules of relevance to all countries, including SADC Member States.

As mentioned in the table above, only six SADC Member States have ratified the Migrant Workers Convention No. 97 as of end May 2022, and two have ratified the Migrant Workers Convention (No. 143). Indeed, Comoros, Madagascar, Malawi, Mauritius, Tanzania-Zanzibar as well as Zambia have ratified Convention No. 97 whereas Comoros and Madagascar have ratified Convention 143.³

In an effort to contribute to the development of intra-SADC collaboration, several SADC Member States have expressed interest in ratifying one or both Conventions: the Democratic Republic of Congo (DRC), Eswatini, Lesotho, Seychelles and Zimbabwe. Assistance is currently being provided to this effect by the ILO Southern Africa Migration Management (SAMM) project, through, amongst others, gap analysis studies examining the extent to which these countries' national legislation and policies already comply with the Conventions as well as the steps remaining to take in order to ratify them in compliance with the Convention/s.

² Migration for Employment Recommendation (Revised 1949), 1949 No. 86 and Migrant Workers Recommendation, 1975 (No. 151) respectively.

³ Madagascar ratified C97 in 2001 and C143 in 2019 in the framework of the ILO Centenary, and Comoros ratified both Conventions in 2021. The comments for Madagascar under Convention No. 143 are not yet available at the time of writing.



In order to further assist SADC Member States' understanding and compliance with the relevant ILO Standards on migration, the ILO SAMM project also examines challenges of implementation by those countries that have ratified the most relevant ILO Conventions to migrant workers as well as way forward to overcome these challenges through the lens of the ILO main Supervisory body: the Committee of Experts on the Application of Conventions and Recommendations (CEACR).

The current publication focuses on the application of ILO Migrant Workers Convention No. 97 by five of the six ratifying SADC Members⁴ by examining the CEACR comments up to June 2022 (at the time of writing of the publication). It also examines comments made in the General Survey concerning other countries.⁵ It is followed by a second publication which looks into the application of the Fundamental Conventions in the SADC countries to migrant workers. A short introduction to the ILO CEACR is first necessary to better comprehend its comments, after which the main issues at stake in the countries having ratified Migrant Workers Convention No. 97 will be outlined.

4 As Comoros ratified it only in 2021 and is currently in the process of preparing its First Report, CEACR comments will be formulated by end of 2023 and will be available on the website only by March 2024.

5 See next section for a brief description of the General Survey and the CEACR.



II. Brief Introduction to the ILO Main Supervisory Body of International Labour Standards: the CEACR

Upon ratifying an ILO Convention,⁶ a State incurs legal obligations whose implementation need to be monitored in order to be effective. Since its inception in 1919, the ILO has developed an array of monitoring mechanisms, of which the CEACR, instituted in 1926, is the main Supervisory Body.⁷ Its principal monitoring tool consists of a well developed reporting procedure, based on regular dialogue between the concerned country and the ILO.

The ILO Committee of Experts is composed of twenty independent high-level legal experts, representing all regions of the world. They are appointed by the ILO Governing Body in their personal capacity in order to assess the compliance of Member States with their Standards obligations. The Committee of Experts further assists the ILO Member States with an impartial and technical evaluation of how to comply with these obligations.

In a nutshell,⁸ once a country ratifies a Convention, it receives a detailed form (the so-called First Detailed Report) to fill, with questions to respond relating to each article of the Convention. The questions ask for information on relevant laws and policies as well as on how these are applied in practice, for instance through administrative and judicial decisions as well as labour inspection visit reports and statistical data. Other requested information relates to whether national authorities exist to monitor these policies and in the affirmative their competence in this regard.

Once this First Detailed Report is submitted to the ILO CEACR, the latter examines the extent to which national legislation and practice conform to the Convention and sends its comments to the country. These comments take diverse forms, such as requesting further information on: (a) a given point or the text of a legislation or a policy referred to but not submitted to it, (b) the concrete application of an obligation under the Convention, (c) labour inspection reports and judicial decisions.

6 Ratification of a Convention is the legal expression of a State agreeing to be bound by the obligations that the Convention contains. Ratification is an act of State sovereignty whereby a given State freely chooses to be bound by a given Convention, usually based on the conviction that it will foster socio-economic development and social justice.

7 For a comprehensive study on the CEACR, *cf.* Monitoring Compliance with International Labour Standards – The key role of the ILO Committee of Experts on the Application of Conventions and Recommendations, ILO, Geneva, Centenary edition 2019, 122 pages. https://www.ilo.org/global/standards/WCMS_730866/lang-en/index.htm

8 For more information, *cf.* above study.



A second category of comments consists of an assessment of the legislation through, for instance, clarifying the scope and meaning of an obligation under the Convention, either showing a gap in the national legislation, an unclear provision or an outright contradiction with the Convention. In this regard, the CEACR will at times refer to its General Survey.⁹

These comments, prepared during the annual session of the CEACR (end of November – early December) are then sent back to the country for its follow-up. Except the ten Fundamental and four governance Conventions which follow a three-year cycle given their particular importance, all other ILO Conventions – so-called technical Conventions -, follow a six year reporting cycle.¹⁰

The country is then to reply back to the comments of the CEACR by 1st of September of the reporting year on how it has applied the comments and the Convention overall, which the CEACR will once again examine during its annual session. This constitutes an ongoing dialogue between the Supervisory Body and the country in question, a dialogue based on goodwill by the country to implement the Convention and by the ILO to provide support in this endeavour. The CEACR comments take two main forms: Observations and Direct Requests. While the latter concern relatively minor discrepancies, the former deal with more serious breaches with the Convention.¹¹

The above-described procedure is called “Article 22 reporting” based on the ILO Constitutional obligation contained in its Article 22 for Member States to submit a regular report on its application of the Conventions that it has ratified. It is incumbent on the Government to prepare this report, in the vast majority of cases represented by its Ministry of Labour.

Given the tripartite structure of the ILO, the social partners – most representative organisations of employers and workers respectively -, are to be involved in this process. The social partners need to receive the reports in order to be availed of the possibility to write their views on the Government report: the option is left for them to complement a Government report, to disagree with it or to submit their own report. Their contribution, falling under Article 23 of the ILO Constitution,

9 Cf. following paragraphs for a short description of General Surveys.

10 The comments formulated by the CEACR are available on the ILO Website and show the comments made under each Convention ratified by the countries. For these, cf.: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11003:0::NO::>

11 Including the absence of reporting for a certain period of time. For more details, cf. the publication on the Committee of Experts referred to the above.



is optional. In addition, the Convention on Tripartite Consultations (International Labour Standards), 1975 (No. 144) provides for more in-depth tripartite consultations in this regard. The latter has been ratified by all SADC Members.

In order for the Committee of Experts to be in the position to well assess the situation in the countries having ratified a Convention, the report must contain detailed information. This is a challenge met by a number of SADC Members where either the information is not readily available – for instance, there are no or very few statistics data concerning migration -, or where the Ministry of Labour is seriously understaffed.

Another constraint may be the lack of coordination among Government Ministries and Authorities concerned by a given Convention as most ILO Conventions are cross-cutting and often involve other Government agencies. It is to be noted that, in general, in addition to the information of relevance contained in United Nations report, the comments of the CEACR are formulated in response to the Government report – and to the social partners' comments when made – and therefore react to the contents of the report. Thus, the CEACR comments are not necessarily exhaustive as to the situation on the ground.

After the CEACR yearly session, all its comments formulated under the Conventions for which a report is due, are compiled and submitted to the ILO Governing Body during its March session which it, in turn, forwards to the ILO Conference session for plenary discussion and approval.¹²

A second major task of the CEACR consists in analysing a selected Standard or group of Standards (Convention and/or Recommendation as the case may be),¹³ based on the selection made by the ILO Members during the Conference. This analysis aims at assessing (a) obstacles to ratifying the chosen instruments by those countries that have not yet done so, on one hand and (b) the compatibility of the legislation and practice of those States that have ratified the given Convention, on the other hand. In so doing, the CEACR brings useful clarifications as to the scope and meaning of the articles and paragraphs of the Standards.

¹² The ILO Governing Body can be compared to the Executive body while the ILO Conference to a Legislative body.

¹³ In certain instances, the Conference adopts only a Convention – the case of Freedom of Association Convention No. 87 for instance – or only a Recommendation such as the Employment Relationship Recommendation, 2006 (No. 198). The majority of cases involve the adoption of a Convention together with an accompanying Recommendation.



These analyses are known as General Surveys and constitute useful tools and guidance for countries in the implementation of their obligations. The Committee of Experts published a General Survey on the two Migrant Workers Conventions Nos. 97 et 143 in 2016, including an assessment by SADC Members on how their legislation and practice compare to the Conventions.¹⁴ While primarily analysing the comments formulated to the ratifying SADC countries individually under the Article 22 reporting procedure, this study will refer to the principles included in the 2016 General Survey (hereinafter the 2016 General Survey).

This publication focuses on examining the comments formulated by the Committee of Experts under Convention No. 97 to five of the six ratifying SADC Members, as Comoros has not yet submitted any report as they are due in September 2023 and has therefore not received any comments from the Committee of Experts.¹⁵ The limited number of country samples is therefore not fully representative of the challenges that SADC Members may face overall.

In addition,¹⁶ as a number of SADC governments that had not ratified any of the two Migrant Workers Conventions submitted replies to the form submitted by the ILO in the framework of the 2016 General Survey on Migration, reference to the comments made in this regard will be included in a complementary bid.

14 The General Surveys are based on reports prepared by the Member States as foreseen under Article 19 of the ILO Constitution. A list of the States having submitted a report is appended at the end of the Survey (*cf.* page 251). The following SADC countries submitted a report under the General Survey 2016 exercise, whether they had ratified or not, notably: Lesotho, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of South Africa and Zimbabwe.

15 As comments are regularly provided by the CEACR, this report takes into account comments made by October 2022. For more recent comments, please see: <https://www.ilo.org/dyn/normlex/en/f?p=1000:11003:::NO:>

16 As mentioned earlier, the obligation to submit a report on the application of a given Convention under the General Survey exercise, concerns both ratifying and non-ratifying States alike. Hence, those SADC Member States that have ratified Convention No. 97 also included the scope of Convention No. 143 in their reports – which has just recently been ratified by two SADC Members: Comoros and Madagascar, and have therefore not yet been availed comments by the CEACR in this regard.



III. Brief Overview of the Provisions of Convention No. 97 Commented Upon by the CEACR

The Migrant Workers Convention No. 97 was adopted in 1949 in the aftermath of the Second World War. It aimed at facilitating the movement of supply of labour in Europe across to the United States, in demand for labour at the end of the Second World War. It is further aimed at regulating flows of regular migrant workers based on the principles of equality of treatment and of just conditions of work. It contains eleven substantive articles and three Annexes.¹⁷ The Convention was adopted together with an accompanying Recommendation (No. 86) which provides details on how to apply the Convention.

In summary, the Convention's articles deal with: the provision of information to the ILO of existing policies and legislation regarding migrant workers (article 1), the existence of a free service of employment to assist migrant workers (article 2), the commitment to suppress misleading propaganda regarding migration (article 3), the facilitation of travel arrangements (article 4), the maintenance of appropriate medical services (article 5), the provision of equality of treatment regarding a number of labour rights, including social security allowances (article 6), the provision for collaboration between employment services of ratifying States (article 7), the conditions for migrant workers to benefit from the right to stay in the destination country (article 8), the facilitation of remittances (article 9), the encouragement to conclude bilateral agreements (article 10) as well as a definition of the migrant worker and the scope of application of the Convention (article 11). Three Annexes supplement the Convention and detail further recruitment under certain conditions and the importation of a migrant worker's personal effects.¹⁸ The Annexes are left open at the discretion of the States to ratify them or not.

The CEACR has commented on the application by the ratifying SADC members of the above-mentioned provisions, with the exception of article 7 which provides for cooperation between employment services. These are examined below.

¹⁷ For the text of the Convention, cf.: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:P12100_ILO_CODE:C097

¹⁸ Madagascar has ratified Annexes I and II, Comoros and Malawi have ratified all three Annexes, whereas the other SADC countries having ratified Convention No. 97 have excluded the Annexes. Malawi received no comments under the Annexes while Madagascar received two comments which will be dealt with below.



1. Article 1: National Migration Framework

In its 2016 General Survey, the CEACR underlines that the Convention is, due to the very nature of migration taking place across borders, based on international collaboration, including exchange of information between countries.¹⁹ The subject matter of the migration policy – legislation, policy, institutional arrangements and bilateral agreements – consists of a wide array of topics, depending on the characteristics and special needs of the migration flows.

Convention No. 97 starts with a commitment by the ratifying State to *inform* the ILO of its legislation and policies of relevance to migrant workers²⁰, the principle of equality of treatment being applicable between national and migrant workers in a regular situation. In its 2016 General Survey, the CEACR “considers that an effective interplay of international, regional, bilateral and national level arrangements is essential”.²¹

In this regard, Article 1 of Convention No. 97 lists a number of elements that the ratifying country is to send information on to the ILO, namely: policies, laws and regulations regarding migration, information on conditions of employment and work of migrant workers as well as whether agreements or arrangements have been concluded, which refers in particular to bilateral labour migration agreements (BLMAs). The type of information required is varied as to both the form of the measure – formal legislation, informal arrangement such as a Memorandum of Understanding, bilateral informal cooperation or bilateral agreement – and the scope of the areas of intervention.²²

Three of the countries having ratified Convention No.97 received comments by the CEACR in this regard: Madagascar, Malawi and Zanzibar. In addition, a number of

19 Cf. paragraph 141 of the General Survey.

20 Article 1: Each Member of the International Labour Organization for which this Convention is in force undertakes to make available on request to the International Labour Office and to other Members—

- (a) information on national policies, laws and regulations relating to emigration and immigration;
- (b) information on special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment;
- (c) information concerning general agreements and special arrangements on these questions concluded by the Member.

21 Cf. paragraph 129 of the General Survey.

22 No further guidelines are provided in either Convention No. 97 or its accompanying Recommendation No. 86 as to what measures constitute a national policy but these are described in the 2016 General Survey.



SADC countries that had not ratified either Convention submitted information in this regard under the 2016 General Survey.²³

a) Migration policies

Migration policies are very varied in both their scope and their form. They can constitute an explicit labour migration policy, form part of a broader national migration policy or a migration and development policy, or be part of an employment policy that will include migrant workers. They can be of a general scope as to cover a large span of conditions of employment and of residence. They can also be more limited to special elements of migration, such as, in the case of Malawi for instance, these elements consisting of the compilation of a National Migration Profile, the development of a National Diaspora Engagement Policy, the setting up of a national Committee to monitor the welfare of refugees or a project to encourage the voluntary return of migrant workers irregularly in South Africa.

However related to the protection of migrant workers and however important *per se*, these measures would appear to be too limited in scope to constitute a comprehensive migration policy in light of the CEACR's request to the country to add information on the steps taken towards the adoption of a migration policy.²⁴ Moreover, the CEACR further encouraged Malawi to request technical assistance from the Office to develop such a policy, which reflects the spirit of collaboration and productive dialogue that is to prevail between the ILO Member States and the Supervisory Bodies in the event of a country facing challenges in implementing a Convention it has ratified.

As to Zanzibar, the CEACR referred to a previous report in which Zanzibar had mentioned the migration policy that it was elaborating but did not provide for any follow-up information in its latest report. The Committee therefore requested Zanzibar to provide information on the progress made in this regard, underlining the critical importance of addressing labour migration as a form of good governance. This request is indicative of the fact that the Committee of Experts pursues its request until it is met and satisfied. It also shows the dynamic nature of International Labour Standards which are of a constantly evolving nature.

In order to ensure the implementation of migration policies, institutional arrangements are crucial. Two SADC Members mentioned have achieved such

²³ For the list of countries, see footnote 14.

²⁴ This interpretation is by the author of the publication.



arrangements: Malawi and its national Committee to monitor the welfare of refugees (under Article 22 reporting procedure) as well as Seychelles and its Committee on Employment of non-Seychellois.²⁵ No description of the mandate and functioning of these Committees was however availed.

Several SADC members – Namibia, Seychelles and Zimbabwe – indicated in their report to the General Survey, that, despite not having ratified the Migrant Workers Conventions, they were in the process of developing a migration policy. In this regard, both Seychelles and Zimbabwe have expressed interest in possibly ratifying the two Conventions. The SAMM project is supporting this through analyses comparing the country's legislation and practice with the Conventions,²⁶ in order to assist them in determining the steps to take to be in conformity with the Conventions and hence in deciding whether they feel ready to ratify them or not.²⁷

b) Laws and regulations

The scope of the legislation varies according to the challenges faced and the characteristics of the migration situation in the country. Reference was made by two SADC Members to regulatory texts governing 1) the contents of an employment contract for emigrating workers and the employers' obligations in this regard – working conditions, work permit and residence permit, 2) the visa procedures to be followed, the obligation of recruitment agencies to follow up on citizens every three months, 3) the conditions of operations of private employment agencies, 4) or the adoption of a Trafficking in People Act. The Committee of Experts invited both countries to pursue providing information on all legislative measures adopted with a bearing on migrant workers. No assessment of the contents of above legislative provisions was made by the CEACR.

c) Bilateral labour migration agreements/arrangements

Bilateral labour migration agreements between sending and receiving countries of migrant workers, that regulate their conditions of entry, employment, work and of living, constitute crucial instruments to ensure the safeguard of decent work for migrant workers.²⁸ In this regard, the accompanying Recommendation No. 86

25 Cf. paragraph 171 of the General Survey. It is to be recalled that the Seychelles have not ratified Convention No. 97.

26 These gap analyses are being carried out by the SAMM project.

27 Other SADC Members have expressed interest in such analyses, notably the Democratic Republic of Congo and Lesotho.

28 Cf. for instance, a section dedicated to bilateral agreements in the General Survey, pages 50 to 55.



contains as annex a model bilateral agreement aimed at inspiring countries when concluding such agreements.

Two SADC countries alluded to bilateral labour migration agreements in their response to the query by the CEACR for information in this regard, namely Madagascar and Malawi. In its Article 22 report, Madagascar referred to the opening of discussions with both Mauritius and France. In the absence of a concrete agreement, the CEACR accordingly requested Madagascar to provide any information regarding progress achieved regarding the conclusion of bilateral or multilateral labour migration agreements in its next report. That information will enable the CEACR to assess how the Convention is implemented.

Malawi on its side indicated having concluded a bilateral agreement with Qatar, a requirement also foreseen by Article 10 of the Convention which encourages ratifying States to enter such agreements in the event of important flows of labour migration to a given country. In response to the information provided by Malawi, the CEACR drew its attention to the ILO General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs, which invite Member States to make labour migration agreements publicly available.

Other SADC countries – not having ratified the Conventions – mentioned in their report to the 2016 General Survey, the existence of bilateral labour migration relations. These could either be formal bilateral agreements, South Africa mentioning such agreements with four neighbouring countries in the field of mining, or informal arrangements such as Seychelles undertaking study tours to Mauritius to exchange on good practices regarding labour migration.

2. Article 2: Adequate and Free Services

Several articles of the Convention foresee measures to facilitate the mobility and recruitment of migrant workers. Such measures pertain for example to services in countries of origin to assist migrant workers prior to their departure or upon their return home or to services in destination countries aimed at supporting them in settling down.

Three articles are particularly instrumental in this regard, namely Articles 2, 3 and 5, where the Committee of Experts has addressed comments to the ratifying SADC members, mainly under Article 2, providing that “an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information,” should be maintained in the country.



Indeed, in order for migrant workers to smoothly integrate into the country of destination, it is crucial that adequate information is availed to them both prior to departing and upon arrival. Such information pertains for instance to residence and employment visa procedures, living and housing conditions, rights and obligations for workers under national labour law, as well as schooling/educational conditions for the accompanying children of the migrant worker.

The information services vary in form according to the countries and must be free of charge for the migrant workers. Usually, they range from documentation brochures, online videos, websites, documentation availed by governmental labour offices or resource centres, in the country's official language and/or in the language used by a large portion of migrant workers. In a number of countries, governments offer free pre-departure training on certain occupations to certain categories of migrants – for instance, to domestic workers -,²⁹ or on language, cultural and other values prevailing in the country of destination.

Three SADC Members were availed comments by the CEACR regarding the application of Article 2.³⁰ In one country,³¹ mention was made to a model agreement adopted by an interministerial committee as well as to the information provided to the emigrating workers on the procedures to follow regarding the employment visa. In order to better assess the extent to which the Article is applied, the Committee of Experts asked for a copy of the model employment agreement as well as for details on the kind of information and assistance supplied to migrant workers by the Migration Management Service. Moreover, the CEACR enquired whether the services were free of charge – in line with the requirements posed by the Convention – and how they reached as large a number of migrant workers as possible?

In another country,³² the CEACR queried about the activities conducted by the Information Centre established at the Ministry of Labour regarding the labour market and the travelling requirements. The Committee further noted the

29 In some countries, domestic workers come from rural areas with hardly any knowledge on the use of electric equipment and are hired to work in destination countries where the infrastructure is more developed. Hence, they need to be trained to learn how to use the equipment in order to be able to perform their duties and obtain better wages. Experience has shown that in the absence of such skills, a number of them cannot retain their jobs and could become particularly prone to expressions of dissatisfaction from their "frustrated" employers.

30 Madagascar, Mauritius and Zanzibar.

31 Madagascar.

32 Zanzibar.



Government's reference to a Bill on Legal Aid Services and queried whether legal aid services are available for free for migrant workers and if the latter benefit from any other types of services free of charge.

A third country referred to the pre-departure training it provided to migrant workers seeking employment under a "circular" migration project as well as skills training which covered communication technology (ICT),³³ English and cultural orientation. The country further mentioned not having availed such services under the project in 2011, to which the CEACR requested information on the reasons for this interruption as well as on the skills training provided each year of the project.

Women migrant workers are particularly susceptible to exploitative work conditions and to abuses of all kinds, and notably domestic workers who form a large proportion of migrants. Hence, the Committee of Experts has underlined the importance of addressing their situation through services tailored to their specific needs and queried the SADC Members whether any special services had been tailored to the specific needs of female workers.

3. Article 3: Protection Against Misleading Propaganda

Already at the time of adoption of Convention No. 97, its authors were aware of the risks posed by misleading information stemming from recruitment intermediaries who would hire workers into jobs across borders, notwithstanding their risk of being subject to labour exploitation or other abuses.³⁴ Unscrupulous recruitment agents have an interest in luring job seekers into any job in order to earn recruitment fees. Migrant workers from rural areas, characterised by poor job opportunities and remoteness from labour market information, are particularly prone to such recruitment practices.

Hence, Article 3 of Convention No. 97 provides for the obligation for States to "take all appropriate steps against misleading propaganda relating to emigration and immigration." Such steps – to be adopted in both countries of origin and destination – range from general awareness campaigns in media – TV, radio, news

³³ Mauritius.

³⁴ Attention is to be paid to the ILO Private Employment Agencies' Convention, 1997 (No. 181) in order both to promote job opportunities through private agencies and to protect workers against exploitative conditions. This Convention details the obligations of the recruiters in order to ensure decent work for the job seekers, including a specific article (8) regarding migrant workers. Madagascar and Zambia have both ratified this Convention, in 2019 and 2013, respectively.



papers – to a free telephone line, advertised for example in petrol stations as victims of unscrupulous recruiters often have to travel from their rural home to a larger city, websites, free brochures, as well as resource and information centres. All these measures are pivotal to deter labour migration in abusive conditions.

Misleading propaganda has been a subject of concern by the Committee of Experts which addressed comments to three of the SADC ratifying Members. In most cases, it asked for further information, detailing the elements it was looking for.³⁵ One country indicated having adopted measures to prevent and sanction recruitment agencies resorting to misleading propaganda – control over the agencies or withdrawal of their operational licence in case of breach against the legislation (Madagascar). In this regard, the CEACR underlined that the obligation incurred by Member States is to prevent the spreading of misleading information and that it should both aim at targeting immigrants into the country and the national population overall against the risks of migration under certain conditions.

It further requested the Government to pursue its efforts to collaborate with other Governments, in line with the second paragraph of the Article. Indeed, the cross-border nature of labour migration requires inter-State collaboration in order to efficiently tackle exploitative conditions of work.

In response to a general statement contained in the Mauritius Government report – that the Ministry of Labour takes “appropriate measures” against illegal recruitment activities –, the Committee of Experts requested that the next report contain detailed information on the following three types of measures adopted to combat abuse and disinformation: (a) specific action adopted against erroneous information contained in employment contracts, (b) type of assistance provided to migrant workers victims of such misleading information, as well as (c) any other measures such as awareness-raising campaigns (Zanzibar).³⁶

In another case still, the CEACR simply took note of the detailed information provided in the country report regarding the legislative framework applicable to private employment agencies. The provisions relevant to the monitoring of private recruitment agencies had been described at length in the Government report and hence, no further follow-up was requested.

³⁵ Madagascar, Mauritius and Zanzibar.

³⁶ The 1999 previous General Survey on the two Migrant Workers Conventions, notes that Article 4 does “not specify in practical terms what these measures entail.”



4. Article 4: Facilitation of Travel of Migrant Workers

Very few comments have been formulated by the CEACR under this article which provides that “Measures shall be taken by each Member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment.”

The Committee of Experts asked Mauritius to review its Recruitment Act of 1993 which requires the examination of the record of a candidate for emigration for the past ten years which is contrary to the Convention. The CEACR further noted that the country reported being embarked on revising section 4 of that Act and thus asked it to cater for its comments when amending it.

The second comment formulated by the CEACR concerns Madagascar where it grouped its comments under several articles, including both articles 2 and 4, *cf.* the comments provided above under article 2.³⁷

5. Article 5: Medical Services

Convention No. 97 is further concerned about the health of migrant workers and their accompanying family members, a concern that is currently different than at the time of adoption of the Convention in the 1940s. Indeed, at that time many migrant workers travelled from Europe to the United States by boat, a travel whose duration would take at least a week and during which diseases could occur, whereas currently, regular workers usually migrate by air. Thus, today, the health of workers is mainly verified upon entering the destination country and not during the travel duration.

Medical examinations of migrant workers constitute a routine practice in a number of destination countries and several Members prohibit the entry into their territories of migrant workers presenting an illness or a suspected illness.³⁸ The CEACR has stated that while such practices may be justified if their entry into the country poses

³⁷ Article 4 is often to be read in conjunction with other articles of the Convention that specify the services at stake, which was the case of Madagascar.

³⁸ Article 5: “Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction, appropriate medical services responsible for:

- (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health;
- (b) ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination.”



a threat to public health, such restrictions should be limited to such risks as they may otherwise constitute discriminatory measures.³⁹ In this regard, the CEACR has drawn the attention to the ILO Recommendation No. 200 on HIV and AIDS in the World of Work, 2010, which provides that workers wishing to migrate should not be prevented to do so due to their actual or supposed HIV/AIDS status.⁴⁰

The restrictions to migrant workers entry into Mauritius have drawn the attention of the Committee of Experts which asked the Government to provide detailed information on the practical application of the Immigration Act No. 13 of 1970. Under section 8 of that Act, immigration officers may deny access to the country of migrants who "appear to be suffering from any physical or mental infirmity" or "dumb, blind or otherwise physically defective or physically handicapped" and who are likely to involve public health expenses.

The CEACR asked in particular for the number of foreign job seekers denied entry into the country or expelled from it for medical reasons, as well as how a person with a disability was determined as likely to become a hinder on public funds. The CEACR further requested information on whether the authorities assessed if the infection or illness of a worker would have a bearing on the job s/he has been recruited for. Finally, the Committee of Experts queried whether the Government had considered adopting amendments to the relevant provisions of the Immigration Act in light of developments made by science and social attitudes, as well as to prevent discriminatory treatment of migrant workers.

No other SADC country received comments by the CEACR under this article.

6. Article 6: Equality of Treatment

The principle of equality of treatment between migrant workers in a regular situation and national workers lies at the core of ILO Migrant Workers Convention No. 97 and is embodied in its Article 6. It has received much attention by the CEACR, both in its comments to the countries having ratified it, including to five of the six SADC Members, and in its 2016 General Survey. Even though the principle seems widely accepted by the ILO Members, regular migrant workers remain facing multiple forms of discrimination and inequalities in the labour market.

39 Cf. paragraph 251 of the 2016 General Survey.

40 Cf. paragraphs 25, 27 and 28 of the Recommendation.



Indeed, discrimination can occur through many ways, for instance, through excluding certain categories of workers from the scope of the protection afforded by the labour legislation, such as those employed in domestic or agricultural work. Other forms of discrimination of regular migrant workers include less favourable conditions of work of women migrant workers compared to men migrants. Convention No. 97 thus prohibits legislation from being discriminatory against migrant workers, legislation that should be enforced in practice through labour inspection visits as well as effective sanctions.⁴¹

Article 6 affords equality of treatment between migrant and national workers in the two main fields of (1) conditions of work – remuneration, hours of work, membership in trade unions – and of (2) social security benefits.⁴² It further prohibits discrimination based on the four criteria of nationality, race, religion or sex. Regarding the latter criterion, the CEACR has expressed its concern, in particular about women facing discrimination given the large number of women migrants employed in domestic work or in caregiving, as these are sectors particularly prone to abuses of all kinds (remuneration, hours of rest, for instance) and often subject to social disregard.

Regular migrant workers are further to be ensured equal treatment with respect to social security, whether they benefit from a temporary or a permanent residence

41 See below section on Enforcement for a detail on these.

42 Article 6:1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

- (a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities—
 - (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;
 - (ii) membership of trade unions and enjoyment of the benefits of collective bargaining;
 - (iii) accommodation;
- (b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
 - (i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
 - (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;
- (c) employment taxes, dues or contributions payable in respect of the person employed; and
- (d) legal proceedings relating to the matters referred to in this Convention.



status. The ambit of the social security benefits is specified in a list of social security allowances, such as employment injury benefits or maternity benefits. They further relate to other ILO social security instruments, including the Social Security (Minimum Standards) Convention, 1952 (102), a main ILO social security Convention.

The CEACR has formulated comments regarding the application of the principle to four of the six SADC Members having ratified the Convention, which illustrates the importance attached to it. The comments cover different issues, remuneration, the granting of social security benefits to migrant workers, as well as modalities of enforcement of the principle of equal treatment.

In order to be in the position to assess the concrete application of the Convention by the ratifying countries, the CEACR needs to be availed by the relevant legislation as well as labour inspection reports, amongst others. Thus, it requested one country to share the legislative texts of applicability regarding equality of treatment between national and migrant workers on work conditions as well as on taxes. It further asked the Government to inform it about the measures adopted to ensure that women migrant were treated on equal footing with men migrant workers regarding conditions of work. Finally, it inquired about the number of complaints submitted to the Judiciary as well as the sanctions enforced by it for breach of the provisions of the Convention. (Madagascar)

The CEACR addressed a request for more specific information to another country consequent to a concern raised by a trade union regarding hours of work in the textile sector for migrant workers originating from three Asian countries. To the Government's response that labour inspection visits were carried out addressing these concerns, the CEACR asked for detailed information on the number of such visits carried out as well as the scope of these with a particular reference to equality of treatment. Finally, the number of grievances submitted by migrant workers as well as the sanctions and remedies applied, were requested in order to assess the compliance in practice with the Convention. (Mauritius)

With regards to social security benefits, the Committee of Experts noted the exclusion from the National Pensions' Act of non nationals having resided less than two years in Mauritius. It therefore queried about the granting of benefits in the event of industrial injuries, in line with another ILO Convention ratified by the country, namely the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19). Article 1 of that Convention likewise embodies the principle of equality between non-national workers and their dependants together with nationals.



Thus, the Committee of Experts linked its query to its comments under both Conventions Nos. 97 and 19, and urged the Government to take the necessary steps to ensure that non-nationals working in export processing zones for less than two years be granted the same industrial injury compensation as nationals.⁴³ It further asked the Government to undertake all efforts to ensure that migrant workers do not get a less favourable treatment than nationals regarding all social security benefits in general.

In a comment to Zanzibar which stated that migrant workers benefit from equal treatment with nationals concerning all points covered by the article – including access to the courts –, the Committee of Experts queried whether the Government had taken any steps to inform the migrant workers of the court remedies available to them in case of grievances. It further asked for information about the number of complaints filed by migrant workers as well as the nature of the grievance at stake as such information sheds light on the practical application of the principle.

In the context of an ongoing labour law reform in one country (Zambia), the Committee of Experts asked the country to inform it of any developments in this process, requesting the Government to ensure that regular migrant workers be treated on an equal footing with nationals regarding conditions of work, including remuneration. It further asked to detail the activities undertaken by a Ministry of Labour committee set up to prioritise employment of nationals in qualified jobs compared to expatriates where nationals qualified to perform the job exist.

As regards social security, that same country had indicated the exclusion of foreign workers in a copper mine from the benefits afforded under the National Pension Schemes Act, on one hand, and challenges of implementation of the Act in another mine as to also cover foreign workers, on the other hand. The Committee of Experts took note of these unequal treatments and requested the Government to ensure that these be dealt with in the currently ongoing legislative amendment process, in conformity with the scope of Article 6 of the Convention.

43 For the full text of the comments of the CEACR under Convention No. 19, cf: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4118389,103106:NO



7. Article 7: Cooperation between Employment Services

No comment was made to the ratifying SADC Members under article 7 of the Convention which provides that employment services are to cooperate with each other across borders.

8. Article 8: Right of Residence in Case of Work Incapacity

Under its Article 8, Convention No. 97 protects migrant workers with a permanent resident permit against being returned back to their country of origin – or from where they emigrated – if they contracted an illness or injury suffered once arrived in the destination country.⁴⁴ This applies equally to the migrant worker's family members admitted together with him or her.

The rationale for this protection is that otherwise migrant workers admitted on a permanent basis may live under constant threat of being repatriated due to illness or injury. This right is important as migrant workers are particularly exposed to work in dangerous conditions and therefore in need of special protection against being sent back in case of injury or illness.

The CEACR requested information on this point from three SADC Members.⁴⁵ In one comment, it stressed that this information was particularly important in light of the increased migration flows in the country (Zambia) whereas in another comment, it asked the country to provide information on the conditions required to be granted a permanent residence permit and to revoke it (Madagascar).

Several SADC Member States replied to this question under the 2016 General Survey reporting, both Seychelles and South Africa responding in the affirmative while Zimbabwe stated that in case of repatriation procedures, the migrant worker would be afforded a fair treatment and the right to lodge an appeal against that decision.

Finally, the CEACR underlined that this right constitutes a human right key to both Conventions. Indeed, otherwise migrant workers face not only the risk of being

⁴⁴ Article 8.1 reads: "A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides."

⁴⁵ Namely Madagascar, Mauritius and Zambia.



engaged in a dangerous work but also to be repatriated due to an occupational injury for example, and be without income upon their return.⁴⁶

9. Article 9: Transfer of Remittances

Convention No. 97 provides further, under its Article 9, that States are to facilitate the transfer of earnings that migrant workers may wish to repatriate to their country of origin.⁴⁷ Transfer of remittances plays an important role in the economy of labour migration as the migrant worker often has a family to support in his or her country of origin, where there may be no job opportunity for that worker, hence prompting the worker to migrate to earn an income.

In its 2016 General Survey, the Committee of Experts examined the legislation in different countries and whether these imposed a certain proportion of the amount to be sent back to the country of destination. Some countries left the migrant workers completely free to decide which amount they wished to send back whereas others provided for transfer facilities. Others still, imposed a certain proportion of the remittances to be sent back to a Government savings scheme on a mandatory basis which the CEACR stated was contrary to the spirit of the Article.

Of the SADC Members having ratified the Convention, the Committee of Experts addressed comments to Mauritius, requesting it to provide for more information about the situation of Chinese workers as the bilateral agreement between Mauritius and China did "not include any provisions prohibiting the practice of transferring the migrant workers wages to their country of origin." Upon analysis of the bilateral agreement, the CEACR noted that its article 4 provides that the labour inspection services are responsible for ensuring the respect and enforcement of Chinese migrant workers rights. It thus requested for information on the violations detected by those services as well as sanctions and remedies. The section below goes into more depth in the role of labour inspection and of the judiciary in the enforcement in general of the Convention.

⁴⁶ It is noteworthy that, during its latest session in June 2022, the International Labour Conference adopted a decision to the effect of including two major Occupational Health and Safety Conventions among the Fundamental Conventions. Cf. Publication No. 2.

⁴⁷ "Each Member for which this Conventions is in force undertakes to permit, taking into account the limits allowed by national laws and regulations concerning export and import of currency, the transfer of such part of the earnings and savings of the migrant for employment as the migrant may desire."



10. Article 10: Entering into Bilateral Agreements

Article 10 encourages countries to enter bilateral agreements where large numbers of workers migrate to. The CEACR has only in one instance commented on SADC ratifying countries, namely with respect to Malawi in a grouped comment under the above described article 1.⁴⁸

11. Article 11: Definition of Migrant Worker

Article 11 defines a migrant worker as a person migrating from one country to another for the purpose of being employed. It contains several exclusions such as a migrant worker on his or her account as well as frontier workers, artists on a short-term basis as well as seafarers. Only one SADC country received a comment by the CEACR under this article, namely Madagascar.

In this regard, the Committee of Experts requested it to amend article 41 of the Labour Code that does not consider displaced workers who have resided less than six months at their work place as migrant workers and who hence fall outside the scope of the Convention. The CEACR thus asked Madagascar to amend the article as to encompass all migrant workers accordingly. It also notes the Government's indication whereby in practice all migrant workers benefit from the protection awarded by the Convention.

12. Annexes

As mentioned earlier, the Convention has three Annexes⁴⁹ open for ratification or not. Whereas both Comoros (who has ratified it in 2021 and therefore has of yet not received comments) and Malawi have ratified all three Annexes, Madagascar included Annexes I and II on Recruitment, placing conditions of labour of migrants in its ratification declaration.

Only Madagascar received comments under the Annexes. The CEACR first queried about the application of articles 6 of Annex I and 7 of Annex II regarding services

⁴⁸ Cf. page 15 above.

⁴⁹ Namely: Annex I – Recruitment, Placing and Conditions of Labour of Migrants for Employment Recruited otherwise than under Government Sponsored Arrangements for Group Transfer; Annex II – Recruitment, Placing and Conditions of Labour of Migrants for Employment Recruited under Government Sponsored Arrangements for Group Transfer and Annex III – Importation of Personal Effects, Tools and Equipment of Migrants for Employment.



provided to migrant workers,⁵⁰ to be read in conjunction with articles 2 and 4 of the Convention. The information requested by the CEACR concerned the type of information and assistance provided to migrant workers by the Service on Migration and the employment services, whether the information provided was free of charge and how the authorities ensured that they reached the largest number of migrant workers.

In its second comment, the CEACR queried about the application of the control of employment contracts as foreseen by articles 5 of Annex I and 6 of Annex II. These detailed provisions deal with the obligation for the ratifying State to maintain a system of supervision of contracts of employer. Such obligations pertain to availing a copy of the contract of employment to the migrant worker prior to his or her departure, the conditions of work, as well as a description of the conditions of life and work in the country of immigration. The competent authorities are further under the obligation to ensure the enforcement of these obligations and to apply appropriate penalties in case of violation thereof.

In this regard, the CEACR requested the competent authorities of Madagascar to indicate, in particular, how the authorities ensured that the relevant information was indeed availed to the migrant workers, and notably on the contents of the work contract. It further asked the country to indicate the measures adopted by the authorities in case of failure to respect this obligation and the number of infringements noted.

50 The articles concern the provision of simplified administrative formalities, interpretation services, and other assistance such as for settlement into the country and welfare during travel time.



IV. Enforcement and Implementation

As mentioned earlier, the mandate of the Committee of Experts is to examine the application by ratifying States of the Convention both in *law* – legislation, regulations, collective agreements -, and in *practice* which it does through a variety of tools. Indeed, as the CEACR emphasised in its 2016 General Survey, “Monitoring and enforcement of legislation and policy in practice is a vital concomitant of measures taken” to protect migrant workers rights.⁵¹

In the context of labour migration, the enforcement of migrant workers rights is particularly challenging due to the vulnerability of those workers. Regular migrant workers may fear losing their job or their right to residence, for instance. Hence, they are particularly susceptible to exploitative conditions of work and life with all kinds of abuses such as non payment of wages or physical abuse -,⁵² and are in special need of an efficient enforcement of their rights.⁵³ Indeed, this vulnerability affects the efficient recourse to legal remedies in case of violation of rights as they may fear for dismissal and consequently of expulsion of the country if they complain against their employer of unrespected working rights. Another challenge faced regards the difficult access to justice due to language barriers, to lack of knowledge of the procedures, or to complications arising from lodging a complaint once back in their country of origin.

The CEACR resorts to several tools to assess the extent to which a ratified Convention is applied in practice, namely: labour inspection visit reports, statistical data as well as administrative and judiciary decisions, whether or not these are explicitly foreseen by the Convention. The ILO has adopted several instruments to regulate both labour inspection and labour statistics.⁵⁴ As regards judicial decisions, as it is the State that ratifies an international Convention, its Judiciary system has a crucial role to play in the enforcement of Conventions.

51 Cf. paragraph 460 of the General Survey.

52 Migrant workers in an irregular situation are endowed with rights under ILO Convention No. 143. Convention No. 97 only deals with regular migrant workers.

53 For a more comprehensive overview of the enforcement and access to justice aspects, see chapter 8 of the General Survey.

54 The ILO has adopted the Labour Statistics Convention, 1985 (No. 160) which is ratified by three SADC Members, including Mauritius.



1. Statistics

Without statistical data on conditions of work and of living of migrant workers, it is very difficult to determine the extent to which their rights under the Conventions are respected. Thus, the CEACR addressed requests for information and comments in this regard to all the SADC Members having ratified Convention No. 97. In a number of countries, the collection of statistical data overall is not readily available, which has an impact on the availability of data regarding migrant workers. Zambia for instance, acknowledged this in its response to the CEACR which replied through emphasising the importance of gathering data on emigration and immigration flows, disaggregated by sex and nationality, as well as by sector of employment. It invited the country to produce such statistics in its next report.

Similar comments were made to all other SADC Members having ratified the Convention, the CEACR explaining that statistics are crucial to determine the nature of the labour migration, the inequalities of treatment, to set priorities and design measures accordingly, as well as to evaluate their impact. In doing so,⁵⁵ it referred to several paragraphs of its General Survey,⁵⁶ in order to assist the ratifying Members to better grasp the importance of statistics in the context of the Convention. In another instance, it asked a country (Mauritius) to also include information on whether the migrant workers are admitted on a temporary or a permanent basis.

The request for statistical data is not based on a specific provision contained in the Convention but reflects a consistent request for statistical data under a large number of Conventions. In line with requests put forward under other Conventions, the statistical data should be disaggregated by sex and employment sector for instance, and adapted to the characteristics of each country.⁵⁷

55 The CEACR did so specifically in its comments to Malawi.

56 Cf. Paragraphs 647 to 650.

57 Two Labour Statistics Conventions have been adopted by the ILO, of which the most recent one (the Labour Statistics Convention, 1985 (No. 160)) has been ratified by Mauritius only.



2. Labour Inspection Reports

A second important tool allowing the CEACR to assess the practical implementation of the Convention consists in the reports produced by the labour inspection inspectorate.⁵⁸ Indeed, labour inspection is often the most important mechanism to enforce labour rights and to protect workers.⁵⁹ With specific regard to migration, the CEACR has underlined that the main function of labour inspectors is to safeguard the rights of migrant workers and not to enforce immigration laws.⁶⁰

Hence, the Committee of Experts requested several countries to provide information on the number of inspection visits conducted regarding the working conditions of migrant workers as well as the outcome of such inspections. In yet another case, the CEACR detailed its query about labour inspection reports asking for not only the number of inspection visits conducted but also the number of enterprises and workers covered, by nationality, sex and economic sector (Mauritius).⁶¹

3. Judicial Decisions

A third and crucial tool to assess the respect in practice of the undertakings contained in ratified Conventions consists in the decisions delivered by the Judiciary. Indeed, access to justice and to remedies in case of violations of workers rights is essential in enforcing the Conventions. Accordingly, the number and the outcome of court decisions regarding migrant workers rights are indicative of the extent to which the Conventions are applied.

In some instances, the CEACR has requested for information on the number of court decisions rendered regarding migrant workers rights and if any, their outcome, including imposed sanctions. In others, it has suggested the country to enhance the capacity of judges – and labour inspectors – to identify and address issues such as equality of treatment. In response to one Government Report (Malawi) mentioning a number of court decisions that had been delivered regarding trafficking in persons for labour exploitation purposes, the Committee of Experts asked for details about

58 Among the 190 ILO Conventions, there are four governance Conventions of which two concern Labour Inspection. All SADC Member States have ratified Labour Inspection (Industry and Commerce), 1947 (No. 81) whereas four SADC Members have ratified Labour Inspection (Agriculture) Convention, 1969 (No. 129).

59 Labour inspection is the subject matter of two governance Conventions, i.e., in particular Labour Inspection Convention 1947 (No. 81), applicable to industry and commerce, which has been ratified by all except one SADC Members.

60 For more detail, cf. paragraphs 477 to 482 of the 2016 General Survey.

61 This query was addressed under its comments regarding the application of Article 6 1) (d) by Mauritius.



these judgments and in particular the penalties and sanctions imposed without which the legislation lacks deterrent effect.

The above-mentioned information is important as many migrant workers fear to be repatriated home if they submit a complaint to the courts against their employer for a violation of their rights. The CEACR stated that granting access to justice is a primary duty of the State and took note of the comments made by a number of trade unions that migrant workers need special assistance to be able to enforce their rights through the court system. Courts, but also specialised complaints bodies exist in a number of countries where a migrant worker address itself such as Equality Commissions, alleging breaches to the principle of equality of treatment (article 6).

Article 6 (1) (d) of Convention No. 97 states the principle of equality of treatment between national and regular migrant workers regarding *legal proceedings* where the latter should have the right to submit an alleged case of violation of their rights to a competent body.⁶² In addition to this reference to a specific article, the CEACR will overall request for information on enforcement under all ratified Conventions.

⁶² Convention No. 143 is the first international instrument protecting the human rights of migrant workers in an irregular situation.



V. Conclusion

In conclusion, one can note that the comments of the CEACR to the SADC Members having ratified Convention No. 97, are varied and adapted to the specificities of each country. They are guided by a strive to achieve progress in the implementation of the Conventions and to foster the understanding by the countries of the scope of the various commitments that they have incurred. The Committee of Experts also characterises itself by a spirit of goodwill by offering ILO's technical assistance to different countries in various ways.

Thus, in one instance, it suggested a country to avail itself of ILO technical assistance to support it in developing a migration policy. In another context, it suggested a country to enhance the capacity of its judiciary and its labour inspection to enforce national provisions to protect migrant workers.

The Committee of Experts also refers the country to specific sources in order to assist it in various ways. In one instance, it referred the country to the model bilateral agreement contained as Annex to the Recommendation No. 86 as a possible source of inspiration in its negotiations with other countries. In another instance, it referred to specific paragraphs of the 2016 General Survey in order for the country to better grasp the relevance of statistics to accurately implement the Convention.

A third example constitutes its reference to the ILO publication on General Principles and Operational Guidelines and Definition of recruitment Fees and Related Costs, which invites member countries to make publicly available their bilateral agreements. In order to shed enlightenment regarding the concrete scope of an article, the Committee of Experts drew the attention of one country to the comments it formulated regarding another Convention the country had ratified,⁶³ in a spirit of promoting coherence among the body of Standards.

A second category of comments pertains to requests for further information to the one provided by the government in its report. Such requests may relate to the progress achieved in the context of a legislative reform process, or to the contents of a legislation referred to, by the country who did not send a copy thereof to the ILO. The CEACR also asks for concrete details on how a given article is applied in practice – were the services that were provided to migrant workers free of

⁶³ Mauritius, see above.



charge? –, or for the number of migrant workers refused of access to a country based on medical grounds. In so doing, it draws the attention of the country to the requirements posed by the Convention.

Finally, the Committee of Experts pays serious attention to the enforcement in practice of the Conventions and addressed requests in this regard to all SADC Members. Thus, it consistently asked for statistical data on the number of migrant workers and their conditions of work and life, as well as for labour inspection visit reports documenting their assessment of the conditions faced by migrant workers. Thirdly, it asked systematically for the number of court decisions delivered and their outcomes. Indeed, the absence of court decisions is not by itself indicative of the absence of problems faced by migrant workers, as the absence of grievances submitted by migrant workers may be caused by fear of reprisals or caused by their lack of knowledge of the procedures, for instance.

All these comments attest the dynamic nature of Standards that continuously strive towards socio-economic progress and justice.





International
Labour
Organization



Funded by the
European Union