PUBLICATION 2

The Application of ILO Fundamental Conventions to Migrant Workers in the Southern Africa Region:

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

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PRETORIA, FEBRUARY 2023

International Labour Organization

THE SOUTHERN AFRICAN MIGRATION MANAGEMENT PROJECT

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The Application of ILO Fundamental Conventions to Migrant Workers in the Southern Africa Region[1]

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1 The Southern Africa region includes the following 16 countries: Angola, Botswana, Comoros, Democratic Republic of the Congo (DRC), Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

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I. General Introduction

This brochure summarises the comments from December 2018 to December 2023 made by the International Labour Organization (ILO)'s Committee of Experts on the Application of Conventions and Recommendations (CEACR) concerning the application to migrant workers of eight[2] ILO Fundamental Conventions (as identified by the 1998 ILO Declaration on Fundamental Principles and Rights at Work) and the Protocol to the Forced Labour Convention No. 29 adopted in 2014[3] (ratified by seven SADC Members (by October 2022)). They concern the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining (Conventions Nos 87 and 98); (b) the elimination of all forms of forced or compulsory labour (Conventions Nos 29, 105 and the 2014 Protocol to the Forced Labour Convention); (c) the effective abolition of child labour (Conventions Nos. 138 and 182); and (d) the elimination of discrimination in respect of employment and occupation (Conventions Nos 100 and 111). In June 2022, two[4] Fundamental Conventions were added to the list of ILO Fundamental Conventions concerning occupational safety and health at work.

This publication will also include a few comments made by the CEACR specifically targeting migrant workers (whether in a regular or irregular situation) to the reports submitted by SADC Member States. Moreover, this publication will include instances where other CEACR comments are of relevance to migrant workers even if they are not explicitly mentioned.[5]

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2 The eight ILO Fundamental Conventions (until June 2022) comprised 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),
- Worst Forms of Child Labour Convention, 1999 (No. 182).

3 The 2014 Protocol to the Forced Labour Convention No. 29 was ratified by seven SADC Members by October 2022.

4 The two new ILO Fundamental Conventions include the:
- Occupational Safety and Health Convention, 1981 (No. 155),
- Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

5 For a description of the CEACR, *cf.* pages 7 – 10 of Publication No. 1.

It is also important to mention that ILO Conventions apply to all workers (including migrant workers) except where stated otherwise. The specific protection of migrant workers offered by International Labour Standards (ILS) includes the ILO Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) in the SADC region. The ratification, and hopefully effective implementation, concerning the protection of migrant workers included under the first Convention is currently (December 2023) limited to five countries (Comoros (2021), Madagascar (2001), Malawi (1965), Mauritius (1969), Zambia (1964) and to Tanzania-Zanzibar (1964). And, they encompass two SADC countries in the case of the latter (Comoros (2021) and Madagascar (2019)).

It is noteworthy that all SADC Member States have ratified the eight original Fundamental Conventions (as covered until December 2023). As a result, migrant workers in the region are protected by these fundamental principles and rights at work enshrined in them. It is thus essential to underline that the ILO Fundamental Conventions are of particular relevance to the protection of migrant workers' rights. In its General Survey of 2012 analysing the scope and applicability of the eight fundamental Conventions,[6] the Committee of Experts mentioned explicitly migrant workers' fundamental or basic rights. These principles are further and foremost enshrined in the ILO Constitution and by mere adherence to the Organisation, a Member State recognises the validity of the fundamental principles embodied therein.[7]

6 *Cf.* "Giving globalization a human face", General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalisation, Report of the CEACR, International Labour Conference, 101st Session, 2012, Geneva, 400 pages.

7 As to the number of SADC Member States having ratified the two Fundamental Occupational Safety and Health Conventions, *cf.* section (5) below.

II. Freedom of Association and Collective Bargaining

Both ILO Conventions on the protection of migrant workers' rights (Nos. 97 and 143) expressly protect trade union rights, illustrating the importance attached to the principles of freedom of association and collective bargaining included in the two ILO Fundamental Conventions mentioned before. Whereas Convention No. 97 embodies the principle in its article 6 (1)(a)(ii): "Each Member for which this Convention is in force undertakes to apply .... to immigrants lawfully within its territory, treatment no less favourable than that it applies to its own nationals in respect of: .... membership of trade unions and enjoyment of benefits of collective bargaining;"

Convention No. 143 goes a step further in that its ratifying States are to adopt a *national policy* that guarantees regular migrant workers equality of opportunity and treatment with nationals with regards to trade union rights.[8] In addition, it is to be recalled that Convention No. 143 affords all migrant workers, including those in an irregular situation, basic human rights, which include freedom of association and collective bargaining.

Indeed, the principle of freedom of association has a core place in the ILO, enshrined, first, in the preamble of the ILO Constitution, and later by several Conventions, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)[9] . Convention No. 87 applies to all workers without distinction,[10] including migrant workers, who may join or establish a trade union of their choice.[11]

Given the importance of the principle of freedom of association in the ILO, a tripartite Committee was specifically set up in 1951 to examine individual cases of

8 While Convention No. 97 provides for equality of treatment, Convention No. 143 goes further in also encompassing equality of opportunity, on one hand, and in foreseeing the adoption of a national policy to this effect which constitutes an active undertaking on the part of ratifying States to efficiently promoting the respect of the principle.

9 Hereinafter Convention No. 87 and Convention No. 98.

10 The only allowed exception being members of the Armed and Police Forces, article 10.

11 Article 2 of the Convention. For a full text of the two Conventions, *cf.* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087 and https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C098:NO

alleged violations of that principle: the Freedom of Association Committee (CFA).[12] It has developed a comprehensive array of principles throughout the years which are subsequently taken up by the CEACR as it ensures, through its comments to the State, that it follows up to the recommendations issued by the CFA.

In other terms, once a country receives recommendations from the CFA regarding a given freedom of association situation following a complaint, the CEACR will follow up through the regular reporting system (provided that the country has ratified the Convention). Thus, the principles developed by both Committees form a coherent and complementary set of rules in this field.

The CFA has on numerous occasions interpreted article 2 of Convention No. 87 as granting migrant workers (whether documented or not) freedom of association under the Convention[13]. It has further explicitly specified that the denial of the right to organise to migrant workers in an irregular situation is incompatible with the Convention. It has also requested countries to amend their legislation accordingly where they do not extend that right.[14]

In its General Survey on migrant workers (hereinafter the 2016 General Survey), the CEACR noted that while the majority of countries recognise the right to unionise for migrant workers, some either require citizenship of the country to unionise while others subject this right for foreign workers to the condition of reciprocity. Others still do not allow for foreign workers to establish trade unions.[15] These restrictions are incompatible with the ILO principles of freedom of association laid down under Convention No. 87.

The CEACR has stated that the enjoyment of freedom of association for migrant workers goes beyond the mere right to unionise to also encompass that of being eligible to trade union leader positions as a prohibition by law would run counter to the principle of non interference with trade unions' right to freely organise their activities as stated by article 3 of Freedom of Association Convention No. 87.[16]

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12 The Committee of Freedom of Association: Its impact over 50 years, Eric Gravel, Isabelle Duplessis, Bernard Gernigon, ILO, Geneva, 2002, 80 pages.

13 *Cf.* paragraphs 320 to 321 of the Compilation of Decisions of the Committee on Freedom of Association, ILO, sixth edition, 2018, hereinafter the Digest.

14 *Cf.* paragraph 323 of the Digest.

15 *Cf.* paragraph 409 of the 2016 General Survey.

16 *Cf.* paragraph 410 of the 2016 General Survey. Certain restrictions may though be brought to the principle such as the obligation for the migrant workers to have resided a certain time period in the country.

This principle has been corroborated by the CFA which has underlined that legislation should be flexible enough to allow "the organisations to elect their leaders freely.... and to permit foreign workers access to trade union posts, at least after a reasonable period of residence in the host country." The CFA continues in its following paragraph by underlining the importance of awarding freedom of association principles to migrant workers "especially in sectors where they are the main source of labour."[17]

As regards the SADC Member States, the latest comments made by the CEACR on the application of freedom of association principles to migrant workers, concerned a country characterised by an important export processing zone sector and employing an important proportion of foreign workers (Mauritius). The CEACR thus formulated an Observation under article 2 of Convention No. 87 drawing the country's attention to a legislative provision under which non-citizens have to hold a work permit in order to join a trade union. This is incompatible with the Convention as all migrant workers, whether in a regular or an irregular situation are to enjoy the benefits afforded by the Convention. The CEACR further noted the Government's ongoing legislative revision work and requested it to seize this opportunity to amend the section accordingly.

This comment is further in line with the 2012 General Survey where the CEACR "observed with concern that there are significant lacunae in the application of Convention No. 87 with respect to workers in export processing zones (EPZs)".[18] It continued by noting the large number of EPZs in the world where a high proportion of workers are deprived of freedom of association rights, in particular women who often form a large proportion of the working force in EPZs. Likewise, the CFA has affirmed the right of workers in EPZs to enjoy trade union rights under Convention No. 87 and that incentives to attract foreign direct incentives may not impinge on freedom of association rights.[19]

A second country received comments by the CEACR which, without expressly quoting migrant workers, have a bearing on their rights. Indeed, under section 6 of the Comorian Labour Code, access to administrative and managerial office in a trade union is limited to nationals. This is not compatible with the freedom of association principles developed by the ILO as mentioned above.

17 *Cf.* paragraph 623 of the CFA Digest.

18 *Cf.* paragraph 74 of the 2012 General Survey.

19 *Cf.* paragraphs 403 to 405 of the CFA Digest.

Above comments are the only ones formulated under Conventions Nos. 87 and 98 to the SADC Member States. Caution should however be paid to drawing a hasty conclusion that migrant workers enjoy full freedom of association rights in the rest of the SADC area. Several factors may explain the absence of comments, such as the lack of attention by governments and social partners to the situation of migrant workers under the two Conventions, focusing instead on the two Migrant Workers' Conventions to report freedom of association challenges faced by them.

It is also to be noted that in a number of countries, certain sectors and occupations are exempt from the application of the labour laws – which provide for freedom of association rights – such as domestic workers of whom a number may be migrant workers, moreover in an irregular situation. The comments of the CEACR therefore focus on the exclusion of domestic workers as a whole without automatically focusing on migrant workers as the government reports contain no information on migrant workers.

III. Forced Labour

Two Fundamental Conventions govern forced labour, notably the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105)[20],the latter instrument having been adopted to complement the former one. Convention No. 29 contains three substantive articles currently valid[21]: article 1 laying down the obligation for ratifying Member States to suppress forced labour, and article 2 defining forced labour: "For the purposes of this Convention, the term ***forced or compulsory labour*** shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." As to the third article (article 25), it obliges States to impose penal sanctions to the offenders of the Convention. Adopted in 1957, Convention No. 105 adds five forms of labour that are to be considered as prohibited forced labour,[22] the general definition of forced labour as contained in Convention No. 29 remaining of validity.

Thirdly, a Protocol to the Forced Labour Convention No. 29 was adopted in 2014 to meet the current challenges that were not dealt with by the Convention at the time of its adoption in 1930.[23] The Protocol is particularly instrumental to combat trafficking in people and contains a number of provisions that require States to actively remedy the scourge of forced labour.

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20 See text of the Conventions: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029 , https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:P029:NO, and https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C105:NO.

21 The Forced Labour Convention, 1930 (No. 29) referred originally to a transitional period during which recourse to forced or compulsory labour might be subject to specific conditions, as set out in Article 1, paragraphs 2 and 3, and Articles 3 to 24. Over the years, the ILO acknowledged that these provisions, commonly known as "transitional provisions" were no longer applicable. In 2014, the International Labour Conference adopted a Protocol to Convention No.29, which expressly provided for the deletion of the transitional provisions. Therefore three substantive Articles of the original Convention No. 29 remain in force, namely articles 1, 2 and 25.

22 "Each Member of the International Labour Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour—(a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; (e) as a means of racial, social, national or religious discrimination."

23 A Protocol is adopted to complement a particular Convention and attached to it, i.e., is only open for ratification by States that have ratified the original Convention. It is legally binding like a Convention and Article 22 reporting under it is done in conjunction with the original Convention. A second purpose of its adoption is not to denounce the original Convention which remains of validity.

The 2014 Protocol complements the Forced Labour Convention No. 29 as it provides for active measures and remedies to be taken by Governments to combat forced labour.[24] These include the adoption (a) of a national policy and action plan, (b) of awareness-raising measures, (c) of an appropriate coverage of the legislation and its enforcement through adequate law penalties, (d) the affording protection and rehabilitation to victims as well as (e) the imposition of effective remedies against their perpetrators.[25]

All SADC Member States have ratified both Forced Labour Conventions while seven have also ratified the Protocol,[26] most of them in 2019 and afterwards. It therefore follows from the reporting cycle regarding ratified Conventions, that the CEACR has yet had very few occasions to make comments specifically under the Protocol.

In its 2016 General Survey on fair migration, the CEACR notes that trafficking in persons constitutes a severe form of migration in abusive conditions as it involves forced labour,[27] whereas in its 2012 General Survey, it observes that forced labour is often at the heart of trafficking in people and involves movement of people for labour purposes. The CEACR further refers to the Palermo Protocol defining trafficking in people. Its definition includes means against of coercion against an individual, thereby excluding the voluntary offer or consent of the victim, an important element of the forced labour definition contained in the ILO Forced Labour Convention No. 29.

The CEACR hardly mentioned migrant workers explicitly in its comments formulated under these instruments, and it would appear that no disaggregated data in this regard was provided by the reporting governments. The comments regarding forced labour that are of greatest relevance to migrant workers relate to trafficking in people and concern therefore mainly Convention No. 29 and its Protocol. The main comments can be articulated around five following areas: a) the existence or not of a National Action Plan, b) the protection and reintegration of victims, c) the legislation and institutional framework and, d) adequate penalties as well as e) court convictions. All these aspects are closely linked to each other.

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24 Article 1: "1. In giving effect to its obligations under the Convention to suppress forced or compulsory labour, each Member shall take effective measures to prevent and eliminate its use, to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour."

25 *Cf.* the full text of the Protocol at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

26 Comoros (July 2021), Lesotho (August 2019), Madagascar (June 2019), Malawi (November 2019), Mozambique (June 2018), Namibia (November 2017) and Zimbabwe (May 2019).

27 *Cf.* paragraph 266.

a) National Action Plan

Comments were made regarding National Action Plans to at least six countries, the level of advancement of such a Plan varying between the countries. In one country, the absence of real policies to prevent or combat trafficking prompted the Committee of Experts, also relying on information availed by the Committee on the Elimination of Discrimination against Women (CEDAW),[28] to request it to provide information on the measures taken or envisaged to this effect.[29] In another country, the CEACR encouraged it to hasten the adoption of the draft Action Plan and requested it to strengthen its efforts in combating trafficking through adopting concrete measures and to raise awareness on trafficking (Lesotho).

Other countries indicated having a National Action Plan in place, whether specifically to combat trafficking in people or a human rights action plan encompassing also trafficking in people. In all instances, the CEACR expressed a marked interest in receiving detailed information on the concrete measures adopted under these plans. Thus, for instance, it requested information on the protection and assistance afforded to victims of trafficking (Namibia). In another case, it encouraged the country in continuing to supply detailed information of the measures adopted such as the number of trained officials and of victims removed and benefiting from reintegration (United Republic of Tanzania). In another country still, the Committee asked for information on the impact of the actions taken to combat trafficking in persons as well as the results achieved.

b) Protection and reintegration of victims

Under its article 3, the Protocol foresees the obligation for States to identify, protect and rehabilitate victims of forced labour. Several countries drew the attention of the Committee of Experts to the activities undertaken to protect and reintegrate victims of human trafficking, whether an action plan existed or not. For instance, in response to a country stating having availed medical, psychological services and life skills workshops to victims at government hospitals and clinics (Lesotho), the CEACR asked for continued information on how the victims were afforded protection and assistance in order to be *reintegrated* into society.

A second example concerns a country which, despite a delay in adopting a Plan of Action, had undertaken a certain number of measures to combat forced labour.

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28 The CEDAW had noted with concern that a study on trafficking in people was delayed.

29 The CEACR also made other comments in this regard which will be described under sub-sections (c) and (d).

The CEACR requested information on the concrete measures adopted to protect and reintegrate victims of trafficking – measures foreseen by law in the country. In a third country, the Committee of Experts asked for the number of victims that had been identified and benefited from assistance and services. This query is in line with its concern to ensure that the Conventions are applied in *practice* and not merely enshrined by national legislation. It would appear from the CEACR requests to obtain information on the concretely adopted measures, that in their reports, governments tend to be somewhat succinct in this regard.

c) Legislative and institutional framework

In order to efficiently carry out concrete measures to tackle trafficking in people and to afford victims protection and rehabilitation, a legislative and institutional framework is necessary. Several countries indicated both having adopted a legislation to combat trafficking and set up an inter-institutional committee/unit/authority under which the measures would be adopted and implemented in a coordinated manner.[30]

Some countries reported having instituted a multi-sectoral committee composed of representatives from different authorities, endowed with the task to jointly implement the adopted National Action Plan (Seychelles), an institutional arrangement the CEACR expressed interest in. It therefore asked for information on the activities undertaken by the Committee, and whether it had been in the position to meet and to monitor jointly the activities foreseen in the National Action Plan.

The Committee noted with interest[31] the passing of an Act to combat trafficking in people in another country, whereas it requested for information on the application in practice of such an Act in two other countries (Seychelles, Zambia).

The Committee commented on the legislative framework in place to combat trafficking in people in other countries, drawing, for instance, the attention of the country to the need to well define the crime of trafficking in people, including the sanctions and penalties to be imposed (see section below). The Committee of Experts further drew the attention of a third country (Democratic Republic of

30 The efficient tackling of trafficking in people necessitates a coordinated action between a number of different stakeholders, such as the Ministry of Labour, that of Immigration, Internal Affairs, Justice, as well as different enforcement authorities such as labour inspection, border migration officers, and members of the Judiciary.

31 This expression indicates a positive development and a certain degree of satisfaction by the CEACR to measures either adopted or abolished, in conformity with the requirements of a Convention.

Congo) to the fact that its laws do not cover all the actors involved in trafficking in people and requested the country to extend its coverage to all those situations.

A second main category of comments regarding the inadequacy of the legislation in place, concerns the nature of the penalties to be imposed on the perpetrators of forced labour, including through trafficking. Whereas article 25 of Forced Labour Convention No. 29 provides that the illegal imposition of forced labour shall be punishable as a *penal* offence,[32] article 1 of its Protocol reaffirms the duty for ratifying Member States to "sanction the perpetrators of forced or compulsory labour".[33]

In its 2012 General Survey, the CEACR emphasises the need for "national jurisdictions to have precise provisions, taking into account the principle of the strict interpretation of penal law."[34] The Committee of Experts has closely examined the legislation of the countries in this regard and addressed a number of comments regarding both the coverage of the legislation and the nature of the sanctions foreseen by the legislation.

While it noted with interest the adoption of an Act to Combat Trafficking in Persons in one country (Namibia),[35] the Committee drew its attention to the fact that the Act left the option for the enforcement authorities to merely impose a *fine* which does not constitute an adequate penalty. Indeed, in order to be an effective and dissuasive sanction given the seriousness of the violation, a fine or a short prison term do not meet the standards posed by the forced labour instruments.

In another country (United Republic of Tanzania), the CEACR, in addition to highlighting the need to penalise the act of trafficking under the form of a prison term, asked to include in its legislation "the provision of "attempt" of trafficking in people as one of the grounds in establishing the crime of trafficking during prosecution." Indeed, without an appropriate definition of the crime of trafficking, the penalties imposed lose their dissuasive effect.

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32 Article 25 of Convention No. 29 reads: "The illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced."

33 The terms forced labour or compulsory labour are used synonymously.

34 *Cf.* paragraph 299 of the 2012 General Survey.

35 The expression "notes with interest" constitutes a positive comment by the CEACR, which notes a development in compatibility with the Convention.

In two instances (Seychelles, Zambia), the CEACR requested information by the country on the nature of the penalties imposed whereas in another country still, it noted that laws on sexual violence had been adopted to supplement the Penal Code but that they did not cover all the offences foreseen by international law. The CEACR in this case emphasised the serious nature of the violence exerted against individuals and expressed its concern that the perpetrators thereof do not remain unpunished, but be imposed with effective and dissuasive criminal penalties.

d) Court convictions [36]

With regards to the need for adequate penal sanctions, the Committee of Experts has underlined the crucial role played by law enforcement authorities, and notably the judiciary. However, it lies in the nature of trafficking that it is difficult to target due to its hidden nature, hence the important complementary role of both labour inspection visits and investigations carried out by police authorities.

In its comments to SADC Government reports, the CEACR has targeted above three categories of enforcement authorities, with an emphasis on the courts as they are the competent authority to impose criminal sanctions to the perpetrators of trafficking, in line with article 25 of Forced Labour Convention No. 29. In order to tackle this scourge efficiently, several SADC Members have adopted awareness and training measures intended to strengthen labour inspectorates and police systems.[37]

The number of investigations, prosecutions and convictions carried out, together with the nature of the penalties imposed, are queries that the Committee of Experts has addressed a large number of ratifying States, on a recurrent basis. Some reporting countries indicated the number of such procedures that had taken place to which the CEACR encouraged it to pursue its efforts to strengthen the judicial proceedings (Lesotho, Namibia).

To one country describing the measures adopted to raise awareness among police officers as well as in certain sectors characterised by trafficking in people (Mozambique), the CEACR encouraged it to pursue its efforts and to allocate more funds to these activities. The Committee noted the low number of prosecutions and convictions as well as the complicity of some police officers with traffickers

36 *Cf.* chapter 5 of the section on the Forced Labour instruments of the 2012 General Survey, pages 141-145.

37 At times in the framework of a project supported by international or regional organisations (for instance the IOM and the EU).

and accordingly requested the country to pursue these efforts and to provide information on the number and nature of investigations carried out, as well as the court decisions delivered, together with the penalties imposed. To another country (DRC), the CEACR reiterated its ”hope” that the country would adopt a legislation allowing for the imposition of effective and dissuasive criminal penalties, as the possibility to impose a fine leaves open the door to applying penalties that are not of a deterrent nature.

In a few government reports, reference was made to a collaboration with the IOM under one form or another, without specifics of whether the migration movements were national or across borders. Some of that support took the form of reintegration of victims of trafficking, and of identifying and protecting potential victims of trafficking. In other instances, the support was provided to assist the country in sustaining its efforts to address irregular migration through border and migration management, as well as sensitisation and building of capacity of law enforcement and border officials (Lesotho).

IV. Child Labour

The two Fundamental ILO Conventions on Child Labour apply to all children, notwithstanding nationality or status of regularity in a country. The first ILO Convention which was adopted regarding child labour in all sectors of the economy,[38] regulates the different ages at which children can access employment and work, depending on the nature of the work (work during school years, for instance) and on the conditions of the work (hazardous work).

Despite the adoption and wide ratification of Minimum Age Convention No. 138 worldwide, the international community realised that child labour persisted on a wide scale and in very exploitative conditions of work. Minimum Age Convention No. 138, adopted in 1973 was therefore subsequently complemented by the Worst Forms of Child Labour Convention, 1999 (No. 182). That Convention calls to immediately suppress the most unacceptable forms of labour for children under eighteen years of age.[39]

The worst forms of child labour are listed under article 3 of Convention No. 182 and concern:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

38 A number of different ILO Conventions governed the minimum ages of child labour in specific sectors and were replaced in 1973 by Minimum Age Convention, 1973 (No. 138) an all-encompassing instrument covering all sectors – even though the Convention allows for some exemptions if a country so requests in its first report.

39 For the text of the Conventions, *cf*. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C138:NO and https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C182:NO.

Even though both Conventions apply to all children, it is mainly Convention No. 182 that is of relevance to child migrant workers. In addition to its above article 3, two other provisions are of particular bearing for migrant children, notably articles 6 and 7 which oblige the ratifying States to actively undertake measures to eradicate these forms of labour exploitation, through, *inter alia*, programmes to identify and remove children engaged in worst forms of labour and the provision of free education. Article 8 further foresees international cooperation and technical assistance between Member States in order to achieve this objective.

As regards the comments formulated by the CEACR to the SADC Members, few target specifically child migrant work under these Conventions. Furthermore, no disaggregated data appear to exist in the Government reports on whether the children are nationals or not. Among the sixteen SADC Member States, five have received comments from the CEACR that to a certain degree may pertain to migrant children. The comments mainly concerned (a) trafficking of children for different purposes – participation in armed conflicts, work in hazardous occupations such as domestic work – and (b) queries regarding the efforts undertaken to combat these forms of child labour.

Thus, in one country for instance (DRC), the CEACR noted under article 7 (2) [40] regarding the obligation to *remove* children from the worst forms of child labour and to ensure their *rehabilitation*, particularly children victims of trafficking and commercial exploitation, the efforts undertaken by the authorities in developing a National Action Plan and establishing an Inter-ministerial Commission. The CEACR expressed concern about the prevalence of *child trafficking* from and into neighbouring countries, in particular undocumented migrant children. The children were trafficked into sexual exploitation and into forced labour in mines and cattle herding.

Expressing its deep concern about this situation, the Committee of Experts urged the Government both to provide information on the measures taken to prevent and remove children from these worst forms of labour as well as to ensure their

40 "Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions." ... 2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to: .... (b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;"

rehabilitation and social integration. The Committee in particular underlined the importance of strengthening the measures already adopted by the Government.

Regarding another country (Mozambique), the CEACR explicitly mentioned the situation of migrant children under the scope of same article 7(2), and referred to the UN Committee on the Protection of all Migrant Workers and their Families (CMW) report on the large number of migrant children exposed to hazardous conditions of work in mines, construction sites and quarries. Similarly to the previous country mentioned, the CEACR asked the Government to take effective and time-bound measures to protect these children from the worst forms of child labour. No breakdown was provided as to the characteristics of the migration patterns, whether these were national or also international.

Regarding a third country (Lesotho), the CEACR responded to the Government reports and the Universal Periodic Review (UPR)[41] describing the hazardous conditions of work of children in domestic work, and their non attending school. The CEACR further noted the report prepared by the CMW which also had expressed concern about the high number of children engaged in domestic work. One may deduct from the reference to this latter report that migration flows occur in the country for this purpose, however, once again, no data shows whether such flows are internal or also include international migration movements. The CEACR requested the Government to take the necessary steps to remove these children from their positions and to ensure their rehabilitation and reintegration in society.

In a fourth country (South Africa), where the Government had mentioned the existence of several programmes of action to prevent trafficking of people overall, the Committee of Experts requested the Government to provide information on the measures adopted to implement the project aiming at assisting victims of trafficking, including vulnerable migrants overall. The CEACR asked for information on the impact of the measures, such as the number of children removed from trafficking and rehabilitated and reintegrated in society.

Finally, in a fifth country the CEACR referred to its comments made under the Forced Labour Convention, 1930 (No. 29) where the Government had reported the existence of a National Inter-Ministerial Committee supported by the IOM as well

41 UPR reports are a comprehensive document regarding the UN basic Human Rights Treaties, established on a five-year period by the UN Office of the High Commissioner for Human Rights. The CEACR also relies on information provided by UN agencies in when formulating its comments.

as a National Action Plan on Anti-Human Trafficking (United Republic of Tanzania). The CEACR requested the Government to detail the measures adopted under the NAP to specifically combat trafficking of children under 18 years of age as well as the results obtained.

The comments above constitute the most closely related to migrant children that have been formulated by the Committee of Experts under the Child Labour Conventions. While in some countries, migration flows of children into hazardous work was stated to occur through trafficking and migration flows, no information was provided as to whether these flows were internal to the country only or also international. Most comments of the Committee of Experts related to the requirement for the authorities to adopt time-bound and effective measures to remove children from the most dangerous forms of work as well as to reintegrate them into society. Such an obligation is applicable to *all* children, and therefore also to migrant children.

V. Equality of Opportunity and Treatment

The principle of non-discrimination is enshrined in both Migrant Workers' Conventions Nos. 97 and 143, and in Fundamental Convention No. 111 on Non-Discrimination (Employment and Vocation), 1958 (hereinafter Convention No. 111).[42] Whereas article 6 of Convention No. 97 provides for equality of treatment for regular migrants compared to nationals regarding, *inter alia*, conditions of work, article 10 of Convention No. 143 provides for the same coverage but goes beyond in that it imposes the obligation for the ratifying State to actively adopt and implement a national *policy* to promote and guarantee equality of opportunity and treatment for migrant workers lawfully residing in the country.

Moreover, Convention No. 143 has a far reaching coverage as its article 1 refers explicitly to basic human rights to *all* migrant workers, including to those in an irregular situation. The basic rights regarding non-discrimination include Fundamental Convention No. 111 which applies to all workers without exception – and therefore also to migrant workers.[43]

Convention No. 111 aims at eliminating all forms of discrimination based, *inter alia*, on the grounds of race, colour, sex and national extraction,[44] which are of particular relevance to migrant workers. Indeed, whereas the Convention is silent on the ground of nationality, the Committee of Experts has specified that the Convention applies to both nationals and non-nationals, including also migrant workers in an irregular situation.[45]

As regards the concrete implementation of the principle, article 2 of Convention No. 111 stipulates that the ratifying States are to "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."[46]

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42 For the text of the Convention, *cf.*: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C111:NO

43 There are two ILO Fundamental Conventions on non-discrimination, the other Convention being Equal Pay Convention, 1951 (No. 100) whose main ambit is equality between men and women. It is however of less relevance even though it applies to migrant workers as well.

44 There are seven prohibited grounds for discrimination, see article 1 (a) of the Convention for the full list.

45 *Cf.* paragraph 776 of the 2012 General survey.

46 The 2012 General Survey devotes a specific section on the applicability of Convention No. 111 to migrant workers and on some main challenges that they may face, *cf.* paragraphs 776 to 783 of the 2012 General Survey.

As the protection from discrimination afforded by the Convention applies to both regular and irregular migrants,[47]it follows therefrom that the coverage of the labour and other legislation must be broad enough to encompass non-nationals, on one hand, and that the legislation must award effective enforcement to protect all workers, including through effective dispute resolution mechanisms, on the other hand.[48]

Few SADC Members referred to migrant workers in their reports under Convention No. 111, and the majority of the comments that would be related to migrant workers are to be found under the comments under articles 2 and 3 in general, as well as under the general heading enforcement. Hence, few comments have been formulated by the Committee of Experts regarding specifically migrant workers.

In one country (Madagascar), the CEACR expressed concern over the fact that the Labour Code provisions prohibiting night work did not cover women in Export Processing Zones (as opposed to the rest of the country). Other conditions of work of workers in EPZs were reported by a social partner as precarious, notably as regards wages, absence of employment contracts, social protection or protection afforded by collective agreements. To the extent that EPZs overall often hire foreign workers, one may assume that there are migrant workers in those areas and that their conditions need to be looked into. Therefore, these comments may be of relevance to migrant workers.

The comments made to a second country (Mauritius) also concerned the scope of the national legislation as it excluded two categories of workers from its protection against discrimination regarding access to employment – domestic workers and workers in enterprises with fewer than ten employees. The CEACR requested the country to consider including them in the legislation to also benefit from that protection.[49] As domestic workers are often migrant workers, this comment may therefore be of relevance but, once again, no explicit reference was made to them.

In a third instance (Mozambique), the Committee of Experts took into account the work by the CMW noting that migrant workers, particularly those in an irregular situation, were often subjected to labour and sexual exploitation, notably in

47 *Cf.* paragraph 778.

48 *Cf.* paragraph 780.

49 The exclusion of domestic workers from the protection afforded by law against non-discrimination is of the nature to affect migrant workers to the extent that they are non-nationals, which is often the case.

the sectors of mining, agriculture, manufacturing, tourism and domestic work. Referring to its 2012 General Survey,[50] the CEACR drew the attention of the reporting government to the fact that all migrant workers, including migrants in an irregular situation, are covered by the protection against discrimination afforded by the Convention.

The Committee of Experts, driven by its concern of an effective and concrete application of the principle of non-discrimination in practice, requested all reporting governments to provide information on how they enforced the Convention. Such information pertains to the number of labour inspection visits carried out, the findings thereof as well as the penalties imposed, the number of court cases and the sanctions imposed, as well as to awareness-raising measures adopted and training activities carried out. Once again, no explicit mention was made to migrant workers.

In a fourth case, the Committee of Experts referred to its 2018 General Observation and welcomed the adoption of a Labour Migration Policy in 2019 which specifically protects migrant workers' right to equality of treatment. The Policy, while noting the number of regulations and legal instruments adopted to protect migrant workers' rights, acknowledged that they were facing a number of rights violations.

Such violations include discriminatory wage practices, abusive working conditions, concentration of migrants in hazardous occupations, as well as lack of access to information by low skilled workers, notably domestic employees. In order to tackle these forms of discrimination, the CEACR requested the government to provide information on the measures taken to effectively promote equality of opportunity and treatment of migrant workers.

A specific challenge that migrant workers face, concern employment permit systems that severely restrict their possibility to change employment. The vulnerable situation in which a number of migrant workers find themselves in should not be exploited by employers who could exert "disproportionate power over them".[51] Indeed, migrant workers, particularly those in an irregular situation, are particularly vulnerable as they may not dare to leave an abusive employer for fear of being deported out of the country. Migrant workers should benefit from flexibility to be able to change employer and from protection of fear of retaliation

50 *Cf.* paragraph 776.

51 *Cf.* paragraph 779.

by the employer. Particular attention should be paid to women workers and notably domestic workers, who are in a very vulnerable situation, subject to all forms of exploitation and discrimination given the hidden nature of their employment and the low social consideration of their work.

Of all the sixteen countries examined, only a very few explicitly mentioned the situation of migrant workers. In the other cases, the comments of greatest relevance to migrants by the Committee of Experts concerned the application of articles 1 to 3 of the Convention. The absence of reference to migrant workers in the government reports does not mean that no discrimination occurs against this category of workers, and attention could usefully be paid to them specifically in future reports.

VI. Occupational Safety and Health

During the June 2022 ILO Conference, the ILO constituents adopted a Resolution adding the principle of a safe and healthy working environment to the 1998 Declaration on Fundamental Principles and Rights at Work.[52] The two new fundamental Conventions are the Occupational Safety and Health Convention, 1981 (No.155), and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).[53]

Three SADC Member States have ratified both Conventions, namely Malawi, Mauritius and Zambia, whereas the Seychelles, South Africa and Zimbabwe have ratified Convention No. 155. No comments have been made by the CEACR regarding the specific situation of migrant workers under these Conventions in the latest reports submitted by Governments. The 2016 General Survey on Migrant Workers is likewise very succinct in its analysis of the specific occupational safety and health situation of migrant workers.[54]

In that publication however, the Committee of Experts draws the attention of ILO Member States to the particular vulnerability of migrant workers to industrial accidents and quotes the observation by the International Trade Union Confederation (ITUC) noting that OSH accidents rates were in general much higher for migrant workers than for national workers.[55] "Migrant workers, especially seasonal migrant workers, were placed in high-risk, hazardous and unhealthy, low-paid jobs with poor supervision."

The Committee of Experts accordingly paid attention to this concern and urged the ILO Member States to take all steps to ensure that migrant worker receive training and instruction, preferably in a language understood by them, in line with paragraphs 20 to 22 of ILO Recommendation No. 151 accompanying Convention No. 143.[56]

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52 See https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_848132/lang--en/index.htm

53 For the text of the Conventions, *cf.*: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C155:NO and https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C187:NO

54 It is to be recalled that at the time of the adoption of the 2016 General Survey on Fair Migration, the two Occupational Safety and Health Conventions were not yet part of the Fundamental Conventions.

55 *Cf.* paragraph386 of the 2016 General Survey.

56 The Recommendation contains a section dedicated to the health and safety of migrant workers, *cf.* paragraphs 20-22 of the Recommendation: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:R151:NO

VII. Conclusion

The ILO Fundamental Conventions apply to all workers, including migrant workers, whether in a regular or irregular situation, with some Conventions having greater relevance, such as the Forced Labour Convention No. 29 and its 2014 Protocol, and the Non-Discrimination Convention No. 111. They provide for basic human rights protection for all migrant workers, which is of particular importance as the ratification rate of the two Migrant Workers' Conventions by the SADC countries amounts to respectively five for Convention No. 97 and two for Convention No. 143 by December 2023 out of a total number of sixteen Member States.

Thus, the Fundamental ILO Conventions complement this gap by affording migrant workers protection against forced labour and human trafficking – a scourge irregular migrant workers are particularly prone to -, discrimination with regards to employment and working conditions, exclusion from trade union rights, exploitation of children as well as exposure of migrant workers to hazardous work. While this protection is significant indeed, its efficiency in practice will depend on the enforcement mechanisms in place – labour inspection reports, police investigations and court decisions, reason why the Committee of Experts relentlessly draws the attention of the Member States to their role.

In order to improve the effectiveness of the protection afforded by the Conventions, an awareness-raising campaign could usefully take place to draw the counties' attention to the vulnerable situation of migrant workers, whereby reporting units of the Labour Ministries would provide aggregated data targeting the specificity of migrant workers. Similarly, the social partners and notably the trade unions could play a very instrumental role in bringing rights violations to the attention of the Committee of Experts[57].

Such reports by both governments and social partners would enable the Committee of Experts to issue recommendations particularly adapted to the needs of the migrant workers, including those in an irregular situation and consequently follow-up on these.

57 Through the so-called Article 23 reports affording social partners the possibility to report rights violations under ratified Conventions to the Committee of Experts.

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