

**INTERNATIONAL TRADE UNION CONFEDERATION (ITUC)**

**INTERNATIONALLY RECOGNISED CORE LABOUR  
STANDARDS IN BOTSWANA, LESOTHO, NAMIBIA, SOUTH  
AFRICA AND SWAZILAND**

**REPORT FOR THE WTO GENERAL COUNCIL REVIEW OF TRADE  
POLICIES OF THE FIVE COUNTRIES OF THE SOUTHERN AFRICAN  
CUSTOMS UNION (SACU)**

**(Geneva, 4 and 6 November 2009)**

**EXECUTIVE SUMMARY**

With the exception of Namibia, which has not ratified one of the conventions regarding discrimination, all the five countries of the Southern African Customs Union (SACU) have ratified every core ILO labour convention. In view of restrictions on the trade union rights of workers (especially in Lesotho and Swaziland) and problems with discrimination and child labour, determined measures are needed in certain areas in order to comply with the commitments the SACU countries accepted at Singapore, Geneva, and Doha in the WTO Ministerial Declarations over 1996-2001, and in the ILO Declaration on Fundamental Principles and Rights at Work adopted in June 1998.

- *Although all SACU member states have ratified both the main ILO Conventions on trade union rights, Conventions No. 87 and No. 98, there remain serious violations of freedom of association and the right to collective bargaining in most SACU countries. In Swaziland, those violations are so serious and widespread that they have a negative impact on wages and working conditions in every sector. In Lesotho civil servants are prohibited from joining trade unions. In Botswana, Lesotho and Swaziland, strikes are virtually impossible. In Lesotho, there have been repeated violations of labour rights by enterprises in EPZs, which has a major impact in turn on the prices of exports. These violations of trade union rights impede trade union activities and deprive millions of workers a tool to achieve a fairer distribution of income and an escape from poverty.*
- *Namibia has ratified just one of the two ILO core labour standards addressing discrimination, but the other four countries have ratified both Conventions. However, in all the member states of the SACU, discrimination with regard to gender remains pronounced in the labour market. In South Africa and Namibia, there persists discrimination on the basis of race stemming from the apartheid legacy. Additionally a large part of the Southern African countries' population is living with HIV/AIDS which is a source of discrimination, making it particularly difficult for them to find work and resulting in economic deprivation and social stigmatisation.*

- *All SACU member states have ratified both the core ILO Conventions on child labour. However, there remains substantial exploitation of child labour in most, if not all countries of the SACU agreement, mainly in informal economic activities and in agriculture. Child prostitution and trafficking is found in the entire region.*
- *All five SACU member states have ratified both the ILO core labour standards on forced labour. Based on uncorroborated data forced labour does not exist on a large scale with the exception of Swaziland where the government has institutionalised forced labour basing it on tradition. Recently, many trafficking cases have been reported as Southern African states become more involved in international criminal rings of prostitution and labour exploitation. The governments have generally failed to design and implement strategies against trafficking, which notably concerns children and compulsory labour.*

## **INTERNATIONALLY-RECOGNISED CORE LABOUR STANDARDS IN THE FIVE COUNTRIES OF THE SOUTHERN AFRICAN CUSTOMS UNION**

### **Introduction**

This report on the respect of internationally recognised core labour standards in the five countries of the SACU is one of the series the ITUC is producing in accordance with the Ministerial Declaration adopted at the first Ministerial Conference of the World Trade Organisation (WTO) (Singapore, 9-13 December 1996) in which the Ministers stated: “We renew our commitment to the observance of internationally recognised core labour standards.” The fourth WTO Ministerial Conference (Doha, 9-14 November 2001) reaffirmed this commitment. These standards were further upheld in the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work adopted by the 174 member countries of the ILO at the International Labour Conference in June 1998.

The ITUC has affiliates in four of the five SACU countries (the exception being Lesotho), with a combined membership of over 3 million workers. These affiliates are the following:

<b>Country</b>	<b>Organisation</b>
Botswana	Botswana Federation of Trade Unions (BFTU)
Lesotho	---
Namibia	Trade Union Congress of Namibia (TUCNA)
South Africa	Congress of South African Trade Unions (COSATU) Federation of Unions of South Africa (FEDUSA) National Council of Trade Unions (NACTU) Confederation of South African Workers’ Unions (CONSAWU)
Swaziland	Swaziland Federation of Labour (SFL) Swaziland Federation of Trade Unions (SFTU)

## I. Freedom of Association and the Right to Collective Bargaining

The ratifications by SACU member states of ILO Convention No. 87 (1948), Freedom of Association and Protection of the Right to Organise, and ILO Convention No. 98 (1949), the Right to Organise and Collective Bargaining, are as follows:

	<u>No. 87</u>	<u>No. 98</u>
Botswana	1997	1997
Lesotho	1966	1966
Namibia	1995	1995
South Africa	1996	1996
Swaziland	1978	1978

### **Botswana**

Workers have the right to form and join trade unions with the exception of police officers, the Botswana Defence Force and prison personnel. Workers may not be dismissed for union-related activities; however, if the trade union is not registered then the unionists are not protected by laws to prevent anti-union discrimination. In order to form a union the law requires a minimum of 30 employees to be in favour. Registration of trade unions is compulsory.

Collective bargaining is allowed, provided that the union represents at least 25 per cent of the workforce. The minimum percentage of representation that enables collective bargaining is met only in the public services, the mining and diamond sorting sectors and, to a lesser extent, in railway and banking sectors. Additionally the 2004 Trade Disputes Act gives the government extensive powers over industrial relations and promotes compulsory arbitration, rather than collective agreements. In recent years the government has used legislation to order strikers back to work, while private employers are reported to ridicule the unions and be hostile against them.

In order to declare a strike it is necessary that the union goes through a time-consuming and complex arbitration procedure which results, in virtually all cases, in strikes being declared illegal. Therefore, striking workers are at risk of dismissal. Such is the case for the 461 Debswana joint diamond mine venture's workers (2004) and 181 workers at BCL Company (2006) who are still waiting for the court decision. In the case of BCL the management undermined the main trade union in that it supported a dissident union which encouraged the workers to hold a strike – later to be declared illegal - in order to give the management the grounds for massive dismissals.

In general, employers take advantage of the lack of specific legislative provisions that would protect unions against acts of interference by employers in their establishment, functioning or administration. In addition to dismissals, other anti-union practices include harassment, spying and threats. The Chairperson and Secretary General of the Botswana

Mining Workers Union (BMWU) have been dismissed by their employers, the new Secretary General of the Botswana Federation of Trade Unions (BFTU) the victim of a harassment campaign and the BMWU leaders from the Debswana company evicted. Moreover, members of the military intelligence are reported to spy on the presidents of the Botswana Unified Local Government Service Association (BULGSA) and the Botswana Federation of Secondary School Teachers (BOFESETE).

The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) in its observations underlines two points where Botswana's Trade Disputes Act is not in conformity with the ILO Conventions No. 87 and No. 98. The first observation concerns the ability of the employers or employers' organisations to apply to the Labour Commissioner demanding the withdrawal of the recognition of a trade union on the grounds that the trade union refuses to negotiate in good faith. The second point concerns the essential services list, which includes many services that are not essential in the strict definition of the term, such as the Bank of Botswana, railway services, and the transport and telecommunications services.

The same labour law applies in export processing zones as in the rest of the country.

### **Lesotho**

Workers have the right to form and join trade unions, except for civil servants and police. However although the Lesotho Constitution guarantees freedom of association, public employees are prohibited from forming and joining trade unions. They can form or join "associations" instead whose role is limited to providing their opinion. The government has promised to the CEACR that the new Public Service Bill will guarantee the right of public workers to form and join associations authorised to conduct collective bargaining.

The law allows unions to conduct their activities without interference. However, the levels of unionised workers remain low, representing some 2 per cent of the national workforce producing a combined membership for functioning trade unions of 25,070. The unions need to register at the Registrar's Office in order to be recognised. Each year the government reviews non-functioning or non-compliant unions and deregisters them. The Ministry reported a total of 40 deregistered unions during 2006-2007 for failing to submit annual reports.

The rights to freedom of assembly are generally respected with some exceptions such as the June 2007 curfew, which lasted a week and featured military deployments and roadblocks in the capital Maseru. Moreover, in 2005, the Congress of Lesotho Trade Unions (COLETU) accused the police of denying workers permission to celebrate May Day by holding a parade, on the grounds that the celebrations coincided with local government elections.

According to the law, collective bargaining is recognised only for trade unions which are representative enough; section 198A1.b of the Labour Code defines a representative trade union as "a registered trade union that represents the majority of the employees in the employ of an employer", and section 198A1.c specifies that "a majority of employees in the employ of an employer means over 50 per cent of those employees". The state of affairs when no union covers more than 50 per cent of the workers is unclear. The exercise of collective bargaining meets particular difficulties in the education sector where the Lesotho Teachers Trade Union's long-standing disputes have been pending before the High Court for 11 years. Additionally, the Ministry of Labour prevented COLETU from taking part in the work of the commission in charge of setting wages, which is supposed to be a tripartite body.

The right to strike is recognised, only in the private sector, after an exhaustingly complex procedure in order to officially declare a strike. In practice, there have not been any official strikes in the country for many years, but only a few spontaneous protest actions. Such actions are technically defined as illegal; thus, they pose the risk of dismissal to any worker who takes part.

Section 19 of the Public Services Act (2005) limits broadly the right to strike in the public sector. The CEACR has emphasised that this is a violation of the respective ILO Conventions and recommended that the prohibition be limited only to public servants who exercise authority in the name of the State. In addition to that, there are no compensatory guarantees, such as arbitration procedures, for those workers whose right to strike is prohibited. Finally, the law prohibits strikes in essential services but the government has not yet listed which services are considered to be essential.

The law prohibits anti-union discrimination, however, many employers denied union organisers access to industrial premises to recruit, discuss, organise or represent workers in disputes. Threats of dismissal are common, particularly in domestic industries, while in the textile and apparel sector unions reported that their members are treated unfairly in order to compel them to leave.

Lesotho has 8 EPZs which employ 44,000 workers and chiefly consist of textiles and pharmaceutical companies. In the EPZs there are a large and fast-rising number of petitions, complaints and reports filed against practices of textiles employers from South Africa, Hong Kong and Taiwan that ignore national legislation, pay wages below the statutory minimum and make use of intimidation practices to prevent union membership.

## **Namibia**

Namibia's law provides for the right to form and join trade unions and 25 per cent of the national workforce is unionised. However, the new Labour Act of 2007, which came into force in 2008, excludes the military, the police and prison staff from joining unions. In the prior Labour Act which was enacted in 1992, prison staff had a right to form or join unions, in line with the respective ILO Conventions.

The process of forming and registering new trade unions does not require excessive prior authorisation or other requirements. The Labour Commissioner may cancel registration if trade unions fail to comply with their legal obligations. The Act provides for trade unions' right to form federations and affiliate with international organisations.

In practice, employers usually face unions with hostility, refusing to engage in collective bargaining with unions, refuting unions' demands and denying them access to industrial premises. Organisation in unions is difficult for farmers and domestic personnel, because such workers are reported not to be fully aware of their rights.

By law, unions and individuals have bargaining rights when a majority of workers in the bargaining unit are members. The law recognises the exclusive bargaining power of the union only when a majority of the workers are members of the union, a system that is unfair in that it only gives recognition to unions that represent over 50 per cent of the workforce. The exclusive bargaining system has other serious restrictions for unions that do not have a majority, with regard to issues such as access to the work premises and deduction of members' dues. According to the new Labour Act of 2007 access to premises by unionists and permission to collect members' dues are subject to the willingness of the employer. In cases where no union represents the majority, workers do not enjoy collective bargaining rights at all and where there is one majority union, the minority unions enjoy very limited collective bargaining rights, which is not in line with ILO core Conventions.

The new Labour Act includes an arbitration and conciliation mechanism for labour disputes resolution which enables unions not only to represent their members but also to shorten the disputes resolution period.

In practice, collective bargaining is not widely practiced in sectors such as domestic work, agriculture, construction and public service. The Ministry of Labour explains that as resulting from lack of information and basic negotiation skills which serve as impediments to workers' ability to bargain with employers successfully.

The law prohibits anti-union discrimination but in practice trade unions which are not affiliated with the ruling party SWAPO are reported to face discrimination. The Trade Union Congress of Namibia (TUCNA) received verbal attacks from the Minister of Labour who stated at a May Day 2009 celebration that "no union other than SWAPO unions has the right to organise workers in Namibia". The Namibian Nurses Union (NANU) has not been recognised by the authorities as eligible to engage in collective bargaining although they represent the majority of the workers in the respective sector. In recent years the Minister of Health has repeatedly intimidated nurses to prevent NANU from unionising. NANU took the matter of non recognition to court but the court ruled in favor of the government, basing its decision on a reference to the existing collective agreement which considered nurses as a bargaining unit.

Namibian law provides for the right to strike, except for those designated as providing essential services. The prerequisites for a strike are the exhaustion of all other conciliation procedures and a 48 hour notice to be given to the employer and to the Labour Commissioner. The strike must be declared on the grounds of work-related disputes, such as a pay rise, in order to be legal. In this way strike action over workers' rights is illegal since it has to be referred to a labour court for arbitration. Equally, solidarity strikes are outlawed.

In practice the right to strike is only partially respected. In the case of the LDD, a diamond and polishing company which sacked more than 250 strikers in July 2008, the workers were finally reinstated after the successful intervention of the National Union of Namibian Workers (NUNW). On the other hand in the case of Namibia Seamen and Allied Workers Union (NASAWU) and Nova-Nam (pty) the company decided to take NASAWU to court in order to restrain the strike. The court in this case ruled against the striking workers and issued an injunction to keep the strikers at least 450 meters away from the premises of the company. Except the fact that the court's ruling was incompatible with the labour law, the collective agreement that the company had signed with the union made provision for strikes to take place in the company premises. The branch organiser of NASAWU, Petrus Shiyandja, and five more strikers were arrested on charges of public violence, impeding the application of the law and refusal to adhere to a court order. After six days in prison and following TUCNA's intervention they were released and charges were dropped.

The labour law applies in the EPZs which employ almost 30,000 persons although the trade unions report that it is particularly difficult for workers to organise since most of the employees are subcontracted. There have been reports of violations of rights at work and other labour rights by enterprises which are established in Namibia's EPZs.

### **South Africa**

Workers have the right to form and join trade unions without previous authorisation or excessive requirements except that employees of the National Intelligence Agency and the Secret Service are excluded from the right to form or join unions. Unions can seek redress in the courts for unfair dismissal. As of March 2008, trade union membership was approximately 35 per cent of the population employed in formal economic activities.

The law allows unions to conduct their activities without interference and prohibits employers from discriminating against employees or applicants due to their involvement in union activities. According to COSATU's 2006 report, only 10 per cent of the workers in the agricultural labour force were unionised. The reason lies in the hostility of the employers towards trade unions in the agricultural sector. Employers frequently refuse access to unionists to the farms in order to recruit new members, while during labour disputes the employers are generally supported by the police.

Unions face discrimination outside the agriculture sector as well; according to the Building Construction and Allied Workers Union, the Johnson Tiles group management never consults with its members and they put pressure on them to resign from the union while they promote workers' committees instead. The management of Woolworths trading chain refused to recognise the South African Commercial Catering and Allied Workers Union (SACCAWU) and where possible employed its workforce with atypical types of employment. After a strike and a boycott the company accepted a counting of members by a public order and recognised the representativeness of the union.

There are no reports that could demonstrate that collective bargaining is not respected or enforced. Disputes in essential services sectors are referred to the Commission for Conciliation, Mediation and Arbitration (CCMA). The right to strike is generally respected, although during strikes and demonstrations in 2005, there were reports of acts of violence and arrests, as well as massive dismissals of strikers from various sectors including truck drivers, toll operators, metalworkers, teachers, rural workers and the public workers. The right to strike is further undermined by the legal right of employers to hire replacement workers for the course of a strike.

Employees of labour brokers agencies, which hire workers in order to lease them to employers on a flexible schedule basis, do not enjoy any formal employment benefits such as pension, medical aid or housing subsidies and are discouraged from joining unions. Even when these employees organise there is no definitive determination as to who their employer is, and therefore they cannot exercise collective bargaining rights. Going on strike would mean their immediate replacement. Despite these egregious violations of workers' rights, many employers have fired and re-hired the same labourers through brokers' agencies, resulting in lower wages and loss of social protection coverage.

There are six Industrial Development Zones (IDZs) in South Africa, equivalent to export processing zones, which employ roughly half a million people. National labour law applies fully in those zones.

### **Swaziland**

A state of Emergency introduced in 1973 suspended all constitutional freedoms until a Constitution was enacted in 2006, but this merely entrenched the political status quo in force since 1973 giving executive, legislative and judicial powers to the King and setting a ban on opposition parties and meetings. The new Constitution's vague clause on "breaching state security" can be interpreted broadly and provides the grounds on which the government can place restrictions on trade union activities.

The Constitution and law provide for the right to form and join trade unions. However, the requirements are excessive. In order to be recognised, a trade union must represent at least 50 per cent of workers in the workplace, which is a high percentage; otherwise the recognition is dependent on the employer's goodwill. The new Constitution gave the employees in essential services, which include the fire brigade, police and

security forces, health care sector and many civil service positions, the right to form unions. However, the authorities have continued to refuse recognition to the Swaziland Police Association (SPA) and the Swaziland Correctional Service Union (SWACU). Additionally union activity is not effectively protected against employers' interference, although the law protects unions from governmental interference. It has been reported that employers' interference with workers' councils has contributed to the failure of some trade unions to negotiate collective agreements. Furthermore, there are reports that some employers dictate which decisions are taken in the workers' councils.

Collective bargaining is permitted by the law and there is no information that reports of abuses of concluded collective agreements.

The law prohibits anti-union discrimination; however, private companies, especially foreign companies of the garment sector, continued to discriminate against unionists. Although the law provides for reinstatement and for fines against employers in the event of unfair dismissal, no such accusations were officially made.

The Industrial Relations Act does not provide for strikes. The procedures for voting and announcing a strike can last up to 74 days, and they are excessively complex. Therefore strikes are virtually impossible in Swaziland. The trade union leadership faces civil liability for damages or income losses caused during a strike. Additionally when it comes to public workers, the state intervenes in order to reduce the chances of a strike. The right to strike is denied to those employed in the export processing zones (EPZs).

In practice the government of Swaziland systematically abuses the above-mentioned rights that do exist. The violations are numerous and they cannot be covered by the extent of this report. Among other things, the police have made excessive use of violence to repress strikes. The authorities have arrested unionists and their leaders and used torture methods, including virtual drowning, to obtain information. In previous years union leaders were ordered to surrender their travel documents after attending meetings abroad. It has been reported several times that the police and the Conciliation, Mediation and Arbitration Commission facilitate employers, especially foreign garment firms' management, in resisting workers' demands and therefore sustain the inhumane conditions of work and the low wages.

The government has repeatedly failed to fulfil its promise to improve labour legislation on very many recommendations that the CEACR has made.

### ***Conclusions***

*Although the core ILO Conventions in these areas are universally ratified by SACU members, there are serious violations of freedom of association and the right to collective bargaining in several SACU member states, particularly Swaziland and Lesotho. In Botswana, Lesotho and Swaziland strikes are virtually impossible while the Namibian government interferes with the unions' activities by preferring to negotiate with certain unions over others. In Swaziland, violations are so serious and widespread*

*that they certainly have a negative impact on wages and working conditions in every sector, including the export sector. In Lesotho and, to a lesser extent, Namibia, the correlation between violations of workers' rights and the existence of export processing zones (EPZs) demonstrates a clearly negative influence of international trade and investment on workers' rights.*

## **II. Discrimination and Equal Remuneration**

The ratifications by SACU member states of ILO Convention No. 100 (1951), Equal Remuneration, and Convention No. 111 (1958), Discrimination (Employment and Occupation) are as follows:

	<u>No. 100</u>	<u>No. 111</u>
Botswana	1997	1997
Lesotho	1998	1998
Namibia	-----	2001
South Africa	2000	1997
Swaziland	1981	1981

### **Botswana**

In Botswana, discrimination on the basis of gender is not prohibited in the national legislation. The Employment Act does not include legislative expression for the concept of equal remuneration for men and women for work of equal value. In 2005, the government of Botswana provided data to the CEACR on earnings disaggregated by sex showing that in local government earnings are fairly balanced, in central government men earn 76 per cent of what women earn and in the private sector women's average earnings amount to 69 per cent of the average pay received by men. According to the Grant Thornton International Business Report of 2007 on the extent of women's participation in business, women occupied 31 per cent of total senior management positions; certain ministries and state agencies were headed by women.

The law prohibits sexual harassment in the public sector and provides for adequate punitive measures. However, the law does not cover sexual harassment in the private sector. In practice, sexual harassment continues to be a problem particularly in occupations where men are in positions of authority, such as teachers and supervisors.

The law does not prohibit discrimination against persons with disabilities who, consequently, have limited access to facilities and opportunities such as education, employment and public services. The government has funded civil society organisations to run small-scale work programmes for disabled employees. Persons living with HIV/AIDS continued to be discriminated against, including at the workplace. The

government has again funded CSOs and communities to reduce the stigma through campaigning. Finally, in terms of discrimination on grounds of ethnicity, the San people enjoy fewer opportunities of education, training and employment as a result of discrimination.

### **Lesotho**

The CEACR states that the government of Lesotho has not adopted policies to promote fair and equal remuneration for all workers for work of equal value. According to the Gender Pay Gap Report of World Economic Forum 2008, women in Lesotho are paid 73 per cent of men's wage for work of equal value. Many high public administration positions are held by women as well as those in the level of management in private companies.

The law does not specifically prohibit sexual harassment. The Law Office has received complaints and it is reported that cases are handled in the enterprise or agency.

The constitution and the law provide for equal treatment of disabled persons and against all types of discrimination in employment, education and services and according to the 2008 HRR of the US Department of State the government takes measures towards this end.

The law prohibits discrimination against persons who live with HIV/AIDS in the workplace and elsewhere. Although social stigmatisation exists, the government has incorporated HIV/AIDS workplace policy in its Labour Code and provides subsidised medicine for public employees.

### **Namibia**

The new Labour Act of 2007 prohibits discrimination in any employment practice, directly or indirectly, against any individual on grounds such as gender, race, religion, disability, HIV/AIDS status as well as sexual harassment. The law establishes a procedure of disputes resolution in such cases that involves the Labour Commissioner and if the dispute remains unresolved can be brought before the courts. The Act was enacted in the end of 2008. The WEF Gap Report informs that the gender pay gap was at 71 per cent for 2008.

The law that applies today does not prohibit all forms of discrimination and its scope covers only some employment practices. In 2004, the government conducted an affirmative action impact assessment study in workplaces and found pay gaps and imbalances in senior positions concerning racially disadvantaged persons, women and persons with disabilities. The present law prohibits sexual harassment although only one recorded complaint has been filed, showing a probable fear of reprisals.

Discrimination on the grounds of disability in employment is prohibited by law although enforcement in this area has been ineffective and discrimination persists. It has

been reported that the San people are the subject of discrimination in terms of education, employment opportunities and remuneration.

There is widespread stigmatisation of persons living with HIV/AIDS and few enterprises employ HIV positive persons or run programmes to accommodate their needs. Additionally the government has made an HIV/AIDS test a requirement for recruitment in defence forces.

### **South Africa**

South Africa's Law prohibits unfair discrimination against women, including remuneration, although the wording does not clearly provide for equal remuneration for men and women for work of equal value. Women, particularly black women, are largely found in unprotected and precarious jobs such as street vendors or domestic servants, while in the formal activities they receive 72 per cent of their male colleagues. According to the Businesswomen's Association 2008 census women occupy one fourth of executive level positions while less than one fifth of directors are women. The CEACR in a Request to the government concludes that equality and anti-discrimination legislation could be improved by the inclusion of gender objective job evaluation; equality clauses in wage determination by collective agreement; equality clauses in sectoral agreements for minimum wages; promotion of social partnership for equality; and improvements in other fields as well.

Violence against women is widespread, including in the workplace. The law prohibits sexual harassment but it does not promote the official handling of complaints. The Labour Department has issued guidelines on how to deal with the issue in the level of enterprise but since then there has been no collection of data on the extent of application of the guidelines. There are alarming allegations of rape and sexual assaults committed by farm owners and managers usually against black women who work for them. The law gives the complainant the ability to bring a case to court if an internal settlement has not been concluded.

While employers have received guidelines for equitable treatment of disability issues in the workplace, its application is not legally binding. The only limitation is that enterprises with more than fifty employees are obliged to create an affirmative action plan for disabled employees.

Enterprises with more than fifty employees are required to ensure that previously disadvantaged groups, legally defined as "Blacks", occupy adequate positions at all levels. Nonetheless, Blacks remained underrepresented according to the 2008-2009 Employment Equity Analysis. The report shows that very little has changed in relation to improving employment equity targets. Whites continue to dominate the top (72.8 per cent), senior (65.2 per cent) and professional (51.6 per cent) employment categories. In contrast, Blacks are not well represented in top (13.6 per cent), senior (17.3 per cent) and professional (28 per cent) employment categories. Black Africans constitute the largest economically active population group, compared to Whites constituting only 12.1 per

cent of the active workforce. Blacks are also disproportionately employed in low-skilled jobs, many of them informally. In government employment Whites are disproportionately overrepresented (61,3% Blacks, 12,1% coloured, 5,4% Indian, 20.7% White and 0.6% foreigners).

Similar trends are indicated in access to training in the workplace for top and senior management, including professionals. Training resources remain skewed in favour of Whites and those who already hold managerial positions.

The reports on the labour brokers in South Africa show that their practices reproduce discrimination on grounds of race and gender.

There are no laws or regulations specifically relating to HIV/AIDS at the workplace; there is a multiplicity of national policies, employers' and unions' statements and policies and an ILO/UN plan to address the epidemic in the workplace. The trade union confederations COSATU, FEDUSA and NACTU have run training and capacity building programmes at management and production level in conjunction with the ILO. Staff members are trained to become peer educators who operate at the workplaces providing advice to their colleagues about HIV risk and prevention. Additionally, other programmes address the enterprise plan for employees who live with HIV/AIDS.

### **Swaziland**

Section 28 of the Constitution stipulates: "Women have the right to equal treatment with men, and the right shall include equal opportunities in political, economic and social activities." The wording is vague and there is no guarantee as to the legal interpretation of the concept of "equal remuneration for work of equal value". The government has no law that prohibits gender discrimination and societal norms have created a labour market that segregates the male and female workforce horizontally and vertically, in certain sectors and levels of positions and pay respectively. The government does not seek actively to address the problem and therefore no policies have been designed. In a response to the CEACR, the government has argued that there are "cultural barriers preventing women from attaining decisions-making positions". The law does not address sexual harassment adequately and application appears anyhow to be largely ineffective.

Apart from the Employment Bill, which awaits enactment, there is no provision for persons with disabilities. Social stigmatisation against persons living with HIV is prevalent. There is no legislation that deals with HIV/AIDS, not only in the workplace but at all, even though the country has the highest HIV/AIDS adult prevalence rate in the world, standing at 38 per cent of the population. There are several programmes addressing the issues at the workplace, including by the ILO and UN, individual government programmes and workplace policies of business coalitions and trade unions. Finally, migrant workers and non-Swazi nationals face significant discrimination in employment, while citizenship is virtually impossible for them to obtain.

## **Conclusions**

*With the exception of South Africa where there has been some improvement, the member states in SACU have not enacted adequate legislation nor taken appropriate measures to fight discrimination with regard to gender. Pay and employment differentials between men and women are still significant. In South Africa and Namibia, there persists discrimination on the basis of race stemming from the apartheid legacy. Discrimination against disabled persons is not properly addressed by law in SACU countries and few or no measures have been taken to improve their position. Finally, SACU member states do not deal effectively with HIV/AIDS at the workplace or with the consequent discrimination that people living with HIV face, either in terms of legislation or of policy.*

## **III. Child Labour**

The ratifications by SACU member states of ILO Convention No. 138 (1973), Minimum Age and No. 182 (1999), the Worst Forms of Child Labour Convention are as follows:

	<u>No. 138</u>	<u>No. 182</u>
Botswana	1997	2000
Lesotho	2001	2001
Namibia	2000	2000
South Africa	2000	2000
Swaziland	2002	2002

### **Botswana**

The minimum employment age set by the law stands at 14 years of age although children younger than that can be employed for light work in family businesses. Children under 15 may work up to three consecutive hours in any industry that is not considered hazardous, and those between the ages of 15 and 18 may work up to four consecutive hours. The potential penalty for illegally employing a child can be imprisonment for up to 12 months and/or a fine.

Education in Botswana is compulsory but not free. The Net Enrolment Rate in primary schools is 82 per cent and completion rate is 85 per cent. In secondary education the enrolment rate is at 61 per cent.

The Penal Code prohibits involvement of girls or women in production of prostitution and pornography. Child prostitution has been reported particularly at truck stops and transit points in the large towns. However the law does not protect boys from the same crimes. Other parts of the legislation that need to be revised, according to the ILO's CEACR, are the use, procuring or offering of a child for illicit activities,

monitoring mechanisms, programmes of action, time-bound and effective measures and identification and reach-out to children at special risk.

Child labour exists in Botswana; boys are reported to manage cattle herds in isolated areas staying without proper food and shelter for days; girls are largely involved in domestic labour, usually taking care of other children. Many children are reported to work in family businesses or in informal economic activities such as street vending and car washing in cities. The law authorises the Commissioner of Labour to terminate the unlawful employment of children and there are some reports that the Ministry has been effective. Additionally the government has established an Advisory Committee on Child Labour comprised of NGOs, government agencies, and trade unions and employer organisations to monitor child labour. However, the government has not engaged in designing and implementing a national policy of action to eliminate child labour generally or in its worst forms. On the other hand, the government collaborated with two US Department of Labor-funded regional child labour projects implemented by ILO-IPEC and by American Institutes for Research. Furthermore the government supported workshops to raise public awareness on the issue.

### **Lesotho**

The minimum age for employment is generally 15 years of age, while light work is allowed for children who are 13 years old and older. However the law does not provide a definition of what light work is, or for other specific issues on light work. The Labour Code establishes that no child (under 15 years) shall be employed in any commercial or industrial undertaking in which only members of the child's own family are employed. The law protects children from night work and restricts their employment in mines and quarries. Although the Labour Code prohibits hazardous work for persons younger than 18 years of age, there has not been a comprehensive list of hazardous activities. Moreover the scope of application of the present law on hazardous activities does not cover self-employed children and domestic labour. Each employer in an industrial undertaking is required to keep a register of all its employees; however such a task is not obligatory if the undertaking is not industrial. With regard to measures against the worst forms of child labour, the law on sexual offences explicitly prohibits child prostitution and punishes offenders stringently.

Some of the above-mentioned issues are covered in new laws that Lesotho is to enact and will start being addressed by the ILO/IPEC action plan for the elimination of child labour, which the government has not yet approved. Discussion on the Children's Protection and Welfare Bill is still ongoing and a law introducing free and compulsory primary education has not yet been adopted. In its correspondence with the government the CEACR finds that measures need to be taken or amendments to be made so that the law adequately restrains child labour, in accordance with the Convention, in the following fields: minimum age for admission to apprenticeship, artistic performances, use, procuring or offering of a child for illicit activities, identification and reach out to children at special risk, and agricultural work in family enterprises and children domestic work.

In practice child labour exists, largely segregated by sex; boys are reported to herd in rural areas and to street vend, car-wash and load bearers in urban environments. Girls are often domestic servants and, although UNICEF reports low numbers, as prostitutes. According to the 2004 Lesotho Child Labour Survey, 21.5 per cent of children were not attending school. Fifty-seven per cent of children finish primary school and 23 per cent enrol in secondary education. The Labour Code provides broad powers to the country's 24 labour officers to perform inspections. Nevertheless, no cases have been brought related to the worst forms of child labour and hence no prosecutions, convictions or penalties have been imposed. Inspections are difficult to execute due to a lack of resources and informal economic activity is not overseen.

The government runs certain programmes with US DOL, ILO-IPEC, UNICEF and the American Institutes for Research focusing on the worst forms of child labour.

### **Namibia**

The Namibian Labour Act of 2007 establishes that a person must not employ a child under the age of 14 years; however, the scope of application of the law does not cover self-employed children. The penalties for offenders are stringent although the monitoring mechanisms have returned few child labour related cases. National legislation does not authorise light work for children of ages between 12 and 14 while the minimum age for admission to, and determination of, hazardous work is not defined. There is general provision that the Minister of Labour can define special tasks where admission to hazardous work can be allowed after 14 years of age. Since Convention No. 138 provides for young persons to perform certain types of hazardous work only from the age of 16 years, therefore the legislation is not in conformity with the Convention. The Immorality Act 1988 and the Combating of Immoral Practices Act 1980, as amended in 2000, prohibit parents or guardians, but not other persons, from offering or procuring a child for prostitution. Moreover the law's application does not cover boys, since prostitution is only regulated as regards girls or women. Other issues that require special attention are the use of children for the production of pornography and illicit activities.

Education is compulsory for children between the ages of 6 and 16 and the net enrolment rate is 95 per cent, with balanced attendance of boys and girls. Eighty-one per cent reach the last grade of primary school.

In practice, child labour exists in Namibia; children often work on family-owned farms while numerous children perform economic activities informally. Other children are reported to do work in communal areas or to help their parents in family businesses. According to the CEACR, 16 per cent (or roughly 72,500) of Namibian children perform some type of work on a regular basis and children in rural areas are ten times more likely to be employed than urban children. Girls are forced into prostitution or domestic servitude and boys are found working in farms, construction or charcoal production.

Namibia runs an ILO/IPEC programme "Towards the Elimination of the Worst Forms of Child Labour (TECL)" as well as policies to comply with the provisions of the

Constitution and the Education Act, including the “Education for All (EFA) National Plan 2001-2015” whereby the government sets specific goals to improve the provision of education. Several programmes are aimed at encouraging parents and guardians to allow children to attend school. The trade unions, namely the Namibia Agricultural Union and the Namibia Farm Workers Union, play a significant role in enabling public awareness campaigns on child labour to reach broad numbers of farm workers. Furthermore, the Programme Advisory Committee on Child Labour, where unions and employers’ organisations collaborate with state agencies and other institutions, continues to coordinate child labour efforts and to provide advice to the two USDOL-funded projects operating in the country.

### **South Africa**

The law prohibits employment of persons under the age of 15. The law prohibits children (defined as persons younger than 18 years old) from any type of hazardous work; however, the application does not cover self-employed children. The government is considering a draft regulation determining the types of hazardous work which is expected to be endorsed soon. Although many children below 15 years of age are reported to work for more than three hours a day, the law does not define or authorise the concept of light work that could place regulation and improve the conditions of working children between 13 and 15 years old. The employers of children are obliged by law to register them unless they employ less than five persons in total. The penalty for illegally employing a child can reach a maximum term of 3 years.

The Department of Labour has 1600 inspectors authorised to apply the labour law and report violations, including the Child Labour Intersectoral Group (CLIG). However, between 31 March 2006 and 1 April 2007 there were only 7 violations of the legislation concerning hazardous work, 12 violations for domestic labour and one for child slavery.

In practice child labour is widespread in agriculture and many children are reported to undertake informal economic activities, particularly in the former homeland areas. Rural children are more likely to perform work than urban children and usually are reported to work in commercial and subsistence farms or as domestic servants. In the cities, children work as vendors, trolley attendants, shop assistants, restaurant assistants and taxi fee collectors. Furthermore there are children engaged in the worst forms of labour such as prostitution or scavenging. According to the 1999 Survey of Activities of Young People, approximately 800,000 children older were working as labourers. About 80,000 children were reported to be missing school completely while more than one third of the working children faced difficulties in complying with both their school and work obligations. According to the government’s report to the CEACR, the primary school net enrolment ratio for 2004 was 87.4 per cent. Of those who enrol in first grade, 79 per cent reach the last class of primary school.

The government has designed time-bound measures to prevent child trafficking although little is known about the degree of effectiveness of their application. The government executes the Child Labour Programme of Action (CLPA), a pilot programme

to help children used by adults and older children to commit crimes, the ILO/IPEC Project “Towards the Elimination of the Worst Forms of Child Labour” (TELC), and a major national awareness campaign on child labour, including school outreach programmes and radio broadcasts.

### **Swaziland**

The law prohibits work by children younger than 15 in any industrial undertaking, except when family members are employed in the undertaking or in technical schools under supervision. The law’s application is not extended to self-employed children or in non-industrial undertakings. The CEACR observes no legal provisions prohibiting the use, procuring or offering of a child for prostitution, pornography, illicit activities, domestic sale and trafficking; no legal provisions covering the determination and identification of hazardous work, the engagement or removal of children from the worst forms of child labour or their rehabilitation and social integration, or forced or compulsory child labour; nor any measures to establish international cooperation and assistance programmes and actions. Monitoring mechanisms returned no results, or poor results, and penalties have not been effectively applied.

Education is neither free nor compulsory and enrolment stands at 77 per cent, while 61 per cent of children complete primary school.

In rural areas, children are employed in agriculture, as domestic workers and as shepherds. In towns children reportedly work in trade, transportation of items and objects, car washing and bus fee charging. There have been reports of children forced into prostitution. In January 2009 two brothels in central Swaziland were discovered where underage girls worked just to obtain food.

### ***Conclusions***

*There is substantial economic exploitation of child labour in most, if not all, the SACU member states, mainly in informal economic activities and in agriculture. Child labour is also used in some industrial sectors. With the exception of South Africa, there are significant gaps in the legislation and governments are insufficiently active in addressing the problem. Social norms remain generally tolerant of child labour. Furthermore much, if not most of the child labour in SACU countries has not yet been documented properly and there is need for further research and data.*

#### **IV. Forced Labour**

The ratifications by SACU member states of ILO Convention No. 29 (1930), the Forced Labour Convention and ILO Convention No. 105 (1957), Abolition of Forced Labour are as follows:

	<u>No. 29</u>	<u>No. 105</u>
Botswana	1997	1997
Lesotho	1966	2001
Namibia	2000	2000
South Africa	1997	1997
Swaziland	1978	1979

##### **Botswana**

The constitution and law prohibit forced and compulsory labour and there are no reports that such practices occur. However the law does not prohibit trafficking in persons which is dealt with instead by the Penal Code provisions against abduction, kidnapping, slave trading, forced labour, and procuring persons for the purpose of prostitution. Although the government encourages and funds training of law enforcement and immigration personnel in anti-trafficking methods, a number of NGOs conclude that the local police do not pursue possible trafficking cases because there is no specific law against the crime. Additionally no government agency has been designated as the leader in the fight against trafficking. NGOs report that Botswana is a transit country for trafficking of eastern African women and children to South Africa. Botswana is a destination country for Zimbabwean women who are employed as domestic workers. According to the USDoS Trafficking Report 2008, one local NGO received reports from Botswana women that they were forced to provide sexual services to tourists at some safari lodges. Usually with the hope for attaining better education and more opportunities, parents from rural areas give their children to better off families in towns. It has been reported that some of these children are later used for domestic servitude or for herding in remote cattle posts.

The CEACR in its observations raises some points relating to the use of the prisoners' labour and the need for the government to take action to amend the sections of its law that are incompatible with the ILO Conventions.

##### **Lesotho**

The law prohibits compulsory labour, including by children. However it is reported that such practices occur in private houses and on small farms or cattle posts that are outside the scope of the Labour Inspectorate.

No law explicitly prohibits trafficking in persons and offences are charged instead on the basis of laws regarding abduction, kidnapping, procuring for prostitution and compulsory labour. Victims of trafficking are not properly protected either.

Uncorroborated reports indicate that trafficking in persons exists in Lesotho; small numbers of women and children are trafficked for the purposes of forced labour such as street vending, cattle herding and prostitution. Despite the lack of legislation, the Ministry of Health and Social Welfare, some NGOs, and the police provide medical assistance and housing services for trafficking victims.

The government has not yet passed or enacted the Child Protection and Welfare Bill drafted in 2005, which includes a provision prohibiting trafficking of children under the age of 18.

### **Namibia**

The Labour Act of 2007 prohibits forced labour and provides for imprisonment of up to four years for those convicted. The Prevention of Organised Crime Act of 2004, which has not yet been enacted, prohibits trafficking in persons and prescribes strict punishment which can reach up to 50 years imprisonment or/and huge fines. Until that happens, Namibia will not have a specific provision criminalising human trafficking. The CEACR raises some points requiring legislative amendments with a view to bringing the law into conformity with the forced labour Conventions in the fields of freedom of public servants to leave their service and work of prisoners for private enterprises.

In practice forced labour occurs; media reports have revealed that farm and domestic workers, including some children, often receive lower compensation or are abused. In 2007, 19 Filipino workers at a local garment factory filed a complaint in the labour courts alleging that their employer confiscated their passports, locked them in the premises, and forced them to work.

Uncorroborated reporting suggests that in Namibia trafficking also occurs and mainly concerns children engaged in prostitution, domestic servitude, agricultural labour and livestock herding. UNICEF and various NGOs have provided shelter facilities and counselling programmes to victims of trafficking. Unfortunately, the magnitude of this problem is unknown.

### **South Africa**

The law prohibits forced or compulsory labour and any convicted offender may be sentenced to a fine or imprisonment for a period of up to three years. However, there is no specific law that prohibits trafficking and therefore such offences are tried under other laws. For example the Sexual Offences Act of 2007 outlaws trafficking for purposes of sexual exploitation and the 2005 Children's Act prohibits "the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic". The CEACR has drawn the government's attention to the paragraphs Article 2(2)(c) of Convention No. 29 on "Work of prisoners for private enterprises" and Article 1(c) and 1(d) of Convention No. 105 on "Disciplinary measures applicable to seafarers" as particular areas where the national legislation on forced and compulsory labour is not compatible with the respective Convention.

There are reports that South Africa is a source, transit, and destination for the trafficking of persons for the purposes of compulsory labour and prostitution. There is evidence that such trafficking is conducted by organised crime circles. Usually women and girls are coerced into prostitution or domestic servitude while men and boys are trafficked internally, chiefly for farm work and otherwise for street vending, petty crime and forced begging. Anecdotal evidence suggests that parents force children to work unpaid for their landowners in return for their family's accommodation. Child sex tourism is prevalent in a number of South Africa's cities. The victims are often subjected to indebted practices, violence, documents confiscation and food rationing while their working conditions are inhumane.

The government together with the International Organisation for Migration (IOM) has conducted training activities and workshops for hundreds of social workers and government and customs officials to improve recognition of trafficking victims. On the other hand it seems that corruption among the border police has facilitated the spread of the phenomenon. The government is reported to have improved its performance with regard to investigating cases of forced labour and trafficking but to have made little progress in its efforts to prosecute or convict suspected traffickers.

### **Swaziland**

The constitution and law prohibit forced or compulsory labour. However the state demands labour from its own citizens, among other things for cultivation, road construction and maintenance and anti-soil erosion works, under the Swazi Administration Order, No. 6 of 1998, which provides for the duty of Swazis to obey orders and participate in compulsory works; participation is enforceable with severe penalties for non-compliance. The Swaziland Federation of Trade Unions (SFTU) has characterised the Order as a form of forced labour which reinforces the traditional powers of chiefs to demand uncompensated labour from citizens and apply punishment in case of refusal.

The law does not prohibit trafficking in persons but certain other laws apply in this case. Unfortunately statistics are unavailable and reporting is uncorroborated, but anecdotal evidence suggests that trafficking and forced labour by individuals occurs in Swaziland. It is believed that trafficking in girls and women largely concerns cases of domestic servitude and prostitution and in men and boys, forced labour in commercial agriculture and market vending. The government has not investigated, prosecuted or convicted anybody for abduction, procurement for prostitution, detainment or forced labour. The Sexual Offences and Domestic Violence Bill outlaws sex trafficking and foresees psychological services for victims and severe penalties for the offenders, including the death penalty, if the victim is under 16 years of age or the trafficker belongs to an organised circle; however it has not yet been enacted. There have been no government campaigns to raise awareness, although in 2007 one of the Ministries participated in an NGO campaign against gender violence that included issues of trafficking.

## **Conclusions**

*Although all the countries of the region prohibit forced labour, the ILO conventions on forced labour are not properly applied. In some countries there are no inspections for forced labour, in other countries the inspections are sporadic and do not appear to have a visible impact. None of the countries has anti-trafficking legislation and there have been almost no action against traffickers. There is little information and more research would certainly clarify the magnitude of the problem. The most flagrant situation exists in Swaziland where forced labour is a state-sponsored practice in order to build infrastructure or undertake cultivation at no cost.*

## Conclusions and Recommendations

1. The governments of SACU member states need to enable the proper exercise of trade union rights by lowering excessive requirements for union formation and registration and the percentage of representativeness that grants a union collective bargaining rights. They should start promoting collective bargaining instead of compulsory arbitration, and take measures to ensure that collective agreements are applied. Lesotho in particular should grant civil servants the right to organise by ensuring that anti-union discrimination provisions in its new Public Service Bill are appropriately strong and that it is enacted rapidly.
2. Another recommendation applying generally across SACU member states is that the judicial system must be reinforced in order to achieve quicker dispute resolution when union rights are violated. The governments should rigorously apply the instructions of the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) on how to improve their legislation effectively.
3. Additionally, the governments of Botswana, Lesotho and Swaziland must simplify the procedural requirements for declaring a strike. Namibia should restore the right to freedom of association and to bargain collectively to prison staff and stop discriminating against certain trade unions. South Africa should take further measures to limit employers' anti-union hostility, especially in the agricultural sector. In Swaziland, the government should restore the democratic freedoms and rights which were suspended by the state of emergency in 1973.
4. The governments of the SACU member states should amend their anti-discrimination and equal remuneration legislation in order to bring it in line with the respective ILO Conventions, in line with the CEACR's requests. Namibia must ratify urgently and implement fully ILO Convention No. 100 (1951) on Equal Remuneration.
5. In South Africa vocational training in the workplace for senior management needs to be designed in such a way that it targets disadvantaged groups and does not perpetuate racial inequality by training those in the top echelons of management while neglecting semi-skilled and unskilled labour.
6. New legislative provisions should be adopted to address discrimination against the disabled and persons living with HIV/AIDS, as well as indigenous and formerly racially discriminated groups. The SACU governments should design and implement policies emphasising the adoption of good social norms in order to impede the perpetuation of discrimination, and provide more opportunities and skills training to disadvantaged groups in order to improve their position.
7. Additionally the government of South Africa should take urgent measures to address the alarmingly high incidence of violence against women as well as sexual harassment at the workplace. South Africa should start dealing with cases of sexual harassment and discrimination against HIV/AIDS positive persons in an official way, instead of leaving these issues to be dealt with internally on the enterprise/agency level.

8. The governments of the Southern African region should review and improve their laws to fight effectively against child labour as many aspects are inadequately covered by current legislative provisions. For example the scope of application of SACU countries' respective laws on self-employed children and on definitions and regulation of hazardous and light work need to be improved.
9. The governments should strengthen social protection and safety nets for poorer families in order to limit the reasons for which a child has to work and, consequently, achieve lower dropout rates from education. Furthermore they should provide free or at least subsidised education in pursuance of giving good reasons to parents for children to attend school. Lesotho and Swaziland have to render basic education compulsory.
10. The states should take action in order to change social norms and render child labour unacceptable. They should implement programmes to identify and reach out to children in work, especially those working in precarious conditions. Additionally Botswana and Namibia have to extend the application of prostitution laws to protect boys as well as girls.
11. The governments of SACU countries should improve the training of child labour inspectors and authorities in order to achieve easy recognition of cases of child labour and quick application of the penalties foreseen by the laws. The capacity of labour inspectorates to act in rural areas, where the problem is extensive, should be reinforced.
12. The states should start collecting data and conduct research so that the dimensions and characteristics of child labour in the region are fully understood.
13. The countries of the SACU agreement should address the problem of lack of information on forced labour by conducting research on its magnitude and nature. They need to promulgate laws that prohibit trafficking and to define strong sanctions for committing this crime. The inspectorates and labour authorities need to be trained to recognise cases of forced labour. Law enforcement structures should be empowered in order to effectively prosecute and convict traffickers and those who make use of forced labour. The governments should design and implement policies and actions in order to provide protection and rehabilitation to exploited persons.
14. The leadership of Swaziland must immediately stop employing compulsory and uncompensated participation of citizens in public works, which constitutes a serious form of forced labour.
15. In line with the commitments accepted by the Southern African Customs Union's member states at the Singapore and Doha WTO Ministerial Conferences and their obligations as members of the ILO, the governments of SACU should provide regular reports to the WTO and the ILO on their legislative changes and implementation of all the core labour standards.
16. The WTO should draw the attention of the authorities of SACU member states to the commitments they undertook to observe core labour standards at the Singapore and Doha Ministerial Conferences. The WTO should request the ILO

to intensify its work with the governments of SACU member states in these areas and provide a report to the WTO General Council on the occasion of the next trade policy review.

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