

**BEFORE THE UNITED STATES
TRADE REPRESENTATIVE**

**REQUEST TO TESTIFY AND PRE-HEARING BRIEF
ON THE PETITION TO REMOVE**

SWAZILAND

**FROM THE LIST OF BENEFICIARY COUNTRIES PURSUANT TO
19 USC § 3703(1)(F) OF THE AFRICAN GROWTH AND OPPORTUNITY ACT**

Filed by

**THE AMERICAN FEDERATION OF LABOR &
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)**

AUGUST 4, 2017

INTENT TO TESTIFY

Please accept this request to testify on the behalf of the AFL-CIO at the August 23, 2017 public hearing on Swaziland's AGOA eligibility.

Sincerely,

Celeste Drake
Trade and Globalization Policy Specialist
815 16th St NW
Washington, DC 20006
202 637 5344
cdrake@aflcio.org

PRE-HEARING BRIEF

I: Introduction

The Government of Swaziland has not established or made continual progress towards establishing internationally recognized worker rights, as required under 19 USC § 3703(1)(F). The country should remain ineligible for benefits under the African Growth and Opportunity Act (AGOA).

The Government of Swaziland continues to restrict internationally recognized worker rights in both law and practice, including the right to freedom of association and the right to organize and bargain collectively. Efforts at reform have been slow and only partially address the legal barriers that prevent workers for exercising their rights. Labor activists are targeted for repression and violence. As detailed in our initial petition, the country has been under formal review by the International Labor Organization (ILO) at least 14 times, and has been the subject of two High Level Missions, a process reserved for the most serious breaches. Despite enhanced scrutiny from both the ILO and the removal of AGOA benefits, the Government has not taken meaningful action. This does not represent the establishment of or continual progress towards establishing internationally recognized worker rights.

II: The Government of Swaziland Restricts the Rights to Freedom of Association and Collective Bargaining in Law

Swazi laws and decrees restrict the right to freedom of association and collective bargaining, including the Public Order Act, the Industrial Relations Act, and the Suppression of Terrorism Act. Efforts at reform have been slow, incomplete, and conducted without consulting representative unions or workers. New measures, such as the Public Service Bill of 2015, further restrict workers' ability to engage in political advocacy. This does not represent a meaningful effort to establish or make continual progress towards establishing the right to freedom of association and collective bargaining.

The Public Order Act continues to be used as a pretext to deny unions permits for assemblies, protests, and other legitimate public activities and to detain activists.¹ In December 2015 the Swazi Parliament adopted a Code of Good Practice to further restrict workers' right to engage in public actions. The Code requires advance notice for any industrial action, with criminal penalties for non-compliance, and grants police significant authority to approve and monitor trade union activities. Unions must apply for permission from Municipal Councils, which are in turn required to obtain a 'no objection note' from the police. These are often rejected for arbitrary reasons. For example, on August 28, 2015, the police rejected a TUCOSWA permit request stating that a gathering involving a sizeable number of people was "not in line with good

¹ See Public Comment to the African Growth and Opportunity Act Implementation Subcommittee of the United States Trade Representative Concerning the Failure of the Government of Swaziland to Comply With Section 104 of the African Growth and Opportunity Act, Submitted by the AFL-CIO (2013)

citizenry and reverence.”² In February, police prevented TUCOSWA from marching on parliament to present a petition.³ The ability to hold public events and advocate for political action are essential aspects of organizing and collective bargaining.⁴

A proposed amendment to the Public Order Act, which currently awaits debate in the Senate, continues to restrict peaceful assembly and public advocacy. The amendment, introduced in March 2016 without any consultation with civil society, retains authorities’ broad discretion to quash public dissent and contains harsh penalties for engaging in ‘gatherings,’ including high fines and jail time. In addition, the amendment requires lengthy advanced notification, with no exception for spontaneous gatherings. Under Article 4, organizers must designate a ‘convener’ for any gathering, who can be charged with criminal penalties and held personally liable for any damages that arise from a gathering. Article 5 specifies that when convenors are not identified “any person who has taken any part in planning or organizing or making preparations for a gathering” or who “invited the public or any section of the public to attend a gathering” will be considered a convener. As the American Bar Association has concluded, “any individual who forwards information about a demonstration via social media could potentially qualify as a convener under this definition and, as a result, could potentially be given a criminal sentence.”⁵ Article 15 applies criminal penalties for providing false information to the authorities, regardless of intent, which leaves open the possibility that organizers would be prosecuted if “larger numbers attend than they estimated in their official notification.”⁶ Article 2 prevents gatherings near many government buildings, and “appears to explicitly target gatherings for expressing opinions or demands related to government policy, political institutions, and other areas of public concern.”⁷ Section 18 contains a broad definition of sabotage of government property and provides stiff penalties, including life in prison.

The Suppression of Terrorism Act grants authorities broad power to detain and imprison labor activists, and proposed amendments retain these restrictions. In September 2016 the High Court of Swaziland deemed several provisions of the Act unconstitutional, in response to a case brought by Thulani Maseko, legal counsel for TUCOWSA, and four other individuals. The Government is appealing the decision. The Government introduced an amendment, but it has since been removed from the parliamentary process without explanation. Even if it is

² Correspondence from Lubombo Police Regional Headquarters to TUCOSWA, Reference STC15-ADM0821/1, Re: TUCOSWA Request to March on the 4th and 5th of September, Sent August 28, 2015, submitted into record as Appendix A.

³ Individual Case Discussion: Swaziland, Freedom of Association and Protection of the Right to Organise Convention, International Labor Organization Committee on the Application of Standards (2016) *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3284595

⁴ *See, e.g.*, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, Geneva, International Labour Office, Fifth (revised) edition, 2006 (hereinafter CFA Digest of Decisions) ¶ 131 (“The right to ... organize union meetings [is an] essential aspects of trade union rights”); ¶ 133 (“Workers should enjoy the right to peaceful demonstration to defend their occupational interests”).

⁵ Preliminary Analysis of Swaziland’s 2016 Public Order Bill and the Right to Freedom of Assembly under International Human Rights Law, American Bar Association Center for Human Rights (May 5 2016) *available at* https://www.americanbar.org/content/dam/aba/administrative/human_rights/preliminaryanalysisofswaziland2016publicorderbill.authcheckdam.pdf

⁶ *Ibid*

⁷ *Ibid*

reintroduced, Amnesty International deemed the changes “mostly cosmetic” and found many problematic provisions remain unchanged, including an impermissibly broad definition of terrorism not restricted to threatened or actual violence against civilians.⁸ The amendment was originally introduced under a ‘Certificate of Urgency,’ which limits opportunity for public comments.

Amendments to the union registration process still grant the Commissioner of Labor broad discretion to demand any additional information the office deems fit from unions petitioning for recognition, and grants broad discretion on whether to recognize an organization at all. For example, the Amalgamated Trade Unions of Swaziland (ATUSWA) was finally recognized in 2015, but was subjected to numerous arbitrary information requests and additional requirements from the Commissioner, including a demand that the union change its name.⁹ Both ATUSWA and the Trade Union Congress of Swaziland (TUCOWSA) were recognized in 2015. However, the Government also registered an alternative national trade union center, FESWATU, which workers report is closely aligned with the government and employers. The Government has been consulting with this body rather than TUCOWSA. The continued ability to interfere with trade union establishment, and the exercise of that ability, are both inconsistent with the right to freedom of association.¹⁰

The Government of Swaziland has also introduced new regulations that impose restrictions on worker rights. The Public Service Bill of 2015, which regulates public sector employees, allows workers to be fired for being ‘visibly associated’ with political parties or organizations, with no access to due process. This is inconsistent with the right to freedom of association,¹¹ but consistent with other government efforts to curtail the labor movement’s participation in public life.

The Government of Swaziland has failed to demonstrate any progress towards establishing the internationally recognized rights to freedom of association and collective bargaining in law.

⁸ Memorandum to the Government of Swaziland on the Suppression of Terrorism (Amendment) Bill, Amnesty International, Southern Africa Regional Office (April 2016) *available at* <https://www.amnesty.org/download/Documents/AFR5539712016ENGLISH.pdf>

⁹ Individual Case Discussion: Swaziland, Freedom of Association and Protection of the Right to Organise Convention, International Labor Organization Committee on the Application of Standards (2016) *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3284595; Interim Report No 377 on Swaziland, Case No 2949, Paragraph 440, International Labour Organization (March 2016) *available at*

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:3277980

¹⁰ CFA Digest of Decisions ¶ 272 (“The principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization. Such authorization could concern the formation of the trade union organization itself, the need to obtain discretionary approval of the constitution or rules of the organization, or, again, authorization for taking steps prior to the establishment of the organization”); ¶ 340 “By according favourable or unfavourable treatment to a given organization as compared with others, a government may be able to influence the choice of workers as to the organization which they intend to join ... a government which deliberately acts in this manner violates the principle laid down in Convention No. 87 that the public authorities shall refrain from any interference which would restrict the rights provided for in the Convention or impede their lawful exercise”

¹¹ *E.g.* CFA Digest of Decisions ¶ 220 (“Public employees ... should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members.”)

III: The Government of Swaziland Actively Interferes with the Rights to Freedom of Association and Collective Bargaining by Targeting Labor Activists with Violence, Threats, and Arbitrary Arrests and Intervening in Efforts to Negotiate Agreements

The Government of Swaziland responds to peaceful labor activism with violence, threats, imprisonment and harassment and intervenes in industrial actions and collective bargaining on behalf of employers. As the ILO has observed, “a genuinely free and independent trade union movement cannot develop in a climate of violence and uncertainty.”¹² The Government of Swaziland’s actions foreclose any possibility of establishing the internationally recognized rights to freedom of association and collective bargaining in practice.

The Government of Swaziland continues to exercise violent repression against trade union leaders and activists. On October 4, 2016 Samkelisiwe Gladys Matsebula was assaulted by the police after participating in a meeting organized by the Swaziland Agriculture and Plantation Workers Union (SAPWU) at Motigny in Bhunya. She was accused of insulting a leader of an employer-backed union, forced into a car and taken to a police station where officers grabbed her breasts and placed a plastic bag over her head until she soiled herself. She was hospitalized for her injuries.¹³

In August 2016 striking workers at Swaziland Plantations in Piggs Peak were subject to police beatings and interrogation. Workers report more than 30 people had to seek medical treatment, including 8 people with fractured bones, following an attack on workers on September 19. The Government of Swaziland never conducted an independent investigation into police misconduct, but did file charges against two members of the Swaziland Agriculture and Plantation Workers Union (SAPWU) for allegedly assaulting another employee during the strike action. In February 2017 SAPWU attempted to hold a mass membership meeting, but Swaziland police denied the permit, citing security concerns. Violently intervening in industrial actions is not consistent with the right to organize and bargain collectively.¹⁴

In June 2016 police assaulted labor activist Gladys Dlamini.¹⁵ In February 2015 TUCOSWA second deputy Muzikayise Gladwell Mhlanga was beaten by police so severely that he lost a front tooth after he “refused to hand over his phone to the police who had intervened in an internal trade union meeting.”¹⁶ Unions and individuals have filed complaints regarding police

¹² CFA Digest of Decisions ¶ 45

¹³ Statement of Samkelisiwe Gladys Matsebula on file with AFL-CIO.

¹⁴ CFA Digest of Decisions ¶ 49 (“In cases in which the dispersal of public meetings by the police has involved loss of life or serious injury, the Committee has attached special importance to the circumstances being fully investigated immediately”); ¶ 52 (“The absence of judgements against the guilty parties creates, in practice, a situation of impunity, which reinforces the climate of violence and insecurity, and which is extremely damaging to the exercise of trade union rights”); ¶ 643 (“The use of police for strike-breaking purposes is an infringement of trade union rights”).

¹⁵ Individual Case Discussion: Swaziland, Freedom of Association and Protection of the Right to Organise Convention, International Labor Organization Committee on the Application of Standards (2016) *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3284595

¹⁶ *Ibid*

brutality, but none have resulted in action against the officers involved. As the ILO has repeatedly stated “[t]he rights of workers’ and employers’ organizations can only be exercised in a climate that is free from violence, pressure or threats of any kind ... and it is for governments to ensure that this principle is respected.”¹⁷

Officials from the Government of Swaziland have made public statements condoning the use of violence against labor activists. In April 2016, the Police Commissioner issued a statement declaring that “police should treat trade unionists as *shishi* (a type of animal considered vermin) and kill them upon sight.”¹⁸ This creates a climate of fear where the free exercise of worker rights is impossible.¹⁹

The Government of Swaziland also targets union leaders with harassment and arbitrary arrest. In February 2016 Mcolisi Ngcamphalala and Mbongwa Dlamini, leaders of the Swaziland National Association of Teachers (SNAT), were arrested after participating in a protest. Their homes were raided. In April 2016 “police twice invaded and searched the Swaziland Union of Financial Institutions and Allied Workers (SUFIAWU) without the necessary search warrant.”²⁰ As detailed in previous petitions, legal counsel to TUCOWSA Thulani Maseko was imprisoned after writing an article criticizing the judiciary. He was finally released in July 2015, but only after serving his full sentence. As the ILO has concluded, the detention of trade unionists, “for reasons connected with their activities in defense of the interests of workers, constitutes a serious interference with civil liberties in general and with trade union rights in particular.”²¹

The government has also targeted pro-union speech. In May 2014, Mario Masuku, President of PUDEMO, and Maxwell Dlamini, Secretary-General of the Swaziland Youth Congress, were arrested after delivering a speech during May Day celebrations organized by TUCOSWA. They were released on bail, but still face criminal charges and up to 15 years in prison. The conditions of their bail include a prohibition on speaking in public.²² As the ILO has recognized, “[a] free trade union movement can develop only under a regime which guarantees fundamental rights, including ... freedom of opinion expressed through speech.”²³

After finally registering ATUSWA, the Commissioner of Labour repeatedly interfered in the unions’ efforts to represent workers and negotiate recognition agreements with employers in a

¹⁷ CFA Digest of Decisions ¶ 44

¹⁸ Individual Case Discussion: Swaziland, Freedom of Association and Protection of the Right to Organise Convention, International Labor Organization Committee on the Application of Standards (2016) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3284595

¹⁹ CFA Digest of Decisions ¶ 44

²⁰ Swaziland: Events of 2016, Human Rights Watch available at <https://www.hrw.org/world-report/2017/country-chapters/swaziland>

²¹ CFA Digest of Decisions ¶ 64; See also, e.g. ¶ 66 (“The detention of trade unionists on the grounds of trade union activities constitutes a serious obstacle to the exercise of trade union rights and an infringement of freedom of association”); ¶ 67 (“The arrest of trade unionists and leaders of employers’ organizations may create an atmosphere of intimidation and fear prejudicial to the normal development of trade union activities.”)

²² Individual Case Discussion: Swaziland, Freedom of Association and Protection of the Right to Organise Convention, International Labor Organization Committee on the Application of Standards (2016) available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3284595

²³ CFA Digest of Decisions ¶ 37

manner inconsistent with both the internationally recognized right to bargain collectively and Swazi law. On June 20, 2016 the Commissioner wrote to the employer Swaziland Meat Industries stating that it should not recognize ATUSWA. On April 22, 2017 the Commissioner held a meeting with several former leaders of a union that had been part of the ATUSWA merger to encourage them to revive the defunct union and leave ATUSWA. These individuals then wrote to employers stating they should cease allowing paycheck deductions to ATUSWA. Employers attempted to clarify the situation with the Commissioner, but received no response. Intervening in negotiations with employers and attempting to promote one union over another are both inconsistent with the right to organize and bargain collectively.²⁴

The Government of Swaziland has used violence, arbitrary arrest, harassment and threats to actively suppress worker rights, and has intervened in efforts by independent unions to reach agreements with employers. These actions are diametrically opposed establishing the internationally recognized rights to freedom of association and the right to organize and bargain collectively.

IV: Conclusion

The Government of Swaziland has not made any significant progress towards establishing internationally recognized worker rights, and instead continues to restrict these rights in both law and practice. Swaziland should remain ineligible from benefits under AGOA.

²⁴ CFA Digest of Decisions ¶ 343 (“Both the government authorities and employers should refrain from any discrimination between trade union organizations, especially as regards recognition of their leaders who seek to perform legitimate trade union activities.”); ¶ 1001 (“State bodies should refrain from intervening to alter the content of freely concluded collective agreements”).