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INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ADVANCE OF THE EXAMINATION OF **SOUTH AFRICA'S** INITIAL PERIODIC REPORT UNDER ARTICLES 16 AND 17 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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ICJ submission to the Committee on Economic, Social and Cultural Rights in advance of the examination of South Africa's initial periodic report

## **INTERNATIONAL COMMISSION OF JURISTS**

### **SUBMISSION TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ADVANCE OF THE EXAMINATION OF SOUTH AFRICA'S INITIAL PERIODIC REPORT UNDER THE COVENANT**

#### **Introduction**

1. During its 64th session, from 24 September to 12 October 2018 the Committee on Economic, Social and Cultural Rights ("this Committee") will examine South Africa's implementation of the International Covenant on Economic, Social and Cultural Rights ("the Covenant"), including in light of the State party's initial report under articles 16 and 17 of the Covenant. The International Commission of Jurists ("ICJ") welcomes the opportunity to submit the following comments to this Committee.
2. The ICJ's comments do not constitute a comprehensive alternative report covering the full scope of Covenant rights or South Africa's compliance with its obligations under the Covenant. Rather, in this submission, the ICJ draws this Committee's attention to limited range of rights and concerns, in particular:
  - a) South Africa's incomplete discharge of its obligations in terms of the Covenant;
  - b) The South African Government's need for guidance from this Committee on the discharge of its obligations in terms of the right to work;
  - c) The South African Government's need for guidance from this Committee on the discharge of its obligations in terms of the right to an adequate standard of living;
  - d) The South African Government's failure to report effectively and accurately on its efforts to realize the ESC rights of persons with disabilities;
  - e) The uncertain status of the South African Government's commitment to the enactment of legislation to ensure the implementation of the Covenant;
  - f) The uncertain status of the South African Government's intention to ratify the Optional Protocol to the Covenant; and
  - g) The uncertain status of the South African Government's declaration with regard to the right to education.
3. Drawing on the ICJ's expertise on international human rights law and standards, including the provisions of the Covenant, and their application in domestic contexts, the ICJ's submissions seek to complement the range of submissions received by this Committee from international and South African civil society actors, research entities and national human rights institutions. The ICJ aims to emphasize certain aspects of international human rights law that may not have been fully covered by these submissions in an attempt to assist this Committee in assessing the compliance by South Africa of compliance with its Covenant obligations and giving guidance to the Government of South Africa regarding the implementation of its ESC rights obligations.
4. In particular, the submission emphasizes aspects of the right to work, aspects of the right to an adequate standard of living, and aspects of Covenant rights of persons with disabilities which the Government of South Africa has failed to report on despite clear guidance produced by this Committee's general comments with regard to specific obligations on States Parties to the Covenant.

## The relationship between the Covenant and the South African Constitution

6. From the outset of its report, the Government of South Africa notes that its ratification of the Covenant is “an important step forward, giving the ICESCR greater force in domestic law” and will “continue to deepen the enforcement of socio-economic rights in the country”.<sup>1</sup> However, it proceeds to explain that the “the language and obligations of our Constitution, to a large extent mirror the socio-economic norms and standards of the ICESCR”.<sup>2</sup>
7. Elsewhere in its report the Government of South Africa accepts that there is not exact symmetry between the Covenant and the Constitution but rather that there are many “*similar* provisions for *most* of the socio-economic rights”.<sup>3</sup> It therefore acknowledges that the “provisions of national laws and regulations” need to be “harmonized with the norms and standards contained in international instruments with a view to their full implementation”.<sup>4</sup>
8. When it comes to specific Covenant rights, the Government of South Africa acknowledges, for example, that “there is no designated right to work in the Constitution”<sup>5</sup> and “the Constitution does not contain a stand-alone section on the right to an adequate standard of living”.<sup>6</sup> Nor does the Government of South Africa engage with the content and elements of rights included in *both* the Constitution and the Covenant with consideration to this Committee’s jurisprudence, in particular its General Comments. The South African Constitutional Court clearly acknowledges that this Committee’s General Comments are “helpful in plumbing the meaning” of rights in the South African Bill of Rights and “explain[ing] the scope of States parties’ obligations under the Covenant”.<sup>7</sup> This prescription should facilitate the Government’s own analysis.
9. Overall, it therefore appears that the Government of South Africa has not understood its assumption of legal obligations under the Covenant to increase, alter or nuance the nature and content of its human rights commitments and obligations. Instead, the Government’s approach to reporting on its Covenant-related obligations is simply to report on its fulfillment of its constitutional obligations in terms of the South African Constitution, which predate South Africa’s ratification of the Convention by almost two decades.
10. Contrary to this apparent understanding, South Africa’s accession to the Covenant cannot be understood as a mere rhetorical repetition or recasting of existing constitutional and legal rights in South Africa. South Africa’s internal legal arrangements must be in line with its Covenant obligations. As this Committee observed in general comment 9 on the “domestic application of the Covenant”, this requires, for example, that: “*Covenant norms must be recognized* in appropriate ways *within the domestic legal order*.”<sup>8</sup>

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights initial reports of States parties due in 2017: South Africa, 25 April 2017, E/C.12/ZAF/1 (Gov SA Report) available at [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en) para 1.

<sup>2</sup> Id para 5.

<sup>3</sup> Id para 24.

<sup>4</sup> Id para 35.

<sup>5</sup> Id para 66.

<sup>6</sup> Id para 96.

<sup>7</sup> Constitutional Court of South Africa, *Government of the Republic of South Africa and Others v Grootboom and Others* (4 October 2000), para 45.

<sup>8</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant, UN Doc. E/C.12/1998/24, (General Comment 9) para 2.

11. This is because although the “existence and further development of international procedures for the pursuit of individual claims is important ... such procedures are ultimately only supplementary to effective national remedies” for the violation of Covenant rights.<sup>9</sup> The full recognition of Covenant obligations is a necessary precondition for the provision of effective national remedies for the violations of those norms.
12. Although this Committee does not provide universal prescription as to *how* national implementation is to be achieved, it is clear that measures taken by States domestically to realize Covenant rights must be capable of “producing results which are consistent with the *full discharge* of its obligations by the State party”.<sup>10</sup> Ultimately, therefore, “while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable.”<sup>11</sup>
13. It is therefore crucial that the Government of South Africa review its existing laws, policies and practices with a view to ensuring that it can accurately analyze how the obligations assumed under the Covenant will affect its existing constitutional, statutory and other legal arrangements concerning ESC. Such a review is necessary both under the Covenant and South African law itself. The Government of South Africa acknowledges that it “complies with *international obligations by enacting or amending domestic legislation* to ensure compatibility with its treaty obligations” because “provisions of an international treaty cannot be invoked before, and directly enforced, by the courts, other tribunals or administrative authorities” prior to such enactment. It also accepts that “international law” *must* be “considered” when “interpreting statutes”.<sup>12</sup>
14. As a component of its “purposive” approach to interpretation of law, the Constitutional Court has indicated that the detailed constitutional provisions on the State’s international law obligations,<sup>13</sup> “demonstrate that international law has a special place in our law”<sup>14</sup> and that the Constitution “reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law.”<sup>15</sup> Importantly, the Constitution specifically requires that all “courts”, “tribunals” and “forums” “must consider international law” when interpreting the Bill of Rights<sup>16</sup> *and* instructs courts to “prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.<sup>17</sup> This includes both binding sources of international law and declarative international law and standards according to the Constitutional Court.<sup>18</sup>
15. Indeed, even regional international human rights treaties to which South Africa is specifically precluded from becoming party (such as instruments from the Inter-American, European, and League of Arab States human rights systems) should be taken into account.<sup>19</sup> In the same vein declaratory or “soft law” such as UN and African Union Declarations: resolutions of UN and regional bodies; reports and guidelines of special rapporteurs; and “reports of specialized agencies such as the International Labour Organization are used “tools of interpretation”.<sup>20</sup>

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<sup>9</sup> General Comment 9, para 4.

<sup>10</sup> Id para 5.

<sup>11</sup> Id para 9.

<sup>12</sup> Gov SA Report (n 1), para 24.

<sup>13</sup> Constitution of the Republic of South Africa, ss 39, 233.

<sup>14</sup> Constitutional Court of South Africa, *Glenister v President of the Republic of South Africa and Others*, (17 March 2011) (Glenister), para 97.

<sup>15</sup> Id.

<sup>16</sup> Constitution of the Republic of South Africa, s 39(1)(b).

<sup>17</sup> Constitution of the Republic of South Africa, s 233.

<sup>18</sup> *Glenister* (n 13), para 192.

<sup>19</sup> Sandra Liebenberg, *Socio-economic Rights: Adjudication Under a Transformative Constitution*, Juta, Claremont, 2010, p 102.

<sup>20</sup> Id; Constitutional Court of South Africa, *S v Makwanyane and Another* (6 June 1995), para 35.

16. This interpretative approach is consistent with this Committee’s own observation that “courts should take account of Covenant rights where this is necessary to ensure that the State’s conduct is consistent with its obligations under the Covenant” and therefore “domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations”.<sup>21</sup>
17. South Africa is yet to enact specific legislation to incorporate the Covenant into law consistently with the Constitution.<sup>22</sup> Though the Government of South Africa points to the “legislative, administrative and policy measures in place for the attainment of socio-economic rights ... even prior to the ratification of the ICESCR”,<sup>23</sup> it indicates that the full “accession” to the protocol is “receiving attention”.<sup>24</sup> Given the absence of specific legislation, the interpretative principles detailed above become crucial: since there is no wholesale implementation of Covenant provisions into South African law, it is vital that all law is interpreted, where reasonably possible to align with South Africa’s obligations in terms of the Covenant.
18. The Government of South Africa itself observes that the Covenant “served as a major source of inspiration for the drafting of the provisions on socio-economic rights in the Constitution” and should help “ensure that our laws, policies and jurisprudence on socio-economic and cultural rights develop in harmony with the standards set by the ICESCR”.<sup>25</sup> Nevertheless, this harmonious interpretation requires an active exercise of simultaneous application of South African and Covenant legal obligations.
19. In light of the above, the ICJ requests that this Committee address the following recommendations to the South African authorities:
- a) That the Government of South Africa undertake a comprehensive review of its domestic law – constitutional, statutory and administrative – as well as policy standards and norms on ESC rights to ensure that implement and are consistent with South Africa’s obligations in terms of the Covenant;
  - b) That the Government of South Africa, through the Office of the Chief Justice and the South African Judicial Education Institute, ensure that judicial officers understand South Africa’s obligations under the Covenant, as interpreted by this Committee, and which will, in accordance with the Constitution, facilitate their adoption of reasonable interpretations of South African law consistent with the Covenant;
  - c) That the Government of South Africa takes special care to review the adequacy of law, policies and practices to protect Covenant rights not entrenched in the Constitution, including the rights to work and aspects of the right to an adequate standard of living; and
  - d) That the Government of South Africa consult meaningfully and at regular periodic intervals with the South African Human Rights Commission, civil society organizations and research institutions in the process of better understanding its obligations under the Covenant as a consequence of its ratification of the Covenant.

### **The right to work (Articles 6-8)**

20. As the Government of South Africa’s report acknowledges, the right *to* work is not protected by the South African Constitution. Instead what is protected by the Constitution is what can be described as rights *at* work, including a number of labour rights.<sup>26</sup>

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<sup>21</sup> General Comment 9, paras 14-15.

<sup>22</sup> Constitution of the Republic of South Africa, s 231(4).

<sup>23</sup> Gov SA Report (n 1), para 5.

<sup>24</sup> *Id.*, footnote 2.

<sup>25</sup> *Id.*, para 166.

<sup>26</sup> Constitution of the Republic of South Africa, s 23.

21. These rights include rights to: “fair labour practices”;<sup>27</sup> to form, join and participate in the activities of a trade union;<sup>28</sup> to strike;<sup>29</sup> and to collective bargaining for trade unions.<sup>30</sup> Also of relevance is the Constitution’s separate entrenchment of the right ensuring that “no one may be subjected to slavery, servitude or forced labour”;<sup>31</sup> a right of “citizens” to “choose their trade, occupation or profession freely”;<sup>32</sup> and a right to picket which is included within a set of protest rights.<sup>33</sup>
22. South Africa has ratified 27 ILO conventions<sup>34</sup> though a range of other Conventions remain unratified.<sup>35</sup> Conventions South Africa has ratified include “core conventions” such as the Forced Labour Convention, 1930 (No. 29); the 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); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); and Worst Forms of Child Labour Convention, 1999 (No.182).<sup>36</sup>
23. Furthermore, these components of the right *to* work are covered by a wide range of legislation and policy as reported by the Government of South Africa.
24. In its report to this Committee the Government of South Africa speculates that the reason for the inclusion of these *rights at work* and the simultaneously exclusion of the *right to work*:
- “One concern against a designated right to work could be that a constitutional right to work could permit individuals to utilise their freedom to contract in order to choose work at a standard below legislated basic conditions of employment or otherwise undermine legislation prescribing basic working conditions; another perceived concern may be that the advancements made with respect to the realisation of the right to have access to social security may be lost by virtue of the constitutional focus on work.”<sup>37</sup>
25. What is clear from this explanation is that the Government of South Africa considers the protection of *rights at work* potentially to be in conflict with *rights to work*. Put simply, it is concerned that binding the State to improve and increase access to job opportunities and so decrease the unemployment rate may potentially limit the State’s ability to ensure the protection of existing workers’ rights.
26. This position appears to have resulted in a failure to implement the right to work in line with the Covenant as interpreted by this Committee. Indeed, consistently with the approach of the International Labour Organization, this Committee has indicated that all work-related rights are “interdependent”

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<sup>27</sup> Id, s 23(1).

<sup>28</sup> Id, ss 23 (2)(a)-(b).

<sup>29</sup> Id, s 23 (2)(c).

<sup>30</sup> Id, s 23(5).

<sup>31</sup> Id, s 13.

<sup>32</sup> Id, s 22. It is puzzling and somewhat alarming that unlike all other socio-economic rights in the Constitution the right to freedom of trade and occupation appears to extend only to “citizens”.

<sup>33</sup> Id, s 17.

<sup>34</sup> International Labour Organization, Ratifications for South Africa, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102888](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888), (Accessed 22 August 2018).

<sup>35</sup> International Labour Organization, Up-to-date Conventions and Protocols not ratified by South Africa, [https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210\\_COUNTRY\\_ID:102888](https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102888) (Accessed 22 August 2018).

<sup>36</sup> International Labour Organization, List of ILO Core Conventions, [https://www.ilo.org/asia/decentwork/dwcp/WCMS\\_143046/lang--en/index.htm](https://www.ilo.org/asia/decentwork/dwcp/WCMS_143046/lang--en/index.htm) (Accessed 22 August 2018).

<sup>37</sup> Gov SA Report (n 1), para 66.

and that the right to work as a whole is a right to “*decent work*”.<sup>38</sup> This means that, in terms of the Covenant, States must not make a tradeoff between the obligation to “adopt, as quickly as possible, measures aiming at achieving full employment”<sup>39</sup> (Article 6) and seeking to ensure “just and favourable conditions of work” (Articles 7 and 8). Though not a right to a “job”, the Covenant does clearly require that measures are taken to ensure increased access to jobs – and decreased unemployment – over time. And this must be done *simultaneously* with improving the quality of existing employment opportunities and ensuring just and favourable conditions which ensure that all work is decent work.

27. The Government of South Africa’s report acknowledges that “unemployment rates remain high”<sup>40</sup> and provides this Committee with information including some examples of measures taken and money spent to ensure the creation of employment opportunities.<sup>41</sup> It does not, however, provide information measuring its success in ensuring the creation of such employment opportunities against its *legal obligation* in terms of the right to work to take measures to achieve full employment. It would appear that, though consistently aiming to increase employment and decrease unemployment in its policy measures, that the Government of South Africa does not consider itself to be legally bound to do so. Whatever its legal position prior to the ratification of the Covenant, this position is now untenable as a matter of South African or international law.
28. This apparent misunderstanding of its legal obligations is a particular concern in light of the *high and increasing* rate of unemployment in South Africa, coupled with a failure to acknowledge the specific guidance given by this Committee about acceptable measures to realize the right to work.
29. As of March 2018, the official or “strict” unemployment rate in South Africa was 26.7 percent. This increased to 27.2 percent as of July 2018. The “strict” rate increases to 36.7 percent (March 2018) and 37.2 percent (July 2018) if under the more realistic “expanded” definition of unemployment,<sup>42</sup> including “discouraged workers” who have stopped looking for work. This reflects a loss of over 100 000 jobs in a short period of three months. Youth unemployment, which measures unemployment among those under the age of 25, is even higher. In terms of the official rate, youth unemployment was at 52.4 percent in March 2018. This rises to 67.4 percent in terms of the expanded definition.<sup>43</sup> This situation may deteriorate further with the government apparently intending to cut the jobs of 30 000 public servants over the next three years.<sup>44</sup>
30. These figures indicate that unemployment in South Africa is unacceptably high and increasing. On its face, and without further explanation, this suggests that the government’s efforts in reducing unemployment *may* be failing and could amount to *retrogressive measures* in direct violation of its Covenant obligation in terms of the right to work.<sup>45</sup> In this Committee’s General Comment 18 on the

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<sup>38</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 18, The right to work, UN Doc. E/C.12/GC/18, 6 February 2006, (General Comment 18) paras 7-8.

<sup>39</sup> *Id.*, para 19.

<sup>40</sup> Gov SA Report (n 1), para 68.

<sup>41</sup> *Id.*, footnote 60.

<sup>42</sup> The distinction between “expanded” and “official” unemployment rates is defined by Statistics South Africa itself. See Statistics South Africa, *Conceptions and Definitions*, 2001, [http://www.statssa.gov.za/census/census\\_2001/concepts\\_definitions/concepts\\_definitions.pdf](http://www.statssa.gov.za/census/census_2001/concepts_definitions/concepts_definitions.pdf) (Accessed 22 August 2018).

<sup>43</sup> Statistics South Africa, *Quarterly Labour Force Survey*, July 2018, <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2018.pdf> p 1, Table A (Accessed 22 August 2018).

<sup>44</sup> Dineo Bendile, Paddy Harper & Govan Whittles “Bombshell plan to lay off 30 000 public servants”, *Mail & Guardian*, 10 August 2018, <https://mg.co.za/article/2018-08-10-00-bombshell-plan-to-lay-off-30000-public-servants> (Accessed 22 August 2018).

<sup>45</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The nature of States Parties’ obligations*, UN Doc. E/1991/23, 14 December 1990, (General Comment 3), para 9.

right to work, this Committee reiterates: “as with all other rights in the Covenant, retrogressive measures should in principle not be taken in relation to the right to work”.<sup>46</sup> Indeed this Committee indicates that States Parties are obliged to take “effective measures to increase the resources allocated to reducing the unemployment rate” and “implement plans to counter unemployment”.<sup>47</sup> Therefore, though an increase in the unemployment rate itself is not necessarily a retrogressive measure, it is a significant indicator to take into account in determining whether there have been retrogressive measures or conditions amounting to a violation of the right to work.

31. Moreover, this Committee has given specific guidance about the range of State obligations in terms of the right to work, none of which the Government of South Africa engages with in its report. This Committee is clear, for example, that the right to work places the following obligations on States Parties to the Covenant:

- a) States Parties must “recognize the right to work in national legal systems”;<sup>48</sup>
- b) States Parties must “adopt a national policy on the right to work”;<sup>49</sup>
- c) States Parties must then also “adopt a detailed plan for its realization”;<sup>50</sup> and
- d) States Parties must “adopt a national strategy, based on human rights principles aimed at progressively ensuring full employment for all”;<sup>51</sup>
- e) States must “undertake ... educational and informational programmes to instill public awareness on the right to work”.<sup>52</sup>
- f) States must “consider the adoption of specific legislative measures for the implementation of the right to work”.<sup>53</sup>

32. In addition to these obligations, this Committee noted that the “incorporation of international instruments setting forth the right to work into the domestic legal order, in particular the relevant ILO conventions” will “strengthen the effectiveness of measures taken to guarantee the right to work” and should be “encouraged”<sup>54</sup> because this would empower courts “to adjudicate violations of the core content of the right to work by directly applying obligations under the Covenant”.<sup>55</sup>

33. The right to work, as construed by this Committee, is broad in scope of application. In General Comment 18, this Committee is clear that the right to work “encompasses *all forms of work*, whether independent work or dependent wage-paid work” and also clearly acknowledges the particular vulnerability of workers in the informal economy noting that “people living in an informal economy do so for the most part because of the need to survive, rather than as a matter of choice” and have “no protection”.<sup>56</sup> This approach, which includes informal workers within the ambit of the protection of the right to work, is consistent with the International Labour Organization’s Decent Work Agenda which “literally applie[s] to all workers” in whether “in formal and informal employment”.<sup>57</sup>

34. In the South African context this is crucial. Informal workers are not included within the definition of “employee” in terms of South African labour law<sup>58</sup> and therefore receive very little protection in terms

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<sup>46</sup> General Comment 18 (n 38), para 21.

<sup>47</sup> Id, paras 26-27.

<sup>48</sup> Id, para 26.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id, para 41.

<sup>52</sup> Id, para 28.

<sup>53</sup> Id, para 38.

<sup>54</sup> Id, para 49.

<sup>55</sup> Id.

<sup>56</sup> Id, para 10.

<sup>57</sup> Gillian MacNaughton & Diane Frye “Decent Work, Human Rights and the Sustainable Development Goals”, *Georgetown Journal of International Law* (2016) Vol 47 (607), p 622.

<sup>58</sup> Labour Relations Act 66 of 1995, s 193 defines “employee” as:



of the *rights at work* (labour rights) protected by the Constitution.<sup>59</sup> The same is true of “temporary employees”, who despite a recent judgment of the Constitutional Court confirming the increased protection of temporary workers’ rights when they have been employed in this capacity for three months, *remain vulnerable* to significant human rights violations at the hand of “labour brokers” and their employers.<sup>60</sup>

35. For example, courts that have been called on to protect the rights of informal traders against arbitrary eviction and relocation; arbitrary confiscation of their goods; and more general protection of their right to trade have had to resort to securing these workers’ rights in terms of the right to dignity in the South African Constitution.<sup>61</sup> Both existing legislation (such as the Businesses Act) and the majority of by-laws governing informal trade predate the Constitution and South Africa’s ratification of the Covenant. The result is an over-emphasis on *policing* informal traders rather than enabling them to enjoy their rights to trade.<sup>62</sup>
36. Despite this context, in its report to this Committee, the Government of South Africa merely notes that though the “informal sector contributes greatly to the South African economy” it “remains largely unregulated”.<sup>63</sup> It appears to not appreciate the specific rights and obligations existing in terms of the Covenant for informal traders. Nor does it engage with the strong human rights standards set out in Recommendation 204 of the ILO “Concerning the Transition from the Informal to the Formal Economy” adopted in 2015.<sup>64</sup> Recommendation 204, for example, sets as a guiding principle “the effective promotion and protection of the human rights of all those operating in the informal economy” and the “fulfilment of decent work for all through respect for the fundamental principles and rights at work, in law and practice”.<sup>65</sup>
37. While acknowledging that the *right to work* is not included within the Constitution, the Government of South Africa fails in its report to analyze what new human rights obligations it may have as a result of its ratification of the Covenant, which clearly includes such a right. It therefore does not give this Committee any information about its compliance with its *specific legal obligations* as defined by this Committee in terms of the right to work.
38. In light of the above, the ICJ requests this Committee to address the following recommendations to the South African authorities:
- a) That the Government of South Africa accept that its Covenant obligations to realize the *right to work* exceed the protection of *rights at work* and take effective measures to implement these obligations;

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“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and  
(b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

<sup>59</sup> Constitution of the Republic of South Africa, s 23.

<sup>60</sup> Constitutional Court of South Africa, *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*, 26 July 2018.

<sup>61</sup> See generally, South African Local Government Association & Socio-Economic Rights Institute of South Africa, *Informal Trade In South Africa Legislation, Case Law and Recommendations for Local Government*, [http://www.seri-sa.org/images/SERI\\_SALGA\\_Informal\\_Trade\\_Jurisprudence\\_WEB.pdf](http://www.seri-sa.org/images/SERI_SALGA_Informal_Trade_Jurisprudence_WEB.pdf) (Accessed 22 August 2018).

<sup>62</sup> *Id.*

<sup>63</sup> Gov SA Report (n 1), para 72.

<sup>64</sup> International Labour Organisation, *Recommendation Concerning The Transition From The Informal To The Formal Economy*, 12 June 2015, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_377774.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_377774.pdf) (Accessed 22 August 2018), (Recommendation 204).

<sup>65</sup> Recommendation 204, p 8, Article III 7(e)-(f).

- b) That the Government of South Africa take legal and policy measures to ensure that *all* workers – whether temporary, permanent, informal or formal – enjoy the effective legal protection in terms of the right to work consistent with the Covenant, this Committee’s General Comment 18 and the Recommendation 204 of the ILO;
- c) That the Government of South Africa, in accordance with this Committee’s General Comment 18 take the following measures:
  - i) Clearly recognize and implement the right to work in law, through an appropriate constitutional amendment or, at a minimum, statute;
  - ii) Undertake educational and informational campaigns to promote public awareness of the right to work, and, in particular, the obligation to “adopt, as quickly as possible, measures aiming at achieving full employment”;
  - iii) Adopt a national policy on the right to work including a detailed plan for its realization;
  - iv) Adopt a national strategy on the right to work “based on human rights principles aimed at progressively ensuring full employment for all”; and
  - v) Initiate an appropriate legislative process through which Parliament considers “the adoption of specific legislative measures for the implementation of the right to work”.
- d) That the Government of South Africa undertake a comprehensive review of law – constitutional, statutory and administrative and policy standards on ESC rights to determine their consistency with its obligations in terms the right to decent work pursuant to Articles 6-8 of the Covenant;
- e) That the Government of South Africa, through the Office of the Chief Justice and the South African Judicial Education Institute ensure that judicial officers understand their constitutional obligations in terms of the right to work, as interpreted by this Committee, and prefer reasonable interpretations of South African law consistent with it; and
- f) That the Government of South Africa consult meaningfully and at regular periodic intervals with the South African Human Rights Commission, civil society organizations and research institutions in the process of better understanding its obligations in terms of ESC as a result of its ratification of the Covenant.

### **The right to an adequate standard of living (Article 11)**

39. As the Government of South Africa’s report indicates, the right to an adequate standard of living is not explicitly protected by the Constitution in a “standalone provision”.<sup>66</sup> Nevertheless, confirming the importance of this right, the Government of South Africa acknowledges that it “is understood that other socio-economic rights all impact on a person’s overall standard of living”<sup>67</sup> and that specific rights such as housing, food, water, sanitation and the environment, which form part of an adequate standard of living, are protected in South African law.
40. In its reporting on the right to an adequate standard of living, the Government of South Africa therefore focuses almost exclusively on reporting on these other specific ESC rights. It does however indicate that through the National Development Plan (NDP) it has made “a firm commitment to *achieving a minimum standard of living* which can be progressively realized through a multi-pronged strategy”.<sup>68</sup> Though the NDP itself does not define that “minimum standard of living”, it “provides a framework for the adoption of a minimum standard of living by society”.<sup>69</sup>
41. Generally, this Committee typically approaches the right to an adequate standard of living through assessment of the content of specific rights expressly enumerated or implied in the Covenant, such as the rights to housing, clothing food, water and sanitation. Nevertheless the right Covenant is broader, and includes the right in article 11(1) to “*the continuous improvement of living conditions*” which is not limited to these enumerated or implied rights.

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<sup>66</sup> Gov SA Report (n 1), para 96.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

42. The Government of South Africa notes “no political democracy can survive and flourish if the mass of our people remain in poverty, without land, without tangible prospects for a better life. Attacking poverty and deprivation must therefore be the first priority of a democratic government”.<sup>70</sup> The effect of the ratification of the Covenant is to ensure that this policy position – which has existed since the government’s very earliest Reconstruction and Development Programme (RDP) – is enforced by concrete international legal obligations. The RDP goes as far as listing as a “fundamental objective” an attempt to “to raise the standard of living”.<sup>71</sup>
43. This policy approach has been implicitly echoed through the jurisprudence of South African courts. In *Daniels v Scribante*, for example, the Constitutional Court held that “permitting an occupier living in circumstances as we have here to make improvements to her or his dwelling” in the absence of an explicit legislative right to do so serves “the twin-purpose *of bringing the dwelling to a standard that befits human dignity* and averting the indignity that the occupier might suffer as a result of the possible departure.”<sup>72</sup> Similarly, in *South African Informal Traders Forum* the Constitutional Court held that “the ability of people to earn money and support themselves and their families is an important component of the right to human dignity”.<sup>73</sup> Understood in their context, these and other similar decisions,<sup>74</sup> suggest that the right to dignity in the South African Constitution is consistent with and includes a broad right to an adequate standard living as is expressed in the Covenant.
44. Moreover, like these judgments, this Committee frequently refers to the right to an adequate standard of living in determining the content of other ESC rights. For example, this Committee in General Comment 18 discussed above, links dignity to work repeatedly, including by indicating that the “right of access to employment” must allow people to “live a life of dignity”.<sup>75</sup> Implementing this right is a “core obligation” of States Parties to the Covenant.<sup>76</sup> This Committee’s approach, which links dignity to an adequate standard of living is consistent with the Universal Declaration of Human Rights which declared: “everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection” (Article 23(1)).
45. This Committee has affirmed this interpretation of the Covenant in General Comment 19 on the right to social security by emphasizing that “benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant.”<sup>77</sup>
46. This Committee’s invocation of the right to an adequate standard of living in interpreting the content of the obligation of States in respect of Covenant rights is relevant to a range of measures reported on by the Government of South Africa. For example, the government reports, in terms of the right to just and

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<sup>70</sup> Id, para 19.

<sup>71</sup> Reconstruction and Development Programme (1994), [https://www.sahistory.org.za/sites/default/files/the\\_reconstruction\\_and\\_development\\_programm\\_1994.pdf](https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf), para 2.12.13, (Accessed 22 August 2018).

<sup>72</sup> Gov SA Report (n 1), para 34.

<sup>73</sup> Constitutional Court of South Africa, *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others*, 4 April 2014, para 31.

<sup>74</sup> See generally, War on Want, “The Living Wage: Winning the Fight For Social Justice”, September 2013, <https://waronwant.org/sites/default/files/The%20Living%20Wage%20-%20War%20on%20Want.PDF> (Accessed 22 August 2013).

<sup>75</sup> General Comment 18 para 31(a).

<sup>76</sup> Id.

<sup>77</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security, UN Doc E/C.12/GC/19, 4 February 2008, (General Comment 19), para 22.

favourable conditions of work, that a “national minimum wage” at a level of “R20 per hour adjusted to a monthly wage of approximately R3500” would “maximize benefits to the poor and minimize any possible disemployment effects”.<sup>78</sup> The report, however, makes no mention of the adequacy of such a minimum wage and the context of a right to an adequate standard of living.

47. It is arguable that the right to an adequate standard of living requires that minimum wages are “living wages” or wages capable of securing an adequate standard of living for the wage earners and their family.<sup>79</sup>
48. Indeed, this Committee has indicated specifically that States Parties’ national employment strategies should respect and protect the right to “employment with remuneration that enables workers and their families to enjoy an adequate standard of living as stipulated in article 7 (a) (ii) of the Covenant”.<sup>80</sup> Moreover, in its general comment 23 on “the right to just and favourable conditions of work” this Committee reinforces this approach indicating both that just remuneration must provide “all workers with *a decent living for themselves and their families*” and that wages “*must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant*” including “*an adequate standard of living*”.<sup>81</sup>
49. Ultimately the Committee is clear that Covenant’s wording of the right to work and rights at work are “designed to ensure that the article should *in no case limit efforts to improve remuneration to a level above*” minimum levels or standards of which the South African National Minimum Wage is an example.
50. In light of the above, the ICJ invites this Committee to address the following recommendations to the South African authorities:
  - a) That the Government realize each Covenant right through implementation of its general obligation to ensure the right to an adequate standard of living. To this end, they must ensure that *the levels* to which such rights are fulfilled *meet the requirements of an adequate standard of living*.
  - b) That the Government of South Africa facilitate the determination and adoption of a “minimum standard of living” as contemplated in the National Development Plan and ensure that such a standard meets the requirements of the right to an adequate standard of living;
  - c) That the Government of South Africa re-evaluate its determination of the National Minimum Wage and determine whether it is consistent with the right to an adequate standard of living;
  - d) That the Government of South Africa consider and initiate public debate on constitutional amendments to ensure consistency with the right to an adequate standard of living in the Covenant. Such an amendment should include the rights to clothing, sanitation, electricity, water and other basic services required to ensure an adequate standard of living;
  - e) That the Government of South Africa consult meaningfully and at regular periodic intervals with the South African Human Rights Commission, civil society organizations and academic sources in the process of implementing these recommendations and on the right to an adequate standard of living.

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<sup>78</sup> Gov SA Report (n 1), para 73.

<sup>79</sup> See generally, War on Want, “The Living Wage: Winning the Fight For Social Justice”, September 2013, <https://waronwant.org/sites/default/files/The%20Living%20Wage%20-%20War%20on%20Want.PDF> (Accessed 22 August 2013).

<sup>80</sup> General Comment 18, para 44.

<sup>81</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 23, The right to just and favourable conditions of work, E/C.12/GC/23, 27 April 2016, (General Comment 23), paras 7-9, 18.

## Disability and Covenant Rights (Articles 2, 6-8, 11 and 13)

51. In General Comment 5 on Persons with Disabilities this Committee highlighted the “central importance” of the Covenant to persons with disabilities.<sup>82</sup> This Committee defines discrimination against persons with disabilities to include “any distinction, exclusion, restriction or preference, *or denial of reasonable accommodation* based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.<sup>83</sup> This definition of discrimination as including a denial of reasonable accommodation has been reaffirmed in the UN Convention of the Rights of Persons with Disabilities, as defined in article 2 of the Convention as well as the Africa Disability Protocol.<sup>84</sup> South Africa is a party to both treaties.
52. This Committee reaffirms that “persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant” which may require “special treatment” resulting in an obligation on states to “take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability”.<sup>85</sup>
53. Attributing the absence of direct mention in the Covenant to disability to a “lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant”, this Committee draws on other, more recent treaties to expound the content of Covenant rights for persons with disabilities.<sup>86</sup> This Committee has recently reiterated this approach by referring to the Convention on the Rights of Persons with Disabilities<sup>87</sup> explicitly in its General Comment on “Non-discrimination in economic, social and cultural rights”.<sup>88</sup>
54. Overall, one of the key aims of the Convention on the Rights of Persons with Disabilities is to ensure that all persons with disabilities can enjoy all rights – including ESC rights – on an “equal basis”.<sup>89</sup> This includes recognition of the need to end “segregation from the community”<sup>90</sup> and move away from institutionalization<sup>91</sup> as required by social and human rights models of disability<sup>92</sup> consistent with the Convention in terms of an explicit right to “independent living”.<sup>93</sup>
55. This approach manifests in the Convention on the Rights of Persons with Disabilities’ approach to all ESC rights. The specific State obligations in terms of a range of ESC rights is therefore spelled out in detail in provisions, for example, on education (Article 24), health (Article 25), housing (Article 28), work and employment (Article 27), an adequate standard of living (Article 28), and social protection (Article 28).

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<sup>82</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities, UN Doc E/1995/22, 9 December 1994, February 2008, (General Comment 5), para 1.

<sup>83</sup> *Id.*, para 5.

<sup>84</sup> Africa Commission on Human and Peoples’ Rights, Africa Disability Protocol, Articles 1(d), (i), 3(2) [http://www.achpr.org/files/news/2016/04/d216/disability\\_protocol.pdf](http://www.achpr.org/files/news/2016/04/d216/disability_protocol.pdf) (Accessed 22 August 2018).

<sup>85</sup> General Comment 5, para 5.

<sup>86</sup> *Id.*, para 6.

<sup>87</sup> Convention on the Rights of Persons with Disabilities (CRPD), Article 2.

<sup>88</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in economic, social and cultural rights, UN Doc E/C.12/GC/20, 2 July 2009, (General Comment 20), para 28 and footnotes 17-19.

<sup>89</sup> Convention on the Rights of Persons with Disabilities (CRPD), preamble (e), (r); Articles 2, 7, 9, 19, 23, 24, 27 all refer explicitly to rights protection on an “equal basis”.

<sup>90</sup> Convention on the Rights of Persons with Disabilities (CRPD), Article 19(3).

<sup>91</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 5, Living independently and being included in the community, UN Doc CRPD/C/GC/5, 27 October 2017, paras 49-51.

<sup>92</sup> Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018), Equality and nondiscrimination, UN Doc CRPD/C/GC/6, 26 April 2018, paras 8-11.

<sup>93</sup> Convention on the Rights of Persons with Disabilities (CRPD), Article 19.

56. It is therefore incumbent upon States Parties to both the Covenant and the Convention on the Rights of Persons with Disabilities, such as South Africa, to ensure that their reporting to this Committee is conscious of the State's specific obligations with regard to the realization of ESC rights protected under the Covenant and the Convention on the Rights of Persons with Disabilities.
57. The report of the Government of South Africa makes only cursory reference to disability-specific rights, obligations and measures throughout the report.
58. With regard to the right to education, protected under article 13 of the Covenant, for children with disabilities, the Government of South Africa reports "significant progress" through "the implementation of the Policy on Inclusive Education as embodied in the Education White Paper 6 (2001) and the Policy on Screening, Identification, Assessment and Support (2014)". It adds that "the number of learners with disabilities enrolled in special schools has increased from 108 240 in 2011 to 119 972 in 2015" while "the number of children with disabilities enrolled in ordinary public schools has also increased from 80 000 in 2011 to 111 430 in 2014". The report, however omits any form of recognition of the following:
- a) That according to a report presented by the Department of Basic Education in Parliament it estimates that the number of children with disabilities who are "either out of school or in school without having been identified for additional support" is as high as 597 593;<sup>94</sup>
  - b) That the majority of learners with disabilities who do currently attend schools remaining in "segregated" special schools contrary to the Convention on the Rights of Persons with Disabilities' clear requirement that the right to "inclusive education" places an obligation on the State to ensure that "persons with disabilities *are not excluded from the general education system* on the basis of disability";<sup>95</sup>
  - c) That according to a report presented by the Department of Basic Education in Parliament, there are "extremely poor conditions in many special school hostels" and "a high rate of child abuse in special school hostels" in general;<sup>96</sup>
  - d) That in 2015 a fire killed three deaf learners and injured 23 who were locked into a special school hostel which did not have adequate safety and security standards, resulting in the South African Human Rights Commission condemning the state's failure to protect the human rights of children with disabilities;<sup>97</sup>
  - e) That other deaths by drowning and fires have been reported in special school hostels by non-governmental organizations' investigations into schools for visually impaired learners;<sup>98</sup> and
  - f) That those children with disabilities who do attend school most often do so without reasonable accommodation<sup>99</sup> and without basic learning materials such as braille and large print textbooks;<sup>100</sup> and

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<sup>94</sup> Department of Basic Education, Report on the Implementation of Education White Paper 6 on Inclusive Education—An Overview for the Period: 2013–2015 (2016), <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160308overview.pdf> (Accessed 22 August 2018), p 70; Silomo Khumalo and Timothy Hodgson, The right to basic education for children with disabilities, in F Veriava and others (eds) *Basic Education Rights Handbook* (2017), <http://section27.org.za/wp-content/uploads/2017/02/Chapter-5.pdf>, (Accessed 22 August 2018), p 105.

<sup>95</sup> Convention on the Rights Persons with Disabilities Articles 24(1), 2(a).

<sup>96</sup> Id.

<sup>97</sup> South African Human Rights Commission, Investigative Report: North West School For The Deaf, 31 January 2018, <https://www.sahrc.org.za/home/21/files/Investigative%20Report%20-%20North%20West%20School%20For%20The%20Deaf%20Final.pdf> (Accessed 22 August 2018).

<sup>98</sup> SECTION27, Left in the Dark: Failure to Provide Access to Quality Education to Blind and Partially Sighted Learners in South Africa, July 2015, <http://www.sancb.org.za/sites/default/files/S27-left-in-the-dark-2015-accessible.pdf> (Accessed 22 August 2018) (Left in the Dark), pp 12, 69.

<sup>99</sup>The Right to Education for Children with Disabilities Alliance, Initial statement to the United Nations Committee on the Rights of Persons with Disabilities: 9 th Pre Sessional Working Group, 15th March

g) That the timeline for the government's flagship policy document on inclusive education – Education White Paper 6 – expires in 2021 and there is no indication what policy/legal framework will replace it.

59. With regard to the right to work of persons with disabilities, the South African Human Rights Commission has estimated that “on average, eight in ten persons with disabilities are unemployed”.<sup>101</sup> Elsewhere the Commission has indicated that the employment rate for persons with disabilities is “extremely low, currently standing at 1%”.<sup>102</sup> This is an actively discriminatory context in which “social attitudes and stigmatization of persons with disabilities remain prevalent in modern-day South Africa”.<sup>103</sup> The Commission therefore concludes that South Africa “*has made limited progress more than 20 years into democracy*, with the continued widespread perpetuation of injustices, disempowerment and marginalization of persons with disabilities”.<sup>104</sup> The Government of South Africa's reports fails to address these serious concerns.

60. Another example is with regard to the right to housing of persons with disabilities. In its report to this Committee on the Rights of Persons with Disabilities, which will be considered by that Committee at its session August 2018, the Government of South Africa reports that a “total of 25 361 beneficiaries with disabilities applied and qualified for access to the housing subsidy between 2008 and March 2012”. Of this number, which is dramatically lower than expected given South Africa's disability prevalence of at least 7.5 percent of the population, it reports “*progress has been slow, with 163 beneficiaries obtaining the additional amount to cover reasonable accommodation measures*”.<sup>105</sup> This suggests a clear violation by South Africa of its obligation to ensure that housing provided by it is suitable for the needs of persons with disabilities in accordance with their rights.<sup>106</sup> Some persons with disabilities have gone as far as saying that living in a government-provided house is like “living in hell” for a person with a disability.<sup>107</sup> The Government of South Africa's report fails to address the right to housing in this context.

61. In light of the above, the ICJ requests this Committee to address the following recommendations to the South African authorities:

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2018, <http://www.included.org.za/wp-content/uploads/2018/03/WG-Statement-oral-final.pdf> (Accessed 22 August 2018).

<sup>100</sup> Left in the Dark (n 97).

<sup>101</sup> South African Human Rights Commission, Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa, 12 July 2018,

[https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017\\_18.pdf](https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf), p 32.

<sup>102</sup> South African Human Rights Commission, National Hearing on Unfair Discrimination in the Workplace, September 2017,

<https://www.sahrc.org.za/home/21/files/SAHRC%20-%20Unfair%20Discrimination%20in%20the%20Workplace%20Report%20-%20September%202017.pdf>, (Accessed 22 August 2018).

<sup>103</sup> Id, p 49.

<sup>104</sup> Id, p 53.

<sup>105</sup> Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention, Initial reports of State parties due in 2009: South Africa, 26 November 2014, CRPD/C/ZAF/1,

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2f1&Lang=en) (Accessed 22 August 2018)), para 329.

<sup>106</sup> National Council of Persons With Disabilities, “Inaccessible RDP housing for persons with disabilities in South Africa”, (7 May 2017), <https://www.youtube.com/watch?v=ynYgWdFAK3U> (Accessed 22 August 2018).

<sup>107</sup> Thamsanqa Mbovane, “RDP houses unfit for people with disabilities”, 19 July 2018, *Groundup* <https://www.groundup.org.za/article/rdp-houses-unfit-people-disability/> (Accessed 22 August 2018).

- a) That the Government of South Africa provide clear information to this Committee on its progress in adopting effective legal, policy and practical measures to ensure the realization of the ESC rights of persons with disabilities in respect of articles 2,6-8, 11 and 13 of the Covenant;
- b) That the government of South Africa indicate the measures that it intends to put in place to give effect to the Covenant right to education of children with disabilities:
  - i) Ensuring that all children with disabilities have access to schools *within the general education system*;
  - ii) Ensuring that all children with disabilities attend schools which can accommodate their learner needs;
  - iii) Ensuring that special school hostels are safe environments for children with disabilities so that they do not risk death, injury, abuse or another form of ill-treatment and degradation;
  - iv) Ensuring that children with visual impairments in particular have access to all prescribed learning materials in Braille and/or large print;
  - v) Ensuring that adequate measures are taken to ensure reasonable accommodations are made, which realistically and expeditiously render all schools accessible to children with disabilities; and
  - vi) Indicating what policy and/or legal framework consistent with the Covenant and the Convention on the Rights of Persons with Disabilities will replace Education White Paper 6 when it expires in 2021.
- c) That the Government of South Africa indicates what concrete measures it intends to take to ensure the realization of the right to work of persons with disabilities and the reduction of workplace and societal discrimination in terms of the right to work;
- d) That the Government of South Africa indicates what concrete measures it intends to take to ensure those who apply for specific accommodation in the form of disability-specific housing subsidies do not wait indefinitely to receive such assistance. Such measures should also indicate how the subsidies will allow for the effective enjoyment of the right to housing by persons with disabilities and how all housing facilities built by the government are designed consistently with the “universal design” requirements of the Convention on the Rights of Persons with Disabilities.
- e) That the Government of South Africa consult meaningfully and continuously with the South African Human Rights Commission, civil society organizations, research institutions and Disabled People’s Organizations in the process of better understanding its obligations in terms of ESC rights as a result of its ratification of the Covenant.

#### **Giving effect to of the Covenant in South African Domestic Law**

62. This Committee has indicated in its General Comment 9 on the Domestic Application of Covenant obligations “the Covenant does not stipulate the specific means by which it is to be implemented in the national legal order”. Nevertheless, “although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide” this Committee is clear that “the means used should be appropriate in the sense of producing results *which are consistent with the full discharge of its obligations by the State party*”.<sup>108</sup>
63. The Government of South Africa acknowledges that the domestication of the Covenant will require the enactment of national legislation. However, it provides no information as to the measures it will pursue to ensure the full implementation of the Covenant in the domestic legal order.<sup>109</sup>
64. The paucity of information provided by the Government of South Africa in this regard is regrettable and complicates this Committee’s task of determining whether the measures taken by the Covenant comply with South Africa’s obligations. This Committee itself, for its part, has indicated that the “means chosen” by a particular state to domestic Covenant obligations will be “subject to review as part of this Committee’s examination of the State party’s compliance with its obligations under the

<sup>108</sup> General Comment 9, para 5

<sup>109</sup> Gov SA Report (n 1), paras 35-7.



Covenant”<sup>110</sup> and it “strongly encourages formal adoption or incorporation of the Covenant in national law”.<sup>111</sup>

65. This Committee therefore provides the following guiding principles to States Parties in determining which means may suffice:<sup>112</sup>
- a) Means taken to give effect to the Covenant in the domestic legal order must be “adequate to ensure fulfilment of the obligations under the Covenant”;
  - b) Means taken “need to ensure justiciability is relevant when determining the best way to give domestic legal effect to Covenant rights”;
  - c) Means taken should be determined in light of “means which have proved to be most effective in the country concerned in ensuring the protection of other human rights” and “compelling justification” is required when the means chosen “differ significantly from those used in relation to other human rights treaties”.
  - d) Means taken should be determined taking into account the fact that this Committee regards the incorporation of Covenant provisions in domestic law as “desirable” because “direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts”.<sup>113</sup>
66. In light of the above, the ICJ requests this Committee to address the following recommendations to the South African authorities:
- a) That the Government of South Africa make clear, time bound commitments to a process which will result in the **full incorporation of the Covenant** into South African law;
  - b) That the Government of South Africa follow the principles set out by this Committee in its General Comments so as to ensure that its incorporation of the Covenant complies fully with its Covenant obligations;
  - c) That in the incorporation process, specific attention is paid to the Government of South Africa’s obligations in terms of rights obligations in the Covenant, which are not reflected elsewhere in South African law, including the right to work.
  - d) That in the incorporation process, specific attention is paid to the Government of South Africa’s obligations to realize the Covenant rights of persons with disabilities; and
  - e) That the Government of South Africa **consult meaningfully and continuously** with the South African Human Rights Commission, civil society organizations and research institutions in the incorporation process.

### **Ratification of the Optional Protocol to the Covenant**

67. The report of the Government of South Africa simply notes without any further explanation: “the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has not yet been acceded to **and is receiving attention**”.<sup>114</sup>
68. At present there appear to be no obstacles to the ratification of the Covenant and others, including those who have made submissions to this Committee, have made compelling cases in detail for South Africa’s ratification of the Optional Protocol.<sup>115</sup> ESC rights, including those in the Covenant, are

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<sup>110</sup> General Comment 9, para 5.

<sup>111</sup> Id, para 8.

<sup>112</sup> Id, para 7.

<sup>113</sup> Id.

<sup>114</sup> Gov SA Report (n 1), para 1, footnote 2.

<sup>115</sup> Francois Viljoen & Nicholas Arago “An Argument For South Africa's Accession To The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights In The Light Of Its

already fully justiciable in South African courts. The ratification of the Protocol, which would provide for the international justiciability of ESC rights and layer the range of effective remedies available to those whose ESC rights are violated, is therefore desirable.

69. In light of the above, the ICJ requests this Committee to address the following recommendations to the South African authorities:

- a) That the Government of South Africa make *clear, time-bound commitments to a process which will result in the ratification of the Optional Protocol* to the International Covenant on Economic, Social and Cultural Rights;
- b) That the Government of South Africa *consult meaningfully and continuously* with the South African Human Rights Commission, civil society organizations and research institutions in the ratification process.

### **Declaration on the right to education**

70. The single declaration that the Government of South Africa has entered upon its ratification of the Covenant is with regard to its obligations in terms of the right to education. The declaration reads as follows:

“The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2) (a) and Article 14, within the framework of its National Education Policy and available resources.”

71. This declaration appears to explicitly aim to respond to decisions of the Constitutional Court that have described the right to basic education in particular as “unqualified” and therefore “immediately realizable”.<sup>116</sup>

72. In South Africa, the entry of this declaration has been criticized by human rights organizations, who expressed “deep concern” about the declaration explaining: “policy should be drawn up to comply with the constitutional right, not the other way around. The declaration therefore undermines the Constitution”.<sup>117</sup> South Africa’s declaration, according to these organizations, is a “deliberate attempt” by the government to “water down its commitment to ensure access to quality and equal education for all learners” in the face of the crisis in South Africa’s education system.<sup>118</sup>

73. Furthermore, in its submission to this Committee on South Africa’s first country report, the South African Human Rights Commission indicated that it was concerned by the declaration. The Commission has therefore requested that this Committee recommend that the government provide “information on the possible withdrawal of the declaration entered under Articles 13 and 14 of the ICESCR”.<sup>119</sup>

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Importance And Implications” *Potchefstroom Electronic Law Journal* (2014) Vol 17 No 6 <http://www.scielo.org.za/pdf/pej/v17n6/10.pdf> (Accessed 22 August 2018).

<sup>116</sup> Constitutional Court of South Africa, *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*, 11 April 2011.

<sup>117</sup> SECTION27, Equal Education, Centre for Child Law, Legal Resources Centre, Equal Education Law Centre, “Education declaration mars ICESCR ratification”, 21 January 2015 <https://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/> (Accessed 22 August 2018).

<sup>118</sup> *Id.*

<sup>119</sup> South African Human Rights Commission, *National Human Rights Institution Report to the United Nations Committee on the Economic, Social and Cultural Rights*, August 2017, [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT\\_CESCR\\_IFL\\_ZAF\\_28910\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_IFL_ZAF_28910_E.pdf) (Accessed 22 August 2018), paras 4, 12.1.

74. While the Vienna Law on the Convention on the Law of Treaties prohibits reservations that are “incompatible with the object and purpose of the treaty”,<sup>120</sup> it should be emphasized that South Africa entered *only a declaration, and not a reservation, meaning that it is without legal effect*. South Africa makes only passing reference to the declaration in its report without explaining the reason for it or its consistency with the objects and purpose of ICESCR.<sup>121</sup>
75. South Africa’s declaration, while it may carry little or no legal effect, risks engendering a significant amount of confusion about the nature of the states’ obligations in terms both international and South African constitutional law. As a matter of both international human rights law *and* South African law, at least some aspects of the right to education are arguably of “immediate” effect, giving rise to “immediate obligations”. In terms of the Covenant, as interpreted by this Committee, though States Parties’ “primary” obligation is to take progressive measures to fully realize Covenant rights, all Covenant rights include aspects that are “immediately realizable”.
76. While it is unclear what the intended effect of such a declaration will be on the Government of South Africa’s understanding of the nature of South Africa’s obligations in terms of the Covenant more generally, the fact that it has been entered is concerning. It is also unclear whether the intent is to affirm that the right to education is only “progressively realizable” while, all other Covenant rights create certain immediate obligations for the Government of South Africa. This creates an unnecessary risk of repeated and protracted litigation to clarify this confusion as well as an unnecessary risk that the government falls short of its obligations in terms of the right to education under article 13 of the Covenant and South African law.
77. In light of the above, the ICJ invites this Committee to address the following recommendations to the South African authorities:
- a) That this Committee clarify to South Africa its “immediate” and “progressive” obligations in terms of the Covenant; and
  - b) That this Committee clarify the legal effect – if any – of South Africa’s declaration and its consistency with the provisions, objects and purposes of the Covenant.

## **Conclusion**

78. The ICJ thanks this Committee for the opportunity to make these submissions, which are made in a spirit of co-operation and with the intention of improving the Government of South Africa’s efforts to ensure that all ESC rights are respected, protected promoted and fulfilled. The ICJ hopes that these submissions may assist the Government of South Africa in reporting to this Committee in the future. Further clarification and information is available upon request.

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<sup>120</sup> Vienna Convention on the Law of Treaties, Article 19(c).

<sup>121</sup> Gov SA Report (n 1), para 139.