



UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
64th Session of the UN Committee on Economic, Social and Cultural Rights
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INTERNATIONAL COMMISSION OF JURISTS' ORAL SUBMISSION TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON **SOUTH AFRICA'S** INITIAL PERIODIC REPORT UNDER ARTICLES 16 AND 17 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1 October 2018

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

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A. INTRODUCTORY COMMENTS

In 2018, amidst heated political contestations about the continued and urgent need for “economic transformation” to deal with the “triple challenges” of “poverty, inequality and unemployment”, the government adopted what the South African Human Rights Commission has described as a “necessary ... programme of radical socio-economic transformation”.¹ Crucially the Commission highlights the need for this economic programme to be understood and implemented consistently with South African and international human rights standards.

Poverty remains high and South Africa is consistently one of the most unequal societies in the world. Crucial context to the rights to work and an adequate standard of living are the high and increasing unemployment rates. As of July 2018 the “expanded” definition of unemployment including “discouraged workers” sat at 37.2% with approximately 100 000 jobs lost the preceding three months. Youth unemployment, which measures unemployment among those under the age of 25, was even higher, estimated at 67.4%.²

Overall, despite these dire circumstances, from Government of South Africa of South Africa’s report,³ it appears that the government has not understood its assumption of legal obligations in terms of the Covenant in 2015 to increase, alter or nuance the nature and content of its human rights commitments and obligations. This is particularly clearly illustrated by its reporting on the right to work which focuses, in large part, on its obligations in terms of rights at work and does not engage with this Committee’s interpretations of the right to work.

B. RECOMMENDATIONS

The ICJ requests that this Committee recommend that the Government of South Africa:⁴

1. Accept that its Covenant obligations to realize the right to work exceed the present protections of rights at work and take effective measures to implement these obligations;
2. Take legal and policy measures to ensure that all workers – whether temporary, permanent, informal or formal – enjoy effective legal protection in terms of the right to work consistent with the Covenant, this Committee’s General Comment 18 and Recommendation 204 of the ILO;
3. In accordance with this Committee’s General Comment 18 take the following measures:
 - a. Clearly recognize and implement the right to work in law, through an appropriate constitutional amendment or, at a minimum, statute;
 - b. 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”;
 - c. Adopt a national policy on the right to work including a detailed plan for its realization;
 - d. Adopt a national strategy on the right to work “based on human rights principles aimed at progressively ensuring full employment for all”;
 - e. Initiate an appropriate legislative process through which Parliament considers “the adoption of specific legislative measures for the implementation of the right to work”;
 - f. Undertake a comprehensive review of law and policy relating to work to determine their consistency with its obligations in terms the right to decent work pursuant to Articles 6-8 of the Covenant; and
 - g. Through the Office of the Chief Justice and the South African Judicial Education Institute ensure that judicial officers understand their obligations in terms of the right to work, as interpreted by this Committee, and prefer reasonable interpretations of South African law consistent with it,

In addition, the ICJ notes that in this Committee's General Comments 18 and 23 on the right to work that this Committee has consistently clarified that:

1. The right to work is a right to *decent* work; and
2. The right to work requires access to work capable of providing workers and their families with the adequate standard of living.

The ICJ therefore invites this Committee to recommend that the Government of South Africa:

1. Facilitates 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;⁵ and
2. Re-evaluates its determination of the National Minimum Wage and determines whether it is consistent with the right to an adequate standard of living. Such re-evaluation should also reconsider whether the National Minimum Wage's exclusion of informal workers and differential and inferior treatment of farmworkers and domestic workers complies with the government's obligations in terms of the rights to work and an adequate standard of living.

C. CONCLUSION

The ICJ's recommendations to this Committee must be understood in the social, political and economic context of post-apartheid South Africa, just over 25 years after South Africa's constitutional and democratic transition in 1994. This transition, as former president Nelson Mandela famously captured, was characterized by the attitude of the majority of the countries' population's position that:

"we do not want freedom without bread, nor do we want bread without freedom ... A simple vote without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanize people. It is to create an appearance of equality and justice, while by implication socio-economic inequality is entrenched."⁶

In the terms of today's public discourse, the Constitution like the Covenant, aims at ensuring that political freedoms are accompanied by economic freedoms. Such economic freedoms include what the Universal Declaration on Human Rights calls the "freedom from want".⁷ At present, the unemployed and the inadequately employed, which currently represent the majority of South Africans, cannot be said to be fully enjoying "freedom from want" or economic freedom.

To avoid the protection of political freedoms in South Africa from becoming seen as, in Mandela's words, "a smokescreen to obscure the deep underlying forces which dehumanize people", this Committee should clearly direct the government's attention to *its specific and detailed obligations* in terms of the rights *to* work and an adequate standard of living.

As the Constitutional Court acknowledged in its very first judgment on socio-economic rights in 1997:

"We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."⁸

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.

¹ South African Human Rights Commission "Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa" (2018)

https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf.

² Statistics South Africa "Quarterly Labour Force Survey" (July 2018)

<http://www.statssa.gov.za/publications/P0211/P02111stQuarter2018.pdf> p 1, Table A. 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.

³ 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 (available at

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en.

⁴ Full references for this section are available in the ICJ's full written submission to the Committee:

"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" (31 August 2018)

<https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf>.

⁵ National Planning Commission "National Development Plan 2030: Our Future Make it Work"

http://www.dac.gov.za/sites/default/files/NDP%202030%20-%20Our%20future%20-%20make%20it%20work_0.pdf.

⁶ Nelson Mandela on the occasion of the ANC's Bill of Rights Conference (1991) in "A Bill of Rights for a Democratic South Africa", at p12.

⁷ UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948)

<http://www.refworld.org/docid/3ae6b3712c.html>.

⁸ *Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) <http://www.saflii.org/za/cases/ZACC/1997/17.html>.