

## **International Commission of Jurists**

### **Draft Briefing Note: Non-citizens rights to work in South Africa**

*19 February 2020*

“How our societies treat migrants will determine whether we succeed in building societies based on justice, democracy, dignity and human security for all.”<sup>1</sup>

**- Navanethem Pillay,  
Former UN High Commissioner for Human Rights**

#### **A. Introduction**

1. According to the United Nations,<sup>2</sup> as of 2019, the number of international migrants worldwide was nearly 272 million, up from 221 million in 2010 and 174 million in 2000. Of the 24 million international migrants in sub-Saharan Africa, an estimated 68.2% are of working age (between 20 and 64 years old).<sup>3</sup> As of 2017, approximately 29 million (an estimated 10.6%) of international migrants were refugees or asylum seekers of which 5.9 million were in sub-Saharan Africa.<sup>4</sup> sub-Saharan Africa hosts the largest number of migrants below the age of 20, with 27.3% of all international migrants being below this age.
2. In a 2010 report to the United Nations Economic and Social Council, the United Nations High Commissioner for Human Rights observed that:

“Migrants around the world are particularly vulnerable to violations of their economic, social and cultural rights. They are often denied access to public health care, adequate housing and essential social security... In some cases, they will avoid seeking services for fear of exposure of their status. Migrants are particularly vulnerable because they are outside the legal protection of their countries of nationality. Moreover, as strangers to a society, migrants are often unfamiliar with the national language, laws and practice, and can lack familiar social

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<sup>1</sup> Address by Ms Navanethem Pillay, United Nations High Commissioner for Human Rights, at the Global Forum on Migration and Development/Civil Society Days, Puerto Vallarta, Mexico, 8 November 2010.

<sup>2</sup> United Nations Department of Economic and Social Affairs “International Migration 2019” available at: [https://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/MigrationStock2019\\_Wallchart.pdf](https://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/MigrationStock2019_Wallchart.pdf).

<sup>3</sup> Id.

<sup>4</sup> Id.

networks. This makes them less able than others to know and assert their rights.”<sup>5</sup>

3. Though estimates vary, the most credible information available appears to indicate that there are approximately 4 million foreign born persons living in South Africa.<sup>6</sup> As a percentage of population, notwithstanding frequent claims that South Africa is “overrun by foreigners”, this figure encompassing all migrants in South Africa is consistent with global migration trends.<sup>7</sup> Estimates indicate that only 4% of South Africa’s working population is made up of international migrants (i.e. non-nationals).<sup>8</sup> Despite this, it is commonly thought that “foreigners are stealing” South African’s jobs.
4. In South Africa, as is the case around the world, the presence of migrants and their participation in society is matter of significant public contestation. Such debates seldom happen with sufficient grounding in human rights law – whether domestic or international. As the ICJ has noted in its *Practitioners Guide on Migration and International Human Rights Law*:

“Migration is a highly charged and contested political issue in most destination States. Control of national borders is seen as an essential aspect of the sovereign State. National political debates on migration or migrants can be a flashpoint for political and social anxieties about security, national identity, social change and economic uncertainty. These political battles are also manifested in national law, which sets the framework within which migrants’ human rights are threatened. States adopt increasingly restrictive rules, often fuelled by popular hostility to immigrants. Such policies and laws, restricting legal migration, often have the effect of increasing the proportion of undocumented migrants, whose vulnerability to exploitation and abuse is acute. There are therefore essential interests at stake for both the individual and the State.”<sup>9</sup>

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<sup>5</sup> Report of the United Nations High Commissioner for Human Rights (1 June 2010) E/2010/89 available at:

[https://www.ohchr.org/Documents/Issues/MHR/E-2010-89\\_en.pdf](https://www.ohchr.org/Documents/Issues/MHR/E-2010-89_en.pdf).

<sup>6</sup> See for example: R Maluleke “Statistician-general clarifies South Africa’s migrant estimates” (17 October 2018) *Africa Check* available at:

<https://africacheck.org/2018/10/17/comment-statistician-general-clarifies-south-africas-migrant-estimates/>.

<sup>7</sup> M Keller & C Manicom “Reporting On Migration In South Africa: A Guide for Journalists and Editors” (October, 2019) available at:

[http://www.migration.org.za/wp-content/uploads/2019/10/Migration-Journalist-Guide\\_final-hi-res.pdf](http://www.migration.org.za/wp-content/uploads/2019/10/Migration-Journalist-Guide_final-hi-res.pdf), p 8.

<sup>8</sup> K Wilkinson “Are foreigners stealing jobs in South Africa?” (17 April 2015) *Africa Check* available at: <http://africacheck.org/2015/04/17/analysis-are-foreigners-stealing-jobs-in-south-africa/>.

<sup>9</sup> International Commission of Jurists “Migration and International Human Rights Law:

5. This briefing note provides some guidance on the international human rights law protections enjoyed by international migrants in the South African context. The ICJ produced this briefing note in consultation with the Socio-Economic Rights Institute of South Africa, Lawyers Human Rights and WIEGO.
6. It is best read with the ICJ's *Practitioners Guide on Migration and International Human Rights Law* and the ICJ's Principles on *the Role of Judges and Lawyers in Relation to Refugees and Migrants*. Though the latter principles focus on the role of the judiciary and lawyers, the principles help clarify legal standards. This is useful to legislators, executive officials, all other persons exercising legal or de facto authority, civil society organizations, human rights defenders and of course migrants themselves.

## **B. Definitional Issues: "Migrants" as Non-Citizens**

7. Although the meaning of "migrant" is broad and somewhat unclear, a helpful definition of "migrant worker" is provided by the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*: "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".<sup>10</sup> It is immediately apparent that this definition does not distinguish between "formal" or "informal" workers or work.
8. Migrants, in general, include a broad range of persons including those described in terms of domestic legal systems as "legal", "illegal", "regular" and "irregular", or "documented" and "undocumented". In General Comment 2, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families indicated:

"the term 'in an irregular situation' or 'nondocumented' is the proper terminology when referring to [migrant workers'] status. The use of the term 'illegal' to describe migrant workers in an irregular situation is inappropriate and should be avoided as it tends to stigmatize them by associating them with criminality."<sup>11</sup>

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A Practitioners' Guide" <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>, p 36.

<sup>10</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art 2(1).

<sup>11</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families "General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families" (28 August 2013) CMW/C/GC/2 available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=C MW%2fC%2fGC%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=C MW%2fC%2fGC%2f2&Lang=en), para 4.

9. This has been confirmed as the preferable terminology in a report of the United Nations Office of the High Commissioner for Human Rights, which, among other things, notes pointedly that "words matter".<sup>12</sup>
10. Migrant itself is not an exact legal term. It can probably be well explained in plain language as "a person who is moving or has moved away from their habitual place of residence, either internally within a country, or internationally across country borders".<sup>13</sup>
11. A range of legal statuses is relevant to discussions about migrants' rights in South Africa including: "citizen", "permanent resident", "asylum seeker", "refugee" and "stateless" persons. Whatever the domestic legal status of particular non-nationals or non-citizens in South Africa, as persons residing within or present in South Africa, they enjoy the protection of a vast array of constitutional rights that apply to "everyone". The same is true in terms of international human rights law.<sup>14</sup>
12. Generally, international law does not prescribe to states how to determine who qualifies or does not qualify for citizenship status.<sup>15</sup> This is, of course, subject to some principles restricting the manner in which states may allocate citizenship, including the prohibition of discrimination and the obligation to not leave individuals stateless. All of the categories of migrants referred to above have in common that they are non-citizens. Though the term "migrant" is not exhaustive of the entire category of non-citizens, many of the challenges faced by migrants in vindicating their human rights are faced by all non-citizens – whether they are migrants or not. As an example, stateless persons and persons who might qualify for citizenship but have simply have been unable to acquire birth certificates or other relevant documentation face serious challenges in accessing their ESCR.<sup>16</sup>

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<sup>12</sup> Office of the United Nations High Commissioner for Human Rights "The Economic, Social And Cultural Rights Of Migrants In An Irregular Situation" (2014) available at: [https://www.ohchr.org/Documents/Publications/HR-PUB-14-1\\_en.pdf](https://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf), p 5.

<sup>13</sup> M Keller & C Manicom "Reporting On Migration In South Africa: A Guide for Journalists and Editors" (October, 2019) available at: [http://www.migration.org.za/wp-content/uploads/2019/10/Migration-Journalist-Guide\\_final-hi-res.pdf](http://www.migration.org.za/wp-content/uploads/2019/10/Migration-Journalist-Guide_final-hi-res.pdf), p 3.

<sup>14</sup> International Commission of Jurists "Principles on the Role of Judges and Lawyers in Relation to Refugees and Migrants" (May 2017) available at: <https://www.icj.org/wp-content/uploads/2017/07/Universal-Refugees-Migrants-Principles-Publications-Report-Thematic-Report-2017-ENG.pdf>, see Principle 2.

<sup>15</sup> Office of the United Nations High Commissioner for Human Rights "The Rights of Non-citizens" (2006) available at: <https://www.ohchr.org/Documents/Publications/noncitizensen.pdf>, p 5.

<sup>16</sup> See, as examples: Lawyers for Human Rights "Childhood Statelessness in South Africa" (2016) available at [https://www.lhr.org.za/sites/lhr.org.za/files/childhood\\_statelessness\\_in\\_south\\_africa.pdf](https://www.lhr.org.za/sites/lhr.org.za/files/childhood_statelessness_in_south_africa.pdf); Lawyers for Human Rights (2013) available at: <https://www.lhr.org.za/sites/lhr.org.za/files/131615558-statelessness-and-nationality-in-south-africa.pdf>.

13. Some of the international human rights law standards drawn on in this briefing note use the word “migrant”. The ICJ notes that, in principle, they could just as easily apply to the broader category of non-citizens.
14. As these varied notions suggest, in South Africa, as elsewhere, there is no specific or single reason why migration and forcible displacement, including across international borders, occur. With respect to migration, the ICJ has noted: “The reasons why people migrate are varied, complex, and subject to change; and the people who migrate are not easily classifiable—they come from a range of circumstances and backgrounds”.<sup>17</sup> Furthermore, migrants may fall under more than one “category” of migrant at the same time or their legal status may change over time.
15. Similarly, as South African jurisprudence suggests, there is no specific or single reason why certain persons find themselves in the position of non-citizens. The statuses of “migrant” or “non-citizen” are consistent with a wide range of social circumstances, contexts and realities. Despite this, it remains common for non-citizens to face poverty and discrimination in access to human rights including ESCR.

### C. “Everyone” and Human Rights

“Human rights are rights to which all persons, without exception, are entitled. Persons do not acquire them because they are citizens, workers, or have any other status.”<sup>18</sup>

**- International Commission Jurists: *Practitioners Guide on Migration and International Human Rights Law***

“All refugees and migrants are entitled to the full range of internationally-recognized human rights, excepting any particular rights that international law explicitly recognizes only in relation to citizens or nationals.”<sup>19</sup>

**- International Commission Jurists: *Principles on the Role of Judges and Lawyers in Relation to Refugees and Migrants***

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<sup>17</sup> International Commission of Jurists “Migration and International Human Rights Law: A Practitioners’ Guide” <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>, p 39.

<sup>18</sup> Id, p 43.

<sup>19</sup> International Commission of Jurists “Principles on the Role of Judges and Lawyers in Relation to Refugees and Migrants” (May 2017) available at: <https://www.icj.org/wp-content/uploads/2017/07/Universal-Refugees-Migrants-Principles-Publications-Report-Thematic-Report-2017-ENG.pdf>, Principle 1.

16. At the most general level, in terms of international human rights law, **all** human rights are applicable to “everyone”. This includes non-citizens of all kinds including migrants. The Universal Declaration of Human Rights is clear that “Everyone is entitled to all the rights and freedoms set forth in this Declaration” irrespective of “national or social origin” and “birth or other status”.<sup>20</sup> It also establishes the “freedom from fear and want” and protection of human dignity as one of the bases of international human rights law.
17. The International Covenant on Economic, Social and Cultural Rights in its Preamble affirms from the outset that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby *everyone* may enjoy his economic, social and cultural rights”.<sup>21</sup> Affirming the prohibition on discrimination on the basis of nationality, ICESCR repeatedly uses the word “everyone” to describe the holders of specific ESCR and does not make any distinction between the ESCR of citizens and migrants.
18. This is consistent with the general approach of core international human rights instruments: that all international human rights are enjoyed by all people irrespective of citizenship or migration status.<sup>22</sup>

The United Nations Human Rights Committee confirmed this as early as 1986 by indicating that: “the rights set forth in the Covenant [on Civil and Political Rights] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness”.<sup>23</sup> The Committee clarifies that though the Covenant “does not recognize the right of [migrants] to enter or reside in the territory of a State party” once migrants have so entered “they are entitled to the rights set out in the Covenant”.<sup>24</sup>

19. The protection of the ESCR of “everyone” and the “equal and inalienable rights of all” are reaffirmed by the Committee on Economic, Social and Cultural Rights in General Comment 20 on “Non-

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<sup>20</sup> Universal Declaration of Human Rights, Article 2.

<sup>21</sup> International Covenant on Economic, Social and Cultural Rights, Preamble.

<sup>22</sup> The one clear exception, which only fortifies the strength of this general rule is the International Covenant on Civil and Political Rights, Art 25 which reads:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.”

<sup>23</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <https://www.refworld.org/docid/45139acfc.html>, para 1.

<sup>24</sup> *Id.*, paras 5-6.

discrimination in economic, social and cultural rights".<sup>25</sup> Turning specifically to the prohibition of discrimination on the basis of nationality, the Committee explains the meaning of "everyone" in the following terms:

"The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. **The Covenant rights apply to everyone including non-nationals**, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, **regardless of legal status and documentation.**"<sup>26</sup>

20. In 2018, the United Nations High Commissioner for Human Rights issued *Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations*.<sup>27</sup> The principles and guidelines include detailed emphases by States on fulfilling their international human rights law obligations towards migrants, including with regard to various ESCR, such as the rights to an adequate standard of living, health, education and family.

21. The Global Migration Group,<sup>28</sup> an interagency group of United Nations and other international agencies has reiterated "the fundamental rights of all persons, regardless of their migration status" as including the full range of ESCR protected by ICESCR.<sup>29</sup>

22. In the African regional context, the African Charter also entrenches almost all rights to "every individual". This includes ESCR, such as

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<sup>25</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <https://www.refworld.org/docid/4a60961f2.html>.

<sup>26</sup> Id, para 30. Emphasis added.

<sup>27</sup> Report of the United Nations High Commissioner for Human Rights "Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations" (2018) available at: <https://digitallibrary.un.org/record/1472491?ln=en>.

<sup>28</sup> The Global Migration Group (GMG) is an inter-agency group bringing together heads of the International Labour Organisation (ILO), the International Organisation for Migration (IOM), the Office of the High Commissioner for Human Rights (OHCHR), the UN Conference on Trade and Development (UNCTAD), the UN Development Programme (UNDP), the UN Department of Economic and Social Affairs (UNDESA), the UN Education, Scientific, and Cultural Organisation (UNESCO), the UN Population Fund (UNPF), the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNCF), the UN Institute for Training and Research (UNITR), the UN Office on Drugs and Crime (UNODC), the World Bank and UN Regional Commissions.

<sup>29</sup> Global Migration Group "Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation" (2010) available at: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E>.

property, work, health, education and family.<sup>30</sup> In interpreting the African Charter, as early as 1997, the African Commission on Human and people's rights indicated the following:

"Article 2 of the Charter emphatically stipulates that 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' ***This text obligates States Parties to ensure that persons living on their territory, be they their nationals or non nationals, enjoy the rights guaranteed in the Charter.***"<sup>31</sup>

23. The Inter-American Court on Human Rights has taken a similar approach.<sup>32</sup>

24. Ultimately, as the ICJ concludes: "As with civil and political rights, economic, social and cultural rights are universally applicable, to citizens and to non-citizens, including all categories of migrants."<sup>33</sup>

25. States therefore carry the same obligations to respect, protect and fulfill ESCR of all non-citizens including migrants as they do for any other person. These standards terms are spelled out clearly in international human rights law by various treaties including ICESCR and interpretation's of such treaty's but treaty bodies, through, for example, CESCR's General Comments and Concluding Observations to State parties.

26. The ICJ's recently published *Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa* draws together international, regional and domestic standards relating to the enforcement of ESCR in South Africa.<sup>34</sup> It provides a good starting point for the understanding of South Africa's legal obligations relating to realizing ESCR for all people living in South Africa, including non-citizens such as migrants. Simply put, and as a general matter,

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<sup>30</sup> African Charter on Human and Peoples Rights, Articles 14-18.

<sup>31</sup> Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on the juridical condition and rights of undocumented migrants (17 September 2003) available at: <http://hrlibrary.umn.edu/africa/comcases/Comm159-96.pdf>.

<sup>32</sup> Id, paras. 109, 133 and 134.

<sup>33</sup> International Commission of Jurists "Migration and International Human Rights Law: A Practitioners' Guide" <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>, p 227.

<sup>34</sup> International Commission of Jurists "A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa" (August 2019) available at <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>, p 42-44.

"States may not draw distinctions between citizens and non-citizens as to social and cultural rights".<sup>35</sup>

27. The approach of the full application of all ESCR to non-citizens is consistent with the Constitutional Court's interpretation of the word "everyone" in the South African Constitution. From a very early stage in its jurisprudence the Court confirmed that the Constitution prohibited discrimination based on citizenship as analogous prohibited ground though it is not listed in the constitutional text. It came to this conclusion unanimously and "with no doubt" because "foreign citizens are a minority in all countries, and have little political muscle".<sup>36</sup> In *Lawyers for Human Rights* the Court held that:

"Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why 'everyone' in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so."

28. The Constitutional Court has subsequently confirmed this approach to the meaning of "everyone" in cases relating to ESCR, including *Khosa* and *Dawood*.<sup>37</sup> In *Watchenuka* the Court confirmed this approach more generally, albeit in the context of the rights to work and education of an asylum seeker concluding that:

"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights."<sup>38</sup>

29. This general position was more recently confirmed by the Eastern Cape High Court, albeit in the context of a decision on affirming the right to basic education of "undocumented" children some of whom were children born of South African parents and others of foreign

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<sup>35</sup> Office of the United Nations High Commissioner for Human Rights "The Rights of Non-citizens" (2006) available at:

<https://www.ohchr.org/Documents/Publications/noncitizensen.pdf>, p 12.

<sup>36</sup> See *Larbi-Odam & Others v Member of the Executive Council for Education* (North-West Province) & another [1997] ZACC 16; 1998 (1) SA 745, para 19 (in the context of permanent and temporary residents employment opportunities as teachers).

<sup>37</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004); *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

<sup>38</sup> *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003), para 25.

nationals.<sup>39</sup> In *Phakamisa*, the Court noted that the denial of access to school has “devastating consequences” consequences, which “denuded [children] of their self-esteem and self-worth, and the potential for human fulfillment”.<sup>40</sup>

30. The Court found that “differentiating the children on their documentation status impairs their fundamental right to dignity” which amounted to unfair discrimination prohibited by the Constitution and the Convention of the Rights of the Child to which South Africa is bound.<sup>41</sup> Importantly the Court also reaffirmed all relevant legislation must be interpreted in line with these constitutional and international human rights principles.<sup>42</sup>

#### **D. Migrants’ Right to Work**

31. A range of rights relevant to the right to work are protected in Articles 6-8 of ICESCR and other international treaties. These include:

- the right *to* work, including the freedom from forced labour and the free choice of employment;
- rights *at work* or workplace rights, including fair and equal remuneration, adequate conditions of employment, protection from unfair dismissal and reasonable working hours;
- non-discrimination in the enjoyment of the right to work and work-place rights; and
- freedom of association and the right to form and join trade unions.

32. Like other rights in ICESCR, on their face, these work rights in Articles 6-8 of ICESCR apply to “everyone” regardless of their nationality or national origin. They are the right of “every human being”.<sup>43</sup> Moreover, according to CESCR’s General Comment 18 the right to work, which amounts to a right to decent work, “encompasses all forms of work, whether independent work or dependent wage-paid work.”<sup>44</sup> According the Committee “people living in an informal economy do so for the most part because of the need to survive”.<sup>45</sup> In the specific context of migrants this means that:

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<sup>39</sup> *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECHC 126 (12 December 2019).

<sup>40</sup> *Id.*, para 81.

<sup>41</sup> *Id.*, paras 85-6.

<sup>42</sup> *Id.*, paras 121-130.

<sup>43</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: <https://www.refworld.org/docid/4415453b4.html>, para 6.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, para 10.

“The principle of non-discrimination ... should apply ***in relation to employment opportunities for migrant workers*** and their families.”<sup>46</sup>

33. This, the CESCR Committee acknowledges requires proactive measures by States, including “national plans of action” that allow States “to respect and promote such principles by all appropriate measures, legislative or otherwise”.<sup>47</sup> General Comment 18 therefore appears to apply to both the rights *to work* and the rights *at work* in terms of ICESCR.
34. According to the CESCR Committee, then, the right to work (Article 6) as well as rights at work (Articles 7-8) of migrant and non-citizen workers should be respected, protected and fulfilled. Indeed, States’ obligations to respect the rights of migrant and non-citizen workers, who are acknowledged by the Committee as “disadvantaged and marginalized individuals and groups”, includes an obligation to refrain from “denying or limiting” their “equal access to decent work”.<sup>48</sup> Indeed the Committee makes clear that “discrimination in access to the labour market or to means and entitlements for obtaining employment”, including based on “national and social origin” violates this duty to respect.<sup>49</sup>
35. Article 25 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which South Africa has not yet signed, protects the right of all “migrant workers” to “enjoy treatment not less favourable than that which applies to nationals of the State of employment”, including with regard to: remuneration; conditions of work; contractual terms; and rules pertaining to the workplace.<sup>50</sup> It requires States to “take all appropriate measures” to:

“ensure that migrant workers ***are not deprived of any rights derived*** from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.”

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<sup>46</sup> Id, para 18.

<sup>47</sup> Id.

<sup>48</sup> Id, para 23.

<sup>49</sup> Id, para 33.

<sup>50</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families “General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families” (28 August 2013) CMW/C/GC/2 available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=C MW%2fC%2fGC%2f2&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=C MW%2fC%2fGC%2f2&Lang=en), para. 62. See also, paras. 63 and 64.

36. With regard to rights *at work*, General Comment 23 of CESCR confirms: “Laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work”.<sup>51</sup>

37. In its Concluding Observations to South Africa the Committee on Economic, Social and Cultural Rights recommended that South Africa consider ratifying the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.<sup>52</sup> This recommendation, would, if accompanied by an alignment process of South African law and policy with the Convention, assist in significantly improving the protection of non-citizen’s right to work.

38. With respect to informal workers, the Committee has also made various recommendations to South Africa, including:<sup>53</sup>

- The introduction of a legislative framework to regulate the informal economy;
- The extension of coverage of labour and security legislation to informal workers;
- The facilitation of transition between the informal and formal economies;
- The prevention and mitigation of casualization or externalization;
- The collection of information on the informal economy including its scale and the working conditions of workers.

39. ILO Recommendation 204 *Concerning the Transition From the Informal to the Formal Economy* adopts as a Guiding Principle the “need to pay special attention to those who are especially vulnerable to the most serious decent work deficits in the informal economy, including... migrants”.<sup>54</sup> The recommendations also require national employment policies to “take into account labour market needs and promote decent work and the rights of migrant workers”.<sup>55</sup>

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<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), “General comment No. 23 (2016) on the right to just and favourable conditions of work (7 April 2016), E/C.12/GC/23, available at: <https://www.refworld.org/docid/5550a0b14.html>, para 47(e).

<sup>52</sup> Committee on Economic, Social and Cultural Rights “Concluding Observations on South Africa”, (29 November 2018) available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en), para 79.

<sup>53</sup> Id.

<sup>54</sup> International Labour Organization “Recommendation Concerning The Transition From The Informal To The Formal Economy” (2014), para 7(i). ILO Recommendations serve as non-binding guidelines that give more content binding ILO Convention by supplementing the basic principles set out in ILO Conventions and by providing detailed guidelines on how they should be applied.

<sup>55</sup> Id, para 15(e).

40. Moreover, and in general, though ultimately aiming for a transition of informal workers to the formal economy, Recommendation 204 requires States to pursue the full protection of the right to work of all informal workers pending such transition.<sup>56</sup> Recommendation 204 does not refer to any of these rights as exclusively rights of citizens or based on any migration status within a particular country. The rights detailed in the recommendations therefore apply equally to non-citizens working within the informal economy.
41. In addition to ILO Recommendation 204, the core conventions of the ILO and their corresponding recommendations all apply to all workers regardless of citizenship status.<sup>57</sup> Worthy of emphasis in the current context are ILO Convention No.97 "Migration for Employment Convention"<sup>58</sup> and ILO Convention No.143 "Migrant Workers (Supplementary Provisions) Convention".<sup>59</sup> Without distinguishing between "lawful" and "unlawful" migrants, Convention 193, for example, commits states to "respect the basic human rights of *all* migrant workers".<sup>60</sup> It also requires states to "guarantee equality of treatment, with regard to working conditions, for all migrant workers".<sup>61</sup>
42. South African Courts are required by the Constitution to prefer reasonable interpretations of "any reasonable interpretation of the legislation that is consistent with international law over alternative interpretations that is inconsistent with international law".<sup>62</sup> Courts are also required to consider the spirit, purport and objects of the Bill of Rights in the process of interpretation of all law.<sup>63</sup> As a founding value of the Constitution,<sup>64</sup> dignity is at the core of the spirit, purport and objects of the Bill of Rights.
43. In addition, Courts can, and have taken into consideration both binding and non-binding sources of international law when interpreting the meaning of ESCR in the South African Constitution.<sup>65</sup> This means

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<sup>56</sup> Id, paras 16-20.

<sup>57</sup> Office of the United Nations High Commissioner for Human Rights "The Rights of Non-citizens" (2006) available at: <https://www.ohchr.org/Documents/Publications/noncitizensen.pdf>, p 30.

<sup>58</sup> International Labour Organization C097 - Migration for Employment Convention (Revised), 1949 (No. 97).

<sup>59</sup> International Labour Organization C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

<sup>60</sup> Id, Article 1.

<sup>61</sup> Id, Article 12(g).

<sup>62</sup> Constitution of South Africa, s 233.

<sup>63</sup> Id, s 39.

<sup>64</sup> Id, s 1(d).

<sup>65</sup> See for example *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para 45; and *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011).

that courts must, in determining the content of the right to work, take into account sources of international law such as the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* and ILO Recommendation 204 *Concerning the Transition From the Informal to the Formal Economy*.

44. Even prior to the ratification of ICESCR in 2017, South African Courts found ways to secure the protection of the right to work of non-citizens in South Africa. The judiciary has done so, in the main, by directly drawing upon the right to dignity. In *Watchenuka*, in the context of the right to work of an asylum seeker, the Supreme Court of Appeal held:

“The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents’ counsel, for mankind is preeminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.”<sup>66</sup>

45. This finding, that the right to dignity includes the right to work for a migrant – even where it is not required in order to survive – has been emphasized even more vociferously in the context of informal trade which Court’s have acknowledge is often survivalist. Indeed, in *Watchenuka* itself the Court held, “where employment is the only reasonable means for the person’s support”, the “ability to live without positive humiliation and degradation” comes into question.<sup>67</sup>

46. In *SAITF*, citing *Watchenuka*, 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”, and that it would be “hard to imagine how any destitute street vendor would survive a ruinous delay” in their ability to trade.<sup>68</sup> Again, this finding makes no distinction between citizens and non-citizens operating as “street vendors”.

47. In *Somali Association*, the applicants, a group of Somali Traders had been prevented from obtaining permits to allow them to lawfully conduct their informal trading. During a police raid they then had their businesses shut down because they did not have the lawful permits

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<sup>66</sup> *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003), para 27.

<sup>67</sup> *Id.*, para 32.

<sup>68</sup> *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* (CCT 173/13; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014), paras 30-31.

they were prevented from obtaining on the basis of their lack of South African citizenship.

48. Again citing *Watchenuka*, the Supreme Court of Appeal held that “where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated”, and that it could discern no “impediment to extending the principle there stated in relation to wage-earning employment to self-employment”.<sup>69</sup> Therefore, it concluded that if an asylum seeker “is unable to obtain wage-earning employment ... can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid.”<sup>70</sup>
49. Although these cases deal with asylum seekers, understood consistently with South African and international human rights law prohibiting discrimination and protecting migrants’ ESCR, the reasoning in *Watchenuka* and *Somali Association* prima facie applies to all migrants and other non-citizens at very least if the work they seek (formal or informal) is their exclusive means of protecting their dignity and preventing destitution. Certainly, regardless of whether it necessary for survival, the Committee on Economic, Social and Cultural Rights has acknowledged “the right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity”.<sup>71</sup>
50. In terms of international human rights law, as we have seen, the protections of the rights of informal workers – whether they are citizens or non-citizens – falls within the ambit of the right to work (Articles 6-8) and an adequate standard of living (Article 11) in ICESCR. As the ICJ has argued,<sup>72</sup> and the CESCR’s Committee’s Concluding observations confirm,<sup>73</sup> these rights – which are not expressly enshrined in the South African Constitution but are

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<sup>69</sup> *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), para 43.

<sup>70</sup> *Id.*

<sup>71</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: <https://www.refworld.org/docid/4415453b4.html>, para 1.

<sup>72</sup> 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) available at: <https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf>.

<sup>73</sup> Committee on Economic, Social and Cultural Rights “Concluding Observations on South Africa”, (29 November 2018) available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en).

entrenched in ICESCR – require a comprehensive review and reassessment by the South African government and South African courts of South Africa so as to fully meet their human rights obligations to informal workers. This includes migrant and non-citizen informal workers in addition to citizens.

51. A reasonable interpretation of South Africa’s constitutional obligations to migrant and non-citizen informal traders and indeed to all migrant and non-citizen workers consistent with the standards set out by CESCR and the ILO in terms of the right to work are therefore required in terms of s 233 of the South African Constitution. Moreover, now that South Africa has ratified ICESCR, it is advisable that cases like *SAITF*, *Watchenuka* and *Somali Association* are, in the future, argued and decided with clear reference to and/or on the basis of the right to work.

### **E. Legitimate distinctions between citizens and non-citizens**

52. In terms of international human rights law, most rights, with very few exceptions,<sup>74</sup> are guaranteed to all persons, irrespective of citizenship status. In the context of ICESCR, all of the provisions are guaranteed to all persons regardless of citizenship status. This is also true of CEDAW, CRC and CRPD.

53. However, even with regard to rights applying to “everyone” the Committee on Economic, Social and Cultural rights has recognized the possibility of restrictions and limitations being placed on non-citizens’ ESCR while affirming clearly that “any restrictions, including a qualification period, must be proportionate and reasonable”.<sup>75</sup> Any such restrictions must therefore be “proportional to the purpose for which they are adopted by the State, and the purpose or aim itself must be legitimate”.<sup>76</sup> The United Nations High Commissioner for Human Rights, after surveying the jurisprudence of UN Treaty Bodies in this regard concludes that, albeit “there may be grounds, in some situations, for differential treatment between migrants and non-migrants in specific areas”, these will be permissible only:

***“as long as minimum core obligations are not concerned: differentiations cannot lead to the exclusion of migrants,***

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<sup>74</sup> See for example, Article 25 of the ICCPR, cited in full above at footnote 22.

<sup>75</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) “General Comment No. 19: The right to social security (Art. 9 of the Covenant)” (4 February 2008) E/C.12/GC/19, available at: <https://www.refworld.org/docid/47b17b5b39c.html>, para 37.

<sup>76</sup> Report of the United Nations High Commissioner for Human Rights (1 June 2010) E/2010/89 available at: [https://www.ohchr.org/Documents/Issues/MHR/E-2010-89\\_en.pdf](https://www.ohchr.org/Documents/Issues/MHR/E-2010-89_en.pdf), para 14.

**regular or irregular, from the core content of economic, social and cultural rights...** differential measures taken by the State in relation to economic, social and cultural rights should not be retrogressive and should be in line with States' obligations to take steps towards the progressive realization of economic, social and cultural rights, with particular attention to the most vulnerable groups — which in many countries will include migrants".<sup>77</sup>

54. Importantly therefore, according to the United Nations High Commissioner for Human Rights, it would appear that the minimum core of migrants' right to work – as all other ESCR – may not be restricted or limited since any restriction or limitation undermining the minimum core of migrants' ESCR would, by definition, be neither proportionate or reasonable. The minimum core of the right to work is summarized in the ICJ's *Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa*.<sup>78</sup> Such minimum core obligations include:

- **Access:** "Ensure the right to access to employment" generally and "especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity".
- **Non-discrimination:** "Avoid any measure that results in discrimination and unequal treatment in the public and private sectors".
- **Strategy:** "Adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process".

55. The South African domestic approach to minimum core obligations relating to ESCR is complicated. The Constitutional Court has explicitly declined to define minimum core obligations as set out in the CESCR Committee's general comments. However, some have argued that the Court may, as result of South Africa's ratification of ICESCR, and notwithstanding its previous jurisprudence, eventually alter its approach and embrace minimum core obligations.<sup>79</sup>

56. The ICJ's *Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa* deals discusses the status of minimum core obligations in South African law

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<sup>77</sup> Id.

<sup>78</sup> International Commission of Jurists "A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa" (August 2019) available at <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>, p 53.

<sup>79</sup> Jackie Dugard "The right to Sanitation in South Africa", *Foundation for Human Rights* (2016), available at: <https://www.fhr.org.za/files/1315/1247/0387/Sanitation.pdf>, p 5.

extensively and concludes that there is an interpretation of South Africa's existing jurisprudence that is consistent with the application of minimum core obligations in international law.<sup>80</sup>

57. Beyond these minimum core obligations, which cannot be limited at all, only reasonable and proportionate limitations of migrants' and non-citizens rights to work are permissible in terms of international human rights law. This is effectively the same as the position taken by the Supreme Court of Appeal in *Watchenuka* and *Somali Association*, in which the Courts applied the limitations clause in section 36 of the South African Constitution in determining the legitimacy of limitations on asylum seekers' work-related rights. Importantly, these cases illustrate that in such a limitations analysis, the right to dignity has a central role to play and blanket restrictions that prevent migrants and non-citizens from ensuring they can undertake survivalist employment and/or trade will seldom pass muster.<sup>81</sup>

58. A useful "Guide on the case-law of the European Convention on Human Rights" published by the European Court on Human Rights summarizes the position in European regional human rights system with regard to justifications for limitations of ESCR based on citizenship or nationality.<sup>82</sup> Similarly to ICESCR, the European Convention on Human Rights requires the protection of all rights without discrimination based on "national or social origin".<sup>83</sup> To comply with the prohibition of non-discrimination any such differentiations in access to ESCR must have reasonable and objective justification and be proportionate to a legitimate aim sought to be realized. This, in effect requires that: "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention".<sup>84</sup>

59. Some examples of relevant decisions of the European Court on Human Rights in this regard include:

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<sup>80</sup> International Commission of Jurists "A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa" (August 2019) available at <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>, p 80-82 for a summary and explanation.

<sup>81</sup> Unlike specific restrictions in particular industries that are subject to exceptions as in *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006).

<sup>82</sup> European Court of Human Rights "Guide on the case-law of the European Convention on Human Rights: Immigration (31 August 2019) available at: [https://www.echr.coe.int/Documents/Guide\\_Immigration\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf).

<sup>83</sup> European Convention on Human Rights, Art 14.

<sup>84</sup> European Court of Human Rights "Guide on the case-law of the European Convention on Human Rights: Immigration (31 August 2019) available at: [https://www.echr.coe.int/Documents/Guide\\_Immigration\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Immigration_ENG.pdf), para 46.

- *Ponomaryovi v. Bulgaria*: in which the Court found that payment of secondary school fees based on nationality and immigration status was not justified.<sup>85</sup>
- *Niedzwiecki v. Germany*: in which the Court found that insufficient justification had been given for the denial of payment of child benefits on the basis of absence of residence permit.<sup>86</sup>
- *Gaygusuz v. Austria*: in which the Court found that denial of access to unemployment benefits purely on the basis of nationality was not justified.<sup>87</sup>
- *Koua Poirrez v. France*: in which the Court found that denial of access to disability benefits purely on the basis of nationality was not justified.<sup>88</sup>

60. The European Committee of Social Rights also has a relevant jurisprudence in this regard. For example, in *International Commission of Jurists (ICJ) and European Council on Refugees and Exiles (ECRE) v Greece*, a decision handed down in December 2018,<sup>89</sup> the Committee found violations of a range of migrant children's ESCR (including housing, social protection, health and education) on the grounds of "insanitary, overcrowded and dangerous living conditions of many migrant children in Greece", including children living in "temporary" or "emergency" camps on Greek islands.<sup>90</sup>

61. The Committee on Economic, Social and Cultural Rights sets out a similar standard. It requires that any measure that discriminates on the basis of nationality must be "in accordance with the law, pursue a legitimate aim, and remain proportionate to the aim pursued".<sup>91</sup> Lack of available resources, the Committee has repeatedly made clear, will not amount to a sufficiently objective and reasonable justification for discrimination "unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority."<sup>92</sup>

<sup>85</sup> *Ponomaryovi v. Bulgaria*, no. 5335/05, ECHR 2011.

<sup>86</sup> *Niedzwiecki v. Germany*, no. 58453/00, 25 October 2005.

<sup>87</sup> *Gaygusuz v. Austria*, 16 September 1996, Reports of Judgments and Decisions 1996-IV.

<sup>88</sup> *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X.

<sup>89</sup> R Pillay "Irreparable harm and ESC rights: immediate measures of the European Committee of Social Rights" (7 August 2019) *Opinio Juris* available at:

<http://opiniojuris.org/2019/08/07/irreparable-harm-and-esc-rights-immediate-measures-of-the-european-committee-of-social-rights/>; *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece* Complaint No. 173/2018.

<sup>90</sup> *Id.*

<sup>91</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) "Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights (13 March 2017) E/C.12/2017/1, available at:

<https://www.refworld.org/docid/5bbe0bc04.html>, para 5.

<sup>92</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: <https://www.refworld.org/docid/4a60961f2.html>, para. 13.

62. According to the UN Committee on the Elimination of Racial Discrimination (CERD Committee), though State parties may “refuse to offer jobs to non-citizens without a work permit”, nevertheless, “all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated”.<sup>93</sup>
63. Given that under international human rights law and standards everyone, including non-nationals such as foreign migrants, are entitled to the enjoyment and exercise of all rights with very few exceptions, the CERD Committee’s qualification should at best be understood as permitting states to create of an *administrative* rather than *substantive* (or categorical) hurdles to access to employment for migrants. In other words, States may set up administrative processes requiring certain permits or documentation in order to allow non-citizens to work in the formal economy. These administrative processes should be geared towards facilitating migrants’ ability to work in South Africa and may not explicitly or implicitly, in practice, prohibit migrants from working in South Africa simply because they are migrants.
64. The above-mentioned statement by the CERD Committee is capable of being read consistently with the Supreme Court of Appeal’s finding in Somali Association that: “when legislative restrictions are placed on the employment of refugees or asylum seekers, the legality of such restrictions may then be considered, if and when they are challenged.”<sup>94</sup> Legislative and regulatory restrictions to migrants’ and non-citizens work (outside of the minimum core of the right to work) are permissible, but only if such restrictions meet the standards in terms of the limitations clause in the South African Constitution (section 36) read consistently with international human rights law. When assessing the permissibility of such restrictions the right to dignity and its intimate connection with the right to work will loom large.
65. In any event, the CERD committee itself has, in its concluding observations to states, encouraged states to “focus on the problems faced by non-citizens with regard to economic, social and cultural rights, notably in areas such as housing, education and employment”<sup>95</sup>

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<sup>93</sup> UN Committee on the Elimination of Racial Discrimination (CERD) “CERD General Recommendation XXX on Discrimination Against Non Citizens” (1 October 2002) available at: <https://www.refworld.org/docid/45139e084.html>, para 35.

<sup>94</sup> *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), para 38.

<sup>95</sup> Office of the United Nations High Commissioner for Human Rights “The Rights of Non-citizens” (2006) available at: <https://www.ohchr.org/Documents/Publications/noncitizensen.pdf>, p 9.

and has insisted that states “guarantee that non-citizens have equal access to social services that ensure a minimum standard of living”.<sup>96</sup>

## **F. General: Combatting Xenophobia and stigmatization of migrants**

66. In 2018, the United Nations High Commissioner for Human Rights issued *Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations*.<sup>97</sup> One of the principles states:

“Repeal or amend all laws or measures that may give rise to discrimination against migrants, including direct and indirect discrimination that is based on multiple grounds. Condemn and take effective measures against all acts and expressions of racism, racial discrimination, xenophobia and related intolerance, against stereotyping of migrants (including on the basis of religion or belief) because they are non-citizens or have an irregular status, and against other intersecting forms of discrimination such as age and gender. Hold those who commit such acts accountable, including politicians, opinion-leaders and the media, and enable victims to access justice, including through accessible complaint mechanisms; provide effective remedies. Make sure that serious and extreme instances of hate speech and incitement to hatred are criminal offences that are brought before an independent court or tribunal.”<sup>98</sup>

67. To “combat prejudice” including xenophobia and “social stigmatization of migrants” the principles also recommend that States “introduce public education measures and run meaningful and targeted awareness campaigns”.<sup>99</sup> In doing so States are advised to:

“Focus as required on specific factors, such as nationalities or religions that are subject to particular discrimination. Promote local campaigns that support migrants and host communities, that build empathy and solidarity, and reinforce notions of a shared humanity, and that confront prejudice, stigmatisation, and exclusion.”<sup>100</sup>

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<sup>96</sup> Id, p 9.

<sup>97</sup> Report of the United Nations High Commissioner for Human Rights “Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations” (2018) available at: <https://digitallibrary.un.org/record/1472491?ln=en>.

<sup>98</sup> Id, Principle 2(2).

<sup>99</sup> Id, Principle 2(5).

<sup>100</sup> Id.

68. These principles and practical guidance are consistent with the warnings of South African Courts that government officials must be wary of perpetuating xenophobia:

“When, during argument before us, we enquired of counsel what was to happen to destitute asylum seekers and refugees, no answer was forthcoming. There appeared to be some suggestion that, regrettably, some persons might be left to their destitution. This attitude is unacceptable and contrary to constitutional values. The frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations. It must especially not be allowed to diminish their humanity. The authorities must also guard against unwittingly fuelling xenophobia. In the present case, one is left with the uneasy feeling that the stance adopted by the authorities in relation to the licensing of spaza shops and tuck-shops was in order to induce foreign nationals who were destitute to leave our shores. The answer to the frustration experienced by the respondents, and in particular by the third respondent’s department, is to facilitate and expedite applications for refugee status.”<sup>101</sup>

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<sup>101</sup> *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), para 44.