

**Mandates of the Special Rapporteur on the human rights of migrants and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 43/6 and 43/36.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received regarding the Gauteng Township Economic Development Bill of 2020 (the Bill) currently under consideration. If approved, some provisions of the Bill may be incompatible with South Africa's obligations under international human rights law and standards.

According to information published by your Excellency's Government, the Bill aims at easing the regulatory burden facing township-based enterprises and to provide a framework for the promotion and development of township economy including through easing Small and Medium Enterprises (SMEs) access to funding and technical support from the Government. The Government invited relevant stakeholders to submit in writing comments they may have on the proposed legislation through a specific template to the Gauteng Provincial Legislature.

We would like to share with your Excellency's Government a number of concerns we have in relation to the proposed bill as it currently stands.

The Bill seems to exclude certain categories of foreign nationals from participation in the township economy, where such exclusions would constitute violations of South Africa's constitution, national laws and relevant international human rights law and standards.

Section 3(b) of the Bill provides that the Bill's purpose is to designate business activities within township areas that are reserved for South African citizens and persons who have permanent residency status in South Africa. Section 7(2) provides that certain business activities designated in the Bill, in a designated township, are "exclusively and solely reserved for ownership and operation" by citizens or persons who have permanent residency status.

Section 7(4) prohibits foreign nationals who do not have permanent residency status from owning or operating certain business activities designated in the Bill. Section 7(5) criminalizes any contravention of this prohibition. Nowhere does the Bill list the business activities reserved for citizens and persons who have permanent residency status or the business activities in which foreign nationals who do not have permanent residency status are prohibited from participating. It is, thus, impossible to assess the full impact of sections 7(2) and 7(4).

Section 7 differentiates between persons who have citizenship or permanent residency status in South Africa and foreign nationals who do not have permanent residency status. The group of foreign nationals who are impacted by this different treatment includes refugees and asylum seekers (and persons who have been granted the requisite visas to engage in business activities in South Africa).

The exclusion of foreign nationals who are lawfully in South Africa, but who do not have permanent residency status, from participating in the township economy in Gauteng may unduly and disproportionately affect the rights of refugees and asylum seekers who are entitled by national law to seek employment including self-employment.

The South African Refugees Act provides asylum-seekers and refugees the right to work and study, access to medical services and freedom of movement. This right often translates in asylum seekers, refugees and other non-citizens having to rely on the informal sector or on small business activities to meet their basic social and economic needs. Depriving them of their ability to do so through new legislation such as the draft Gauteng Township Economic Development Bill would violate South Africa's obligations as explained below.

The Bill further risks fueling xenophobia in an already tense and volatile context by demonizing or stereotyping foreigners (including migrants, refugees, and asylum seekers) as negatively affecting the townships economy and portraying them as competitors for the limited available resources and opportunities. On the contrary, States should promote and protect in their legislation and policies migrant workers' rights. Migrant workers' important contributions to the economic and human development of the countries in which they work and where they fill gaps in the labour market and provide essential skills should be duly recognized. In addition, migrant workers contribute to their home countries through remittances which contribute to development and poverty reduction. By effectively protecting migrants, regardless of their immigration status, and enabling them to earn decent pay and enjoy decent working conditions, their productivity will contribute to the host country's economy and to that of the country of origin. Upholding the rights of migrants in accordance with the international legal framework, benefits both the migrant population and society as a whole.

In this connection, we would like to transmit to your Excellency's Government our concerns in relation to the compatibility of these provisions of the Bill with international human rights law and standards.

Firstly, we would like to remind your Excellency's Government of its obligation under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by South Africa in 1998.

Article 1 (1) of ICERD defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

Article 4 of ICERD provides the obligation of States parties to condemn all propaganda and all organizations which attempt to justify or promote immediate racial hatred and discrimination. In addition, Article 4 (c) stipulates that States parties shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The Committee on the Elimination of Racial Discrimination, in its General recommendation N° 30 (CERD/C/64/Misc.11/rev.3) on discrimination against non-citizens highlighted the obligation of State parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights adding that “States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law”. It further clarified that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim” (CERD/C/64/Misc.11/rev.3, paras. 3 and 4). The Committee further recommended States “ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.

The Committee also recommended States “remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health” (para. 29) and “take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirement, including employment rules and practices with discriminatory purposes or effects” (CERD/C/64/Misc.11/rev.3, para. 33).

Furthermore, the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by South Africa in 2015, includes a binding “right to work” for everyone (Articles 6 and 7). This right applies to both “formal” and “informal” forms of work.

As stated by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 20 on non-discrimination in economic, social and cultural rights, all people irrespective of citizenship or documentary status, enjoy the right to work. In its General Comment 20, the Committee stressed that “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” (E/C.12/GC/20, para. 30).

In its General Comment 18, in relation to the right to work, the Committee reaffirmed that “States parties are under the obligation to respect the right to work by ... refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups including prisoners or detainees, member of minorities and migrant workers” (E/C.12/GC/18, para 23). In its General Comment 23, the Committee confirmed that this applies not only to the right to work but also rights at work: “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” (E/C.12/GC/23, para 47).

With regards to the potential impact of the Bill on the human rights of migrants, we would like to call to the attention of your Excellency’s Government, resolution 9/5 of the Human Rights Council, which addresses the issue of the human rights of migrants and “reaffirms [...] the obligation of States to effectively promote protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status, in conformity with the Universal Declaration of Human Rights and international human rights instruments”. The resolution also “reaffirms that States, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants.”

In this connection, we would also like to draw the attention of your Excellency's Government to the Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants, of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and UN Special Rapporteur on the human rights of migrants.<sup>1</sup> In this Note, the Experts called on States to guarantee the labour rights of migrant workers, especially of those working in essential sectors and to pro-actively prevent discrimination and scapegoating of individuals or groups of migrants.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please provide information on measures taken to ensure the compliance of the Bill with South Africa’s relevant obligations under international human rights law and standards.
3. Please provide information on the status of the legislative process including any consultation with affected groups and individuals,

We reiterate our willingness to assist South Africa in its efforts to strengthen the country's legislative and institutional framework, and thus to guarantee the realization of human rights for all persons in South Africa.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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<sup>1</sup> [Joint Guidance Note on the Impacts of the COVID-19 Pandemic on the Human Rights of Migrants.](#)

Please accept, Excellency, the assurances of our highest consideration.

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