



# ANNUAL INTERNATIONAL AND REGIONAL HUMAN RIGHTS REPORT 2016

*Transforming society. Securing rights. Restoring dignity.*



**South African Human Rights Commission**

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# LIST OF ACRONYMS

<b>ACERWC</b>	African Committee of Experts on the Rights and Welfare of the Child
<b>ACHPR</b>	African Commission on Human and Peoples' Rights
<b>ACRWC</b>	African Charter on the Rights and Welfare of the Child
<b>AU</b>	African Union
<b>ACJHR</b>	African Court on Justice and Human Rights
<b>CAT</b>	Committee Against Torture
<b>CED</b>	Committee on Enforced Disappearances
<b>CEDAW</b>	Convention on the Elimination of Discrimination Against Women
<b>CERD</b>	Committee on the Elimination of Racial Discrimination
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CMW</b>	Committee on Migrant Workers
<b>CRC</b>	Committee on the Rights of the Child
<b>CRPD</b>	Committee on the Rights of Persons with Disabilities
<b>DBE</b>	Department of Basic Education
<b>DIRCO</b>	Department of International Relations and Cooperation
<b>DOJCD</b>	Department of Justice and Correctional Services
<b>ECOSOC</b>	Economic and Social Council
<b>GANHRI</b>	Global Alliance for National Human Rights Institutions
<b>HRC</b>	Human Rights Council
<b>HRCtee</b>	Human Rights Committee
<b>ICPED</b>	International Convention for the Protection of All Persons from Enforced Disappearance
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICRMW</b>	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
<b>NGO</b>	Non-Governmental Organisation
<b>NHRI</b>	National Human Rights Institution
<b>NPM</b>	National Preventive Mechanism
<b>OAU</b>	Organisation of African Unity
<b>OP-ICESCR</b>	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

<b>OPAC</b>	Optional Protocol on the Involvement of Children in Armed Conflict
<b>OPCAT</b>	Optional Protocol to the Convention Against Torture
<b>OPSC</b>	Optional Protocol on the Sale of Children, Child Pornography, and Child Prostitution
<b>OPIC</b>	Optional Protocol on a Communications Procedure
<b>SAHRC</b>	South African Human Rights Commission
<b>SOGIE</b>	Sexual Orientation and Gender Identity and Expression
<b>UN</b>	United Nations
<b>UNCAT</b>	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>UNCRPD</b>	United Nations Convention the Rights of Persons with Disabilities
<b>UPR</b>	Universal Periodic Review

# Executive Summary

As an institution established to support constitutional democracy and an internationally recognised national human rights institution (NHRI), the SAHRC's 2016 Annual International and Regional Human Rights Report (report) complements the institution's constitutional, statutory and international mandate. The report seeks to provide a snapshot of key human rights developments at the international and regional level during 2016, and to connect these with developments at a domestic level. In doing so, the report highlights the inextricable link between South Africa's international human rights obligations and their application domestically.

The introductory chapters expands on the context, purpose and scope of the report and positions the SAHRC within its various mandates, recognising the vital role the institution plays as an A-status accredited NHRI.

The report then provides a broad overview of the international and regional human rights system by succinctly explaining the differences between the United Nations charter and treaty-based systems and the human rights frameworks emanating from the African Charter on Human and Peoples Rights.

The main body of the report is structured according to human rights themes which incorporate the relevant activities of international and regional human rights bodies, including resolutions, General Comments and where applicable, concluding observations (recommendations) issued to the South African government.

In the chapter on civil and political rights, the report provides insight on the South African government's initial report to the Human Rights Committee as well as the government's stance on key resolutions relating to sexual orientation and gender identity. This is further expanded on in the domestic sub-section of the report.

The economic, social and cultural rights chapter details the two General Comments released by the Committee on Economic Social and Cultural Rights (CESCR), as well as the letter addressed to the South African government inquiring about the alleged assassination of an environmental human rights defender. The chapter also expands on two resolutions on the right to education, issued by the CESCR and the African Commission on Human and Peoples Rights. A notable inclusion is a summary of a UN Special Rapporteur report on the relationship between the right to life and the rights to adequate housing. At the domestic level, the report draws on the SAHRC's investigation into protest-related action and its impact on the right to education.

The chapter on racial discrimination addresses the South African government's review before the Committee on the Elimination of Racial Discrimination (CERD) and the observations and recommendations of the CERD. The report also touches on the 15<sup>th</sup> anniversary of the

Durban Declaration and Programme of Action which sets the scene for the discussion in the domestic section of the report which relates to the National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

The chapter related to the elimination of discrimination against women, highlights the delays on the part of the South African government, to submit information to the Committee on the Elimination of Discrimination against Women (CEDAW Committee). It also discusses General Recommendation No. 34 on the rights of rural women and provides an overview of the findings issued by the Special Rapporteur on violence against women, its causes and consequences, in the official mission to South Africa. At the domestic level, the report acknowledges the revised Traditional Courts Bill and issues recommendations to Parliament to view the Bill in light of the CEDAW Committee's General Recommendation No. 34 on women's access to justice and General Recommendation No. 35 on the rights of rural women.

The chapter on torture and other cruel, inhuman or degrading treatment or punishment, highlights South Africa's overdue report under the Convention Against Torture. It also discusses the ACHPR resolution on promoting the revised Nelson Mandela Rules, as well as the thematic report of the Special Rapporteur. Linking the international and regional developments to the domestic front, the report highlights the SAHRC's 2016 reports in respect of Marikana and the Lindela Repatriation Centre, respectively. The chapter concludes motivating that the government ratifies the Optional Protocol to the Convention Against Torture (OPCAT) and establishing a national preventive mechanism to monitor places of detention.

The rights of the child chapter discusses the South African government's review before the Committee on the Rights of the Child (CRC) as well as two General Comments issued by the CRC during 2016. It also speaks to the African Charter on the Rights and Welfare of the Child and discusses two resolutions related to children at the international and domestic level, respectively. Drawing on these developments, the domestic section of the chapter addresses the inadequate resources and infrastructure at schools as well as the challenges faced by children of non-nationals.

The chapter on the rights of persons with disabilities discusses two General Comments issued by the Committee on the Rights of Persons with Disabilities on the right rights of women and girls with disabilities, and the right to an inclusive education, respectively. The chapter also speaks to the ACPHR resolution related to psychosocial disabilities and in the domestic section of the chapter, addresses the Esidimeni tragedy and the UN's reaction to the incident. The chapter ultimately recommends that the South African government adheres to its obligation under the Convention on the Rights of Persons with Disabilities and establish a national monitoring mechanism.

In the chapter on migrant workers, the Report points out that the South African government has not signed the International Convention on the Protection of All Migrant Workers and

Members of their Families (ICRMW). It also discusses the 2016 landmark UN summit on refugees and migrants which culminated in the adoption of the New York Declaration. Connecting these to the domestic level. The report briefly discusses the Green Paper on International Migration and calls on the government to sign and ratify the ICRMW to further strengthen human rights of migrants.

The final chapter of the report recognises all the human rights milestones of the year 2016. The chapter provides a list of broad recommendations which complement those issued by international and regional mechanisms. The chapter concludes by affirming the SAHRC's commitment to continue monitoring the South African government's international and regional human rights obligations.

# 1. Introduction

## 1.1. Context of the 2016 Annual International and Regional Human Rights Report

By adopting human rights instruments, States express their commitment to promoting, protecting and defending human rights, in line with the provisions contained in the respective international instrument. South Africa's Constitution under section 231(4), requires the implementation of domestic measures in order to enact the international instrument into law and provides,

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>1</sup>

Once domesticated, the State is bound by the provisions under the instrument. Embedded in these international and regional human rights instruments, is a system of periodic review and reporting by oversight committees, which are mandated to assess the measures taken by a State party in giving effect to its human rights obligations. This form of review / reporting exposes the State party to scrutiny and constructive engagement as the international / regional bodies issue specific findings, areas of concern and / or recommendations for the State to further action. The reporting obligation therefore has three benefits for the State under review, namely self-assessment, a national dialogue and international exposure to expert advice and good practices.<sup>2</sup>

In addition, these bodies regularly release General Comments / Recommendations; resolutions; and thematic reports which are aimed to assist the State in the understanding and implementation of a particular right. It should be noted that national human rights institutions (NHRIs) and civil society are an integral part of the system and where applicable, may submit independent reports to the relevant body.

## 1.2. Background and Purpose of Report

The Annual International and Regional Human Rights Report<sup>3</sup> is in line with the South African Human Rights Commission's (SAHRC) broad mandate, to monitor the development of international and regional human rights laws, norms and standards. This report seeks to present an informative overview of key developments impacting human rights on both the international (UN) level and on a regional human rights level. The report aims to draw attention to South Africa's international and regional obligations, as well as to provide readers with a synopsis of human rights developments during 2016 at the UN and African human rights level.

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<sup>1</sup> It should be noted that Section 233 of the Constitution provides that, 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'

<sup>2</sup> UN Office of the High Commissioner for Human Rights 'How the General Assembly Strengthened the UN Human Rights Treaty Body System' <[http://www.ohchr.org/Documents/HRBodies/TB/HRTD/LeafletTBS\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/TB/HRTD/LeafletTBS_en.pdf)>

<sup>3</sup> Hereinafter referred to as the 'Report'.

## **1.3. Scope and Limitations**

The report presents information relating to human rights developments at the UN and African regional level during the year 2016. The report includes references to resolutions, General Comments, recommendations etc. as issued by these bodies and highlights matters which have direct and substantive relevance to human rights in South Africa.<sup>4</sup> At the end of each thematic chapter, there is a brief discussion on domestic developments. While the SAHRC notes that there may be several developments under one specific theme, it is beyond the scope of the report to address these in detail. Therefore, limited key domestic issues are discussed, without prejudice to other equally-important developments. The SAHRC however recommends that this report is read together with the SAHRC's Annual Equality Report; Civil and Political Rights Report; and Economic, Social Rights Report (policy briefs), so as to appreciate a comprehensive set of human rights developments over the past year.

The report makes reference to the activities of various Committees associated with human rights instruments. For the purpose of the report, the term 'Committee' (or applicable acronym), is used to identify the body tasked with overseeing the implementation of the rights as discussed under a thematic chapter heading.

It should be pointed out that the term 'international human rights obligations' is inclusive of regional human rights obligations, unless otherwise stated.

Where applicable, the report includes information on the South African government's voting on resolutions. The report specifically highlights instances where the government voted in favour of a resolution or against. In instances where information has not been provided, it can be inferred that the particular resolution was adopted without a vote.

## **1.4. Methodology**

The information gathering for this report primarily took the form of desktop research. The report also draws on reports submitted by the SAHRC to international and regional bodies and first-hand accounts of the institution's engagements with these bodies.

## **1.5. Structure of Report**

The report is structured thematically according to the human rights themes. The introductory chapter sets out a brief overview of the frameworks within international and regional human rights systems. In each subsequent chapter of the report, key developments which occurred at the international and regional levels during 2016, are discussed. Text boxes are used to illustrate an event which is incidental to a discussion under a particular theme. In the concluding chapter of the report, the SAHRC provides broad recommendations which dovetail with recommendations and observations emanating from international and regional mechanisms and serve to strengthen South Africa's human rights obligations.

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<sup>4</sup> It should be noted that during 2016, several recommendations at the regional level were either country specific or technical in nature. Where relevant, applicable resolutions from the African structures are discussed.

## 2. Mandate of the South African Human Rights Commission

### 2.1. Constitutional mandate

The South African Human Rights Commission is established under Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution) as a state institution supporting constitutional democracy. Under section 184(1) of the Constitution, the SAHRC must, a) promote, respect for human rights and a culture of human rights; b) promote the protection, development and attainment of human rights; and, c) monitor and assess the observance of human rights in the Republic.

Section 184(2) of the Constitution provides further context to the core mandate of the SAHRC and states that the institution has the power to, investigate and to report on the observance of human rights; take steps to secure appropriate redress where human rights have been violated; and to carry out research and educate.<sup>5</sup>

### 2.2. Statutory Mandate

In giving effect to its constitutional mandate, the SAHRC's enabling legislation, the South African Human Rights Commission Act 40 of 2013,<sup>6</sup> provides an expanded mandate and sets out the institution's powers, duties and functions. The Act recognises the role of the institution in relation to international and regional human rights institutions and provide, under section 13 that the SAHRC,

must monitor the implementation of, and compliance with, international and regional treaties and conventions, international and regional covenants and international and regional charters relating to the objects of the Commission;<sup>7</sup>

The Act also permits the SAHRC to submit reports, pertaining to any international or regional human rights instrument, to Parliament's National Assembly.<sup>8</sup>

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<sup>5</sup> Constitution, section 184(2)(a) - (d).

<sup>6</sup> Act 40 of 2013 repealed the initial Human Rights Commission Act 54 of 1994. Hereinafter referred to as the SAHRC Act.

<sup>7</sup> SAHRC Act, section 13(1)(b)(vi).

<sup>8</sup> SAHRC Act, section 13(1)(b)(vii).. It should be noted that the SAHRC is accountable to the Parliament's National Assembly and periodically reports on its performance and activities, in line with its constitutional and legislative mandate. On an operational level, the SAHRC exercises its mandate through its legal, advisory, advocacy and research programmes.

## 2.3. International Mandate

As a national human rights institution, the SAHRC is additionally guided by the Principles Relating to the Status of National Institutions (the Paris Principles) as adopted by the UN General Assembly through Resolution 48/134 in 1993.<sup>9</sup> The Paris Principles sets out the competencies and responsibilities of NHRIs; the composition and guarantees of independence of NHRIs; the methods of operation; and, where applicable, the quasi-judicial competencies of NHRIs.

The Paris Principles guides NHRIs in the exercise of their duties and functions and recommends that the institutions, i) monitor human rights violations; ii) advise the government, parliament and other competent bodies on issues in legislation; iii) promote the implementation and harmonisation of international norms and standards within domestic legislation; and, vi) educate and inform in the field of human rights.<sup>10</sup>

Through the Sub-Committee on Accreditation of the Global Alliance for National Human Rights Institutions (GANHRI), NHRIs may be reviewed for their compliance with the Paris Principles and accredited with either A, B, or C status.<sup>11</sup> The SAHRC is recognised as an 'A' status NHRI and is regarded as fully compliant with the Paris Principles.

### Box 1: 2016 Resolution on NHRIs

NHRIs are increasingly recognised for the important role the institutions play in the link between national human rights structures and international and regional human rights mechanisms. Building on the momentum of the efforts made by the GANHRI to enhance the recognition of NHRIs in the UN system, in October 2016, the UN Human Rights Council adopted a resolution on, 'national institutions for the promotion and protection of human rights'.<sup>12</sup> The resolution encourages the development of a common approach by UN treaty bodies in their engagements with NHRIs,<sup>13</sup> and commends the efforts made to date by all relevant UN mechanisms and processes which sought to further enhance the participation of NHRIs.<sup>14</sup> The resolution complements the General Assembly's 2015 landmark resolution on NHRIs,<sup>15</sup> which called on all UN processes and mechanisms to enhance, within their work, the participation and contributions of NHRIs compliant with the Paris Principles.<sup>16</sup>

<sup>9</sup>Paris Principles accessible at, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages>StatusOfNationalInstitutions.aspx>>

<sup>10</sup> Ibid paras 3(a) - (g).

<sup>11</sup> The categories denote: "A" Voting member: complies fully with the Paris Principles (has speaking rights at the UN Human Rights Council); "B" Observer member: does not fully comply with the Paris Principles (has observer status in international and regional matters); C: Non-member: does not comply with the Paris Principles. See section 5 of the GANHRI Statute, as amended, at <<http://nhri.ohchr.org/EN/AboutUs/Governance/Statute/GANHRI%20Statute%202016%20as%20amended.pdf>>

<sup>12</sup> Resolution on national institutions for the promotion and protection of human rights, A/HRC/RES/33/15.

<sup>13</sup> Ibid para 21.

<sup>14</sup> Ibid para 24.

<sup>15</sup> General Assembly Resolution 70/163 on National institutions for the promotion and protection of human rights, 17 December 2015.

<sup>16</sup> UN Office of the High Commissioner for Human Rights 'United Nations to break new ground on NHRI participation' <<http://nhri.ohchr.org/EN/News/Lists/News/Disp-Form.aspx?ID=203&ContentTypeID=0x0104006A3D2D731523E24B9C932DE5D6E5EDFF>>. For further reading on the role of NHRIs, see Report of the Secretary General addressing national institutions for the promotion and protection of human rights, July 2016, A/HRC/33/33. Available at, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/142/49/PDF/G1614249.pdf?OpenElement>>

## 2. Overview of the international human rights system

The international human rights system operates primarily within two branches, namely the UN Charter-based system and the UN Treaty-based system.

### 2.1. Charter-based system

The Charter based system has developed under the UN Charter and is comprised, *inter alia*, the Special Procedures and the UN Human Rights Council, including its subsidiaries such as the Universal Periodic Review Working Group (UPR) and the Advisory Committees.<sup>17</sup> Through the UN Human Rights Council, resolutions are adopted and although non-binding, they nonetheless serve as a guidance to States. The Charter-based system has been responsible for the development of international human rights law, including the core human rights treaties.<sup>18</sup>

### 2.2. Treaty-based system

The treaty-based system is comprised of ten treaty bodies / committees that monitor the implementation of the nine international human rights treaties as ratified by State parties.<sup>19</sup> Depending on the committee, meetings occur two or three times a year during which independent experts who serve as the committee members, review State party reports and consider individual communications, where applicable. The review process allows the committees to gain insight on the implementation of a treaty within a particular State and issue concluding observations to further strengthen adherence to the treaty's provisions.<sup>20</sup> The committees also release General Comments on specific provisions of a treaty which provides authoritative guidance to States and other actors on the measures to be taken to ensure full compliance with the respective human rights instrument. Following the 2015, General Assembly's Resolution on 'Strengthening and enhancing the effective functioning of the human rights treaty body system',<sup>21</sup> there have been continued efforts to harmonise the working methods of the various treaty bodies.<sup>22</sup>

17 'UN Documentation: Human Rights' <<http://research.un.org/en/docs/humanrights/charter>>

18 International Human Rights and the International Human Rights System A Manual for National Human Rights Institutions, Asia Pacific Forum of National Human Rights Institutions July 2012, available online at, <<http://nhris.ohchr.org/EN/IHRS/Documents/International%20HR%20System%20Manual.pdf>>>

19 <<http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>>

20 SAHRC International and Regional Human Rights Report 2015, p. 16.

21 General Assembly's Resolution on Strengthening and enhancing the effective functioning of the human rights treaty body system, A/RES/68/268. According to paras 1 and 2, the resolution aims to streamline and harmonise the work of the various UN treaty bodies through adopting a simplified reporting procedure for State parties and limiting the number of questions posed. The resolution also calls on the modernisation of the treaty body system and encourages State parties to use interactive dialogue when reporting on the implementation of their treaty obligations.

22 Most recently, refer to the Report of the Secretary General regarding the 'Status of the human rights treaty body system', July 2016, A/71/118. See in particular section VIII.

### **2.2.1. List of international human rights treaties**

- i. International Covenant on Civil and Political Rights, 1966 and its optional protocols (monitored by the Human Rights Committee);
- ii. International Covenant on Economic, Social and Cultural Rights, 1966, (monitored by the Committee on Economic, Social and Cultural Rights)
- iii. International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (monitored by the Committee on the Elimination of Racial Discrimination);
- iv. Convention on the Elimination of All Forms of Discrimination against Women, 1979 and its optional protocol, 1999; (monitored by the Committee on the Elimination of Discrimination against Women)
- v. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1984<sup>23</sup> (monitored by the Committee Against Torture)
- vi. Convention on the Rights of the Child, 1989 and its optional protocols, (monitored by the Committee on the Rights of the Child) ;
- vii. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, (monitored by the Committee on Migrant Workers);
- viii. International Convention on the Rights of Persons with Disabilities, 2006, (monitored by the Committee on the Rights of Persons with Disabilities); and,
- ix. International Convention for the Protection of All Persons from Enforced Disappearance, 2006,<sup>24</sup> (monitored by the Committee on Enforced Disappearances).

The South African government's compliance with these international instruments, where applicable, are further discussed throughout the report.

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<sup>23</sup> The Optional Protocol to the Convention Against Torture (OPCAT), establishes the Subcommittee on Prevention of Torture and other Cruel, inhuman or Degrading Treatment or Punishment (SPT). This is regarded as the tenth treaty body. See further discussion in section 8.2 below.

<sup>24</sup> It should be noted that South Africa has not signed the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED). There is limited information relevant to South Africa regarding the activities of the treaty body and the Working Group on Enforced Disappearances. As a result the ICPED is not addressed in the SAHRC's 2016 Annual International and Regional Human Rights Report.

### 3. Overview of the African Regional Human Rights System

The African regional human rights system is premised on the African Charter on Human and Peoples' Rights (African Charter), which was adopted on 27 June 1981 by the former Organisation of African Unity (OAU), later known as the African Union (AU).<sup>25</sup> In June 1998, the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights was adopted.<sup>26</sup> The Protocol came into force in 2004.

#### 3.1. African Commission on Human and Peoples Rights

The African Charter addresses civil, political, economic, social and cultural rights as well as peoples' and group rights. It further recognises the rights and the duties of African citizens, including duties towards family, society, the state and the international community.<sup>27</sup> The African Charter establishes the African Commission on Human and Peoples' Rights (ACHPR), which has a mandate to promote, protect and interpret the human and peoples' rights as espoused under the African Charter. The ACHPR meets twice a year and is comprised of 11 independent members who serve a renewable six-year term.<sup>28</sup> In accordance with article 62 of the African Charter, States parties are required to submit a report to the ACHPR every two years setting out the measures taken to implement the Charter. The ACHPR is permitted to receive and investigate complaints (communications) submitted by individuals, NGOs and States parties, concerning alleged violations of the Charter.<sup>29</sup> It should be noted that the ACHPR has Special Mechanisms in the form of rapporteurs, committees and working groups which often present information / reports to the Committee for consideration at the bi-annual sessions.<sup>30</sup>

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25 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), also known as the, 'Banjul Charter'.

26 Copy of the protocol available at, <<http://en.african-court.org/images/Protocol-Host%20Agmt/africancourt-humanrights.pdf>>

27 SAHRC Annual International and Regional Human Rights Report 2015, p. 50.

28 <<http://www.achpr.org/about/structure/>>. Note that in certain instances, extraordinary sessions may be held.

29 The African Commission shall only hear communications of persons or groups of persons of a state alleging violation if that state has ratified the Charter. If it is a State submitting a complaint against another state, then both must have ratified the Charter. Furthermore, complainants must have exhausted all available domestic legal remedies. See, Guidelines for the submission of communications at, <[http://www.achpr.org/files/pages/communications/guidelines/achpr\\_infosheet.communications\\_eng.pdf](http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet.communications_eng.pdf)>

30 Also see generally, <<http://www.achpr.org/mechanisms/>>

## 3.2. African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (the Court) was established by virtue of article 1 of the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) which was adopted in June 1998 by member states of the then OAU. The Protocol came into force on 25 January 2004 after it was ratified by more than 15 countries.<sup>31</sup> Pursuant to article 2 of the Protocol, the Court is established to complement the protective mandate of the ACHPR.

The Court has jurisdiction over cases and disputes submitted to it concerning the interpretation and application of the ACHPR, the Protocol and any other relevant human rights instrument ratified by the State parties.<sup>32</sup> The Court has contentious and advisory jurisdiction and may receive complaints and/or applications submitted to it either by the ACHPR, State parties to the Protocol or African intergovernmental organisations.<sup>33</sup>

According to article 5 and article 34 of the Protocol, non-governmental organisations (NGOs) with observer status before the ACHPR and individuals may only make direct applications to the Court if their State party has entered a declaration accepting the jurisdiction of the Court.<sup>34</sup>

The Commission and Court are charged with interpreting and applying the regional human rights instruments,

### 3.2.1. List of African human rights instruments

- i. African Charter on Human and Peoples' Rights;
- ii. African Charter on the Rights and Welfare of the Child;
- iii. Protocol to the African Charter on the Rights of Women;
- iv. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;
- v. Convention for the Elimination of Mercenarism in Africa;
- vi. African Union Convention on the Conservation of Nature and Natural Resources;
- vii. Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa;
- viii. African Union Convention on Preventing and Combating Corruption;
- ix. OAU Convention on the Prevention and Combating of Terrorism;
- x. African Union Non-Aggression and Common Defence Pact; and,
- xi. African Charter on Democracy, Elections and Governance.

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<sup>31</sup> To date, only the 27 States have ratified the Protocol, including South Africa.

See, <<http://en.african-court.org/index.php/about-us/establishment>>. Also see, <<http://en.african-court.org/index.php/about-us/court-in-brief>>

<sup>32</sup> Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights, article 3.

<sup>33</sup> Ibid article 5.

<sup>34</sup> Ibid. As at October 2016, only seven of the 30 States Parties to the Protocol had made the declaration recognising the competence of the Court to receive cases from NGOs and individuals. South Africa has not entered a declaration.

In 1996, South Africa ratified the African Charter and submitted its initial report in January 1998.<sup>35</sup> South Africa's first periodic report, covering the period 1998 to 2001 was submitted in May 2005. During April 2016, the South African government was reviewed under its second periodic report. Concluding observations are yet to be issued.<sup>36</sup>

## Box 2: African Court of Justice and Human Rights

In July 2003, the African Union Assembly adopted the Protocol to the African Court of Justice, which subsequently entered into force in February 2009.<sup>37</sup> Although the African Court of Justice and Human Rights (ACJHR) was not operationalised, the AU Assembly decided that it should be merged with the African Court on Human and Peoples' Rights, to form the African Court of Justice and Human Rights (ACJHR).<sup>38</sup> The decision to merge the two courts was based on the need to rationalise the existence of the two courts and to make them cost effective.<sup>39</sup> Accordingly on 1 July 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol), merging the two courts, the African Court on Human and Peoples' Rights and the African Court of Justice.<sup>40</sup> The Protocol is set to come into force 30 days after the 15<sup>th</sup> ratification by Member States.<sup>41</sup>

It should be noted however that during its 23<sup>rd</sup> session in June 2014, the AU adopted an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights. The amendment confers immunity to African leaders accused of committing serious human rights violations from criminal prosecution before the proposed African Court of Justice and Human Rights.<sup>42</sup>

35 Republic of South Africa: Initial Report on the African Charter on Human and Peoples' Rights: 1998, available at, <[http://www.achpr.org/files/sessions/25th/state-reports/1st-1996-1998/staterep1\\_southafrica\\_1998\\_eng.pdf](http://www.achpr.org/files/sessions/25th/state-reports/1st-1996-1998/staterep1_southafrica_1998_eng.pdf)>. Note that the Maputo Protocol was ratified in 2004.

36 <<http://www.achpr.org/states/south-africa/>>

37 The AU Constitutive Act provided for the establishment of a judicial organ, the African Court of Justice which would complement with existing African Court on Human and Peoples' Rights.

38 SAHRC International and Regional Human Rights Report 2015, p. 108.

39 K Moyo, 'Justice for all: Realising the Promise of the Protocol establishing the African Court on Human and Peoples' Rights' SALC Handbook Series 2014, p.5.

40 Note that under article 30 of the Protocol, NHRIs are also entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned.

41 <<http://www.african-court.org/pt/index.php/2-home?start=6>>

42 Article 46A *bis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('the Protocol on Amendments') provides: 'No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.' See, <<https://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf>>. For an in-depth analysis, see report available at, <<https://www.amnesty.org/en/documents/afr01/3063/2016/en/>>

## **INTERNATIONAL AND REGIONAL HUMAN RIGHTS DEVELOPMENTS DURING 2016**

# 4. Civil and Political Rights

## 4.1. International Covenant on Civil and Political Rights

In 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR). The treaty places an obligation on State parties to uphold, promote, protect and fulfil basic human rights such as, the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial, and; minority rights. There are two Optional Protocols to the ICCPR; the First Optional Protocol establishes an individual complaints system to enable the Human Rights Committee, which monitors the implementation of the treaty, to examine alleged violations of the ICCPR by State parties to the Protocol. The Second Optional Protocol relates to the abolishment of the death penalty in State parties that have ratified the protocol.<sup>43</sup>

The year 2016 marks the 50<sup>th</sup> anniversary of the ICCPR.<sup>44</sup>

### 4.1.1. Human Rights Committee

The Human Rights Committee (HRCtee) monitors the implementation of the ICCPR and its Optional Protocols. The HRCtee, which convenes thrice a year, is composed of 18 independent experts who are elected to a four-year term. During 2016, South African academic, Professor Christof Heyns, was appointed to serve on the Committee from 2017 until 2020.<sup>45</sup>

### 4.1.2. Draft General Comment on the Right to Life

As a follow-on to the discussions held in 2015 on article 6 of the ICCPR,<sup>46</sup> the right to life, the HRCtee, during 2016 the HRCtee commenced formal deliberation of the contents which will inform the a General Comment on the Right to Life. The Committee also proceeded to adopt several provisions for inclusion in the final version of the General Comment.<sup>47</sup>

It should be noted that the Special Rapporteur on 'adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context', presented a report to the General Assembly illustrating the link between the right to life and the right to housing. This is further discussed in section 5.4 below.

43 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>>

44 As well as the 50<sup>th</sup> anniversary of the ICESCR. See text box 4 in the report.

45 <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx>>. Professor Heyns was nominated by the South African government on 15 April 2016. See nomination at, <<http://www.ohchr.org/Documents/HRBodies/CCPR/Elections35th/ChristofHeyns.pdf>>

46 Draft General Comment on the Right to Life, CCPR/C/GC/R.36. Also see, <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>>

47 <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20817&LangID=E#shash.Bdpw5AQZ.dpuf>>

#### 4.1.3. South African government's review before the HRCtee

South Africa ratified the ICCPR in December 1998 and both the Optional Protocols in August 2002. Whilst article 40 of the treaty requires that State parties must submit an initial report within one year after acceding to the ICCPR, the South African government only submitted its initial, second, third and fourth reports in November 2014.

On 8 March 2016, the South African government appeared before the HRCtee in consideration of its initial report. During the review, the government acknowledged that the report was overdue and asserted that it had subsequently increased its capacity to comply with its treaty body reporting obligations.<sup>48</sup>

During the review, the Committee expressed concern over several matters including, racism, xenophobia and associated violence; treatment of prisoners and conditions of detention, the rights of migrants; and the rights of indigenous communities.<sup>49</sup> These concerns were further elaborated on in the Committee's Concluding Observations which were issued to South Africa in April 2016 and is expanded on below.<sup>50</sup>

- i. Noting the numerous manifestations of racism and xenophobia, including violent attacks against foreign nationals and migrants, refugees and asylum seekers, the Committee expressed concern about the, 'inability of the authorities to prevent and address racist and xenophobic attacks and to hold perpetrators accountable.'<sup>51</sup> The Committee recommended that South Africa should redouble its efforts to prevent and eradicate all manifestations of racism and xenophobia, protect all communities in South Africa against racist and xenophobic attacks, and improve policing responses to violence against non-nationals.<sup>52</sup> Furthermore, that perpetrators of these acts should be prosecuted and that victims have recourse to adequate remedies.
- ii. The Committee expressed concern over the poor conditions of detention at prisons, particularly overcrowding, dilapidated infrastructure, unsanitary conditions, inadequate food, lack of exercise, poor ventilation and limited access to health services.<sup>53</sup> It recommended that the South African government increase efforts to guarantee the rights of detainees to be treated with humanity and dignity and that alternate measures are introduced to reduce overcrowding.<sup>54</sup>
- iii. Noting immigration detention in South Africa, particularly overcrowding and a lack of hygiene and medical services at the Lindela Repatriation Centre, the Committee recommended that the government strengthen its efforts to ensure adequate living

<sup>48</sup> See remarks by Deputy Minister John Jeffery, available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17175&LangID=E#sthash.7SB6D24B.dpuF>>

<sup>49</sup> During the discussions, the Committee further inquired from the government regarding the deaths of miners at Marikana as well as the State's failure to arrest Sudanese President al-Bashir, despite an International Criminal Court warrant. See <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17175&LangID=E#sthash.7SB6D24B.dpuF>>

<sup>50</sup> Concluding Observations on the Initial Report of South Africa, Human Rights Committee, 27 April 2016, CCPR/C/ZAF/CO/1.

<sup>51</sup> Ibid para 14.

<sup>52</sup> Ibid para 15.

<sup>53</sup> Ibid para 30.

<sup>54</sup> Ibid para 31.

conditions in all immigration centres.<sup>55</sup> It further recommended that detention pending deportation is applied as a last resort only, with special regard being given to the needs of particularly vulnerable persons.<sup>56</sup>

- iv. Whilst taking note of the progress made with regard to combating trafficking in persons, the Committee expressed concerned that South Africa lacks proper identification and referral mechanisms for victims of trafficking in persons.<sup>57</sup> It accordingly called on the South African government to continue its efforts to prevent and eradicate trafficking in persons, step up its efforts to identify and protect persons who may be vulnerable to human trafficking and establish a nationwide identification and referral system for victims of trafficking.<sup>58</sup> It also noted with concern, allegations that migrant workers employed through labour brokers' services in the mining industry are victims of exploitative labour conditions,<sup>59</sup> and recommended that the government take measures to outlaw and hold responsible labour brokers involved in the exploitation of workers in violation.<sup>60</sup>
- v. The Committee noted that gender-based and domestic violence remains a challenge in South Africa and that the conviction rate for such acts is low.<sup>61</sup> Furthermore, that there are high levels of discrimination, sexual and physical violence against persons based on their real or perceived sexual or gender identity. The Committee therefore recommended that the South African government should redouble its efforts to prevent and combat sexual, gender-based and domestic violence and to eradicate discrimination and violence against persons based on their real or perceived sexual or gender orientation, gender identity or bodily diversity.<sup>62</sup> Furthermore that adequate training is provided for law enforcement and health service personnel regarding domestic and gender-based violence; violence based on sexual orientation and gender identity and that perpetrators of sexual and gender-based crimes are brought to justice.<sup>63</sup>

The South African government is due to report to the Committee by 31 March 2020 and provide progress on the implementation of the recommendations issued in the concluding observations. It should be noted that the SAHRC submitted both a List of Issues report and a NHRI report to the HRCtee in anticipation of the South African government review.<sup>64</sup> The institution also delivered an oral statement during the official review process.

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55 Ibid para 36 – 37.

56 Ibid para 37.

57 Ibid para 32.

58 Ibid para 33.

59 Ibid.

60 Ibid para 33.

61 Ibid para 20.

62 Ibid para 21.

63 Ibid.

64 In April 2015, the SAHRC submitted a 'List of Issues' report following a request received from the Human Rights Committee. Subsequently, during the Committee's 114th session in June / July 2015, it adopted a list of issues to which the South African government responded to in December 2015. The SAHRC submitted a NHRI report in February 2015, available at, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fLOP%2fZAF-2%2f23161&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fLOP%2fZAF-2%2f23161&Lang=en)>

## 4.2. Resolutions on civil and political rights

Several resolutions relating to civil and political rights were passed during the course of 2016, at both the international and regional level. Key excerpts of selected resolutions are discussed below.

### 4.2.1. HRC and GA Resolution on the protection against violence and discrimination based on sexual orientation and gender identity (SOGI)

During the 32<sup>nd</sup> session in June 2016, the Human Rights Council adopted 'resolution 32/2' on the protection against violence and discrimination based on sexual identity.<sup>65</sup> The resolution specifically establishes an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for a period of three years.<sup>66</sup> The resolution further mandates the Independent Expert with the power to assess the implementation of international human rights law, identifying best practices and gaps, raising awareness of violence and discrimination against persons on the basis of their sexual orientation or gender identity; engaging in dialogue and consultation with states and other stakeholders, technical assistance, and capacity-building and cooperation.<sup>67</sup> In terms of the resolution, the Independent Expert should annually report to the Human Rights Council as well as the General Assembly.<sup>68</sup>

During the 71<sup>st</sup> session (November 2016), the General Assembly's Third Committee, debated resolution 32/2, noting that the African Group proposed amendments which sought to defer the enactment of the resolution and determine the legal basis of the Independent Expert's mandate. The amendments were however rejected by vote,<sup>69</sup> and the original text of the resolution, was adopted.<sup>70</sup>

#### 4.2.1.1. South Africa's voting on the SOGI resolution

When the SOGI resolution was considered at the Council level, the South African government abstained from the voting citing that the approach of the resolution was arrogant and added unnecessary divisiveness to the issue of discrimination and violence.<sup>71</sup> It should be noted however, that in 2011, the South African government tabled the Council's first resolution on SOGI and in 2014, it was the only African state to support the follow-up to the initial resolution.<sup>72</sup> The action of the South African government to abstain from the vote alongside the African bloc was therefore met with international and domestic opprobrium, and was

<sup>65</sup> Resolution on the protection against violence and discrimination based on sexual orientation and gender identity, A/HRC/RES/32/2.

<sup>66</sup> UN Office of the High Commissioner for Human Rights 'Council establishes mandate on protection against violence and discrimination based on sexual orientation and gender identity' <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20220#sthash.xutH8EzR.dpu#>>

<sup>67</sup> Ibid.

<sup>68</sup> Commencing at the 35<sup>th</sup> session of the Human Rights Council and the 72<sup>nd</sup> session of the General Assembly.

<sup>69</sup> By a recorded vote of 84 against, to 77 in favour, and 16 abstentions. See, <<https://www.un.org/press/en/2016/ga11879.doc.htm>>

<sup>70</sup> Ibid. Note that there was greater agreement on the text as a whole, which the Assembly adopted by a recorded vote of 106 in favour, to 2 against and 74 abstentions, see, <<https://www.un.org/press/en/2016/ga11879.doc.htm>>

<sup>71</sup> UN Office of the High Commissioner (note 66 above).

<sup>72</sup> UN Office of the High Commissioner for Human Rights 'Human Rights Council adopts resolution on sexual orientation and gender identity and concludes twenty-seventh session' <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15109&>>

criticised as a reversal of its initial stance on the issue. The SAHRC also expressed its concern on the matter noting that the institution and the Department of International Relations and Cooperation (DIRCO), co-hosted a three-day seminar in March 2016, on finding practical solutions for addressing violence and discrimination against persons based on sexual orientation, gender identity and expression.<sup>73</sup> In official correspondence directed to the Minister of International Relations and Cooperation in June 2016, the SAHRC urged the government to vote in support of the resolution and in July 2016, the SAHRC again addressed the Minister, expressing its dissatisfaction that the government abstained from the voting. The SAHRC furthermore requested a meeting with the Minister to discuss the matter as well as other issues relating to South Africa's international conduct.<sup>74</sup> However, the Minister delegated the request to officials in the DIRCO to engage with the SAHRC and official responses to the institution's concerns were not fully addressed.<sup>75</sup>

During the November 2016 deliberations on the resolution at the General Assembly level, the South African government acknowledged the potential detrimental circumstances of voting alongside the African bloc and in favour of the amendments.<sup>76</sup> Noting the sensitivity of the resolution, the government affirmed that South Africa's constitution did not permit discrimination against persons based on their lifestyle choices. On this basis, the government announced that it would support the African bloc and that the country's vote would be based on its constitutional imperative. Unlike at the Council level, the South African government subsequently voted in support of the resolution establishing the Independent Expert.<sup>77</sup>

#### **4.2.2. HRC Resolution on the promotion, protection and enjoyment of human rights on the Internet**

During its 32<sup>nd</sup> session, (June 2016), the Human Rights Council adopted the resolution on the promotion, protection and enjoyment of human rights on the Internet.<sup>78</sup> The resolution builds on similar resolutions from 2012<sup>79</sup> and 2014<sup>80</sup> and reaffirms that, 'the same rights that people have offline must be protected online'.<sup>81</sup> The resolution recognises the global and open nature of the Internet as crucial to achieving the Sustainable Development Goals and calls on States to facilitate international cooperation aimed at the development of media, information and communication facilities and technologies in all countries.<sup>82</sup>

Through the resolution, the Council affirms that quality education plays a decisive role in development, and subsequently called on all States to promote digital literacy and to facilitate access to information on the Internet, which can be an important tool in facilitating

<sup>73</sup> <<http://www.sahrc.org.za/index.php/sahrc-media/news/item/392-sogie-rights-in-the-spotlight>>. See further information under section 4.4 below.

<sup>74</sup> Letter to the Minister available at, <<https://www.sahrc.org.za/home/21/files/Letter%20to%20Hon%20Minister%20of%20DIRCO%2015%20July.pdf>>

<sup>75</sup> On 1 September 2016, the SAHRC held the meeting with officials in Human Rights and Humanitarian Affairs Directorate of the Department of International Relations and Cooperation.

<sup>76</sup> South Africa's statement was delivered by Permanent Representative to the United Nations, Ambassador Jerry Matthews Matjila.

<sup>77</sup> UN 'Intense Debate, Close Voting as Gender Identity, Sexual Orientation, Digital-age Privacy Take Centre Stage in Third Committee' <<https://www.un.org/press/en/2016/gashc4191.doc.htm>>

<sup>78</sup> UN Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/32/L.20

<sup>79</sup> UN Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/res/20/8, June 2012.

<sup>80</sup> UN Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the Internet, A/HRC/res/26/13, June 2014.

<sup>81</sup> Ibid para 1.

<sup>82</sup> Ibid para 2 – 3.

the promotion of the right to education.<sup>83</sup> The resolution also recognises the importance of applying a comprehensive human rights-based approach in providing and in expanding access to Internet and as such, States are requested to make efforts to bridge the many forms of digital divides,<sup>84</sup> and to promote access to persons with disabilities. The resolution also recommends that States ensure accountability in instances where persons are subject

to human rights abuses (such as intimidation, harassment, detention etc), for exercising their human rights and freedoms on the internet.<sup>85</sup> It furthermore stressed the importance that States combat the advocacy of hatred that constitutes incitement to discrimination or violence on the Internet, including by promoting tolerance and dialogue.<sup>86</sup>

During the deliberations on the resolution, China and Russia proposed amendments which sought to remove references relating to the right to freedom of expression. Despite supporting the 2012 and 2014 versions of the resolution, the South African government voted in favour of the proposed amendments citing that, 'the South African constitution guarantees the exercise of the right of freedom of opinion and expression,' and that, 'incitement to hatred is problematic in the context where we are having our domestic debates on racism and the criminalisation thereof'.<sup>87</sup> However, these amendments were rejected and despite opposition from a minority of States, the Council adopted the resolution.<sup>88</sup>

#### **4.2.3. ACHPR Resolution on the Right to Freedom of Information and Expression on the Internet in Africa**

During its 59<sup>th</sup> session (October / November 2016), the ACHPR adopted a resolution on the right to freedom of information and expression on the internet in Africa.<sup>89</sup> The ACHPR condemned the use of hate speech on the internet noting that it encourages violence against a group on the basis of criteria including race, colour, religion, national origin, gender, disability.<sup>90</sup> It also expressed concern at the emerging practice of State parties to interrupt or limit access to telecommunication services such as the Internet, social media and messaging services, particularly during elections.<sup>91</sup>

Through the resolution, the ACHPR noted the critical importance of clear and comprehensive principles that ought to be established to guide the promotion and protection of human rights in the online environment. It accordingly called on State parties to respect and take legislative and other measures to guarantee, respect and protect citizen's right to freedom

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83 Ibid para 4.

84 Ibid para 5.

85 Ibid para 9.

86 Ibid para 11.

87 See video footage of South Africa's deputy permanent representative to the UN in Geneva, Ncumisa Notutela, in her address to the Human Rights Council. Available at, <<https://www.enca.com/south-africa/sa-justifies-contentious-un-decision>>. It should be noted that the SAHRC raised concern over the South African government's voting stance in respect of the aforementioned resolution in its NHR report to the Committee on the Elimination of Racial Discrimination (in August 2016).

88 <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Pages/ResDecStat.aspx>

89 ACHPR Resolution on the Need to Develop Guidelines on Policing and Assemblies in Africa, ACHPR/Res. 362(LIX) 2016, <<http://www.achpr.org/sessions/59th/resolutions/362/>>.

90 Ibid p.1.

91 Ibid.

of information and expression through access to Internet services.<sup>92</sup> Through the resolution, the ACHPR also urged African citizens, 'to exercise their right to freedom of information and expression in the Internet responsibly'.<sup>93</sup>

#### **4.2.4. ACHPR Resolution on the Need to Develop Guidelines on Policing and Assemblies in Africa**

During the 59<sup>th</sup> Ordinary session, the ACHPR adopted a resolution which recognised the need to develop guidelines on policing and assemblies in Africa.<sup>94</sup> The resolution, is an expression of concern over the persistence of police violence during assemblies in Africa and that, in many cases, the legal frameworks in States does not sufficiently protect the right to freedom of assembly, expression and access to information in the context of public assemblies.<sup>95</sup> Further exacerbating the situation is the interference of political actors, lack of training for police officers and the non-existence of special mechanisms to monitor policing. The resolution accordingly recognises the, 'urgent need to develop guidelines on policing and assemblies in Africa to guide States Parties to the African Charter, in particular law enforcement officials to ensure greater observance of human rights during assemblies in Africa'.<sup>96</sup> Through the resolution the ACHPR mandates the Special Rapporteur on Human Rights Defenders in Africa, the Special Rapporteur on Freedom of Expression and Access to Information in Africa and the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa to develop the Guidelines on Policing and Assemblies in Africa, including tools to facilitate its effective implementation.

#### **Box 3: Joint Statement of ACHPR and UNCRC regarding pathologisation of LGBT persons**

In May 2016, the ACHPR together with the UN Committee on the Rights of the Child and other international human rights experts,<sup>97</sup> called for an urgent end to the, 'pathologisation' of LGBT adults and children. The group noted that branding LGBT persons as 'ill' continues to be one of the root causes of discrimination and stereotype.<sup>98</sup> Furthermore, that on the basis of pathologising classifications, LGBT people continue to be subjected to abusive, harmful and unethical forced treatments, including, "conversion" or "reparative" "therapies" based on their sexual orientation or gender identity.<sup>99</sup>

The group expressed deep concern that transgender children and adults continue to be pathologised based on international and national medical classifications and called for States to adopt measures to prevent, investigate and prosecute all forms of forced, coercive and otherwise involuntary treatments and procedures on LGBT persons.<sup>100</sup> Furthermore, that States introduce legal and policy reforms to protect LGBT persons from violence and discrimination.

<sup>92</sup> Ibid para 1.

<sup>93</sup> Ibid para 2.

<sup>94</sup> ACHPR/Res. 363(LIX) 2016, <<http://www.achpr.org/sessions/59th/resolutions/363>>.

<sup>95</sup> Ibid p.1.

<sup>96</sup> Ibid.

<sup>97</sup> Together with the Inter-American Commission on Human Rights and the Commissioner for Human Rights of the Council of Europe.

<sup>98</sup> African Commission on Human and Peoples' Rights 'Pathologization: being lesbian, gay, bisexual and/or trans is not an illness' <<http://www.achpr.org/press/2016/05/d299/>>

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

## 4.3. Domestic developments and recommendations

### 4.3.1. SOGIE rights

One of the key issues which dominated 2016 was the enhanced recognition of the rights of LGBTI persons. At the domestic level, section 9 of the constitution specifically prohibits discrimination on the basis of sexual orientation, a right which is applicable both vertically and horizontally. Thus, there is a duty on both the government and persons to recognise the right to equality for LGBTI persons and to refrain from any form of discrimination in this regard.

It is notable that the government has, over the years, taken significant steps to protect the rights of LGBTI persons.<sup>101</sup> Key developments during 2016 include the Department of Justice and Correctional Services, together with the SAHRC,<sup>102</sup> co-hosting the African Regional Seminar on Violence and Discrimination based on Sexual Orientation Gender Identity and Expression.<sup>103</sup> The seminar explored practical solutions for addressing violence and discrimination against persons based on sexual orientation, gender identity and expression and primarily focused on implementing the ACHPR 2014 Resolution 275, which addresses, 'human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity'<sup>104</sup> The resolution specifically urged States to end all acts of violence and abuse committed by both State and non-State actors and to enact and apply laws which prohibit and penalise all forms of violence targeted at LGBTI persons, and to ensure the investigation and prosecution of such offences.<sup>105</sup> The seminar culminated in the adoption of the Ekurhuleni Declaration,<sup>106</sup> which focuses on practical solutions to the following issues faced by LGBTI persons, i) changing perceptions and creating awareness; ii) violence and discrimination in accessing education; iii) economic justice; iv) health and psycho-social support; v) legal support for victims of violence and discrimination and their families; vi) secondary victimisation in the criminal justice system and in border control systems; and vii) accurate data on incidences of violence and discrimination based on SOGIE.

During September 2016, the government again reaffirmed its commitment to upholding the rights of LGBTI persons when it refused a homophobic pastor and his entourage, entry to the country,<sup>107</sup> The refusal was invoked under section 29(1)(d) of the Immigration Act 13 of 2002, which authorises the prohibition of a person who is, 'a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence.'

These are indeed notable actions on the part of the government and demonstrates its commitment to upholding the rights of LGBTI persons in their recognition of their sexual

<sup>101</sup> Refer to 2013 to 2015 SAHRC Annual Equality Reports, available at <<http://www.sahrc.org.za>>

<sup>102</sup> Including the Department of International Relations and Cooperation and Foundation for Human Rights.

<sup>103</sup> The seminar was held from 3 to 5 March 2016.

<sup>104</sup> ACHPR Resolution 275: Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, 2014.

<sup>105</sup> Ibid para 4.

<sup>106</sup> Ekurhuleni Declaration on Finding Practical Solutions to End Violence and Discrimination Based on Sexual Orientation and Gender Identity and Expression in Africa, available at, <[http://www.chr.up.ac.za/images/files/news/news\\_2016/EKURHULENI%20DECLARATION%20FINAL.pdf](http://www.chr.up.ac.za/images/files/news/news_2016/EKURHULENI%20DECLARATION%20FINAL.pdf)>

<sup>107</sup> Pastor Steven Anderson is from the United States of America and openly promotes hate speech against LGBTI persons. See news article, 'The law, the homophobic pastor of hate, and why Malusi Gigaba barred him from SA', at <<https://mg.co.za/article/2016-09-13-the-law-the-pastor-of-hate-and-why-malusi-gigaba-barred-him-from-sa>>. Copy of the Minister of Home Affairs statement on Pastor Anderson accessible at, <<http://www.politicsweb.co.za/documents/steven-anderson-is-barred-from-sa--malusi-gigaba>>.

orientation and gender identity. However, the year 2016 highlighted the incongruence in the conduct of the government in respect of SOGIE issues, at the domestic and international level. Whilst several commitments were being made at the domestic level to safeguard the rights of LGBTI persons, internationally, South Africa appeared to be reneging on its commitments.

The SAHRC recommends that the government commits itself to a uniform approach in both its engagements at the international and domestic level and that its support for resolutions are always measured in line with the country's constitutional ideals. To this end, the SAHRC reiterates its call that the South African government continue to follow-through on its commitments made on the various SOGIE-based resolutions, both at the international and regional level, and that it strives to be a forerunner of LGBTI rights on the African continent.

# 5. Economic, Social and Cultural Rights

## 5.1. International Covenant on Economic, Social and Cultural Rights

In December 1966, the UN General Assembly adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR) which came into force in 1976. The rights enshrined in ICESCR include, among others, the right to work; to just and favourable conditions of work; to form trade unions; to social security; to family protection; to an adequate standard of living; to physical and mental health; to water and sanitation; to housing; to education; and to take part in cultural life.

The Optional Protocol to the ICESCR (OP-ICESCR) establishes a complaints mechanism whereby individuals or groups who claim to be victims of a violation of any of the rights under the Covenant, may submit communications to the ICESCR Committee.<sup>108</sup> However, the Committee will not consider a communication unless all available domestic remedies have been exhausted or where the application of such remedies is unreasonably prolonged.<sup>109</sup>

South Africa ratified the ICESCR in January 2015, nearly two decades after its initial signature in October 1994. The Optional Protocol has not been ratified as yet.

## 5.2. The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) was established under the UN's Economic and Social Council's (ECOSOC) Resolution 1985/17 of 28 May 1985.<sup>110</sup> The CESCR is tasked with monitoring the implementation of the ICESCR in State parties and is comprised of 18 expert members, elected to renewable four year terms.<sup>111</sup> During 2016, South African academic, Professor Sandra Liebenberg, was appointed to serve on the Committee from 2017 until 2020.<sup>112</sup>

During 2016, the CESCR continued deliberations on its draft general comment on 'State obligations under the International Covenant of Economic Social and Cultural Rights in the Context of Business Activities', which is set for further discussion during 2017.<sup>113</sup> However, the year saw the finalisation and adoption of two General Comments namely, General Comment No. 22 on the right to sexual and reproductive health (article 12 of the ICESCR), and the General Comment No. 23 on the right to just and favourable conditions of work (article 7 of the ICESCR).<sup>114</sup>

<sup>108</sup> OP-ICESCR, article 2.

<sup>109</sup> Ibid article 3.

<sup>110</sup> The ICESCR is the only UN treaty which did not establish a Committee to oversee and monitor the implementation of the Covenant. See, <[http://www.who.int/hhr/Economic\\_social\\_cultural.pdf](http://www.who.int/hhr/Economic_social_cultural.pdf)>

<sup>111</sup> Committee on Social Economic and Cultural Rights 'Elections 2014 of the Members of the Committee' <<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Elections2014.aspx>>. The Committee met from 28 April to 23 May 2014 (52<sup>nd</sup> session) and from 10 November to 28 November 2014 (53<sup>rd</sup> session).

<sup>112</sup> <<http://blogs.sun.ac.za/law/prof-sandra-liebenberg-appointed-to-serve-on-un-committee/>>, and <<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Membership.aspx>>.

<sup>113</sup> Draft version as at 17 October 2016, available at, <<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Discussion2017.aspx>>

<sup>114</sup> These originally commenced in November 2014. The last General Comment issued by the Committee was in 2009.

### **5.2.1. General Comment No. 22 on the right to sexual and reproductive health**

According to the CESCR, General Comment No.22,<sup>115</sup> is aimed at assisting States in their implementation of the Covenant, and their obligation to ensure every individual's enjoyment of the right to sexual and reproductive health.<sup>116</sup> It should be noted that the CESCR has previously addressed the issue of sexual and reproductive health in its General Comment No. 14 (2000), within the context of the right to the highest attainable standard of health (article 12 of the ICESCR). However, in considering the continuing grave violations of the right to sexual and reproductive health, the Committee decided to issue a specific general comment on the matter.<sup>117</sup>

The CESCR sets the context of the General Comment by confirming that the right to sexual and reproductive sexual and reproductive health entails a set of freedoms and entitlements. The freedoms entail the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health.<sup>118</sup> According to the Committee, the entitlements of the right include unhindered access to a range of health facilities, goods, services and information, which ensure that all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant (the right to the highest attainable standard of health).<sup>119</sup> The Committee further expands that the right is interdependent on other rights under the ICESCR and draws on the example that the right to sexual and reproductive health, combined with the right to education (articles 13 and 14) and the right to non-discrimination and equality between men and women (articles 2 (2) and 3), entails a right to education on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate.<sup>120</sup>

In expanding on the elements of the right to sexual and reproductive health, the Committee identifies four interrelated characteristics, i.e. i) availability; ii) accessibility; iii) acceptability (respectful of and sensitive to patients' particular identities and needs); and iv) quality.<sup>121</sup> Some of the requirements under these elements include ensuring the availability of trained medical professionals; providing access to health facilities and information concerning sexual and reproductive health; respecting the culture and sensitivities of specific groups with regard to sexual and reproductive health; and providing good quality facilities, goods, and information related to sexual and reproductive health.<sup>122</sup>

In enunciating the general obligations of State parties, the General Comment clarifies that State parties are under immediate obligation to eliminate discrimination against individuals

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<sup>115</sup> Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR), E/C.12/GC/22.

<sup>116</sup> Ibid article 3.

<sup>117</sup> Ibid article 4.

<sup>118</sup> Ibid article 5.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid article 9.

<sup>121</sup> <<http://www.ijrcenter.org/2016/03/16/the-cescr-addresses-the-right-to-sexual-and-reproductive-health/>>

<sup>122</sup> Ibid.

and groups and to guarantee their equal right to sexual and reproductive health.<sup>123</sup> States must further adopt the necessary measures to eliminate conditions and combat attitudes that perpetuate inequality and discrimination, particularly on the basis of gender, so as to enable all individuals and groups to enjoy sexual and reproductive health on the basis of equality.<sup>124</sup>

The Committee also lists the core obligations of the State party to ensure the satisfaction of the right to sexual and reproductive health.<sup>125</sup> These core obligations include: i) eliminating laws and policies that criminalize or undermine individual's or specific groups access to sexual and reproductive health facilities, services, and information; ii) adopting a national strategy on sexual and reproductive health; iii) guaranteeing access to quality sexual and reproductive health services, goods, and facilities; iv) enforcing and enacting legal prohibition of gender-based violence, including female genital mutilation and forced marriages; v) taking active measures to prevent unsafe abortion; vi) ensuring a comprehensive education on sexual and reproductive health absent of discrimination; providing essential medicines and medical equipment needed for sexual and reproductive health; vii) and ensuring access to effective remedies and redress for violations of the right to sexual and reproductive health.<sup>126</sup>

### **5.2.2. General Comment No. 23 on the right to just and favourable conditions of work**

In March 2016, the CESCR adopted General Comment No. 23 on the right to just and favourable conditions of work, as contained under article 7 of the ICESCR.<sup>127</sup> The General Comment follows up on the Committee's General Comment No. 18 on the right to work (2006) and notes that the concept of work and workers has evolved since the initial drafting of the Covenant.<sup>128</sup> The General Comment confirms that the right to just and favourable conditions of work is a right of everyone, and applies to all workers in different settings, regardless of gender, age, disability, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.<sup>129</sup>

The General Comment unpacks all aspects of article 7, namely, i) remuneration, (which includes fair wages and equal remuneration for work of equal value, and a decent living for workers and their families); ii) safe and health working conditions and iii), equal opportunity for employment promotion (subject to seniority and competence), and, iv) rest, leisure and reasonable limitation of working hours.<sup>130</sup> The General Comment stresses that the notion of a fair wage is not static and should be assessed against a range of factors and in the relevant context, including, the position of women workers; the precariousness of contracts;

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<sup>123</sup> General Comment No. 22 (note 115 above) article 34.

<sup>124</sup> Ibid article 35.

<sup>125</sup> Ibid article 49.

<sup>126</sup> See note 121 above.

<sup>127</sup> CESCR General Comment No 23. on the Right to on the right to just and favourable conditions of work, A/HRC/31/L.32. (It should be noted that during the 31<sup>st</sup> session, the Human Rights Council adopted a resolution on the right to work. See, A/HRC/RES/31/15)

<sup>128</sup> Ibid (General Comment No. 23) article 4.

<sup>129</sup> Ibid article 5.

<sup>130</sup> ICESCR article 7.

and job insecurity.<sup>131</sup> The General Comment clarifies 'equal remuneration for work of equal value' and provides guidance to States on how to objectively evaluate jobs to avoid indirect discrimination (including across sectors) and measures, including targets, to eliminate discrimination in this context.<sup>132</sup>

In setting out the obligations, the General Comment affirms that State parties must take deliberate, concrete and targeted steps towards the progressive realization of the right to just and favourable conditions of work, using maximum available resources and ensure the provision of judicial and other effective remedies.<sup>133</sup> The General Comment also recognises that non-State actors, such as employer and worker organisations, have a responsibility to secure just and favourable conditions of work and that State parties must effectively regulate and enforce the right, and sanction non-compliance by public and private employers.<sup>134</sup> It further emphasises that State parties must guarantee that the right to just and favourable conditions of work is exercised without discrimination, particularly gender-based discrimination.<sup>135</sup>

The General Comment explains that States have a core obligation to, 'ensure the satisfaction of, at the very least, minimum essential levels of the right' and then outlines that this entails: a legislatively enshrined, non-discriminatory and non-derogable minimum wage; a comprehensive national policy on occupational safety and health; a national policy and laws prohibiting harassment at work, including sexual harassment; and legal guarantee of non-discrimination in respect of the exercise of the right.<sup>136</sup> The role of non-State actors are also listed in the General Comment, asserting that, 'business enterprises, trade unions and all members of society have responsibilities to realise the right to just and favourable conditions of work.'<sup>137</sup> The General Comment notes a State's obligations to realise article 7 rights in respect of the overseas operations of enterprises where the State owns or controls

the enterprise or provides substantial support or services to the enterprise.<sup>138</sup> In addition, States should take measures to require enterprises domiciled in their territory to respect the right throughout their operations extra-territorially and to ensure accountability.<sup>139</sup>

### **5.3. Resolutions on economic, social and cultural rights**

The year 2016, saw a considerable number of resolutions related to economic, social and cultural rights, adopted at international and regional level.<sup>140</sup> Selected resolutions are expanded on below.<sup>141</sup>

<sup>131</sup> Global Initiative for Economic, Social and Cultural Rights 'Committee on ESC Rights adopts General Comment #23 on Just and Favourable Conditions of Work (Art 7)' <<http://globalinitiative-escr.org/committee-on-economic-social-and-cultural-rights-adopts-general-comment-23-just-and-favourable-conditions-of-work-art-7/>>.

<sup>132</sup> Ibid.

<sup>133</sup> General Comment No. 23 (note 127 above) article 50.

<sup>134</sup> Ibid article 51.

<sup>135</sup> Ibid article 53.

<sup>136</sup> Global Initiative for Economic, Social and Cultural Rights (note 131 above).

<sup>137</sup> General Comment No. 23 (note 127 above) para 74.

<sup>138</sup> See note 136 above.

<sup>139</sup> Ibid.

<sup>140</sup> In comparison to the last three years, the report contributors note an increase in resolutions related to economic, social and cultural rights.

<sup>141</sup> It should be noted that during the 32nd session of the Council, (July 2016), South Africa co-sponsored two resolutions relating to promoting the right of enjoyment of the highest attainable standard of physical and mental health, within the context of capacity building in public health (A/HRC/RES/32/15), and access to medicines (A/HRC/RES/32/16), respectively.

Further, that during 2016, both the Human Rights Council and the General Assembly adopted resolutions on the right to food. At the Human Rights Council level, refer to, A/HRC/RES/31/10 (March 2016) and at the General Assembly level, refer to, A/RES/71/191 (December 2016). The ACHPR also adopted a general resolution to develop reporting guidelines with respect to the extractive industries, see, ACHPR/Res. 364(LIX) 2016.

### **5.3.1. HRC Resolution on Protecting Human Rights Defenders, whether Individuals, Groups or Organs of Society, Addressing Economic, Social and Cultural Rights**

During March 2016, the Human Rights Council adopted a Resolution on Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights.<sup>142</sup> Through the resolution, the Council calls upon States to take all measures necessary to ensure the safety of human rights defenders, including those working towards the realization of economic, social and cultural rights.<sup>143</sup> The resolution further emphasises that States should combat impunity by investigating and pursuing accountability for all attacks and threats by State and non-State actors against any individual, group or organ of society that is defending human rights.<sup>144</sup> (The Council calls upon all States to ensure that information held by public authorities, including with respect to economic, social and cultural rights, and as related to environmental, land, natural resources and development issues, is proactively disclosed; and encourages business enterprises of all categories to avoid, identify, assess and address any adverse human rights impacts related to their activities through consultations with potentially affected groups). The resolution was adopted by a vote, the South African government was one of the 33 States which voted in favour of the resolution.<sup>145</sup>

#### **Box 4: Letter addressed to the South African government**

In May 2016, the Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises, together with several other UN mandate holders,<sup>146</sup> addressed an official letter to the South African government regarding allegations over the assassination of environmental human rights defender, Mr. Sikhosiphi Rhadebe.<sup>147</sup> The mandate holders expressed grave concern that the deceased's death appeared to be directly related to his work in the promotion and protection of the rights of a mining community, and called on the South African government to fully investigate the matter. Furthermore, the government provided the mandate holders with detailed responses on several issues surrounding the death, by 31 August 2016.<sup>148</sup>

<sup>142</sup> Resolution on Protecting Human Rights Defenders, whether Individuals, Groups or Organs of Society, Addressing Economic, Social and Cultural Rights, A/HRC/31/L.28, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18535&LangID=E#sthash.Q9qMseju.dpuF>

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid. Six states voted against and eight states abstained from voting. It should be noted that during the November 2015 session of the General Assembly's Third Committee, the South African government voted against the Resolution Human rights defenders in the context of the Declaration on the Right and Responsibility of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms (A/RES/70/161). However, during the December 2015 plenary session of the General Assembly, the South African government supported the resolution and voted in favour. See, voting results at, <[http://www.un.org/en/ga/third/70/docs/voting\\_sheets/L.46.Rev.1.pdf](http://www.un.org/en/ga/third/70/docs/voting_sheets/L.46.Rev.1.pdf)> and <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/70/PV.80](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/PV.80)>, respectively.

<sup>146</sup> Namely, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the, Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on extrajudicial, summary or arbitrary executions.

<sup>147</sup> See letter, Ref: AL ZAF 1/2016, available at, <[https://spdb.ohchr.org/hrdb/33rd/public\\_L\\_AL\\_ZAF\\_31.05.16\\_\(1.2016\).pdf](https://spdb.ohchr.org/hrdb/33rd/public_L_AL_ZAF_31.05.16_(1.2016).pdf)>. According to the reports received by the mandate holders, the deceased was the founder and chairperson of Amadiba Crisis Committee (ACC) an advocacy group launched in 2007 to campaign for the rights of the residents of the Xolobeni community in the Eastern Cape, South Africa. ACC has been at the forefront of a campaign opposing open-cast mining of titanium in the Xolobeni area by Mineral Commodities Limited (MRC).

<sup>148</sup> It is unclear whether the South African government adhered to the request, public information is not available in this regard as yet.

### **5.3.2. HRC Resolution on the right to safe drinking water and sanitation**

In the resolution on the right to safe drinking water and sanitation, the Human Rights Council expressed concern that the lack of access to water and sanitation and hygiene contributes to poor health and high mortality rates.<sup>149</sup> Furthermore, that applying the human rights criterion of affordability, accessibility and availability, require that the use of water, sanitation and hygiene facilities and services is accessible at a price that is affordable to all people.<sup>150</sup> The Council also recognised the challenges faced by women and girls in their access to water and sanitation, particularly during their menstrual cycle, and that the deprivation of the right, reinforces widespread stigma associated to menstruation and may impact both the right to education and health. The Council further noted with concern that gender inequalities still exist in the realisation of the rights to safe drinking water and sanitation, and therefore calls upon States to i) identify, repeal or reform all laws that have both direct and indirect discriminatory consequences with regard to the equal enjoyment of the human rights to safe drinking water and sanitation, as well as with regard to gender-based violence; ii) take action to tackle systemic inequalities and to meet their obligations to effectively achieve substantive gender equality in the enjoyment of the rights to safe drinking water and sanitation; (ii) prevent and combat root causes of gender inequalities, including the impact of social norms, stereotypes, roles and taboos with regard to both women and men, through public campaigns, education and the media, among other measures; and to, iii) develop water, sanitation and hygiene approaches, programmes and policies that enable the meaningful participation of women and girls at all stages of planning, decision-making, implementation, monitoring and evaluation.<sup>151</sup> Also by virtue of the resolution, the Council extended the mandate of the Special Rapporteur on the human right to safe drinking water and sanitation for a period of three years.<sup>152</sup>

The resolution was adopted by vote with the South African government voting in favour.<sup>153</sup> It should be noted that in July 2016, Special Rapporteur on the human right to safe drinking water and sanitation submitted a report to the Council, focusing on gender equality in the realisation of the rights to water and sanitation.<sup>154</sup>

### **5.3.3. HRC Resolution on the right to education**

In July 2015, the Human Rights Council expressed concern at the ongoing attacks on students, teachers, schools and universities, and subsequently, adopted a resolution on the right to education.<sup>155</sup> One year later, in July 2016, the Council adopted another resolution on the right to education, within the context of information and communications technology.<sup>156</sup>

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149 UN Human Rights Council Resolution on the right to safe drinking water and sanitation, A/HRC/33/L.19, p.2.

150 Ibid. It should be noted that in December 2015, the UN General Assembly adopted resolution 70/169 on the human rights to safe drinking water and sanitation.

Through the resolution, Member States recognised that 'the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity. See, General Assembly Resolution on the Rights to Safe Drinking Water and Sanitation, A/RES/70/169, available at, <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/169](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/169)>.

151 Ibid paras 9 (a) - (f).

152 Ibid para 11.

153 For information on the right to water and sanitation in South Africa, see the SAHRC's 'Investigative Report on the Right to Access Sufficient Water and Decent Sanitation, 2014', available on the SAHRC website.

154 Report of the Special Rapporteur on the human right to safe drinking water and sanitation, A/HRC/33/49.

155 UN Human Rights Council Resolution on the Right to Education, 2015 A/HRC/29/L.14/Rev.1.

156 UN Human Rights Council Resolution on the Right to Education, 2016, A/HRC/RES/32/22.

Through the resolution, the Council recognises that factors such as the digital divide, disparities in access to the Internet, infrastructure constraints, marginalization and exclusion, can limit the full potential of information and communications technology in the realisation of the right to education.<sup>157</sup> The Council accordingly called upon all States to give effect to the right to education by, complying with their obligations to respect, protect and fulfil the right to education by all appropriate means.<sup>158</sup> These include taking measures to i) address issues of access, quality and equity in the use of information and communications technology in education, so as to bridge the digital divide; ii) create an enabling policy environment for drawing on digital technologies that can serve as valuable tools in the delivery of education; iii) build the capacity of teachers to use digital technologies yet retain their freedom concerning pedagogical approaches; (iv) assess the quality of education, including online / Internet education and certification; and (v) encourage the availability of educational resources in various languages, including in the implementation of information and communications technology in education.<sup>159</sup> The resolution recognises the significant importance of investment in public education to the maximum of available resources and urges States to expand educational opportunities for all without discrimination.<sup>160</sup> The resolution also acknowledges that communications procedures can promote the right to education and in this regard, calls upon all States that have not yet signed and ratified the Optional Protocol to the ICESCR, to consider doing so as a matter of priority;

The resolution was co-sponsored by South Africa and adopted without a vote.<sup>161</sup> It should be noted that at the time of ratification of the ICESCR, the South African government entered a declaration in respect of the right to education stating that it shall, '*give progressive effect to the right to education... within the framework of its National Education Policy and available resources.*'<sup>162</sup>

#### **5.3.4. ACHPR Resolution on the right to education in Africa**

During its 58<sup>th</sup> session (April 2016), the ACHPR adopted a resolution on the right to education in Africa.<sup>163</sup> In the resolution, the ACHPR affirms the right to education under the African Charter as well as the ICESCR. However, it expressed concern that despite the existence of legal frameworks for the protection of the right to education, many children, particularly girls, children with disabilities, refugee children, migrant children, street children, internally displaced children, girls who abandon school as a result of pregnancy, and children from marginalised communities have not been given equal opportunity to exercise this basic right.<sup>164</sup> The ACHPR further notes that adequate resources have not been made available by States in their budgets to realise the right to education, including the provision of equal access and opportunity.<sup>165</sup>

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157 Ibid p. 2.

158 Ibid para 2.

159 Ibid para 2(a) - (f).

160 Ibid para 3.

161 See, Report of the Human Rights Council's 32nd session, A/HRC/32/2, para 354.

162 For general information see, <<http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/>>.

163 African Commission on Human and Peoples' Rights Resolution on the right to education in Africa, ACHPR/Res. 346 (LVIII) 2016.

164 Ibid p.1.

165 Ibid.

The ACHPR accordingly urged State Parties to guarantee the full scope of the right to education, including, i) the opportunity for all children to enjoy free and compulsory primary education without distinction by progressively providing adequate financial and other resources in their education budget; and ii) ensuring equal opportunity and general accessibility, both physical and economic, for all persons to education without discrimination.<sup>166</sup> The ACHPR further called on State Parties to fulfil their duties with respect to access to education, and adopt all necessary and appropriate measures to the maximum of its available resources to promote, provide and facilitate access to education for all in Africa.<sup>167</sup>

## **5.4. The relationship between the right to life and the right to adequate housing: Report of the Special Rapporteur**

In August 2016, and on the occasion of the 50<sup>th</sup> anniversary of the adoption of the two Covenants, the Special Rapporteur on 'adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context', presented a report to the General Assembly illustrating the link between the right to life and the right to housing.<sup>168</sup>

The report sets out the linkages between housing conditions and the right to life, noting, for example that the death rate among homeless people ranges from two to ten times higher than for those who are not homeless; lack of clean water and sanitation leads to illnesses that kill over 840,000 each year; and approximately 26.4 million people lose their homes through natural disasters every year.<sup>169</sup> The report notes that the right to adequate housing is frequently disconnected from the right to life and core human rights values, and is treated more as a policy aspiration rather than as a fundamental right which demands timely rights-based responses and access to justice.<sup>170</sup>

The Special Rapporteur asserts that the right to life cannot be separated from the right to a secure place to live, and the right to a secure place to live only has meaning in the context of a right to live in dignity and security, free of violence.<sup>171</sup> The report recognises that the international human rights mechanisms, States, domestic courts, civil society and the media are well placed to bring forward an integrated understanding of the right to life within the context of the right to housing. The Special Rapporteur further recommends that States should i) conduct a thorough examination of legislation, court practice and public policies to ensure that the right to life is not restricted to a negative rights framework; ii) formally

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<sup>166</sup> Ibid para 1.

<sup>167</sup> Ibid.

<sup>168</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 2016, A/71/310 (Special Rapporteur on adequate housing report).

<sup>169</sup> UN Office of the High Commissioner for Human Rights 'Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' <<http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>>

<sup>170</sup> Special Rapporteur on adequate housing report (note 168 above), para 5.

<sup>171</sup> Ibid para 27.

recognise that the right to life includes the right to a place to live in dignity and security, free of violence; and ensure access to justice for all victims of violations of the right to life, including those linked to homelessness and inadequate housing; iii) ensure the effective integration of housing policy and social protection with human rights frameworks, so that housing policy is properly framed around the implementation of core human rights obligations.<sup>172</sup> The Special Rapporteur also calls on NHRIs to commit to, 'renouncing the false division between categories of rights and review their mandates and programmes to ensure that full attention is given to violations of the right to life linked to socioeconomic deprivation, including homelessness and inadequate housing.'<sup>173</sup>

#### **Box 4: 50<sup>th</sup> Anniversary of the ICCPR and ICESCR**

During the course of 2016, several events and activities were hosted to commemorate the 50<sup>th</sup> anniversary of the two covenants.<sup>174</sup> In addressing the Human Rights Council at its 31<sup>st</sup> session, South Africa's Deputy Minister of International Relations and Cooperation, announced that the anniversary of the two covenants coincided with the 20<sup>th</sup> anniversary of the South African Constitution. The Deputy Minister further stated that the Constitution is predicated on the rights and guarantees enshrined in both the ICCPR and the ICESCR.<sup>175</sup>

In marking the 50<sup>th</sup> anniversary of the Covenants, the Office of the High Commissioner for Human Rights conducted a campaign entitled, '*Our Rights, Our Freedoms, Always*', to promote and raise awareness of the two treaties.<sup>176</sup>

## **5.5. Domestic developments and recommendations**

### **5.5.1. Protest-related action and the impact on the right to education**

In June 2016, the SAHRC conducted an investigative hearing after a community in the Vuwani District in the Limpopo Province, resorted to vandalising and burning schools as part of a protest to demonstrate their dissatisfaction over a decision by the Municipal Demarcation Board to incorporate Vuwani into a new municipality.<sup>177</sup> Whilst the SAHRC recognised the constitutional right to assemble, it reiterated that the right to protest should not infringe on other rights, and within the context of Vuwani, the children's constitutional right to basic education.<sup>178</sup> The SAHRC specifically stressed that where other rights are exercised at the cost of the right to education without justification, the rights of learners are violated.<sup>179</sup>

<sup>172</sup> Ibid para 73.

<sup>173</sup> Ibid para 74.

<sup>174</sup> See, <<http://2covenants.ohchr.org>>. Whilst 2016 indeed commemorates the anniversary of the two covenants, it also provides the opportunity to reflect on the 'missed opportunity' of enacting the 1967 International Convention on Religious Intolerance and the potential contribution it may have had to the evolution, growth, and understanding of international human rights law within the context of religious intolerance. For a detailed discussion hereon, see, Jensen, S.L.B, 'Lost Covenant: A Story of the Failed 1967 Convention on Elimination of Religious Intolerance', Universal Rights Group Blog, available at, <<http://www.universal-rights.org/blog/lost-covenant-story-failed-1967-convention-elimination-religious-intolerance/>>.

<sup>175</sup> Statement by Deputy Minister Landers at the High-Level Segment of the 31st Session of the Human Rights Council, available at, <<http://www.dirco.gov.za/docs/speeches/2016/land0301.htm>>

<sup>176</sup> <<http://2covenants.ohchr.org/>>

<sup>177</sup> It is alleged that these acts of arson have been committed by persons who are allegedly opposed to a High Court decision in a demarcation matter involving the integration of Vuwani District into the Malamulele Municipality. See, <<http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/370-sahrc-condemns-burning-of-schools-in-limpopo-province>>

<sup>178</sup> South African Human Rights Commission 'SAHRC condemns burning of schools in Limpopo Province' <<http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/370-sahrc-condemns-burning-of-schools-in-limpopo-province>>

<sup>179</sup> Ibid.

The SAHRC's investigative hearing set out to, i) consider the extent to which protest related action has affected basic education; ii) the adequacy of policy and measures in place at local, provincial, and national levels in detecting and preventing public protests; and, iii) whether early warning, and monitoring mechanisms are in place to ensure that schools are secure and threats to continued learning are mitigated.<sup>180</sup> The SAHRC accordingly found that often, protest actions deliberately target schools with the intention of drawing attention to a cause that may be unrelated to basic education and that undermining basic education through the disruption of schools appears to be an effective mechanism to elicit immediate high-level government reaction.<sup>181</sup> In its 'Report on the National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa'<sup>182</sup>, the SAHRC issued a number of recommendations to various stakeholders within government. These include, i) the need for early warning systems in the event of school disruptions due to protest action<sup>183</sup>; ii) the establishment of a reporting mechanism so that information and statistics on all school disruptions as a result of protest actions are recorded at a national level;<sup>184</sup> iii) that the Department of Basic Education (DBE) should constitute an inter-departmental National Public Protest Response Team (National Response Team); and iv) that the National Response Team should provide the SAHRC with a report within nine months focusing on the implementation of recommendations issued by the institution, and again one year thereafter.<sup>185</sup> The SAHRC accordingly calls on Parliament to follow-up with the DBE and ensure that it adheres with the recommendations as issued in the report.<sup>186</sup>

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<sup>180</sup> South African Human Rights Commission 'Media Release: National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa' <<http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/450-media-release-national-investigative-hearing-into-the-impact-of-protest-related-action-on-the-right-to-a-basic-education-in-south-africa>>

<sup>181</sup> SAHRC Report on the National Investigative Hearing into the Impact of Protest-related Action on the Right to a Basic Education in South Africa, 2016, para 1.4, p.43, available on the SAHRC website.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid para 2(b) p. 39.

<sup>184</sup> Ibid para 2(h) p. 39.

<sup>185</sup> Ibid paras 1, 7 and 8, p.39 - 40.

<sup>186</sup> It should be noted that the outcome report on the investigative hearing is scheduled to be tabled in Parliament in early 2017.

# 6. Racial Discrimination

## 6.1. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the UN General Assembly in 1965 and entered into force in 1969. The Convention is a comprehensive instrument prohibiting discrimination based on race, descent, national or ethnic origin.<sup>187</sup> It 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".<sup>188</sup> It further sets out the obligations on State parties to combat racial discrimination and that, "effective protection and remedies' are in place to address any acts of racial discrimination.<sup>189</sup>

### 6.1.1. The Committee on the Elimination of Racial Discrimination

Article 8 of the Convention establishes the Committee on the Elimination of Racial Discrimination (CERD). The CERD is comprised of 18 independent experts, elected to a four year term to monitor the implementation of the Convention.<sup>190</sup> Under the ICERD, States Parties are required to submit an initial report one year after acceding to the Convention, thereafter every two years or "whenever the Committee so requests".<sup>191</sup>

### 6.1.2. South African government's review before the CERD

South Africa ratified ICERD on the 10 December 1998. According to the Convention, the government was due to submit a periodic report to the CERD every two years. However, six years after ratification in 2006, the South African government submitted its initial to third periodic reports. This report was subsequently considered by the Committee in August 2006 where it requested that the government respect the deadlines for submission of its next periodic report and submit by January 2010. However, the South African government failed to adhere to the request and in November 2014, submitted a comprehensive report addressing its outstanding fourth to eight periodic reports.

In August 2016, the CERD reviewed the South African government's fourth to eighth period report under the Convention. During the review, the government acknowledged that the report was overdue and informed the Committee that subsequent measures were introduced to improve the country's reporting mechanisms and enhance its reporting obligations.<sup>192</sup>

<sup>187</sup> ICERD article 1(1).

<sup>188</sup> Ibid.

<sup>189</sup> Ibid article 6.

<sup>190</sup> <<http://www.ohchr.org/EN/HRBodies/CERD/Pages/Membership.aspx>>

<sup>191</sup> ICERD article 9.

<sup>192</sup> Address by Deputy Minister John Jeffery to the Committee on the Elimination of Racial Discrimination, 9 August 2016. Transcript of the statement available at, <[http://www.justice.gov.za/m\\_speeches/2016/20160809-CERD-OpeningStatement.pdf](http://www.justice.gov.za/m_speeches/2016/20160809-CERD-OpeningStatement.pdf)>

Noting the country's apartheid legacy, the government informed the Committee of the steps taken to redress the imbalances of the past and the address the systematic inequality which for years, underpinned South African society.<sup>193</sup> In its Concluding Observations issued to South Africa,<sup>194</sup> the Committee listed several concerns including i) the lack of disaggregated statistical data; ii) absence of hate crimes and hate speech legislation; iii) discrimination against indigenous persons, persons with albinism and black women and girls, and iv) treatment of 'non-citizens' (foreign nationals).<sup>195</sup>

In specific relation to the hate crimes and hate speech legislation, the Committee welcomed the Draft Prevention of Combatting of Hate Crimes and Hate Speech Bill and called for the urgent enactment of the Bill, in consultation with the public.<sup>196</sup> It further recommended that the government ensure that incidents of hate crimes and hate speech are investigated and prosecuted and that the perpetrators are punished, regardless of their official status.<sup>197</sup> The Committee requested that the South African provide feedback, within one year, on the measures taken to give effect to the recommendations pertaining to hate speech and hate crimes.<sup>198</sup>

Noting the multiple layers of discrimination faced by non-citizens in South Africa, including asylum seekers, refugees and migrants in, the Committee expressed concern with regards to, i) unlawful prolonged detention and conditions of detention at the Lindela Repatriation Centre; ii) challenges in accessing basic services such as health-care and in accessing justice; and, iii) xenophobia, and racism, including the violent attacks perpetrated against foreign nationals and the subsequent displacement and damage to property.<sup>199</sup> Within this context, the Committee therefore recommended that the South African government, should

- i. Improve conditions of detention and end unlawful detention practices of asylum seekers and refugees. Furthermore, that detention should be for the shortest period of time and reserved for urgent cases.<sup>200</sup>
- ii. Ratify the outstanding international treaties<sup>201</sup>, particularly the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), and establish an independent monitoring mechanism to monitor repatriation and detention centres.<sup>202</sup>
- iii. Take measures to ensure non-citizens have access to basic services such as health-care, and access to justice, without discrimination and that language interpretation services are introduced to eliminate barriers in access to basic services.<sup>203</sup>

<sup>193</sup> Observation from a contributor of this report, who was present during the review of the South African government.

<sup>194</sup> Concluding observations on the fourth to eighth periodic reports of South Africa, Committee on the Elimination of Racial Discrimination, 26 August 2016, CERD/C/ZAF/CO/4-8.

<sup>195</sup> Ibid paras 6; 12; 20-26.

<sup>196</sup> By October 2016, the South African government released the draft Bill for public comment. See notice in Government Gazette, available at, <<http://www.justice.gov.za/legislation/bills/2016-HateCrimes-HateSpeechBill.pdf>>

<sup>197</sup> CERD Concluding Observations (note 194 above) para 13.

<sup>198</sup> Ibid para 36.

<sup>199</sup> Ibid paras 26(a) - (c).

<sup>200</sup> Ibid para 27(a).

<sup>201</sup> Namely, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, International Convention for the Protection of all Persons from Enforced Disappearance, ILO Convention on Indigenous and Tribal Peoples (No. 169). See, CERD Concluding Observations (note 194 above) para 31.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid para 27(b).

- iv. Conduct public education campaigns to end racism and xenophobia, which includes, dialogues with communities in conflict and training, law enforcement officials, health and social service providers are trained on the rights of non-citizens.<sup>204</sup>
- v. Prosecute perpetrators of racial discrimination and xenophobia motivated crimes and provide further information to the Committee during the next review, on the prosecution of cases of violence against foreign nationals, including statistical data on the number of cases reported, prosecutions, and convictions of perpetrators.<sup>205</sup>

The Committee encouraged the South African government to facilitate a visit by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, which was requested in 2008, with reminders sent in 2010, 2011, and 2012.<sup>206</sup>

The Committee also recognised the role of the SAHRC in combatting racial discrimination in the country and noted with concern, that the institution does not have sufficient resources to effectively execute its mandate. It therefore recommended that the South African government provide the SAHRC with adequate financial resources and to implement the recommendations emanating from the institutions various investigative reports.<sup>207</sup> The Committee specifically requested that the South African government provide a follow-up steps taken to implement on this recommendation, within one year. It should be noted that the SAHRC submitted a NHRI parallel report to the Committee and delivered an oral statement during South Africa's review.<sup>208</sup>

### Box 5: SAHRC's Designation under ICERD

At the time of ratification of the ICERD in 1998, the South African government entered a declaration under article 14(2) which confirms that, 'the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention.'<sup>209</sup>

<sup>204</sup> Ibid paras 27(b) - (c).

<sup>205</sup> Ibid para 27(c). It should be noted that in March 2011, the CERD issued an 'Early Warning' to the South African government wherein it expressed concern over the xenophobic acts and continuing, 'racist violence targeting refugees and asylum-seekers' in South Africa. The Committee recommended that South Africa, expedite the process of granting asylum, eradicate all forms of ill-treatment of foreign nationals, and ensure that foreign nationals are fully aware of their rights and called on the government to strengthen measures for dealing with xenophobia and prejudices which lead to racial discrimination. See, UN High Commissioner for Human Rights, Palais de Nations, GH/cbr (11<sup>th</sup> March 2011), available at, <[http://www2.ohchr.org/english/bodies/cerd/docs/SouthAfrica\\_11March2011.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/SouthAfrica_11March2011.pdf)>

<sup>206</sup> CERD Concluding Observations (note 194 above) para 28.

<sup>207</sup> Ibid para 9.

<sup>208</sup> SAHRC's NHRI Report to the CERD available at, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fIFN%2fZAF-%2f24639&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fIFN%2fZAF-%2f24639&Lang=en)>

<sup>209</sup> Under article 14 of the Convention, individuals or groups of individuals who claim that any of their rights under the Convention have been violated by a State party, and who have exhausted all available domestic remedies may submit written communications to the Committee for consideration.

## 6.2. Resolutions on racial discrimination

### 6.2.1. HRC Resolution on addressing the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls

In July 2016, the Human Rights Council adopted a resolution, without a vote, addressing the impact and violence in the context of racism, racial discrimination, xenophobia and related intolerance, with specific reference to women and girls.<sup>210</sup> Through the resolution, the Council expressed deep regret that many women and girls, including those belonging to national or ethnic, religious and linguistic minorities, face multiple and intersecting forms of discrimination and are disproportionately affected by aggravated forms of racism, racial discrimination, xenophobia and related intolerance.<sup>211</sup> The Council recognised that the elimination of all forms of discrimination against women and girls requires the consideration of their specific socioeconomic context, including their increased vulnerability to certain patterns of racism, racial discrimination, xenophobia and related intolerance.<sup>212</sup> To this end, the Council accordingly called on States to develop and strengthen comprehensive gender-responsive, multi-sectoral policies and programmes involving relevant authorities, in sectors such as justice, health, social services, education and child protection services and relevant non-State actors, with a view to promoting the human rights of women and girls affected by multiple and intersecting forms of racism, racial discrimination, xenophobia and related intolerance, and related violence.<sup>213</sup>

The Council also requested the UN High Commissioner for Human Rights to prepare a report on the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls, with a view to identifying challenges and good practices and to present it to the Council at a future session.<sup>214</sup>

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<sup>210</sup> Resolution on addressing the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls, A/HRC/RES/32/17.

<sup>211</sup> Ibid p.2.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid para 3.

<sup>214</sup> Namely the 35<sup>th</sup> session, with a discussion on the report scheduled for the 36<sup>th</sup> session, see *ibid* paras 4 – 5.

### **6.3. Report of the UN Working Group of Experts on People of African Descent**

The UN Working Group on People of African Descent, was established in 2002 to 'study the problems of racial discrimination faced by people of African descent living in the African Diaspora and make proposals for the elimination of racial discrimination against people of African descent'.<sup>215</sup> In January 2015, the International Decade for People of African Descent commenced under a three pillar theme of 'Recognition, Justice and Development'.<sup>216</sup> The main objectives of the International Decade are to, i) promote respect, protection and fulfilment of all human rights and fundamental freedoms by people of African Descent, as recognized in the Universal Declaration of Human Rights; ii) promote a greater knowledge of and respect for the diverse heritage, culture and contribution of people of African descent to the development of societies and iii) adopt and strengthen national, regional and international legal frameworks according to the Durban Declaration and Programme of Action and the ICERD and to ensure their full and effective implementation.<sup>217</sup>

In August 2016, the Working Group released a report to the General Assembly, setting out the activities for implementation of the International Decade and listing recommendations for action by Member States.<sup>218</sup> While recognising that the second year of the International Decade for People of African Descent brought promising and positive results, the Working Group observed a resurgence and legitimisation of racism and xenophobia in public discourse in the media and, in some instances, by politicians.<sup>219</sup> The Working Group notes this as a 'major threat, not only to the rights of victims, but also to the rule of law, democracy, social cohesion and peace for society in general'.<sup>220</sup> It subsequently recommended that States should comply with their obligations under the ICERD and, continue to revise their legislation and adopt public policies to address the needs of people of African descent and other groups facing racial discrimination.<sup>221</sup>

The Working Group specifically recommended that States 'redouble their efforts', in the following areas, i) a stronger manifestation of political will to combat racism, racial discrimination and xenophobia, based on the awareness of the resurgence of racism and its serious threat; ii) intervene more actively and take positive measures to eliminate the conditions that cause or contribute to perpetuating racial discrimination and the continued challenge of social exclusion faced by people of African descent; iii) encourage the participation of all groups facing racial discrimination, including people of African descent, in the political, social and economic life of their countries and promote intercultural dialogue; iv) take all necessary steps

<sup>215</sup> Durban Declaration and Programme of Action 2001, (hereafter the DDPA), para 7. The DDPA is available at, <<http://www.un.org/WCAR/durban.pdf>>. Note that the Working Group of Experts on People of African Descent was established by the former Commission on Human Rights resolution 2002/68 (as a Special Procedure). The mandate was subsequently renewed by the Commission on Human Rights and the Human Rights Council in its resolutions (CHR 2003/30, 2008/HRC/RES/9/14, 2011/HRC/RES/18/28, 2014/HRC/RES/27/25). See, <<http://www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx>>

<sup>216</sup> As proclaimed by the 2013 General Assembly resolution 68/237. The resolution is available at, <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/237](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/237)>

<sup>217</sup> United Nations 'Programme of Activities' <<http://www.un.org/en/events/africandescentdecade/plan-action.shtml>>

<sup>218</sup> Programme of activities for the implementation of the International Decade for People of African Descent, A/71/290.

<sup>219</sup> Ibid para 76.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

to combat racial discrimination against people of African descent at all stages of the justice system; and v) collect, compile, analyse, disseminate and publish reliable statistical data on the human rights situation of people of African descent, in order to monitor the situation of people of African descent, assess progress made, increase visibility, identify social gaps and formulate public policies.<sup>222</sup>

### **Box 6: 15<sup>th</sup> Anniversary of the Durban Declaration and Programme of Action (DDPA)**

Adopted by consensus at the 2001 World Conference against Racism (WCAR) in Durban, South Africa, the Durban Declaration and Programme of Action (DDPA) is a comprehensive, action-oriented document that proposes concrete measures to combat racism, racial discrimination, xenophobia and related intolerance.<sup>223</sup> The DDPA embodies the firm commitment of the international community to tackle racism, racial discrimination, xenophobia and related intolerance at the national, regional and international level, and contains recommendations and practical measures.<sup>224</sup>

In 2016, the Human Rights Council commemorated the 15<sup>th</sup> anniversary of the DDPA under the theme, 'Challenges and achievements of the Durban Declaration and Programme of Action – 15 years after'. Whilst acknowledging the progress made over the last 15 years, the UN High Commissioner for Human Rights noted the resurgence of racial discrimination and xenophobia across the world and the violent attacks perpetrated against foreign nationals.<sup>225</sup> The High Commissioner accordingly called on States to focus their attention on fulfilling their responsibility to protect the most vulnerable persons in society and to honour their obligations under the ICERD.<sup>226</sup>

## **6.4. Domestic developments and recommendations**

### **6.4.1. National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance**

One of the outcomes of the Durban Declaration and Programme of Action was the recommendation issued to States to, 'establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance, including their gender-based manifestations.'<sup>227</sup> In 2016, the South African government finally launched the much anticipated draft National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP), for public consultation.

The objective of the NAP is to provide South Africa with a comprehensive policy framework to address racism, racial discrimination, xenophobia and related intolerance at both a private

222 Ibid paras 76(a) - (e).

223 United Nations 'The Durban Declaration and Programme of Action' <<http://www.un.org/en/durbanreview2009/ddpa.shtml>>

224 Ibid.

225 <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18488&LangID=E#sthash.avnAULxf.dpu>>. Also see the remarks made by the Special Rapporteur on contemporary forms of racism, Mutuma Ruteere; the Chair-Rapporteur of the Working Group of Experts on People of African Descent, Mireille Fanon Mendes-France; and the Chairperson of the Committee on the Elimination of Racial Discrimination, José Francisco Cali Tzay, where the three experts opined that, 'fifteen years after the Durban Conference very little progress has been made in tackling racism, afrophobia, racial discrimination, xenophobia and related intolerance... instead we see an alarming increase of hate and xenophobic speech echoing across the globe...'. Available at, <<http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17242&LangID=E#sthash.yTqjQQFv.dpu>>

226 Ibid.

227 DDPA (note 215 above) para 66.

and public level.<sup>228</sup> The NAP is also intended to complement existing laws and policies which address equality, equity and discrimination and is an attempt to consolidate these into a workable programme of action. The NAP also provides for monitoring on-going incidents of racism, racial discrimination, xenophobia and related intolerance through establishing a rapid response team which reports directly to government.<sup>229</sup> It is envisioned that the latter will serve as a barometer to measure the extent of the incidents, the circumstances which allow for their continuation and the aid in the provision of tools to address them.<sup>230</sup> The NAP is also specifically intended to assist South Africa to meet its international and regional human rights obligations, particularly those listed under the ICERD.<sup>231</sup> One of the legislative measures recognised under the NAP to combat discrimination, includes the passing of hate crimes legislation.<sup>232</sup> To this end, it should be noted that in October 2016, government released the draft Prevention and Combating of Hate Crimes and Hate Speech Bill for public comment.<sup>233</sup>

It should be pointed out that the DDPA also calls on States to engage with NHRIs in the formulation and execution of their NAPs.<sup>234</sup> To this end, the SAHRC has been closely involved in the process and previously co-chaired the National Coordinating Committee which was tasked with drafting the NAP.<sup>235</sup> In August 2016, the SAHRC submitted comments to the Department of Justice and Correctional Services, on the draft version the NAP. Noting the significant delays over the years in finalising the NAP, the SAHRC however encourages the government to expedite the processing of the NAP so as to adhere with its obligations under Durban Declaration and Programme of Action and further strengthen the existing legislative and policy frameworks in South Africa to combat racism, racial discrimination, xenophobia and related intolerance.<sup>236</sup>

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228 National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016 – 2021, para 4

229 Ibid para 6.

230 Ibid.

231 Ibid para 7.

232 Ibid table as populated on p.47.

233 The deadline for comments was extended to 31 January 2017. As at December 2017, the SAHRC was in the process of preparing a submission. It is anticipated that further issues related hereto will be addressed in the SAHRC's 2017 Annual International and Regional Human Rights Report.

234 DDPA (note 215 above) para191.

235 However in 2009, the SAHRC relinquished its position as co-chair to ensure that its role as an independent body would be preserved and to monitor the drafting and implementation of the NAP with the necessary autonomy and impartiality. The SAHRC continues to play a consultative role in the process of advancing South Africa's NAP.

236 See also para 51 in the SAHRC's NHRI Report on the South African Government's combined Fourth to Eight Periodic Country Report under the International Convention on the Elimination of Racial Discrimination, submitted to the CERD, July 2016.

# 7. Discrimination Against Women

## 7.1. Convention on the Elimination of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), was adopted by the UN General Assembly in 1979. The Convention provides the basis for realising equality between men and women through ensuring women's equal access to, and equal opportunities in political and public life as well as education, health and employment.<sup>237</sup> The Convention defines discrimination against women as, 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'<sup>238</sup> In its approach, the Convention covers three dimensions of the situation of women, namely, i) civil rights and the legal status of women; ii) human reproduction, and iii) the impact of cultural factors on gender relations.<sup>239</sup>

In 1999, the Optional Protocol to the CEDAW was adopted and formally entered into force in December 2000. It empowers the Committee on the Elimination of Discrimination against Women (CEDAW Committee) to consider communications submitted by individuals or groups of individuals alleging violations of CEDAW. It further enables the Committee conduct inquiries into grave or systematic violations of the Convention.<sup>240</sup>

### 7.1.1. Committee on the Elimination of Discrimination Against Women

The Committee on the Elimination of Discrimination against Women (CEDAW Committee), is the body which monitors State party compliance with the CEDAW. The Committee is comprised of 23 independent experts who meet thrice annually to review State party reports.<sup>241</sup> Under article 18 of the CEDAW, State parties should submit an initial report to the Committee within one year after ratification and thereafter at least every four years or whenever the Committee requests.<sup>242</sup>

### 7.1.2. South Africa's responses to the CEDAW Committee

South Africa ratified the CEDAW in 1995 and the Optional Protocol in 2005. In 1998, the South African government submitted the initial report to the Committee but subsequently failed to adhere to its reporting obligations for timeous submission of its second, third and fourth periodic reports.<sup>243</sup> These overdue reports which were only submitted in 2009 and

<sup>237</sup> UN 'Convention on the Elimination of All Forms of Discrimination against Women: Overview of the Convention' <<http://www.un.org/womenwatch/daw/cedaw/>>

<sup>238</sup> CEDAW, article 1.

<sup>239</sup> UN Office of the High Commissioner for Human Rights 'Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979' <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>>

<sup>240</sup> In those States parties where this procedure is applicable, in accordance with articles 8 and 10. <<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Membership.aspx>> Also see, <<http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm>>

<sup>241</sup> <<http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>>

<sup>242</sup> CEDAW, article 18(b).

<sup>243</sup> Women in the Presidency 'South Africa's compliance with the Convention on the Elimination of all Forms of Discrimination against Women & 1995 Beijing Platform for Action reporting requirements: Commission on Gender Equality briefing' <<https://pmg.org.za/committee-meeting/11736/>>

during the country review in 2011, the Committee requested that the South African government provide feedback on specific Concluding Observations, by February 2013.<sup>244</sup> The government did not however adhere to this deadline and in both August 2013 and April 2014, the CEDAW Committee addressed reminder letters to South Africa requesting a response to the call for additional information.<sup>245</sup> It was only in September 2015 that South Africa responded to the Committee's request.<sup>246</sup>

In May 2016, the CEDAW Committee's Rapporteur for Follow-up on Concluding Observations, addressed correspondence to the South African government noting the 31 month delay in submission of the responses.<sup>247</sup> In examination of these responses, the Committee concluded that the government failed to adequately implement the recommendations related to, i) the implementation of gender equity legislation; ii) the adoption of the Customary Law of Succession and Related Amendment Bill, and iii) the preparation of a unified family code, in conformity with the Convention, in which unequal inheritance rights, property and land rights and polygamy are addressed.<sup>248</sup> The Committee accordingly requested that the South Africa government provide information on these aspects in its next periodic report to the Committee. It should however be noted that the country's fifth periodic report was due in February 2015 and to date, has not been submitted.<sup>249</sup>

### **7.1.3. General Recommendation No.34 on the rights of rural women**

In March 2016, the CEDAW Committee adopted General Recommendation No. 34 on the Rights of Rural Women (under article 14 of the CEDAW).<sup>250</sup> During the course of its work, the Committee identified various ways in which rural women continue to face discrimination and subsequently developed a General Recommendation which recognises the unique situation of rural women and the obligations of States parties in recognising, promoting and protecting their rights.<sup>251</sup>

The General Recommendation focuses on rural women in both developing countries and developed countries, recognizing that in the latter instance, rural women suffer discrimination and challenges in economic empowerment, participation in political and public life, access to services and the labour exploitation.<sup>252</sup> The Committee further notes that rural women continue to face systematic and persistent barriers to the full enjoyment of their human rights and that, in many cases, conditions have deteriorated.<sup>253</sup>

The Committee cites that it has observed a number of obstacles and restrictions that impede women from realising their right of access to justice on a basis of equality, including a lack of

<sup>244</sup> Concluding observations of the Committee on the Elimination of Discrimination against Women, issued to South Africa, March 2011, CEDAW/C/ZAF/CO/4.

<sup>245</sup> Letter to Permanent Representative of the Republic of South Africa to the United Nations <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT\\_CEDAW\\_FUL\\_ZAF\\_16988\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_FUL_ZAF_16988_E.pdf)>

<sup>246</sup> Information provided by South Africa in follow-up to the concluding observations issued by the CEDAW Committee, CEDAW/C/ZAF/CO/4/Add.1. See, recommendations 15 and 42, respectively.

<sup>247</sup> Letter to the South African government available at, <[http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT\\_CEDAW\\_FUL\\_ZAF\\_23900\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_FUL_ZAF_23900_E.pdf)>

<sup>248</sup> Ibid p.2.

<sup>249</sup> See treaty reporting status for South Africa at, <[http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN)>

<sup>250</sup> General Recommendation No. 34 on the Rights of Rural Women, CEDAW/C/GC/34.

<sup>251</sup> Ibid para 1.

<sup>252</sup> Ibid para 2.

<sup>253</sup> Ibid para 4.

effective jurisdictional protection offered by the State parties to the CEDAW.<sup>254</sup> Furthermore, that these obstacles occur in a structural context of discrimination and inequality, due to factors such as gender stereotyping, discriminatory laws, intersecting or compounded discrimination, procedural and evidentiary requirements and practices, and a failure to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all women.<sup>255</sup> According to the Committee, all of these obstacles constitute persistent violations of women's human rights.<sup>256</sup>

The General Recommendation therefore comprehensively sets out the obligations on State parties to overcome the obstacles of women's access to justice. It emphasises the importance of women's access to justice in diverse legal systems and all areas of law, irrespective of economic or social status, political background, geographical location, disability, sexual orientation or gender identity.<sup>257</sup>

The General Recommendation contains several progressive provisions related to the rights of rural women, and places a strong emphasis on rural women's rights to land and natural resources. The Committee highlights that it "considers rural women's rights to land, natural resources, including water, seeds, forestry, as well as fisheries, as fundamental human rights."<sup>258</sup>

The General Recommendation also contains specific recommendations to States in relation to rural women's rights to health, education, employment, housing, water, sanitation, energy and participation.<sup>259</sup>

## **7.2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)**

In 2003, the AU adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) which came into effect in November 2005.<sup>260</sup> The Maputo Protocol complements and strengthens the articles of the African Charter which relate to the protection and promotion of women's rights. Its provisions, with regard to civil and political rights, physical and psychological integrity, sexual and reproductive health, non-discrimination, economic emancipation, among others, symbolise African States' commitments to put an end to discrimination, violence and gender stereotypes against women.<sup>261</sup> In terms of article 62 of the African Charter, State parties include in the periodic reports to the ACHPR, the measures taken to implement the Maputo Protocol.

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254 Ibid para 3.

255 Ibid.

256 Ibid.

257 UN Women 'UN Women welcomes CEDAW General Recommendation on women's access to justice' <<http://www.unwomen.org/en/news/stories/2015/8/cedaw-general-recommendation#sthash.t6Bfc2xP.dpuf>>

258 The Global Initiative 'GI-ESCR welcomes CEDAW General Recommendation No. 34 on the Rights of Rural Women' <<http://globalinitiative-escr.org/gi-escr-welcomes-cedaw-general-recommendation-no-34-on-the-rights-of-rural-women/>>

259 Ibid.

260 Maputo Protocol available online at, <[http://www.achpr.org/files/instruments/women-protocol/achpr\\_instr\\_proto\\_women\\_eng.pdf](http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf)>

261 FIDH 'Women's Rights in Africa: 18 countries are yet to ratify the Maputo Protocol!' <<https://www.fidh.org/en/international-advocacy/african-union/13644-women-s-rights-in-africa-18-countries-are-yet-to-ratify-the-maputo>>

## **7.3. Resolutions relating to discrimination against women**

### **7.3.1. HRC Resolution on the elimination of discrimination against women**

In July 2016, the Human Rights Council adopted, without a vote, a resolution on the elimination of discrimination against women.<sup>262</sup> While the resolution touches on many aspects related to discrimination against women, the Human Rights Council expressed regret that many women and girls from marginalised groups or vulnerable situations, are still subjected to discriminatory laws and practices, and that de jure and de facto equality has not been achieved.<sup>263</sup> The Council also expressed concern about the disparate impact of poverty, climate change, austerity measures and natural disasters on women and girls' health and well-being, and that often health policies perpetuate gender stereotypes and fail to consider socioeconomic disparities and other differences among women.<sup>264</sup> The resolution therefore calls on States to ensure equal access to and equal treatment of women and men in both education and health care, and to enhance women's sexual and reproductive health.<sup>265</sup> States should also commit to ensure women's equal right to the full enjoyment of the highest attainable standard of physical and mental health, and to promote the integration of the distinct needs of each phase of their life cycle through their differential health treatment.<sup>266</sup>

The Council specifically calls on States to promote a human rights-based approach to women's health, and to foster a functioning health system, with adequate supplies, equipment, trained personnel and infrastructure, and an efficient system of communication, referral and transport to support women's right to the full enjoyment of the highest attainable standard of physical and mental health.<sup>267</sup> The Council emphasised, the need to accelerate efforts at all levels to eliminate all forms of violence against women and girls, including domestic violence, violence on their way to or at school, in other public spaces and in health facilities.<sup>268</sup>

By virtue of the resolution, the Council also extended the, mandate of the Working Group on the issue of discrimination against women in law and in practice for a period of three years.<sup>269</sup>

### **7.3.2. HRC Resolution on the elimination of female genital mutilation**

In July 2016, the Human Rights Council adopted a resolution on the elimination of female genital mutilation.<sup>270</sup> The Council expressed concern that, despite the increase in national, regional and international efforts, the practice of female genital mutilation persists in some countries and has seen the development of new forms, such as medicalisation and cross-border practice.<sup>271</sup> However, the Council recognised the growing global consensus regarding the need to take appropriate measures to prevent and eliminate female genital mutilation, and reiterated that the practice has no relevant religious or cultural basis.<sup>272</sup>

<sup>262</sup> UN Human Rights Council Resolution on the elimination of discrimination against women, A/HRC/RES/32/4.

<sup>263</sup> Ibid p. 2.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid para 12.

<sup>266</sup> Ibid para 5.

<sup>267</sup> Ibid para 7.

<sup>268</sup> Ibid para 16.

<sup>269</sup> Ibid para 20.

<sup>270</sup> UN Human Rights Council Resolution on the elimination of female genital mutilation, A/HRC/RES/32/21.

<sup>271</sup> Ibid p.1.

<sup>272</sup> Ibid p.2.

The Council further noted that States have primary responsibility for creating favourable conditions to prevent and eliminate female genital mutilation and accordingly called on States to continue and intensify efforts to provide information and raise awareness about the harmful effects of the practice.<sup>273</sup> It was also recommended that States place special emphasis on education, in particular of youth, parents and religious, traditional and community leaders, about the harmful effects of female genital mutilation, and especially to encourage men and boys to become more involved in information and awareness-raising campaigns to become the agents of change.<sup>274</sup> States are also urged to adopt national legislation prohibiting female genital mutilation, consistent with international human rights law, and harmonising legislation in order to effectively address the cross-border practice of female genital mutilation.<sup>275</sup>

The resolution was adopted without a vote, but was sponsored by the South African government (on behalf of the Africa group).

## **7.4. Report of the Special Rapporteur on violence against women, its causes and consequences: Mission to South Africa**

In June 2016, the Special Rapporteur on 'violence against women, its causes and consequences', released a report following an official mission to South Africa during December 2015.<sup>276</sup> The report examines the gaps and challenges in South Africa fulfilling its obligation to eliminate violence against women and recommends measures for preventing and combating violence against women in the country.<sup>277</sup> The Special Rapporteur recognises that South Africa is still a young democracy which is deeply influenced by its historical violent past characterised by race, class and gender divide.<sup>278</sup> Furthermore, that effect of apartheid, still resonate profoundly in South African society which is dominated by, 'deeply entrenched patriarchal norms and attitudes towards the role of women and which makes violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon'.<sup>279</sup> At the core of this violence against women pandemic lie unequal power gender relations, patriarchy, homophobia, sexism and other harmful discriminatory beliefs and practices.<sup>280</sup> The Special Rapporteur further notes the additional triggers of violence against women include widespread use of drug and alcohol, high unemployment rate and the continuing stereotypical portrayal of women in the media.<sup>281</sup>

The Special Rapporteur noted the absence of national statistics available on domestic violence,<sup>282</sup> and that few studies have been conducted on the prevalence and forms of

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273 Ibid para 2.

274 Ibid para 1.

275 Ibid para 3.

276 Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa , A/HRC/32/42/Add.2

277 Ibid p. 1

278 Ibid para 3

279 Ibid

280 Ibid

281 Ibid

282 Ibid para 15. (Domestic violence is not recorded by the SAPS as a specific crime category and therefore there are no national statistics available. When cases of domestic violence are reported to the police, they are recorded under a range of different categories such as assault, malicious damage to property, pointing a firearm, murder etc.)

domestic violence, mostly on intimate partner violence which is said to be the most common form of violence experienced by women.<sup>283</sup>

While recognising South Africa's legislative frameworks to address gender-based violence, the Special Rapporteur noted the gaps in incorporation and giving full effect to substantive gender equality and the prohibition of direct and indirect discrimination against women.<sup>284</sup> The Special Rapporteur accordingly issued several recommendations to the South African government under four themes, namely, i) law and policy reform; ii) investigation, prosecution, support services and protective measures; and, iii) national mechanisms; and, iv) collection of data and prevention of violence against women. In summary selected recommendations under these themes include:

- i. Renewing efforts to implement the CEDAW Committee's recommendations, (as referenced in 7.1.2 above), on a Gender Equality Law and a unified family law in line with the CEDAW.<sup>285</sup>
- ii. Review of relevant legislation and regulations currently in force with a view to decriminalise women in prostitution.<sup>286</sup>
- iii. Ensure that the criminal justice system has the capacity, in human resources, skills, expertise, and funding, to deal efficiently and effectively with gender-based violence.<sup>287</sup>
- iv. Improve training of police officials in the response, management and investigation of domestic violence and sexual offences and establish a monitoring and evaluation process for such training initiatives.<sup>288</sup> In addition, mandatory training should also be provided to members of the judiciary on South Africa's obligations under the CEDAW and the CEDAW Committee's jurisprudence on violence against women.<sup>289</sup>
- v. Strengthen, clarify roles and responsibilities and ensure adequate resources for state institutions to carry out their mandate with respect to gender equality and violence against women.<sup>290</sup>
- vi. Expand the collection of data to all forms of violence against women, domestic violence and sexual offences to include details on sex, age, sexual orientation, disability as well as relationship between perpetrator and victim.<sup>291</sup>

During the mission, the Special Rapporteur consulted with several women's shelters and conducted inspections at informal settlements. Noting the 'extreme levels' of violence against women in the informal settlements, the Special Rapporteur recommended that the

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283 Ibid para 16.

284 Ibid para 81.

285 Ibid para 81(1)(a).

286 Ibid para 81(1)(d).

287 Ibid para 81(2)(f).

288 Ibid para 81(2)(e).

289 Ibid para 81(2)(g).

290 Ibid para 81(3)(a).

291 Ibid para 81(4)(a).

government consider establishing national inquiries on the issue. It was further recommended that a specific national action plan on violence against women is adopted, taking into account the dynamics of informal settlements including safety, housing, education and health needs of women and girls specifically.<sup>292</sup>

It should be noted that the SAHRC held consultations with the Special Rapporteur during the official mission to the country.

#### **Box 7: 60<sup>th</sup> anniversary of the Women's March**

On 9 August 2016, South Africa commemorated the 60th anniversary of the 1956 Women's March, where over 20000 women marched to the Union Buildings in Pretoria to protest against the carrying of pass books and the apartheid government's control over the movement of black women in urban areas.<sup>293</sup>

## **7.5. Domestic developments and recommendations**

### **7.5.1. Traditional Courts Bill**

In December 2016, South Africa's Cabinet approved for introduction into Parliament, the much-anticipated, Traditional Courts Bill. Noting that the previous versions of the Bill<sup>294</sup> faced substantial criticism and failed to fully recognise the rights of women, the new draft Bill recognises the participation of women in the traditional court proceedings.<sup>295</sup> In its approval of the draft legislation, Cabinet stated that the new Bill, 'contributes to realising a developmental, capable and ethical state by regulating the role and functions of the institution of traditional leadership in the resolution of disputes, in accordance with the Constitution of South Africa.'<sup>296</sup> Cabinet further announced that the draft Bill will improve access to justice services by all with the view to promote social cohesion.<sup>297</sup> This is significant in light of the challenges faced by women, particularly in the rural areas, in their right to access justice. Noting that the draft Traditional Courts Bill will be processed in Parliament during 2017,<sup>298</sup> the SAHRC calls on Parliament to engage in a comprehensive public engagement process, and give due consideration to the concerns raised by affected women. Furthermore, the Bill should draw on the insight of the CEDAW Committee in both their 2015 General Recommendation No. 33 on women's access to justice,<sup>299</sup> and the 2016 General Recommendation No. 34 on the rights of rural women. The SAHRC also recommends that Parliament encourage the South African government to urgently submit its overdue reports under the CEDAW.

292 Ibid para 81(1)(h).

293 South African Government 'Women's Day' <[www.gov.za/womens-day](http://www.gov.za/womens-day)>

294 Namely the 2008 and 2012 versions.

295 South African Government News Agency 'Revised Traditional Courts Bill on its way to Parliament' <[www.sanews.gov.za/south-africa/revised-traditional-courts-bill-its-way-parliament](http://www.sanews.gov.za/south-africa/revised-traditional-courts-bill-its-way-parliament)>

296 See para 3.2 of the Cabinet statement, 7 December 2016, available at, <http://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-7-december-2016>

297 Ibid

298 Further developments in this regard will be captured in the SAHRC's 2017 Annual International and Regional Human Rights Report.

299 Committee on the Elimination of Discrimination against Women General Recommendation No. 33 on women's access to justice, CEDAW/C/GC/3.

# **8. Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

## **8.1. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

In December 1984, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was adopted. The Convention places an obligation on State parties to take effective legislative, administrative, judicial or other measures to prevent acts of torture within its jurisdiction,<sup>300</sup> and prohibits a State party from expelling, returning or extraditing a person to another State where they are likely to be subjected to torture.<sup>301</sup>

In June 2006, the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) entered into force. The OPCAT establishes the Sub-Committee on Prevention of Torture which has a mandate to visit places where persons are deprived of their liberty.<sup>302</sup> Under the OPCAT, State parties shall establish an independent national preventive mechanism (NPM) which is authorised to inspect places of detention.<sup>303</sup>

The year 2016 marks the tenth anniversary of the OPCAT.

### **8.1.2. Committee Against Torture**

The Committee Against Torture (CAT) is established by article 17 of the UNCAT and is comprised of ten independent experts who meet thrice a year to monitor the implementation of the Convention by its State Parties. Under the treaty, States must submit an initial report within one year after accession and thereafter every four years, or at the Committee's request.<sup>304</sup> The Committee may also receive complaints or communication from individuals.

In addition to the considering State reports, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions, namely, i) the consideration of individual complaints or communications from individuals claiming that their rights under the Convention have been violated; ii) undertake inquiries in State parties; and iii) consider inter-state complaints.<sup>305</sup>

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<sup>300</sup> UNCAT article 2(1).

<sup>301</sup> UNCAT article 3(1).

<sup>302</sup> UN Office of the High Commissioner for Human Rights'Monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment' <<http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx>>

<sup>303</sup> Ibid.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

### **8.1.3. South Africa's overdue report under the UNCAT**

South Africa signed the UNCAT in 1993 and ratified it in 1998. The initial State report was due in 2000, however, the South African government submitted the report five years later in 2005. In 2009, the Committee released a list of issues prior to the submission of South Africa's second periodic report which was due in the same year.<sup>306</sup> However, the South African government failed to respond to the list of issues and, to date, has not submitted the second periodic report.

In November 2014, South Africa's Cabinet approved the submission of the government's comprehensive report under the UNCAT, covering the period 2002 to 2013.<sup>307</sup> However, in its report to the General Assembly in August 2016, the Committee noted that South Africa has not replied to its requests and that its reports are overdue.<sup>308</sup>

## **8.2. Subcommittee on the Prevention of Torture**

As noted above, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('SPT') was established pursuant to the provisions of the OPCAT.

The SPT meets thrice a year and is composed of 25 independent experts who are elected on a four-year term. The SPT has a dual mandate, which includes, i) visits to States Parties, which includes oversight and unrestricted access to places where persons may be deprived of their liberty; and ii) serving an advisory function in respect of the establishment of a NPM. At the end of its State visits, the SPT draws up a confidential written report which contains recommendations and observations to the State, requesting a written response within 6 months of its receipt.<sup>309</sup>

## **8.3. Resolutions relating to torture and cruel, inhuman or degrading treatment / punishment**

### **8.3.1. HRC Resolution on safeguards to prevent torture during police custody and pre-trial detention**

In March 2016, the Human Rights Council passed a resolution on 'safeguards to prevent torture during police custody and pre-trial detention'.<sup>310</sup> In the resolution, the Council recognises that law enforcement officials play a vital role in the protection of the right to life, liberty and security, which includes protecting persons against acts of torture and other cruel, inhuman or degrading treatment or punishment.<sup>311</sup>

<sup>306</sup> List of issues report available at, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/408/64/PDF/G0940864.pdf?OpenElement>>

<sup>307</sup> South African Government 'Statement on Cabinet meeting of 10 December 2014'

<<http://www.gov.za/statement-cabinet-meeting-10-december-2014>>

<sup>308</sup> Report of the Committee on the Rights of the Child, 66<sup>th</sup> to 71<sup>st</sup> session, A/71/41.

<sup>309</sup> UN Office of the High Commissioner for Human Rights 'Optional Protocol to the Convention against Torture Subcommittee on Prevention of Torture' <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx>>

<sup>310</sup> UN Human Rights Council Resolution on safeguards to prevent torture during police custody and pre-trial detention, A/HRC/RES/31/31.

<sup>311</sup> Ibid p.1.

The resolution calls on States to include education and information regarding the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment in the training of law enforcement personnel. Furthermore, that such initiatives should include training on the use of force and all available modern scientific methods for crime investigation and the critical importance of reporting instances of torture or other cruel, inhuman or degrading treatment or punishment to superior authorities.<sup>312</sup>

The resolution further emphasises that States must take persistent, determined and effective measures to prevent and combat all acts of torture and other cruel, inhuman or degrading treatment or punishment,<sup>313</sup> and stresses the importance of inspections at places of detention by an independent authority.<sup>314</sup> In addition, that such visits should be regular and unannounced, and with the mandate to examine all issues related to the treatment of persons in detention.<sup>315</sup>

The resolution also urges States that have not done so yet, to sign and ratify the OPCAT as a matter of priority.<sup>316</sup>

### **8.3.2. ACHPR Resolution on promoting the revised Nelson Mandela Rules**

During its 58<sup>th</sup> Ordinary Session in April 2016, the ACHPR adopted a resolution on the Collaboration between the African Commission on Human and Peoples' Rights and Partners on promoting the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules).<sup>317</sup>

The resolution reaffirms that States parties to the African Charter bear the responsibility for people deprived of their liberty and have the obligation to improve prison conditions and protect the human rights of prisoners, detainees and all persons deprived of their liberty in Africa. However, the ACHPR expressed concern that, 'the conditions of prisons and prisoners in many African countries are some of the poorest in the world with high congestion rates, the overuse of pre-trial detention, poor sanitation and lack of access to proper medical care, with few rehabilitative programmes, educational or vocational opportunities'.<sup>318</sup> The ACHPR notes that the Mandela Rules provide a standard relating to treatment in detention, and as the key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners.<sup>319</sup>

In expressing its support for the Mandela Rules, the ACHPR commits itself, through the work of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, to collaborate with partners and other stakeholders to promote and disseminate the Revised Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules).<sup>320</sup> The ACHPR

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312 Ibid para 14.

313 Ibid para 1.

314 Ibid para 16.

315 Ibid.

316 Ibid para 2.

317 ACHPR Resolution on promoting the revised Nelson Mandela Rules, ACHPR/Res. 348(LVIII) 2016.

318 Ibid p.1.

319 For more information on the Mandela Rules, see SAHRC 2015 International and Regional Human Rights Report, p. 35. Also the Revised Standard Minimum Rules for the Treatment of Prisoners, UN-Doc A/Res/70/175.

320 ACHPR Resolution (note 317 above) para 2.

further encouraged stakeholders to draw inspiration from the Mandela Rules in order to fill the existing gaps in the applicable laws, policies and practice.<sup>321</sup>

## **8.4. Special Rapporteur Thematic Report**

In August 2016, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment submitted a report to the General Assembly, exploring the legal, ethical, scientific and practical arguments against the use of torture, other ill-treatment and coercive methods during interviews of suspects, victims, witnesses and other persons in various investigative contexts.<sup>322</sup> The report advocates for the development of a universal protocol identifying a set of standards for non-coercive interviewing methods and procedural safeguards, which ought to be applied during interviews by law enforcement officials, military and intelligence personnel and other bodies with investigative mandates.<sup>323</sup>

The Special Rapporteur notes the need for the development of a protocol in line with international and regional human rights mechanisms to ensure that no person is subjected to torture, ill-treatment or coercion, including any forms of violence, duress or threat during interviews.<sup>324</sup> The Special Rapporteur recommends that by 'moving away from accusatory, manipulative and confession-driven techniques to an investigative interviewing model, States will enhance not only the human rights compliance of their questioning practices, but also their effectiveness in solving crimes and keeping societies safe.'<sup>325</sup> It is further recommended that the envisaged protocol should be designed to protect the physical and mental integrity of all persons during questioning and provide accountability mechanisms and appropriate remedies for victims.<sup>326</sup>

It should be noted that during the course of 2016, progress was made in the establishment of a 'Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol)'.<sup>327</sup>

## **8.5. Domestic developments and recommendations**

### **8.5.1. SAHRC's Marikana Report**

In August 2016, the SAHRC released its report entitled, 'An overview of the South African Human Rights Commission's participation at the Marikana Commission of Inquiry',<sup>328</sup> which was duly tabled with Parliament in September 2016. The report highlights that the SAHRC's involvement in the matter, emanates from complaints received from affected communities at

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321 Ibid para 1.

322 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment submitted a report to the General Assembly, exploring the legal, ethical, scientific and practical arguments against the use of torture, other ill-treatment and coercive methods during interviews of suspects, victims, witnesses and other persons in various investigative contexts, A/71/298.

323 Ibid p.1.

324 Ibid para 101.

325 Ibid para 102.

326 Ibid para 103.

327 This process was led by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, see, <<http://www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx>>

328 SAHRC Report on, 'An overview of the South African Human Rights Commission's participation at the Marikana Commission of Inquiry', August 2016.

Marikana, regarding the violent conduct of the South African Police Services. The SAHRC therefore resolved to participate in the Marikana Commission proceedings in the investigation of the complaints and to avoid duplication of several investigations on similar issues.<sup>329</sup>

The SAHRC accordingly contributed procedurally and substantively to the Marikana Commission hearings. In its procedural role, the SAHRC monitored the proceedings and ensured fairness, transparency and impartiality, whereas substantively, the SAHRC brought independent experts to address any gaps in existing evidence presented before the Marikana Commission.<sup>330</sup> The participation of the SAHRC in the Marikana Commission made various positive contributions to the process and ultimately the findings and recommendations made by the Commission.<sup>331</sup> Although largely positive, the SAHRC remains disappointed at the manner in which the Marikana Commission investigated the underlying causes of the events at Marikana.<sup>332</sup> The SAHRC's report in this regard, therefore sets out the shortcomings of the Marikana Commission,<sup>333</sup> particularly in relation to the material conditions experienced by mining-affected communities. The SAHRC noted that, 'much remains to be investigated and scrutinised' and to this end, the institution hosted a, 'National Hearing on the Underlying Socio-economic Challenges of Mining- Affected Communities in South Africa', in September 2016.

### **8.5.2. Lindela Monitoring**

In August 2014, the Gauteng High Court passed a judgment in favour of the SAHRC (and others) in the matter of, *South African Human Rights Commission and Others v Minister of Home Affairs*.<sup>334</sup> The SAHRC challenged the detention of 39 non-nationals at South Africa's 'Lindela Repatriation Centre', who were held beyond the requisite time frame of 30 days as stipulated under section 34 of the Immigration Act. In this instance, persons were detained for over 120 days without a warrant. The Court accordingly found that the extended detention period was unlawful and unconstitutional<sup>335</sup> and ordered the respondents to, take all reasonable steps to terminate such unlawful detention practices.<sup>336</sup> The Court further held that the respondents should provide the SAHRC with a written report on a, 'regular or at least a quarterly basis', setting out, i) the steps taken to comply with the judgment to ensure that no person is detained in contravention of the order;<sup>337</sup> and, ii) full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of that person's initial arrest and detention.<sup>338</sup> In addition, the respondents were directed to provide the SAHRC with regular access to the Lindela Repatriation Centre and its detainees.<sup>339</sup>

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329 Ibid p.1.

330 Ibid.

331 Ibid p.23.

332 Ibid.

333 Ibid pp 23 – 25.

334 *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198, (SAHRC v Home Affairs)* available at <<http://www.saflii.org/za/cases/ZAGPJHC/2014/198.html>>

335 Ibid para 52.2. (Also see, <<http://ewn.co.za/2014/08/29/SAHRC-immigration-case-and-outright-victory>>)

336 Ibid para 52.3.

337 Ibid para 52.4.1.

338 Ibid. These particulars include: The person's full names; person's country of origin; The reason for the person's detention; The date on which that person was arrested; The basis on which the respondents seek to justify that person's continued detention beyond the 30 day period and whether a warrant for extension of the detention beyond 30 days has been authorised in terms of section 34(1)(d) of the Immigration Act (with a copy of such warrants to be provided).

339 *SAHRC v Home Affairs* (note 334 above) para 52.5.

In giving effect to the judgment, during 2016, SAHRC released its Report on the Lindela Monitoring and Oversight Project.<sup>340</sup> The SAHRC's monitoring revealed several systemic issues at Lindela, including, i) allegations of abuse, corruption and/ or bribery; ii) the use of isolation as a conflict management tool; iii) overcrowding; iv) consistent outbreaks of infections and deficient hygiene standards; v) detention of unaccompanied and separated migrant children; and vi) continued detention of undocumented migrants beyond the prescribed periods.<sup>341</sup> The SAHRC's report contains a host of recommendations to several government departments to address the widespread and continued violation of the rights of persons detained at Lindela.

The SAHRC's monitoring of Lindela demonstrates the critical need for South African government to ratify the OPCAT and ensure that places of detention, are adequately monitored and that preventive mechanisms are put in place to curtail any abuse of rights. The SAHRC therefore calls on Parliament to exercise its oversight on the government to ensure that the ratification of the OPCAT is expedited. In the interim, the SAHRC calls on both government and Parliament to provide adequate resources to the SAHRC to execute the monitoring function in line with the High Court judgment.<sup>342</sup>

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<sup>340</sup> . SAHRC Report on the Lindela Monitoring and Oversight Project (hereafter the SAHRC's 2016 Lindela Monitoring Report). Covering the period, January to August 2016.

<sup>341</sup> These summary observations were listed by an official of the SAHRC's Lindela Monitoring Project, during a data-gathering exercise for the drafting of the SAHRC's Report under the third cycle of the Universal Periodic Review. Also refer to para 4.6.1, pp. 49 to 50 of the SAHRC's 2016 Lindela Monitoring Report.

<sup>342</sup> Also see the CERD's Concluding Observations to South Africa (note 194 above) para 27(a).

# 9. Rights of the Child

## 9.1. United Nations Convention on the Rights of the Child

In November 1989, the UN General Assembly adopted and opened for signature, the United Nations Convention on the Rights of the Child (UNCRC). In September 1990, the Convention entered into force as the first human rights instrument to incorporate a complete range of rights specifically for children.<sup>343</sup> The Convention is premised on four guiding principles, i) non-discrimination; ii) adherence to the best interests of the child; iii) the right to life, survival and development; and, iv) the right to participate.<sup>344</sup>

There are three optional protocols to the UNCRC i.e. the Optional Protocol on the Involvement of Children in Armed Conflict (OPAC); the Optional Protocol on the Sale of Children, Child Pornography and Child Prostitution (OPSC); and, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC).

## 9.2. Committee of the Rights of the Child

The Committee on the Rights of the Child (CRC) is tasked with monitoring the implementation of the UNCRC and its optional protocols. It is comprised of 18 independent experts who are elected to a renewable four year term.<sup>345</sup> During 2016, South African academic, Professor Ann Skelton was elected to the Committee, effective from 1 March 2017.

During 2016, the Committee released two General Comments related to budgeting for the realisation of children's rights and the rights of the child during adolescence, respectively.

### 9.2.1. South Africa's review before the Committee on the Rights of the Child

South Africa signed the UNCRC in 1993, and ratified it two years later on 16 June 1995. South Africa has ratified the two protocols, the OPSC in 2003 and the OPAC in 2009. However, the OPIC has not been signed by South Africa.

In 1998, the South African government submitted its initial report to the Committee, but subsequently failed to adhere to its periodic reporting and in November 2014, submitted its combined second, third and fourth report (covering 1998 to 2013). The initial report under the OPSC covering the period 2003 to 2011 was also submitted.

During February 2016, the Committee held a pre-sessional working group to engage with the SAHRC and civil society organisations, in anticipation of the official South African government review in September 2016.<sup>346</sup> The pre-sessional working group facilitated frank engagement and provided the forum in which to provide further insight on South Africa's fulfilment of its

<sup>343</sup> UNICEF 'Rights under the Convention on the Rights of the Child' <[http://www.unicef.org/crc/index\\_30177.html](http://www.unicef.org/crc/index_30177.html)>

<sup>344</sup> Ibid.

<sup>345</sup> UN Office of the High Commissioner for Human Rights 'Committee on the Rights of the Child' <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx>>

<sup>346</sup> The SAHRC submitted a NHRI report to the CRC in respect of the South African government report. See, National Human Rights Institution Report on the South African Government's combined periodic country report under the United Nations Convention on the Rights of the Child, November 2015, (SAHRC NHRI Report to the CRC), available at, <[http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/INT\\_CRC NGO\\_ZAF\\_22429\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZAF/INT_CRC NGO_ZAF_22429_E.pdf)>.

obligations under the UNCRC and OPSC. Following the pre-sessional working group, the Committee released a list of issues report to South Africa, requesting information in preparation for the official review, by June 2016. The government adhered to the request and duly submitted the information.

In September 2016, the South African government appeared before the Committee for its review under the UNCRC. Among the issues raised by the Committee during the review included, i) the high prevalence of violence against children, including sexual violence and corporal punishment; ii) harmful practices such as virginity testing and *ukuthwala*; iii) children with disabilities and the prevalence of HIV/AIDS among children; iv) indigenous and migrant / refugee children; v) access to the range of socio-economic rights; and, vi) administration of juvenile justice.<sup>347</sup> Selected recommendations issued to South Africa, includes:

- i. Noting the negative effect of business enterprises, particularly in the extractive industries, on children's rights, the Committee recommended the establishment and implementation of regulations to ensure that the business sector complies with international and national human rights, labour, environmental and other standards, particularly with regard to children's rights.<sup>348</sup>
- ii. While recognising that there is legislation in place to address corporal punishment in schools, the Committee noted the high levels of violence perpetrated in the home. It was accordingly recommended that the government develop and implement a national strategy to prevent and eradicate all forms of corporal punishment and expedite supporting legislation in this regard.<sup>349</sup>
- iii. Although the Committee welcomed the significant progress made in improving access to basic education, the Committee expressed concern over the 'persistence of wide disparities in access to quality education, according to economic status, race and geography.' Furthermore, concerns were raised over poor school infrastructure, shortage of education materials, bullying and school-based violence. The Committee therefore recommended that the government improves the quality of education, availability of school facilities, educational materials; enhance its efforts to provide access to free and quality basic education for all children, particularly by children facing multiple discrimination; and, take effective measures to prevent and eliminate school violence, committed both by students and educators.<sup>350</sup>
- iv. Expressing concern at the increasing number of unaccompanied migrant children in South Africa, the Committee recommended that the government expedite the development and implementation of a protocol to streamline the delivery of timely child-protection services

<sup>347</sup> See Committee on the Rights of the Child, Concluding Observations on the second periodic report of South Africa, 26 October 2016, CRC/C/ZAF/CO/2 (CRC Concluding Observations 2016). (Also see generally, the Committee on the Rights of the Child, Concluding Observations on the initial report under the OPSC submitted by South Africa, 26 October 2016, CRC/C/OPSC/ZAF/CO/1.)

<sup>348</sup> Ibid paras 19 – 20.

<sup>349</sup> Ibid paras 33 – 36.

<sup>350</sup> Ibid para 60 (a) - (d).

to migrant, asylum-seeking and refugee children, which includes including services for the registration and issuance of identity documents and access to basic services.<sup>351</sup>

The Committee welcomed the role of the SAHRC and its activities related to children's rights. However, the Committee expressed concern that the resources and capacity of the SAHRC to promote and protect children's rights are insufficient.<sup>352</sup> The Committee therefore recommended to the South African government to, i) provide the SAHRC with 'sufficient human, technical and financial resources';<sup>353</sup> ii) raise the awareness of children and the general public about the mandate and work of the SAHRC;<sup>354</sup> and iii) legally mandate the SAHRC to appoint a commissioner exclusively dedicated to the rights of the child.<sup>355</sup>

### **9.2.2. General Comment No. 19 on public budgeting for the realisation of children's rights**

In July 2016, the Committee released its 'General Comment No. 19 on public budgeting for the realisation of children's rights', addressing article 4 of the UNCRC.<sup>356</sup> The General Comment seeks to assist State parties in the implementation of public budgets and provides recommendations on the realisation of children's rights through effective, efficient, equitable, transparent and sustainable public budget decision-making.<sup>357</sup>

The General Comment affirms the four general principles under the UNCRC which form the basis for all State decisions and actions that directly or indirectly relate to the rights of the child, including public budgets.<sup>358</sup> These include, i) right to non-discrimination; ii) best interest of the child; iii) Right to life, survival and development; and is) the right to be heard.<sup>359</sup> The Committee further recognises that there are many ways to achieve sufficient resources for realising children's rights, including the application of the budget principles of effectiveness, efficiency, equity, transparency and sustainability.<sup>360</sup> The General Comment identifies a number of obligations that States must assume, in order to ensure that public spending is effective, efficient and equitable, and respects, promotes, protects and fulfils the rights of children.<sup>361</sup> These include, i) assessing the macroeconomic, fiscal and children's rights situation and considering laws, policies, taxes and budget relating to children; ii) providing a favourable environment for the legislature to monitor and enact public budgets, including the parts that directly and indirectly affect the rights of children; and iii) promote favourable conditions for civil servants and civil society, including children, to participate in a meaningful way in the budgetary process, including its monitoring, encouraging transparent and accountable public financial systems.<sup>362</sup>

<sup>351</sup> Ibid para 61(a) and para 62(b).

<sup>352</sup> Ibid para 14(a).

<sup>353</sup> Ibid para 16(b).

<sup>354</sup> Ibid para 16(c).

<sup>355</sup> Ibid para 16(a).

<sup>356</sup> UN Committee on the Rights of the Child General Comment No. 19 on public budgeting for the realisation of children's rights, CRC/C/GC/19.

<sup>357</sup> Ibid para 1.

<sup>358</sup> Ibid para 40.

<sup>359</sup> Ibid para III A - C.

<sup>360</sup> Ibid para 57.

<sup>361</sup> European Council for Juvenile Justice 'Launch of General comment No. 19 on public budgeting for the realization of children's rights' <<http://www.ejjc.org/news/launch-general-comment-no-19-public-budgeting-realization-childrens-rights>>

<sup>362</sup> Ibid.

### **9.2.3. General Comment No. 20 on the implementation of the rights of the child during adolescence**

In December 2016, the Committee released its General Comment No. 20 on the implementation of the rights of the child during adolescence.<sup>363</sup> Through the General Comment No. 20, the Committee notes that the potential of adolescents is widely compromised as States parties do not recognize or invest in the measures needed for them to enjoy their rights.<sup>364</sup> The General Comment therefore provides guidance to States on the measures necessary to ensure the realisation of the rights of children during adolescence, and highlights, the recognition and respect for the dignity and agency of adolescents; their empowerment, citizenship and active participation in their own lives; the promotion of optimum health, well-being and development; and a commitment to the promotion, protection and fulfilment of their human rights, without discrimination.<sup>365</sup>

The General Comment sets out four key objectives namely, i) provide States with guidance on the legislation, policies and services needed to promote comprehensive adolescent development consistent with the realization of their rights; ii) raise awareness of the opportunities afforded by and challenges faced during adolescence; (c) enhance understanding of and respect for the evolving capacities of adolescents and the implications for the realization of their rights; and iv) strengthen the case for greater visibility and awareness of adolescents and for investment to enable them to realize their rights throughout the course of their lives.<sup>366</sup>

It should be noted that in June 2016, the Human Rights Council, adopted a resolution on 'youth and human rights', and hosted a panel discussion under the same theme in September 2016.

## **9.3. African Charter on the Rights and Welfare of the Child**

In 1990, the OAU adopted the African Charter on the Rights and Welfare of the Child (Children's Charter / ACRWC).<sup>367</sup> The Children's Charter, which came into force in 1999, provides a comprehensive set of rights and obligations for the advancement of children's rights in Africa.<sup>368</sup>

The Children's Charter establishes the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) which has the mandate to monitor the implementation and ensure the protection of the rights in line with the Charter.<sup>369</sup> The Committee meets bi-annually and is comprised of 11 independent members who serve a five year term.<sup>370</sup> State parties are required to submit an initial report to the Committee within two years after ratification and thereafter every three years detailing legislative or other measures taken to give effect

<sup>363</sup> UN Committee on the Rights of the Child General Comment No. 20 on the implementation of the rights of the child during adolescence, CRC/C/GC/20.

<sup>364</sup> Ibid para 3.

<sup>365</sup> Ibid para 4.

<sup>366</sup> Ibid para 7 (a) - (d).

<sup>367</sup> African Charter on the Rights and Welfare of the Child (Children's Charter), OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>368</sup> Similar to the UN Convention on the Rights of the Child, the Children's Charter is premised on four pillars, viz. i) principles of non-discrimination; ii) the best interest of the child; iii) life survival and development, and iv) participation.

<sup>369</sup> Ibid article 42.

<sup>370</sup> <<http://acerwc.org/about-the-committee/experts/>>

to the rights and freedoms under the ACRWC.<sup>371</sup> The ACERWC also has the competence to receive complaints against States which may be submitted by any individual, group or non-governmental organisation recognised by the AU, a member State or the UN.<sup>372</sup>

In 1997, South Africa signed and ratified it in 2000. The initial report was due in January 2003, however, it was only in December 2013, that the South African government submitted its initial report to the ACERWC covering the period January 2000 to April 2013.<sup>373</sup> The report was subsequently considered in October 2014 with concluding recommendations issued to the government.<sup>374</sup> The Committee indicated that it would undertake a follow up Mission to South Africa to ascertain the implementation of its recommendations. The Committee specifically requested that South Africa should submit its combined, first, second, third, fourth and fifth periodic reports by 21 January 2017 and every three years thereafter.<sup>375</sup>

## **9.4. Resolutions relating to the rights of the child**

### **9.4.1. HRC Resolution on information and communications technologies and child sexual exploitation**

In March 2016, the Human Rights Council adopted a resolution on the rights of the child within the context of information and communications technologies and child sexual exploitation.<sup>376</sup> Adopted by consensus, the resolution is framed in the context of protecting children from online sexual abuse and exploitation and State control over online content that could be perceived as harmful to children.<sup>377</sup> While noting that children are among the most active participants online, the Council cautions that information and communications technologies can facilitate the commission of criminal activities with impunity regarding the sale, sexual abuse and exploitation of children, including in pornography, child sexual abuse material.<sup>378</sup>

The Council further expresses deep concern around the 'new and evolving forms of violence against children', exacerbated by, cyberbullying, 'sexting and self-generated content'.<sup>379</sup> The resolution therefore calls on States to, i) safeguard the protection of children online and offline through an integrated and multi-faceted approach based on the rights and well-being of children; ii) ensure the legal protection of children from sexual abuse and exploitation online and criminalise all relevant conduct related to the sexual exploitation of children online and offline; iii) provide for effective remedies, recovery and reintegration, including through integrated gender-sensitive and child-friendly complaints and reporting mechanisms, services and programmes for child victims of sexual abuse and exploitation; and iv) to develop

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371 Children's Charter (note 367 above) article 43.

372 African Committee of Experts on the Rights and Welfare of the Child (ACERWC) <<http://www.ihrda.org/515-2/>>. Also see SAHRC Annual International and Regional Human Rights Report, 2015, p.51.

373 A copy of the report is available at, <<http://www.acerwc.org/?wpdmdl=8787>>.\_Also see the reporting calendar at, <<http://www.acerwc.org/reporting-calendar/>>.

374 During the 1<sup>st</sup> Extra-Ordinary session, from 6 to 11 October 2014. Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child (ACERWC Concluding Recommendations) available at, <[http://www.acerwc.org/download/concluding\\_observations\\_south\\_africa/?wpdmdl=8754](http://www.acerwc.org/download/concluding_observations_south_africa/?wpdmdl=8754)>.

375 Ibid para 67.

376 UN Human Rights Council Resolution on the rights of the child within the context of information and communications technologies and child sexual exploitation, A/HRC/RES/31/7.

377 Sexual Rights Initiative 'Highlights: Sexual Rights at HRC31' <<http://www.sexualrightsinitiative.com/2016/04/04/>>

378 ACERWC Concluding Recommendations (note 374 above) p. 2.

379 Ibid.

initiatives and programmes to inform children of their rights, the risks of sexual abuse and exploitation in the online space.<sup>380</sup>

### **9.4.2. ACHPR Resolution on human rights issues affecting African youth**

During its 58<sup>th</sup> session in April 2016, the ACHPR adopted a resolution addressing the human rights issues affecting African youth.<sup>381</sup> In the resolution, the ACHPR recognises the unique contribution the youth provide in contributing to the development of democracy. However, it notes with concern that, inequality in income and wealth; lack of access to decision-making institutions; high illiteracy rates, unemployment and underemployment and HIV/ AIDS which present a threat to the human rights of youth.<sup>382</sup> The ACHPR therefore urged State parties to, (i) establish institutions to ensure the participation of youth movements and to take concrete steps to promote effective youth participation in the decision-making and government of their countries; and, ii) adopt plans, policies and programmes to improve the situation of young girls who face structural and cultural obstacles, in particular forced and early marriages, female genital mutilation, discrimination and other harmful cultural practices.<sup>383</sup>

## **9.5. Domestic developments and recommendations**

### **9.5.1. Inadequate resources and infrastructure at schools**

In its engagement with both the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination, the SAHRC highlighted the challenges facing children in South Africa and that education, in particular, remains characterised by high drop-out rates, weak infrastructure, poor quality of education and the inefficient usage of education resources.<sup>384</sup> These challenges are further heightened based on socio-economic and racial lines with black children living in rural areas being the most affected.<sup>385</sup> The SAHRC also noted the challenges faced by learners with disabilities and the lack of resources to accommodate learners with visual impairments with adequate learning materials.<sup>386</sup> In its NHRI reports to both the CERD and the CRC, the SAHRC recommended that the South African government put measures in place to ensure that a minimum level of infrastructure relating to school buildings, access to water, electricity, basic electrical equipment, sufficient toilets for the number of children attending the school, fences and a library are provided to all schools throughout South Africa, and that these should also be catered for learners with disabilities. The SAHRC reiterates this call to Parliament as well and calls on the legislature to ensure that the recommendations contained in the SAHRC's investigative reports related to these issues, are adequately considered.<sup>387</sup>

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380 Ibid paras 2, 4, 14 and 18 respectively.

381 African Commission on Human and Peoples' Rights Resolution on human rights issues affecting African youth, ACHPR/Res. 347(LVIII) 2016.

382 Ibid p.1.

383 Ibid paras i - vi.

384 SAHRC Charter of Children's Basic Education Rights, p 8, available at, <[http://www.sahrc.org.za/home/21/files/SAHRC%20Education%20Rights%20Charter\\_Part1.pdf](http://www.sahrc.org.za/home/21/files/SAHRC%20Education%20Rights%20Charter_Part1.pdf)>. [Also see para 105 of the SAHRC's NHRI Report to the CERD (note 208 above), and para 104 in the SAHRC's NHRI Report to the CRC (note 346 above)].

385 Ibid.

386 SAHRC NHRI Report to the CRC (note 346 above) section 8.1.2 on 'the right to education for children with disabilities'.

387 These include the following, SAHRC Investigative Report on the Right to Access Sufficient Water and Decent Sanitation, 2014; SAHRC Report on the Investigation into the Delivery of Primary Learning Materials to Schools 2014; SAHRC Report on Report on Investigation into issues of Rule of Law, Justice and Impunity arising out of the 2008 public violence against non-nationals. These reports are available on the SAHRC website, <<http://www.sahrc.org.za>>.

### **9.5.2. Challenges faced by children of non-nationals**

In its engagements with the CERD and CRC, the SAHRC expressed concern on several matters affecting non-national children in South Africa, including the registration of births, access to social / health services and the impact of xenophobia.

The SAHRC specifically pointed out that xenophobia places children in a vulnerable position and that xenophobic attacks often result in the interruption of schooling. Furthermore, that when attacks occur, non-national families are often uprooted from their community or displaced and that several children have lost their school books and uniforms through the looting or fleeing of their homes.<sup>388</sup> The SAHRC further recognised the emotional and psychological trauma inflicted on the children, particularly where families are forcibly displaced and / or where a child experienced or witnessed a parent / caregiver exposed to violence during a xenophobic attack.<sup>389</sup>

In sharing these concerns with the two treaty bodies, the SAHRC expresses satisfaction that the institution's advices were adequately captured and reflected in the concluding observations. The CRC, in its concluding observations, specifically recommended that the South African government, expedite the development and implementation of a protocol to streamline the delivery of timely child protection services to migrant, asylum-seeking and refugee children, including services on, i) registration and issuance of identity documents; ii) protection from violence and abuse; iii) family unification or provision of alternative care; and (iv) access to basic services.<sup>390</sup>

The SAHRC strongly recommends that Parliament exercises its oversight to monitor the government's implementation of the above recommendations and ensure that the children of non-nationals are not deprived from fully exercising their rights.

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<sup>388</sup> SAHRC NHRI Report to the CRC (note 346 above) para 66.

<sup>389</sup> Ibid.

<sup>390</sup> CRC Concluding Observations 2016 (note 347) para 60(b).

# 10. Rights of Persons with Disabilities

## 10.1. UN Convention of the Rights of Persons with Disabilities

In December 2006, the UN Convention on the Rights of Persons with Disabilities (UNCRPD) was adopted. The Convention opened for signature in March 2007 and by May 2008, it entered into force after receiving the requisite number of signatories.<sup>391</sup> The year 2016 therefore marks the 10<sup>th</sup> anniversary of the adoption of the CRPD and remains one of the most quickly ratified of all the international human rights treaties.<sup>392</sup>

The UNCRPD adopts a broad categorisation of persons with disabilities and reaffirms that persons, regardless of the type of disability, should enjoy all human rights and fundamental freedoms.<sup>393</sup> It seeks to combat discrimination and stereotypes towards persons with disabilities and asserts the rights of people with disabilities to education, health, work, adequate living conditions, freedom of movement, freedom from exploitation and equal recognition before the law for persons with disabilities.<sup>394</sup> Through ratifying the UNCRPD, States commit themselves to enact laws and other measures to improve disability rights and to abolish legislation, customs and practices that discriminate against persons with disabilities.<sup>395</sup>

The Optional Protocol to the UNCRPD, was adopted at the same time as the Convention. Under article 8 of the Optional Protocol, the Committee on the Rights of persons with Disabilities is mandates to receive individual complaints (petitions), and undertake inquiries to investigate grave or systematic violations of any of the provisions of the UNCRPD by a State party to the Convention.<sup>396</sup>

## 10.2. Committee on Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities (CRPD) monitors the implementation of the ICRPD as well as the mandate as vested under article 8 of the CRPD's Optional Protocol. The Committee meets twice annually and is comprised of 18 independent experts who serve a renewable four year term.<sup>397</sup>

In November 2007, South Africa ratified both UNCRPD and its optional protocol. The initial report under the UNCRPD was due in 2010, however, the South African government submitted four years later in November 2014.<sup>398</sup> The report is yet to be considered by the Committee.<sup>399</sup>

<sup>391</sup> UN News Centre 'Landmark UN treaty on rights of persons with disabilities enters into force' <<http://www.un.org/apps/news/story.asp?NewsID=26554#.VvwVT-J97IW>>

<sup>392</sup> UN Office of the High Commissioner on Human Rights 'Celebrating 10 Years of the Convention on the Rights of Persons with Disabilities' <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPD10.aspx>>

<sup>393</sup> UN Office of the High Commissioner for Human Rights 'The Rights of Persons with Disabilities: Questions and Answers'. <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx>>

<sup>394</sup> UN News Centre (note 391 above).

<sup>395</sup> UN News Centre (note 391 above).

<sup>396</sup> See article 8 of the Optional Protocol to the UNCRPD. Also see, <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/QuestionsAnswers.aspx>>

<sup>397</sup> Ibid.

<sup>398</sup> For a copy of the report, see, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2f1&Lang=en)>

<sup>399</sup> It should be noted that in May 2015, the South African government released a call for public comment in respect of its first periodic report under the CRPD, which covers the period April 2012 to March 2013. See, <[http://www.gov.za/sites/www.gov.za/files/38802\\_gen445.pdf](http://www.gov.za/sites/www.gov.za/files/38802_gen445.pdf)>

During 2016, the Committee adopted two General Comments, namely, General Comment No. 3 on women and girls with disabilities;<sup>400</sup> and General Comment No. 4 on the right to inclusive education.<sup>401</sup> These are discussed in further detail hereunder.

### **10.2.1. General Comment No. 3 on women and girls with disabilities**

In August 2016, the Committee adopted General Comment No. 3 which addresses women and girls with disabilities as espoused under article 6 of the UNCRPD. Article 6 of the UNCRPD accordingly addresses non-discrimination against women and girls with disabilities and promotes, 'equality of opportunity and equality of outcomes'.<sup>402</sup> The General Comment No. 3 examines the inter-relationship between article 6 and other articles under the UNCRPD, in particular, i) article 16 on violence against women with disabilities; and ii) article 25 and 23 on sexual and reproductive health and rights, including respect for home and the family.<sup>403</sup>

The General Comment notes that women with disabilities are at a heightened risk of violence, exploitation and abuse. It particularly notes that harmful stereotypes which, 'infantilise women with disabilities, call into question their ability to make judgments,' or perceive women with disabilities as being, 'asexual or hypersexual', poses a threat to the right to freedom from exploitation, violence and abuse,<sup>404</sup> and the full enjoyment of sexual and reproductive rights.<sup>405</sup> Due to preferential care and treatment of boys, the General Comment indicates that violence against girls with disabilities is more prevalent compared to boys with disabilities.<sup>406</sup> Girls with disabilities are reportedly at particular risk of violence from family members and caregivers with specific acts of violence such as, gender-specific neglect, humiliation, concealment, abandonment, abuse, including sexual abuse and sexual exploitation, which often increases during puberty.<sup>407</sup> In addition, 'a lack of access to sexuality information for women with disabilities, especially women with intellectual disabilities, deaf and deaf-blind women, can increase their risk of sexual violence.'<sup>408</sup>

Through the General Comment, the Committee notes that in practice, the choices of women with disabilities, particularly women with psychosocial or intellectual disabilities are often ignored, or their decisions are often substituted by third parties. In this regard, the General Comment points out that all women with disabilities, 'must be able to exercise their legal capacity by taking their own decisions, with support when desired with regard to medical and/or therapeutic treatment'.<sup>409</sup>

In order to assist State parties in the full implementation of article 6 of the UNCRPD, the Committee, by virtue of the General Comment, recommends, i) that States repeal discriminatory

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400 UN Committee on the Rights of Persons with Disabilities General Comment No. 3 on women and girls with disabilities, CRPD/C/GC/3.

401 UN Committee on the Rights of Persons with Disabilities General Comment No. 4 on the right to inclusive education, CRPD/C/GC/4.

402 General Comment No.3 (note 400 above) para 9.

403 Ibid para 28.

404 Ibid para 29 – 30.

405 Ibid para 38.

406 Ibid para 35.

407 Ibid.

408 Ibid para 41.

409 Including decisions on: retaining their fertility, reproductive autonomy, their right to choose the number and spacing of children, to consent and accept a statement of fatherhood, and the right to establish relationships. See *ibid* para 44.

laws, policies and practices that prevent women with disabilities from enjoying all the rights under the UNCRPD;<sup>410</sup> ii) adopt affirmative action measures for the development, advancement and empowerment of women with disabilities to address inequalities, particularly in the sphere of access to justice, sexual and reproductive health, education, employment etc.<sup>411</sup> and iii) ensure that public and private service providers are trained and educated to provide appropriate attention, support and assistance to women with disabilities.<sup>412</sup>

### **10.2.2. General Comment No. 4 on the right to inclusive education**

Following on from developments in 2015 on the right to education for persons with disabilities,<sup>413</sup> in September 2016, the Committee adopted General Comment No. 4 on the right to inclusive education, as enumerated under article 24 of the UNCRPD.<sup>414</sup>

In setting the context of the General Comment, the Committee notes that the right to inclusive education encompasses a transformation in culture, policy and practice in all formal and informal educational environments, in order to accommodate the differing requirements and identities of individual students.<sup>415</sup> The Committee further lists that inclusive education is to be understood as, i) a fundamental right of all learners and, in relation to children, not the right of the parent or caregiver; ii) a principle that values the well-being of all students, respects their inherent dignity and autonomy, acknowledges individual requirements and ability to effectively be included in and contribute to society; iii) a means of realising other human rights and an inclusive society; and iv) the result of a continuing and ongoing commitment to eliminate barriers impeding the right to education.<sup>416</sup>

The Committee highlights the importance of recognising the differences between, 'exclusion, segregation, integration and inclusion'. It accordingly defines inclusion as, 'a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and environment that best corresponds to their requirements and preferences.'<sup>417</sup>

Furthermore, that placing students with disabilities in mainstream classes without accompanying structural changes, such as organisation, curriculum, teaching and learning strategies etc. does not constitute inclusion. In the alternate, the Committee proposes an extensive list of the core features of inclusive education.<sup>418</sup>

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410 Ibid para 62(a)(i).

411 Ibid para 62(b)(ii).

412 Ibid.

413 In 2015, the Committee held a Day of General Discussion on the right to education for persons with disabilities. The discussion sought to, *inter alia*, engage key stakeholders and begin dialogue on the development of a General Comment on the right to education

414 General Comment No.4 (note 401 above). (According to article 24(1), States parties must ensure the realisation of the right of persons with disabilities to education through an inclusive education system at all levels, including pre-schools, primary, secondary and tertiary education, vocational training and lifelong learning, extra-curricular and social activities, and for all students, including persons with disabilities, without discrimination and on equal terms with others.)

415 Ibid para 9.

416 Ibid para 10 (a) - (d).

417 Ibid para 11.

418 Ibid paras 12(a) - (i).

In clarifying the obligations of State parties in respect of realising the right to inclusive education, the Committee recommends that State parties, should respect, protect and fulfil each of the essential features of the right to inclusive education, namely availability, accessibility, acceptability, adaptability,<sup>419</sup> and redefine budgetary allocations for education, including transferring budgets to develop inclusive education.<sup>420</sup> The Committee called on State parties to implement the following core rights with immediate effect, i) non-discrimination in all aspects of education and the removal of barriers which impede access to inclusive education; ii) reasonable accommodation to ensure non-exclusion from education for persons with disability, noting that the failure to reasonable accommodate constitutes discrimination on the ground of disability, and iii) guarantee compulsory, free primary education on the basis of inclusion to all children and youth with disabilities.<sup>421</sup>

## **10.3. Resolutions relating to the rights of persons with disabilities**

### **10.3.1. HRC Resolution on the role of the family in supporting the protection and promotion of human rights of persons with disabilities**

In July 2016, the Human Rights Council adopted a resolution on the role of the family in supporting the protection and promotion of human rights of persons with disabilities.<sup>422</sup>

Through the resolution, the Council recognises that the family unit faces increasing vulnerabilities and pressures, and that single parent-headed households, child-headed households, families with members with disabilities and intergenerational households are particularly vulnerable to poverty and social exclusion.<sup>423</sup> The resolution notes that families with members with

disabilities may be subject to discrimination by association on the basis of disability.<sup>424</sup> It therefore highlights that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute to the full and equal enjoyment of the rights of persons with disabilities.<sup>425</sup>

The resolution recommends that States adopt immediate, effective and appropriate measures aimed at raising awareness throughout society, including at the family level, regarding persons with disabilities.<sup>426</sup> It further calls on States to recognise in their policy and legal frameworks the important role played by families in caring for and supporting persons with disabilities and to provide effective protection, support and assistance to the maximum of their available resources.<sup>427</sup>

The resolution was adopted by vote, with South Africa voting in favour.

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419 Ibid para 38.

420 Ibid para 39.

421 Ibid para 40 (a) - (c).

422 UN Human Rights Council Resolution on the role of the family in supporting the protection and promotion of human rights of persons with disabilities, A/HRC/RES/32/23.

423 Ibid para 9.

424 Ibid para 13.

425 Ibid para 10.

426 Ibid para 18.

427 Ibid paras 19 – 20.

### **10.3.2. ACHPR Resolution on the Right to Dignity and Freedom from Torture or Ill-Treatment of Persons with Psychosocial Disabilities in Africa**

During its 58<sup>th</sup> Ordinary Session (April 2016), the ACHPR adopted a Resolution on the Right to Dignity and Freedom from Torture or Ill-Treatment of Persons with Psychosocial Disabilities in Africa.<sup>428</sup> The resolution reaffirms the rights enshrined in the UNCRPD, particularly, the right to equal recognition before the law, the prohibition of arbitrary deprivation of liberty, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, and the right to receive treatment on the basis of free and informed consent.<sup>429</sup> The ACHPR expressed deep concern over the violation of the rights to dignity, freedom from torture or ill-treatment, and freedom from arbitrary deprivation of liberty of persons with psychosocial disabilities by State and non-State actors.<sup>430</sup> It therefore called on State parties to, i) adopt the necessary measures to ensure that persons with psychosocial disabilities enjoy legal capacity on an equal basis with others in all aspects of life; and ii) review and amend mental health laws which have been used as a basis for the torture or ill-treatment of persons with psychosocial disabilities.<sup>431</sup> The resolution also calls on NHRIs to monitor on a regular basis, institutions which provide services to persons with psychosocial disabilities.<sup>432</sup>

## **10.4. Domestic developments and recommendations**

### **10.4.1. Esidimeni tragedy**

During 2016, South Africa experienced a tragedy in the disability sector after 94 mental health care patients with psychosocial and intellectual disabilities died in 16 non-governmental organisations (NGO) and 3 hospitals.<sup>433</sup> These tragic events were precipitated by a decision of the Gauteng provincial Department of Health, in line with its de-institutionalisation policy and to save on costs, to terminate the contract of its service provider, Life Esidimeni Health Care Centre (Esidimeni).<sup>434</sup> Subsequently, in December 2016, a collective of four UN Special Rapporteurs,<sup>435</sup> issued a formal call for the South African government to establish a, 'policy framework to guide its de-institutionalisation process, inclusive of a plan of action with timelines and benchmarks, the redistribution of public funds from institutions to community services, and the development of adequate housing and community support for persons with disabilities, such as housing assistance, home and family support, and respite care.'<sup>436</sup>

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428 African Commission on Human and Peoples' Rights Resolution on the Right to Dignity and Freedom from Torture or Ill-Treatment of Persons with Psychosocial Disabilities in Africa, ACHPR/Res. 343(LVIII) 2016.

429 Ibid p.1.

430 Ibid.

431 Ibid paras 1 - 2.

432 Ibid para 3.

433 M. W Makgoba, *The Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province. No Guns: 94+ Silent Deaths and Still Counting*. Health Ombud: Republic of South Africa. Available at, <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170215finalreport.pdf>> Also see, SAHRC's Economic and Social Rights: Research Policy Brief 2016/2017, The Right to Adequate Housing, p.1.

434 It should be noted that the SAHRC received complaints related to the Esidimeni matter. As at end December 2016, the institution was still seized with the matter. It is anticipated that the SAHRC's observations will be captured in the 2017 Annual International and Regional Human Rights Report.

435 Namely, the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar; Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras; and Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Leilani Farha.

436 Read the statement of the Special Rapporteurs regarding the Esidimeni tragedy at, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?News-ID=20981&LangID=E#sthash.BuUl9qdb.dpuf>>

The Special Rapporteurs supported de-institutionalisation but cautioned that it could have fatal consequences if implemented without a human-rights based plan, as evident in the Esidimeni tragedy. The Special Rapporteurs also underscored the inter-linkages of human rights and opined that the transfer of persons with disabilities to unsuitable locations, without their consent and adequate support, 'may result in further grave abuses to their right to physical and mental integrity, health and well-being, an adequate standard of living including adequate housing, and places them at risk of extreme poverty, homelessness and loss of dignity.'<sup>437</sup> Furthermore, the Special Rapporteurs reminded the South African government that it has a duty to protect and guarantee the right to life of persons with disabilities, which extends to preventing abuses by non-State actors, and that persons with disabilities should not be obliged to live in particular living arrangements. It further emphasised that as a party to the UNCRPD, South Africa must respect the Convention's obligation to provide persons with disabilities with access to a range of community services to prevent isolation and segregation from the community.<sup>438</sup>

It is also important to note that article 33(2) of the UNCRPD, requires State Parties to 'maintain, strengthen, designate or establish' one or more independent mechanisms to promote, protect and monitor the Convention and that such mechanisms ought to be in line with the Paris Principles.<sup>439</sup> In its initial report to the Committee on the Rights of Persons with Disabilities,<sup>440</sup> the South African government recognises that the SAHRC is an A-status institution in accordance with the Paris Principles, and that it has the constitutional and statutory mandate to, 'be part of the framework as an independent mechanism to promote, protect and monitor implementation of the Convention.'<sup>441</sup> During 2015, the SAHRC submitted a business plan to government outlining the designation of the SAHRC as the monitoring mechanism and the related financial implications. Whilst there have been several meetings with relevant government departments during the course of 2016 to discuss the proposal, there is a need for a swifter, targeted process to ensure that the State is adhering to its obligations under article 33(2) the Convention. The SAHRC therefore recommends that, in light of the challenges facing persons with disabilities in the country that priority is given to the establishment of the monitoring mechanism and that Parliament should encourage the government to expedite the process and ensure the allocation of financial resources.

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437 Ibid.

438 Ibid.

439 UNCRPD, article 33(2).

440 South African Government Initial Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities, 2008 to 2012, CRPD/C/ZAF/1.

441 Ibid para 406.

# 11. Protection of Migrant Rights

## 11.1. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) was adopted in 1990 although the instrument only entered into force in 2003. The Convention protects the rights of workers and their families seeking employment in countries of which they are not nationals and establishes the minimum standards that the States parties should apply in these instances, irrespective of migratory status.<sup>442</sup> The rationale behind the recognition of rights of undocumented migrant workers is reaffirmed in the preamble to the Convention, where State parties recognise, that 'irregular migrants are frequently exploited and face serious human rights violations and that appropriate action should be encouraged to prevent and eliminate clandestine movements and trafficking in migrant workers while at the same time ensuring the protection of their human rights'.<sup>443</sup>

South Africa has not signed the ICRMW.

### 11.1.1. Committee on Protection of the Rights of All Migrant Workers and Members of their Families

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is comprised of 14 independent experts who meet bi-annually to review state reports, consider complaints<sup>444</sup>, and conduct days of general discussions.<sup>445</sup> States Parties to the ICRMW must submit an initial report one year after ratification followed by a periodic report every five years thereafter.<sup>446</sup>

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442 <<http://www.migrationeducation.org/17.2.html?&rid=175&cHash=7716e96fd03d9a32b4422c9e5734e530>>

443 Office of the UN High Commissioner for Human Rights 'The International Convention on Migrant Workers and its Committee: Fact Sheet No. 24 (Rev.1)' <<http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>>

444 Article 77 of the Convention foresees an individual complaints mechanism to allow the CMW to address specific alleged violations of the Convention. However, the CMW will only be authorized to receive individual complaints after 10 State parties have made the declaration necessary to accept the individual complaint procedure. As of June 2014, only two States have made the relevant declaration under article 77 to receive and consider individual complaints. See, <<http://www.ijrcenter.org/un-treaty-bodies/committee-on-migrant-workers/>>

445 UN Office of the High Commissioner for Human Rights 'Committee on Migrant Workers' <<http://www.ohchr.org/EN/HRBodies/CMW/Pages/Membership.aspx>>

446 UN Office of the High Commissioner for Human Rights 'Committee on Migrant Workers: Introduction' <<http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIntro.aspx>>

## **11.2. HRC Resolution on the Protection of the human rights of migrants: strengthening the promotion and protection of the human rights of migrants, including in large movements**

In July 2016, the Human Rights Council passed a resolution on the strengthening the promotion and protection of the human rights of migrants.<sup>447</sup> Through the resolution, the Council expresses deep concern at the large and growing number of migrants, including women and children, who have lost their lives or have been injured in attempting to cross international borders, and recognizing the obligation of States to protect and respect the human rights of those migrants, regardless of their immigration status.<sup>448</sup> The Council also expressed serious concern at the situation of vulnerability and risk faced by migrants in transit, in particular, unaccompanied migrant children and children who have been separated from their families.<sup>449</sup> Furthermore, that women and girls and migrants with disabilities are particularly vulnerable and disproportionately affected in situations of large movements and in their aftermath, and that they are often at increased risk of discrimination, exploitation and violence, including sexual and gender-based violence.<sup>450</sup> In this regard, the Council asserted the need to promote and protect the human rights and fundamental freedoms of all migrants, regardless of their migration status, including those of women, children and persons with disabilities, and to address international migration through international, regional or bilateral cooperation and dialogue, as well as in conformity with international human rights instruments.<sup>451</sup> The Council called on States to, i) promote and protect the human rights of all migrants, without discrimination of any kind, ii) provide assistance and relief to migrants who need it, including those in a vulnerable situation, regardless of their immigration status, iii) create a safe, accessible and enabling environment in which individuals and organizations that provide such attention can operate; iv) adopt a comprehensive and integral approach to migration policies, and v) to cooperate at the international level on the basis of shared responsibility to harness fully the economic developments and cultural and social opportunities that migration represents and to address efficiently its challenges in line with international human rights standards.<sup>452</sup> The Council also recommended that States who have not done so yet, should ratify the ICRMW as a matter of priority.<sup>453</sup>

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<sup>447</sup> UN Human Rights Council Resolution on the Protection of the human rights of migrants: strengthening the promotion and protection of the human rights of migrants, including in large movements, A/HRC/RES/32/14.

<sup>448</sup> Ibid p1.

<sup>449</sup> Ibid.

<sup>450</sup> Ibid.

<sup>451</sup> Ibid paras 1 - 6.

<sup>452</sup> Ibid paras 10 -11.

<sup>453</sup> Ibid para 4.

## 11.3. UN summit on refugees and migrants: New York Declaration

On 19 September 2016, the General Assembly called for the first time in history, for a summit at Heads of State and Government level, addressing large movements of refugees and migrants.<sup>454</sup> During the summit, the 'New York Declaration for Refugees and Migrants' was adopted.<sup>455</sup> The Declaration notes that large movements of refugees and migrants are a global phenomenon and has political, economic, social, developmental, humanitarian and human rights ramifications, across borders.<sup>456</sup> Through the Declaration, Member States acknowledge a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate, people -centred manner underpinned by international cooperation.<sup>457</sup> Member states further expressed their determination to, 'address the root causes of large movements of refugees and migrants, including through increased efforts aimed at early prevention of crisis situations based on preventive diplomacy.'<sup>458</sup>

The New York Declaration reflects bold commitments by Member States to address the current migration patterns as well as prepare for future challenges. The commitments include, i) protect the human rights of all refugees and migrants, regardless of status; ii) ensure that all refugee and migrant children are receiving education within a reasonable timeframe after their arrival in a host country; iii) support countries rescuing, receiving and hosting large numbers of refugees and migrants; iv) work towards ending the practice of detaining children for the purposes of determining their migration status; and, v) strongly condemn xenophobia against refugees and migrants and support a global campaign to counter it.<sup>459</sup>

## 11.4. Domestic developments and recommendations

### 11.4.1. Green Paper on International Migration

During June 2016, the South African government released the Green Paper on International Migration.<sup>460</sup> The Green Paper proposes that international migration must be managed proactively and strategically in order to contribute to national priorities such as nation building and social cohesion, inclusive economic growth and national security.<sup>461</sup> It further recognises that migration policies would shape the future composition of the country's population and confirms that the purpose of policy is to, 'determine which foreigners can become part of the community of South Africa's people either on a temporary or on a permanent basis.'<sup>462</sup>

The Green Paper notes that South Africa is among the top five countries that have received the most individual asylum seekers and alleges that 90% of these applicants, 'do not qualify

454 'UN Summit for Refugees and Migrants 2016' <<http://refugeesmigrants.un.org/summit>>

455 New York Declaration for Refugees and Migrants, A/71/L.1.

456 Ibid para 9.

457 Ibid para 11.

458 Ibid para12.

459 UN 'New York Declaration' <<http://refugeesmigrants.un.org/declaration>>

460 Green Paper on International Migration, 2016. Available at, <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160624greenpaperoninternationalmigration.pdf>> (Also see Minister of Home Affairs statement at the launch of the Green Paper on International Migration, available at, <<http://www.gov.za/speeches/green-paper-on-international-migration-30-jun-2016-0000>>)

461 Ibid p.9.

462 Ibid p.17.

as refugees but are seeking work or business opportunities'.<sup>463</sup> The Green Paper further recognises that South Africa has not adopted a clear and coherent integration policy for the integration of foreign nationals into the country's value system and population which may be attributed to the country's lack of a common vision on the value of international migration.<sup>464</sup> It therefore proposes several policy interventions and in specific relation to migrant workers, recognises that South Africans are a product of migration and that much of South Africa's economy was built by migrant workers who extracted raw materials during the colonial era.<sup>465</sup>

The Green Paper recommends measures on how to manage international migrants with skills and capital and how to attract and retain 'high-valued migrants'. Measures to support this policy objective includes to i) fast-track the granting of permanent residency and naturalisation; ii) introduce a points-based system; iii) recommend permanent residency and citizenship to attract investors and skilled migrants; iv) grant critical skills and business visas which extends to the migrant's family members as well.<sup>466</sup>

The SAHRC is aware that the Green Paper is the first phase of discussion and that it envisaged that a White Paper on Migration will be introduced during 2017 and shall contain definitive proposals based on sound research and consultation, with a view to ultimately drafting legislation on the matter.<sup>467</sup> The SAHRC therefore strongly recommends that the Department of Home Affairs gives due consideration to the rights of children, rights of access to health and social services and statelessness during the next phase of the process. The SAHRC further recommends that the government signs and ratifies the ICRMW, which will impose upon South Africa, international human rights standards and basic norms which are applicable universally and will furthermore seek to secure the international protection of all migrant workers and members of their families.<sup>468</sup>

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<sup>463</sup> Ibid p.78.

<sup>464</sup> Ibid p.85.

<sup>465</sup> Ibid p.5.

<sup>466</sup> Ibid (see detailed information on each point in pp 42 - 44).

<sup>467</sup> Ibid p. 93.

<sup>468</sup> See preamble to the ICRMW.

## 12. Conclusion and Recommendations

The year 2016 celebrated several milestones within the international human rights frameworks. Coinciding with 20 years of South Africa's Constitution, which espouses many of the ideals contained in the international instruments, South Africa has notably taken tremendous strides in its personal human rights evolution. Despite being a relatively young and new role-player in the international and regional human rights arena, South Africa has ratified several of the international and regional human rights instruments. While this certainly demonstrates South Africa's commitment to international human rights, the SAHRC recommends that the government consider the following to further ensure the promotion, protection and fulfilment of human rights in the country:

- i. Adhere to the reporting cycles of the international and regional bodies and ensure timeous submission of reports;
- ii. Submit its outstanding periodic reports under the CEDAW, UNCAT and the UNCRPD as a matter of urgency;
- iii. Ratify the OPCAT which will provide further protection to persons who are deprived of their liberty potentially curtail the allegations of torture and ill-treatment allegedly perpetrator at places of detention;
- iv. Ratify of the Optional Protocol to the ICESCR which allows persons to lodge complaints to the CESCR in instances where their rights under the Covenant have allegedly been violated;
- v. Ratify the ICRMW; and,
- vi. Provide timeous responses to the international treaty bodies in respect of request for follow-up information;

It is anticipated that during the year 2017, the South African government will submit its initial report under the ICESCR as well as appear for the third cycle of the Universal Periodic Review (UPR). In its role as a NHRI, the SAHRC will continue to closely monitor government's performance and adherence with its international and regional human rights obligations, and where permitted, submit independent NHRI reports for consideration by the international and regional mechanisms.



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