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**For Attention: The Gauteng Department of Economic
Development Gauteng Provincial Government**

By email: GDEDLegal.Services@gauteng.gov.za

To Whom it May Concern,

**In Re: Submissions on the Gauteng Township Economic
Development Bill**

This submission is filed by the International Commission of Jurists (ICJ) in response to the call for submissions issued by the Gauteng Provincial Government contained in Provincial Notice 467 of 2020.

The ICJ remains available to attend and present its submissions at any public hearings on the Bill.

The ICJ's briefing paper *Promoting Non-Citizens' Right to Work in South Africa* is available here: <https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf>.

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A. INTRODUCTION AND BACKGROUND

1. Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems.¹ Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
2. The ICJ maintains offices in Johannesburg and, in partnership with human rights defenders and local civil society organizations, undertakes coordinated research and advocacy on the protection of economic, social and cultural rights in South Africa, in particular.²
3. The ICJ has repeatedly expressed concern regarding discriminatory measures and statements against non-citizens in the country. In this context, the organization draws attention to significant xenophobia rising to xenophobic violence, including as most recently documented in Human Rights Watch's September 2020 report: "*They Have Robbed Me of My Life*": *Xenophobic Violence Against Non-Nationals in South Africa*.³
4. The purpose of this submission is to draw the Gauteng Provincial Government's attention to a briefing paper published by the ICJ in April 2020 titled *Promoting Non-Citizens' Right to Work in South Africa*. The briefing paper, which is forwarded together with this submission, sets out South Africa's binding international human rights law obligations to respect, protect and fulfil non-citizens' right to work.⁴ What follows is a short summary of that briefing paper, which should be read with the briefing itself as the ICJ's submission on the Gauteng Township Economic Development Bill.
5. The submissions focus directly on Chapter 3 of the Bill which is titled "Economic Activities Reserved for Citizens or Persons with Permanent Residency Status" and reserves an as yet unspecified range of economic activities for citizens and permanent residents. The clear effect of the Bill would be that the vast majority of non-citizens in South Africa would be excluded from a large range of economic activities and, if found to be in

¹ For more information on the International Commission of Jurists: <https://www.icj.org/>.

² In general, see: International Commission of Jurists "A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa" (August 2019): <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>.

³ Human Rights Watch "*They Have Robbed Me of My Life*": *Xenophobic Violence Against Non-Nationals in South Africa*" (September 2020), available: <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south>.

⁴ International Commission of Jurists "Promoting Non-Citizens' Right to Work in South Africa" (April 2020): <https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf>.

contravention of such prohibitions, would be subject to criminal sanction.

B. THE RIGHT TO WORK

6. The South African Constitution requires the consideration of international human rights law in interpretation and evaluation of both existing law and policy,⁵ even with respect to provisions and sections of the Constitution itself.⁶ Therefore, as a matter of *both* South African law and international human rights law, South Africa's binding treaty commitments are relevant to the evaluation of the constitutionality of the Gauteng Township Economic Development Bill.⁷
7. Unlike the South African Constitution, the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes a binding "right to work".⁸ This right applies to both "formal" and "informal" forms of work.⁹
8. South Africa ratified ICESCR in 2015, reinforcing South Africa's existing human rights commitments to a range of human rights and adding further obligations in terms of rights not expressly set out in the Constitution, such as the right to work and the right to an adequate standard of living. In doing so the government was explicit that: "*South Africa's accession of the ICESCR has and **will continue to deepen the enforcement of socio-economic rights** in the country*".¹⁰
9. Under the ICESCR, as authoritatively held by the UN Committee on Economic, Social and Cultural Rights ("CESCR"), all people, irrespective

⁵ Constitution, s 39, s 233.

⁶ *Ibid*; see also, International Commission of Jurists "A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa" (August 2019): <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>; International Commission of Jurists "Promoting Non-Citizens' Right to Work in South Africa" (April 2020): <https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf>.

⁷ Constitution, s 39, s 233. The Vienna Convention on the Law of Treaties (VCLT) provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith", and that a State "may not invoke the provisions of its internal law as a justification for a failure to perform a treaty".

⁸ ICESCR, Articles 6-8.

⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 7 April 2016, E/C.12/GC/23, available at: <https://www.refworld.org/docid/5550a0b14.html> [accessed 1 July 2020]; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: <https://www.refworld.org/docid/4415453b4.html> [accessed 29 June 2020]; International Labour Organization "Recommendation Concerning The Transition From The Informal To The Formal Economy" (2014).

¹⁰ The Statement is featured in in South Africa's periodic report to the Committee on Economic, Social and Cultural Rights, "Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/C.12/ZAF/1 (2017), para 5.

of citizenship or whether their status is documented under domestic law or not, enjoy the right to work. In its General Comment 20, the CESCR made clear that:

*"The Covenant rights apply **to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.**"¹¹*

10. Furthermore, in its General Comment 18, in the direct context of the right to work, CESCR had affirmed the following:

*"States parties are under the obligation to respect the right to work by ... refraining from denying or limiting equal access to decent work for all persons, **especially disadvantaged and marginalized individuals and groups**, including prisoners or detainees, **members of minorities and migrant workers.**"¹²*

11. In General Comment 23, CESCR has confirmed that this obligation applies not only with respect to the right to work but to rights at work:

*"Laws and policies should ensure that **migrant workers enjoy treatment that is no less favourable than that of national workers** in relation to remuneration and conditions of work."¹³*

12. This clear legal position is based on the simple fact that ICESCR rights – and States' obligations to give effect to those rights – like the overwhelmingly majority of constitutional rights in South Africa, apply to "everyone". The Constitutional Court has consistently taken a similar approach to the interpretation of the term "everyone" as holders of constitutional rights.¹⁴ South African courts have also acknowledged the constitutional protection afforded to non-citizens as inherent to the right to dignity. In *Watchenuka*, for example, the Supreme Court of Appeal emphasized that:

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

13. As recalled above, in interpreting the Bill of Rights in the South African Constitution, consideration must be given to international law.¹⁵ In the context of the right to work, therefore, the right to dignity enshrined in

¹¹ General Comment 20, para 30.

¹² General Comment 18, para 23.

¹³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 7 April 2016, E/C.12/GC/23, available at: <https://www.refworld.org/docid/5550a0b14.html> [accessed 1 July 2020], para 47(e).

¹⁴ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004); *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

¹⁵ Constitution, s 39.

the Bill of Rights must be interpreted consistently with the right to work in international human rights law.¹⁶

14. As a result, as the Supreme Court of Appeal has emphasized in judgments such as *Watchenuka* and *Somali Association*,¹⁷ the right to dignity includes a clear protection for the right to work of non-citizens in South Africa. In turn, any restriction or limitation of this right, including in the Gauteng Township Economic Development Bill, must – as with all other rights – comply with South Africa’s international human rights law obligations, as well as section 36 (“limitation of rights”) of the South African Constitution.¹⁸
15. Unsubstantiated and irrational limitations of rights, such as those featured in the Gauteng Township Economic Development Bill providing for the exclusion of non-citizens from broad swathes of economic activity, are unlikely to be reasonable, justifiable, necessary and proportionate limitations of the right to work and, therefore, would fall short of the requirements of both South African law and international human rights should they be adopted in their present formulation.

C. RISK OF FUELLING XENOPHOBIA

16. In its current form the Gauteng Township Economic Development Bill may prevent many non-citizens from making a living and could leave many destitute facing circumstances incompatible with the right to dignity and to life with dignity. Whatever the specific categories of economic activity the Bill ultimately excludes non-citizens from, it may well give rise to an increase in the existing xenophobic sentiment, which, in turn, may result in recurrences of xenophobic violence. Courts in South Africa have repeatedly warned government officials and departments against conduct that risks perpetuating xenophobia. For example, in *Somali Association*, the Supreme Court of Appeal warned that:

“the frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations. It must especially not be allowed to diminish their humanity. ***The***

¹⁶ This argument is also supported by South Africa’s binding obligations relating to the right to life. In terms of international human rights law, the right to life includes the “right to life with dignity”. See Human Rights Committee General Comment No. 36 (2018) “On Article 6 of the International Covenant on Civil and Political Rights, on the right to life” CCPR/C/GC/36, available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

¹⁷ *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), para 43.

¹⁸ Constitution, s 36. See also, International Commission of Jurists “Promoting Non-Citizens’ Right to Work in South Africa” (April 2020): <https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf> p 22-27.

authorities must also guard against unwittingly fuelling xenophobia.¹⁹

17. In 2018, the United Nations High Commissioner for Human Rights issued a set of Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations. These principles recommend that States:

“Repeal or amend all laws or measures that may give rise to discrimination against migrants, including direct and indirect discrimination that is based on multiple grounds. Condemn and take effective measures against all acts and expressions of racism, racial discrimination, xenophobia and related intolerance, against stereotyping of migrants (including on the basis of religion or belief) because they are non-citizens or have an irregular status, and against other intersecting forms of discrimination such as age and gender.”²⁰

18. In conclusion, in its current form the Bill itself is not only inconsistent with South African and international human rights law, but risks “fueling xenophobia” and even xenophobic violence. The ICJ therefore submits that the Gauteng Provincial Government should reevaluate the Bill as a whole for its compliance with international human rights law and consider withdrawing it unless it be revised to ensure the protection of non-citizens’ right to work.

¹⁹ *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014).

²⁰ Report of the United Nations High Commissioner for Human Rights “Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations” (2018) available at: <https://digitallibrary.un.org/record/1472491?ln=en>.