



## Submission by Human Rights Watch to the Committee on Economic, Social and Cultural Rights on South Africa

*64<sup>th</sup> plenary, 2018*

This submission focuses on the right to education including discrimination in education for children with disabilities and barriers for pregnant girls and adolescent mothers' to education. It also looks at protection of environmental activists, the rights of sex workers, and protecting education from attack.

### **Right to Education** (*Articles 13 and 14*)

When South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2015, it included a declaration that the government “will give progressive effect to the right to education ... within the framework of its National Education Policy and available resources.”<sup>1</sup> The declaration indicates a compromise of South Africa’s commitment to key international obligations on the right to education; notably the obligation to guarantee the right to free and compulsory primary education to all children.<sup>2</sup> Indeed, South Africa has yet to develop an action plan on how it will guarantee free and compulsory primary education to all children, pursuant to its obligations under article 14.

### **Free Education**

South Africa does not guarantee the right to free primary or secondary education to all children in law or practice.<sup>3</sup> Research by Human Rights Watch in 2014 and 2015 found

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<sup>1</sup> United Nations Treaty Database, “South Africa,” undated, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/14531/A-14531-South%20Africa-08000002803ff711.pdf> (accessed August 10, 2018).

<sup>2</sup> Joint statement by Section 27 et al., “South Africa Government’s Declaration on Education Clause Mars the Welcome Ratification of the International Covenant on Economic, Social and Cultural Rights,” Johannesburg, January 21, 2015.

<sup>3</sup> Department of Basic Education, “School fees and exemption,” undated, <https://www.education.gov.za/Informationfor/ParentsandGuardians/SchoolFees.aspx>.

that the current fee-based system particularly discriminates against children with disabilities. It results in many children with disabilities paying school fees that many children without disabilities do not, as well as additional costs, such as for uniforms, food, transport, and to secure reasonable accommodations for the child’s disability.<sup>4</sup>

South Africa’s Schools Act mandates that the state fund public schools on an equitable basis.<sup>5</sup> The government in turn requires that the governing bodies of public schools—made up of teachers, parents, and other community representatives—adopt a resolution for a school to charge fees and supplement a school’s funding “by charging school fees and doing other reasonable forms of fund-raising.”<sup>6</sup>

Public schools may be classified as “no-fee” schools, a status granted to public schools by provincial governments, which means that those schools should not charge fees. Today, around 80 percent of schools across the country benefit from a “no-fee” policy, and approximately 60 percent of the current school population accesses “no-fee” schools. The “no-fee” designation is based on the “economic level of the community around the school,” and on a quintile system from poorest to richest, whereby the lowest three quintiles do not pay fees in designated public schools.<sup>7</sup>

Since 2014, Human Rights Watch has found that no special schools, where most children with disabilities are enrolled, are listed in any “no-fee” schools list produced by the government.<sup>8</sup>

Although a high number of students in special schools come from townships and predominantly poor areas of towns, many public special schools in urban areas are

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<sup>4</sup> “School fees” are defined as “any form of contribution of a monetary nature made or paid by a person or body in relation to the attendance or participation by a learner in any programme of a public school,” South African Schools Act, Act No. 24 of 2005; Education Laws Amendment Act, 2005, [http://www.gov.za/sites/www.gov.za/files/a24-05\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/a24-05_0.pdf), ch. 1 and s. 1(b).

<sup>5</sup> South African Schools Act, s. 34.

<sup>6</sup> Department of Basic Education, “School Fees and Exemption – No Fee Schools”, undated, <http://www.education.gov.za/Parents/NoFeeSchools/tabid/408/Default.aspx> (accessed August 9, 2018).

<sup>7</sup> Department of Education, “National Norms and Standards for School Funding,” General Notice 2363, October 12, 1998, <http://www.education.gov.za/LinkClick.aspx?fileticket=ZYYtOiXHTeE%3D&tabid=188&mid=498> (accessed August 5, 2018); Department of Basic Education, “Amended National Norms and Standards for School Funding,” January 16, 2015, [http://www.gov.za/sites/www.gov.za/files/38397\\_gon17.pdf](http://www.gov.za/sites/www.gov.za/files/38397_gon17.pdf) (accessed August 5, 2018).

<sup>8</sup> See for example, “Western Cape No Fee School 2017,” <https://www.education.gov.za/Portals/o/Documents/Publications/2017%20No%20Fee%20Schools/WC%20No%20Fee%20Schools%202017%20list.pdf?ver=2018-01-12-121024-040> (accessed August 15, 2018), or “Gauteng No Fee School 2017” <https://www.education.gov.za/Portals/o/Documents/Publications/2017%20No%20Fee%20Schools/GT%20No%20Fee%20Schools%202017%20list.pdf?ver=2018-01-12-121056-800> (accessed August 15, 2018).

located in wealthier suburbs previously inaccessible to the majority of children under apartheid.<sup>9</sup> The income level of surrounding communities and locations means many special schools fail the “needs” or “poverty” test used to assess a school’s access to recurrent public funding or to qualify as a “no-fee” school.<sup>10</sup>

The high cost of education, including school fees and other school-related costs, continues to be a significant barrier keeping children with disabilities out of school. School fees in special schools visited by Human Rights Watch ranged from R350-R750 (US\$24-\$53) per each of the year’s four terms. In many cases, parents reported not having access to fee waivers. In some cases, parents paid as much as R5,000 (\$353) per year in school fees alone. Parents with children who are referred to special schools which are far away from their families also pay for boarding or housing fees and transport for their children to travel long distances to school. Many are not able to pay these costs, which leads to children being excluded from school.<sup>11</sup>

In 2017, senior government officials indicated their intention to review school fees for children with disabilities but did not adopt any policy changes at the beginning of the school year in January 2018.<sup>12</sup> At time of writing, the South African government had not communicated an intention to adopt measures to ensure children with disabilities do not pay for school fees, on an equal basis with children without disabilities.

### ***National Resources for Inclusive Education***

Insufficient allocation of resources for inclusive education remains a concern. The majority of the limited budget for students with disabilities continues to be allocated to special schools rather than to inclusive education.<sup>13</sup> Most mainstream schools do not have additional budget lines to provide reasonable accommodation to students with disabilities.

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<sup>9</sup> Human Rights Watch found that this is particularly the case in Gauteng and Western Cape provinces where special schools were traditionally set up to cater for white children with disabilities. Within Gauteng Province, many full-service schools are mainly in the outskirts of the city and the majority are Afrikaans speaking.

<sup>10</sup> Provincial Departments of Education are guided by a “Resource Targeting Table” to define needs-based allocations, “National Norms and Standards for school funding,” pp. 27-28. See Department of Basic Education, “Amended National Norms and Standards for School Funding,” Government Gazette no. 38397, 16 January 2015.

<sup>11</sup> Human Rights Watch, “*Complicit in Exclusion: South Africa’s Failure to Guarantee Inclusive Education for Children with Disabilities*”, August 2015, <https://www.hrw.org/report/2015/08/18/complicit-exclusion/south-africas-failure-guarantee-inclusive-education-children>.

<sup>12</sup> Parliamentary Monitoring Group, “Inclusive Education and Special Education: DBE Progress Report; with Deputy Minister, Meeting Summary.”

<sup>13</sup> Department of Basic Education, “Progress Report on Inclusive Education and Special Needs Education, Portfolio Committee on Basic Education Meeting,” 30 May 2017.

In 2015, the government communicated its intention to publish “Draft National Norms and Standards for Resource Distribution for an Inclusive Education System,” which will have a binding effect on the national and provincial governments once they are adopted.<sup>14</sup> In September 2017, the minister of basic education, Angie Motshekga, announced the proposal of new “National Guidelines for Resourcing an Inclusive Education System,” which will only provide guidance but have no binding effect on governmental institutions.<sup>15</sup> At time of writing, neither of these documents have been finalized.

### ***Discrimination Against Children with Disabilities in Education***

In August 2015, Human Rights Watch released our report “[Complicit in Exclusion](#)”: [South Africa’s Failure to Guarantee Inclusive Education for Children with Disabilities](#),” documenting barriers to inclusive, quality education for children with disabilities in South Africa. Many of the barriers we documented persist today, although Human Rights Watch acknowledges that the government has progressed in some critical areas, as detailed in this submission.<sup>16</sup>

There is a lack of disaggregated and transparent data concerning current numbers of children with disabilities who remain out of school or on waiting lists for public schools. In 2013, the government estimated that more than 500,000 children with disabilities remained out of school.<sup>17</sup> In 2015 and 2016, the government estimated that close to 600,000 children with disabilities remained out of school.<sup>18</sup>

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<sup>14</sup> Department of Basic Education, “Draft National Norms And Standards For Resource Distribution For An Inclusive Education System,” June 2015, <http://www.saou.co.za/wp-content/uploads/2011/04/Draft-norms-2015.pdf> (accessed July 22, 2018).

<sup>15</sup> Department of Basic Education, “Statement by Minister of Basic Education, Mrs. Angie Motshekga on the occasion of the post-CEM Media Briefing,” September 15, 2017, <https://www.education.gov.za/Newsroom/MediaReleases/tabid/347/ctl/Details/mid/5986/ItemID/5472/Default.aspx> (accessed July 22, 2018).

<sup>16</sup> Human Rights Watch, “[Complicit in Exclusion](#),” Alternate Report Coalition – Child Rights South Africa, Complementary Report to The African Committee of Experts on The Rights and Welfare of the Child, A Response to South Africa’s Second Country Report to The African Committee of Experts On The Rights And Welfare Of The Child On The African Charter On The Rights And Welfare Of The Child; United Nations Committee on the Rights of the Child, “Concluding observations on the second periodic report of South Africa,” CRC/C/ZAF/CO/2, October 27, 2016, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fZAF%2fCO%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fZAF%2fCO%2f2&Lang=en) (accessed July 21, 2018).

<sup>17</sup> Government of South Africa, Initial Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities, 2008 – 2012, approved by Cabinet on 17 April 2013, [http://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/ZAF/CRPD\\_C\\_ZAF\\_1\\_7020\\_E.doc](http://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/ZAF/CRPD_C_ZAF_1_7020_E.doc) (accessed July 17, 2018), paras. 204-206.

<sup>18</sup> Department of Basic Education, “Report on the Implementation of Education White Paper 6 on Inclusive Education: An Overview for the Period 2013-2015,” May 2015, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160308overview.pdf> (accessed August 15, 2018); Human Rights Watch, “[Complicit in Exclusion](#).”

Human Rights Watch notes that various government departments have agreed to improve data collection on children with disabilities.

In its reply to the Committee on the Rights of Persons with Disabilities, the government stated that “Ensuring the enrolment of children with disabilities, who are currently out of school because of impairment, is a work in progress.”<sup>19</sup>

Although South Africa’s constitution protects the right to a basic education, and protects individuals from discrimination on the grounds of race and disability, the government has not adopted legislation that specifically guarantees the right to inclusive education for children with disabilities.<sup>20</sup> Despite a national policy to provide inclusive education for all children with disabilities, many children with disabilities do not have equal access to inclusive quality primary or secondary education and face multiple forms of discrimination and barriers.<sup>21</sup> South Africa’s Human Rights Commission has deemed that the education system continues to be exclusionary of children with disabilities.<sup>22</sup>

Many children with disabilities face discrimination when accessing public schools. A lack of governmental oversight of waiting lists and placements leaves school officials with the last word on enrolling learners, delaying children’s entry into schools beyond the age of compulsory education. Many mainstream schools deny children with intellectual or developmental disabilities a place in mainstream schools in their communities. Human Rights Watch found that social workers, district education officials, and health workers most often refer children to special schools based on their disabilities. The referrals system, overcrowding, and special schools operating at maximum capacity means children can wait for up to four years at care centers or at

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<sup>19</sup> Committee on the Rights of Persons with Disabilities, “List of issues in relation to the initial report of South Africa, Addendum – Replies of South Africa to the list of issues,” CRPD/C/ZAF/Q/1/Add.1, July 2, 2018, para. 152.

<sup>20</sup> Constitution of the Republic of South Africa, Act No.108 of 1996, <http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf>, s.29(1)(a) and 2(a).

<sup>21</sup> In 2001, the government adopted “Education White Paper 6: Special Needs Education,” a national policy to provide inclusive education for all children with disabilities within 20 years, but key aspects of the policy have yet to be implemented. Department of Basic Education, “Education White Paper 6: Special Needs Education, Building an inclusive education and training system,” July 2001, <http://www.education.gov.za/LinkClick.aspx?fileticket=gVFccZLi/tl=> (accessed August 5, 2018).

<sup>22</sup> South African Human Rights Commission, “National Human Rights Institution Report on the South African Government’s Initial Country Report under the International Convention on the Rights of Persons with Disabilities,” January 2018, [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN) (accessed August 15, 2018), para. 45

home for placement in a special school.<sup>23</sup> The Department of Basic Education's statistics for 2017 indicate that 11,461 children with disabilities are on school waiting lists.<sup>24</sup> According to civil society and disability rights organizations, this remains an underestimate.<sup>25</sup>

When children are placed on long waiting lists or turned down by special schools, parents face the burden of having to find alternatives for their children, including special schools further away from their homes or communities. Consequently, they are not always able to register children in the most appropriate school. Traveling to schools to register children can be a very costly activity for many parents who already struggle to pay for basic needs.

Once in school, many children with disabilities do not have access to the same curriculum as children without disabilities nor to the necessary materials, including assistive devices and services in Braille or sign language. Many students in mainstream schools face discriminatory physical and attitudinal barriers they need to overcome in order to receive an education.

The Department of Basic Education has made progress in providing resources for learners who are blind or have low vision. In 2014, the government adopted a policy to ensure education officials adequately assess children with disabilities and provide them with the support they need. The government intends to fully implement this policy by 2019.<sup>26</sup> However, our findings indicate that insufficient resources—due in part to a lack of adequate financing allocated to inclusive education by regional governments, and lack of qualified personnel—mean the policy is being implemented inconsistently, particularly in rural areas and under-resourced townships.<sup>27</sup>

*Human Rights Watch recommends the Committee ask the government of South Africa:*

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<sup>23</sup> Human Rights Watch, *"Complicit in Exclusion;"* and "South Africa: Little Progress for Youth With Disabilities," August 19, 2016, <https://www.hrw.org/news/2016/08/19/south-africa-little-progress-youth-disabilities>.

<sup>24</sup> Parliamentary Monitoring Group, "Inclusive Education and Special Education: DBE Progress Report; with Deputy Minister, Meeting Summary," May 30, 2017, <https://pmg.org.za/committee-meeting/24505/> (accessed July 19, 2018).

<sup>25</sup> IESA/R2ECWD Response to the presentation, on progress in the implementation of inclusive education, to the portfolio committee on basic education scheduled for 30 May 2017," May 30, 2017, <http://www.included.org.za/news/iesar2ecwd-response-dbe-presentation-progress-implementation-inclusive-education-portfolio-committee-basic-education-scheduled-30-may-2017/> (accessed August 15, 2018).

<sup>26</sup> Department of Basic Education, "Policy on Screening, Identification, Assessment and Support (SIAS)," December 2014, <http://www.naptosa.org.za/index.php/doc-manager/oo-general/367-sias-final-19-december-2014/file> (accessed August 4, 2018).

<sup>27</sup> Human Rights Watch, "Complicit in Exclusion;" "South Africa: Little Progress for Youth With Disabilities."

- What measures has the government adopted to ensure children with disabilities have access to free quality inclusive education, on an equal basis with children without disabilities, particularly in rural and remote areas?
- What binding measures has the government taken to ensure provincial governments respect and fulfil the right to inclusive education of children with disabilities?
- What steps has the government taken to ensure legislation and policy reflect the government's obligation to provide free education, and its obligation to provide reasonable accommodation to allow children with disabilities to access education without discrimination?
- Will the government adopt legislation providing specific protections to children with disabilities and guaranteeing inclusive education?

*Human Rights Watch recommends the Committee to:*

- Urge the government to ensure access to free and compulsory primary education and to secondary education to children with disabilities, including by developing a detailed plan of action for the immediate realization of free compulsory primary education, in line with its responsibilities under international human rights law.
- Call upon the government to adopt stronger legal protections for children with disabilities to complement the South African Schools Act. This includes a clear duty to provide reasonable accommodation in public ordinary schools, accompanied by specific provisions that prevent the rejection of students with disabilities from schools in their neighborhood.

### ***Insufficient Protections for Pregnant Students and Adolescent Mothers***

South Africa has a high rate of teenage pregnancies: in 2016, around 16 percent of 15 to 19 year old girls and women had begun childbearing.<sup>28</sup> According to the government's estimates, in 2015, over 85,000 students fell pregnant, representing 3.3 percent of the student population.<sup>29</sup> According to the government, only a third of students stay in school during a pregnancy and return following childbirth.<sup>30</sup>

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<sup>28</sup> Statistics South Africa, "Media release: South Africa Demographic and Health Survey," May 15, 2017, <http://www.statssa.gov.za/?p=9836> (August 15, 2018).

<sup>29</sup> Department of Basic Education, "Portfolio Committee on Basic Education – Prevention and Management of Learner Pregnancy," November 14, 2017, powerpoint slide 12. Available in Parliamentary Monitoring Group, "Learner Pregnancies: Basic Education, Social Development, Health Departments briefing," November 14, 2017, <https://pmg.org.za/committee-meeting/25478/> (accessed August 10, 2018).

<sup>30</sup> Ibid.

South Africa has had a policy on the prevention and management of student pregnancies since 2007, which states that school children who are pregnant shall not be unfairly discriminated against and cannot be expelled.<sup>31</sup> However, research by South African NGOs indicates that this policy has not been fully respected by schools, and schools have often discriminated against female students.<sup>32</sup> Research conducted by South African organisations shows that some school officials continue to exclude pregnant girls from school or ask them to shift to other schools, contradicting their obligations to respect student’s right to compulsory education.<sup>33</sup>

In 2018, the government initiated a consultation to develop a new policy on management and prevention of student pregnancies.<sup>34</sup> Human Rights Watch recommends that the government removes any conditional measures –currently applied through the government’s 2007 policy—that impact on girls’ education or deter them from going back to school. For example, students should not have to wait a conditional period until they can return to school.<sup>35</sup>

The new policy should ensure that pregnant students can stay in school while they are medically able to, and that they return to school as soon as they are ready. Schools should also provide basic accommodations for adolescent parents, including: time to breastfeed during breaks, and time off in case a student’s child is ill or to comply with other medical or bureaucratic requirements.<sup>36</sup>

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<sup>31</sup> Republic of South Africa, Department of Basic Education, “Measures for the Prevention and Management of Learner Pregnancy,” 2007, <https://www.naptosa.org.za/doc-manager/40-professional/46-general/105-sgb-dbe-pregnancy-2007/file> (accessed August 28, 2018), pp. 6 – 7. Despite its existence, schools continue to expel pregnant girls in breach of South Africa’s constitutional laws. Lisa Draga et al, “Basic Education Rights Handbook – Chapter 8 – Pregnancy,” <http://section27.org.za/wp-content/uploads/2017/02/Chapter-8.pdf> (accessed August 28, 2018).

<sup>32</sup> Equal Education Law Centre and Section 27, “Equal Education Law Centre and Section 27 Submission to the Department of Basic Education in Respect of the Draft “National Policy on the Prevention and Management of Learner Pregnancy in Schools,” April 2018, <http://section27.org.za/wp-content/uploads/2018/05/EELC-and-S27-Submissions-on-Draft-Pregnancy-Policy-.pdf> (accessed August 15, 2018).

<sup>33</sup> Lisa Draga, Chandré Stuurman, and Demichelle Petherbridge, “Basic Education Rights Handbook – Education Rights in South Africa – Chapter 8: Pregnancy,” 2017, <http://section27.org.za/wp-content/uploads/2017/02/Chapter-8.pdf>.

<sup>34</sup> Department of Basic Education, “DBE Draft National Policy on the Prevention and Management of Learner Pregnancy in Schools,” 2018, <https://www.education.gov.za/Portals/o/Documents/Policies/Draft%20Pregnancy%20Policy%202018.pdf?ver=2018-06-26-142235-687> (accessed August 15, 2018).

<sup>35</sup> Republic of South Africa, Department of Basic Education, “Measures for the Prevention and Management of Learner Pregnancy,” 2007, <https://www.naptosa.org.za/doc-manager/40-professional/46-general/105-sgb-dbe-pregnancy-2007/file> (accessed August 17, 2018).

<sup>36</sup> Human Rights Watch, Letter to the Department of Basic Education regarding their draft pregnancy policy, August 16, 2018, <https://www.hrw.org/news/2018/08/15/letter-south-africas-department-basic-education-regarding-their-draft-pregnancy>.

Through its policy, the government should communicate a clear obligation on all education establishments to respect girls' right to stay in school. Schools should not be able to block a student's return to school.

*Human Rights Watch recommends the Committee ask the government of South Africa:*

- What steps will the government take to fully guarantee, in law and policy, pregnant students and adolescent parents' right to education?
- What measures will the government adopt to fully support pregnant students and adolescent parents' return and retention in school?
- How will the government ensure provincial governments' and schools' compliance with its forthcoming policy on pregnancy management and prevention in schools?

*Human Rights Watch recommends the Committee to:*

- Encourage the government to adopt a human rights compliant policy that guarantees pregnant girls' and adolescent parents' right to education and includes basic accommodations to ensure parents are supported to stay in school. The government should regularly monitor this policy to ensure schools adhere to its provisions.

### **Protection of environmental activists (Article 12)**

Community activists are on the frontlines advocating for the protection of their communities from the environmental impacts of mining. South Africa is one of the world's biggest coal producers,<sup>37</sup> and a leading producer of a wide range of metals.<sup>38</sup> The serious environmental, health, and social impacts of mining, coupled with a lack of transparency, accountability, and consultation, has increased public opposition to mining projects. The response to this opposition has at times resulted in harassment and violence against opponents of mines exercising their rights to a health and a healthy environment.

From March to July 2018, Human Rights Watch interviewed more than 40 community members and environmental activists from Limpopo, KwaZulu-Natal, North West, and Eastern Cape provinces. We also spoke with municipal officials, police, and prosecutors in these provinces.

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<sup>37</sup> BP Statistical Review of World Energy June 2016, <https://www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2016/bp-statistical-review-of-world-energy-2016-full-report.pdf>

<sup>38</sup> United States Geological Survey, <http://minerals.usgs.gov/minerals/pubs/#mcs>

Several activists and community members said they had received death threats related to their opposition of mining and their concerns over its environmental impacts. Some of the activists who experienced threats said they were also physically attacked or their property was damaged. Another issue we documented in several communities relates to limitations of protests about the right to a healthy environment. Several community members told us that the police, and in some instances a private security company, used teargas and rubber bullets to disperse peaceful protesters. Several of the people we interviewed were injured and one person was killed during these interactions. Activists also said that they are often arrested during protests and charged with “public violence.” Even if most of these cases did not result in a criminal conviction, the risk of being jailed or injured every time they participate in a protest deters some communities from protesting or mobilizing against environmental harm that impacts their communities.

*Human Rights Watch recommends the Committee ask the government of South Africa:*

- How does the government respond to violence and harassment against environmental activists in mining-affected communities and ensure timely and impartial investigations?
- How does the government ensure that activists in mining-affected communities can exercise their rights to health and healthy environment and freely voice their concerns during protests?

*Human Rights Watch asks the Committee to:*

- Call upon the government to protect community members and environmental activists from harassment and violence, investigate threats or acts of harassment or violence, prosecute those responsible, and provide an adequate remedy for victims.
- Call upon the government to ensure that community members and activists are free to safely engage in action to secure or promote respect for their rights to health and a healthy environment, such as through participating in protests.

### **Protection of Sex workers** *(Article 1, 7 and 12)*

South Africa criminalizes the sale and purchase of sex, as well as related activities such as keeping a brothel or living on the earnings of sex work. However, in part

because criminalization may be interpreted as at odds with South Africa's constitution, decriminalization has been under active discussion for nearly a decade.<sup>39</sup>

In May 2017, the South African Law Reform Commission explored the need for reform of South Africa's laws related to adult sex work.<sup>40</sup> The Commission recommended maintaining the criminalization of both the sale and purchase of sex, albeit with some modifications, or, as a second choice, that the sale of sex should be decriminalized but purchase and third-party involvement remain illegal (partial decriminalization, also known as the "Nordic" model).

Human Rights Watch is concerned about violations of the ICESCR against sex workers in South Africa under criminalization and recommends that the government instead decriminalize sex work. Criminalization of sex work has a direct impact on the right to health, and the right to self-determination and state's obligations to "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and ... take appropriate steps to safeguard this right."<sup>41</sup> Criminalization also interferes with the right to form unions protected by the convention, including at work, and the right to bodily autonomy.

In May and June 2018, Human Rights Watch interviewed 46 female sex workers in 10 interview sites in Limpopo, Mpumalanga, and Gauteng provinces. Almost all interviewees were unmarried mothers and supporting their children (as well as other dependents) was the main reason they chose and remained in sex work. Interviewees shared their experiences of police harassment and frequent, arbitrary detentions, which appeared to almost always be the result of police profiling, that kept them from their families and their work. Police have used their powers of arrest and detention to coerce sex workers into paying bribes or providing free sex. Many of the sex workers we interviewed were victims of violence, and other crimes such as theft and discrimination, at the hands of clients, men posing as clients, police, and community members. About a third of our interviewees said they had been raped in the past three years. Women told us how it is humiliating, useless or even dangerous to report crimes

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<sup>39</sup> Sexual Offences Act, No. 23 of 1957, ss. 2, 10, 12, 12A, 19, 20; Criminal Procedure Act, No. 51 of 1977, s. 268(c); Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007, s. 11. The debate over decriminalization of sex work in South Africa began in earnest during the build-up to the FIFA 2010 World Cup in South Africa, though many advocates had been pushing for decriminalization long before 2009.

<sup>40</sup> South African Law Reform Commission, "Project 107: Report on Sexual Offences: Prostitution," June 2015, <http://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017-Sum.pdf> (accessed July 18, 2018).

<sup>41</sup> Part III, Article 6.1

committed against them to the police who do not take them seriously, who see them as criminals, and who are sometimes the perpetrators of such violence.<sup>42</sup>

On a positive note, the sex workers we interviewed told us they had free, fairly straightforward, and non-discriminatory access to healthcare, including reproductive healthcare and HIV/AIDS treatment. Many remarked on their experiences of improved, friendlier services over the past six years. A driving force behind these improvements has been the South African Department of Health and the South African National AIDS Council (SANAC, which coordinates several government bodies) openly calling for services for sex workers and for decriminalization.<sup>43</sup> A whole-of-government approach towards sex work that recognizes the rights and needs of this vulnerable group would make more sense and help end police practices that obstruct SANAC's goals of ending the pandemic, for example detaining sex workers without access to antiretroviral drugs.

*Human Rights Watch recommends the Committee ask the government of South Africa:*

- How does the government plan to respond to the South African Law Reform Commission's report on sexual offenses, released in May 2017, which recommended continued full criminalization of consensual adult sex work?

*Human Rights Watch asks the Committee to:*

- Call upon the government of South Africa to impose an immediate moratorium on arrests of sex workers, including for loitering, indecent exposure, and other misdemeanors, at least until the future legal status of sex work is settled.
- Call upon the government of South Africa to, in consultation with sex workers, introduce a new law to parliament removing criminal and administrative

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<sup>42</sup> The Women's Legal Centre, a non-profit center that offers free legal advice to women in South Africa, analyzed data from cases of verbal, physical and sexual abuse reported to them by sex workers between 2011 and 2015, and found that over 60% of cases were from police as perpetrators. See Women's Legal Centre, "Police abuse of sex workers: Data from cases reported to the Women's Legal Centre between 2011 and 2015," April 2016, <http://wlce.co.za/wp-content/uploads/2017/02/Police-abuse-of-sex-workers.pdf> (accessed July 18, 2018), p. 14.

<sup>43</sup> See, for example: Nelson Dlamini, "SANAC calls for decriminalisation of sex work," SANAC News, March 9, 2018, <http://sanac.org.za/2018/03/09/sanac-calls-for-decriminalisation-of-sex-work/> (accessed July 10, 2018); South African Department of Health, "Health Sector HIV Prevention," 2016, <http://www.health.gov.za/index.php/component/phocadownload/category/324-hiv-prevention-strategy?download=1823:hiv-prevention-strategy> (accessed July 10, 2018). The Sex Workers' Programme includes a plan for sex worker community mobilization and engagement, service provision, sensitization of service providers, advocacy, health systems strengthening, and strategic information. Advocacy efforts include a decriminalization campaign (see pp. 7-8).

sanctions against voluntary, consensual adult sex work and related offenses, such as solicitation, living on the earnings of prostitution, and brothel-keeping.

### **Protection of Education during Armed Conflict** (*Articles 13, 14*)

South Africa was among the first group of countries to join the Safe Schools Declaration when it was opened for endorsements on May 29, 2015. The Declaration outlines various common-sense actions that countries can take to reduce the negative consequences of armed conflict on education, including using the *Guidelines on Protecting Schools and Universities from Military Use* with respect to protecting schools from military use.<sup>44</sup>

In July 2018, the United Nations Security Council unanimously adopted resolution 2427 (2018) on children and armed conflict, which encourages UN member states to take concrete measures to deter such use of schools by armed forces and armed groups.

As of June 2018, South Africa was contributing 1,177 troops and 20 staff officers to UN peacekeeping operations around the world. Such troops are required to comply with the United Nations Department of Peacekeeping Operations' UN Infantry Battalion Manual (2012), which includes the provision that "schools shall not be used by the military in their operations."<sup>45</sup> South Africa's peacekeepers are deployed in the Democratic Republic of Congo and Sudan — two countries where the military use of schools has been documented as a problem.

The Peace and Security Council of the African Union has recognized the importance of the Safe Schools Declaration in protecting education during armed conflict and encouraged states to support it, including urging "Member States to endorse and implement" the Declaration in June 2017.

*Human Rights Watch recommends to the Committee that it ask the government of South Africa:*

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<sup>44</sup> Safe Schools Declaration, [https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe\\_schools\\_declaration.pdf](https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe_schools_declaration.pdf) (accessed August 17, 2018); Global Coalition to Protect Education from Attack, *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*, March 18, 2014, [http://protectingeducation.org/sites/default/files/documents/guidelines\\_en.pdf](http://protectingeducation.org/sites/default/files/documents/guidelines_en.pdf) (accessed August 17, 2018).

<sup>45</sup> United Nations Infantry Battalion Manual, 2012, section 2.13. Moreover, the 2017 Child Protection Policy of the UN Department of Peacekeeping Operations, Department of Field Support, and Department of Political Affairs notes: "United Nations peace operations should refrain from all actions that impede children's access to education, including the use of school premises. This applies particularly to uniformed personnel. Furthermore, ... United Nations peace operations personnel shall at no time and for no amount of time use schools for military purposes." UN Department of Peacekeeping Operations, Department of Field Support and Department of Political Affairs, "Child Protection in UN Peace Operations (Policy)," June 2017.

- What steps has South Africa taken in line with UN Security Council Resolutions 2143 (2014), 2225 (2015), and 2427 (2018) to deter the use of schools for military purposes?
- Are protections for schools from military use included in any policies, rules, or pre-deployment trainings for South Africa's armed forces?
- What further steps has South Africa taken to implement the commitments in the Safe Schools Declaration?

*Human Rights Watch recommends the Committee:*

- Congratulate South Africa for having led the way in being one of the first states globally to endorse the Safe Schools Declaration.
- Call upon the government of South Africa to take concrete measures to deter the military use of schools, including by bringing the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* into domestic military policy and operational frameworks.
- Encourage the government of South Africa to champion the protection of students, teachers, and schools during armed conflict, and the Safe Schools Declaration, during its upcoming membership of the United Nations Security Council in 2019-2020.