

From the global to the local
The role of international law in the enforcement
of socio-economic rights in South Africa

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ACRONYMS AND ABBREVIATIONS

African Charter on Human and Peoples' Rights	African Charter
African on the Rights and Welfare of the Child	African Children's Charter
African Commission on Human and Peoples' Rights	African Commission
African National Congress	ANC
African Union	AU
African Union Convention Governing Specific Aspects of Refugee Problems in Africa	AU Refugee Convention
American Convention on Human Rights	American Convention
Basic Conditions of Employment Act 75 of 1997	BCEA
Charter of the United Nations	UN Charter
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	CAT
Convention on the Elimination of All Forms of Discrimination against Women	CEDAW
Convention on the Elimination of All Forms of Racial Discrimination	CERD
Convention on the Rights of all Migrant Workers and Members of their Families	Migrant Workers' Convention
Convention on the Rights of the Child	CRC
Committee on Economic, Social and Cultural Rights	CESCR
Economic and Social Council	ECOSOC
Employment Equity Act 55 of 1998	EEA
European Committee of Social Rights	ECSR
European Social Charter	ESC
Extension of Security of Tenure Act 62 of 1997	ESTA
Human Rights Council	HRC



Inter-American Commission on Human Rights	Inter-American Commission
International Court of Justice	ICJ
International Covenant on Civil and Political Rights	ICCPR
Intrnational Covenant on Economic, Social and Cultural Rights	ICESCR
Labour Relations Act 66 of 1995	LRA
non-governmental organisation	NGO
Organisation for Security and Co-operation	OSCE
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	PIE
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	African Women's Protocol
Rental Housing Act 50 of 1999	RHA
South African Institute for Advanced Constitutional, Public, Human Rights and International Law	SAIFAC
United Nations	UN
United Nations General Assembly	UNGA
United Nations High Commissioner for Human Rights	UNHCHR
Universal Declaration of Human Rights	UDHR
universal periodic review	UPR
World Health Organization	WHO



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EXECUTIVE SUMMARY

International law occupies an important space in South African law, particularly within the framework of the Constitution. Sections 231 and 232 of the Constitution provide for mechanisms for the direct application of international law in South Africa and section 39(1)(b) requires that in interpreting the Bill of Rights, a court, tribunal or forum must consider international law. This is a peremptory requirement. This study argues that a decision premised on the application of the Bill of Rights, in which applicable or relevant norms of international human rights law are not considered, would be defective (made *per incuriam*), and would thus not apply as binding or highly persuasive precedent in that regard.

This paper demonstrates that international human rights law played a quintessential role in the drafting of the Constitution of South Africa, 1996, particularly the Bill of Rights, and that this was more so with regard to socio-economic rights where the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) highly influenced the guarantees of these rights under the Constitution, both in terms of language and content. The cases of *In re Certification of the Constitution of the Republic of South Africa, 1996 (First Certification case)*; *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification case)*; and *Government of South Africa and Others v Grootboom and Others (Grootboom case)*, among others, demonstrate this point.



The influence of international law has percolated into the drafting of various pieces of legislation hinging on socio-economic rights. In some areas, such as legislation on housing, such influence has been implicit; whereas in others, such as under labour law and refugee law, the influence of and reference to international law has been explicit.

The role of international human rights law has been even more pronounced in the South African socio-economic rights jurisprudence that has developed since 1994. Courts have referred to and applied international human rights law norms directly. For instance, with regard to the question of evictions, the relevance of the ICESCR and General Comment 7 of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) is evident in the case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*. Also, in *Discovery Health Limited v Commissioner for Conciliation, Mediation and Arbitration and Others*, the Labour Court applied the Convention on the Rights of all Migrant Workers and Members of their Families even though South Africa has not yet ratified it.

This paper argues, however, that there are some areas where courts have fallen short in their appreciation and/or application of international human rights law. The refusal by the Constitutional Court to embrace the concept of minimum core obligations in the *Grootboom* case, for instance, is particularly troubling. In *Minister of Health and Others v Treatment Action Campaign*, the Constitutional Court, among other things, introduced some confusion in the otherwise settled terrain of the justiciability of socio-economic rights in South Africa, first, by suggesting that courts are ill-equipped and not institutionally competent to deal with matters that have multiple social and economic consequences on communities; second, by failing to consider General Comment 14 of the CESCR; and consequently, by also failing to adjudicate on the content of the right to health.

Another concern is that in several prominent cases, the Constitutional Court has been reluctant or unwilling to explore the relevance of international human rights law in its decisions. These include *Sobramoney v Minister of Health, KwaZulu-Natal* and *Khosa and Others v Minister of Social Development and Others*, where the Court failed to consider international law. In yet others, such as *Port Elizabeth Municipality v Various Occupiers*, the Court merely made a fleeting reference to international law, as if only to barely comply with the



obligation to consider such, without any well considered reasoning on its relevance to the decision.

Further, there is a worry that in their consideration of international human rights law, courts and other institutions, including Parliament, when enacting its legislation, and civil society organisations/non-governmental organisations (NGOs), when prosecuting cases or appearing as *amici curiae* (friends of the Court) in courts, have paid little regard to the African human rights system. It is unclear whether this is out of a lack of familiarity with the system, or a low opinion of it, but there are advantages to be gained from a candid consideration thereof.

This paper concludes with some recommendations. For instance, it recommends more vigilance and creativity in the application of international human rights law, both directly where applicable, and as an interpretive tool when enacting legislation, making policy, litigating or adjudicating on socio-economic rights in South Africa.



1 INTRODUCTION

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.¹

The international human rights law regime is a normative and institutional system codifying the consciousness and conscientiousness for moral imperatives that developed out of depravity and adversity: specifically, in reaction to the horrors of the Second World War. Before the war, save for a few occasional exceptions, ‘international law was generally not concerned with how states treated individuals within their own borders’.² Such matters were viewed as falling within the exclusive domestic jurisdiction of each state. International law discourse was hugely dominated by the principle of state sovereignty and under this broad principle, what a government did to its own citizens ‘was its own affair and beyond the reach of international law or legal intervention by other States’.³



This world view was abandoned during and in the immediate aftermath of the Second World War. The ordeals of the war triggered a reawakening of the critical importance of fundamental moral principles, including the principle that human beings possess basic fundamental and inalienable rights.⁴ Thus, when the Charter of the United Nations (UN Charter) was adopted in 1945 establishing the UN, it was expressly stated, among other things, that the Charter was adopted to ‘reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small’.⁵ It included the promotion and protection of human rights among its purposes, expressed in articles 1, 55 and 56. Former UN Secretary General, Boutros Boutros-Ghali, eloquently expressed the nature and character of human rights in his opening remarks at the 1993 World Conference on Human Rights in Vienna, Austria, when he stated:

*The human rights we are about to discuss here at Vienna are not the lowest common denominator among all nations, but rather what I should like to describe as the “irreducible human element”, in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity.*⁶

It has been urged that today, ‘human rights law is the core of international law’.⁷ Although article 2(7) of the Charter contains a caveat that nothing contained in it authorises the UN or any of its members to intervene in matters which are ‘essentially within the domestic jurisdiction’ of any other state, consistent international law jurisprudence and scholarship, as well as norms arising out of international agreements, clearly demonstrate that issues of human rights are not matters that are essentially within the domestic jurisdiction of any state; and that, on the contrary, they are the concern of the international community at large. For instance, the International Court of Justice (ICJ) has held that human rights obligations are by their very nature ‘the concern of all States’ and that in view of their importance, ‘all States can be held to have a legal interest in their protection’.⁸ Carozza, affirming this position, states:

[a]s any basic, mainstream introduction to the subject would tend to emphasise, the central innovation of human rights law



*within international law was the idea that a state's treatment of its own citizens is a matter of international concern, a basic value of the international community.*⁹

Since the adoption of the UN Charter, a large number of human rights instruments have been adopted both at the global (UN) and regional levels¹⁰ and socio-economic rights have formed an integral part of the internationally recognised catalogue of human rights that has subsequently developed.¹¹ International law norms and principles have had a profound effect in fashioning the development of domestic human rights norms and principles around the world.¹² This effect seems more pronounced in the domain of socio-economic rights. As Porter puts it:

*Whether in litigation, public advocacy or academic discourse, those working in the area of social and economic rights have relied extensively on international human rights law, and particularly on the International Covenant on Economic, Social and Cultural Rights (ICESCR) to elucidate the content and meaning of rights.*¹³

Porter urges that even where social and economic rights achieve explicit protection in domestic law, as in the case of South Africa's new constitutional democracy, the paucity of domestic jurisprudence and judicial unfamiliarity with social and economic rights has meant that courts, NGOs, academics and politicians have continued and will continue to run to international human rights law for guidance.¹⁴

In the context of the South African 1996 Constitution (the Constitution), Liebenberg locates the pertinent role and influence of international human rights law in the architecture of the various guarantees of socio-economic rights, and her account resonates with Porter's propositions above. She states that:

A perusal of the relevant minutes and memoranda prepared during the drafting process reveals the strong influence of international law on the drafting of the relevant sections protecting socio-economic rights. For example, the concepts of progressive realisation and resource availability in sections 26 and 27 were based on article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 (the ICESCR). According to the Technical Committee, this formulation has the dual advantage of facilitating consistency between South Africa's domestic



*law and international human rights norms, and directing the courts towards a legitimate international resource for the interpretation of these rights.*¹⁵

Some scholars have gone as far as suggesting that the embrace of international law under the Constitution is perhaps overloaded. Olivier, for instance, states that ‘the Constitution adopts an approach which is unashamedly international law and comparative law friendly’¹⁶ and that ‘it is, therefore, no wonder that the courts have not hesitated to invoke the provisions of international instruments when interpreting fundamental rights, including those rights which have a socio-economic character’.¹⁷ For a country with a sad and deep legacy of apartheid and international isolation – whose struggle for freedom was a matter of international concern and engaged the direct application of international law¹⁸ – it is unsurprising that the location of international law, particularly international human rights law, is so central within post-apartheid South Africa’s constitutional framework.

Again, it is unsurprising that the Constitution is strong in its guarantee of socio-economic rights, as the policy of apartheid not only deliberately created huge socio-economic gaps between different racial groups, but also condemned the majority black population to generally squalid living conditions that were characterised by massive deprivations of socio-economic amenities. Socio-economic rights guarantees would thus help ensure that those deeply disadvantaged and deprived in society are provided with the necessary socio-economic safety nets so that they do not fall through the cracks into desperation and destitution. It was in this spirit – the firm commitment to heal the divisions of the past through the achievement of, among other things, social justice¹⁹ – that during the Constitution negotiation process, the delegation of the African National Congress (ANC) and its allies emphasised the imperative to include guarantees of socio-economic rights in the Constitution. They argued that the guarantee of these rights would represent an ‘explicit commitment to the redress of the socio-economic legacy of apartheid’.²⁰

The Constitutional Court reiterated this point in its first decision on socio-economic rights, *Soobramoney v Minister of Health, Kwa-Zulu-Natal*,²¹ where Justice Chaskalson stated that South Africa remained a society with great disparities in wealth and that millions of people continued to live in deplorable conditions and great poverty.²²



He observed that 'for as long as these conditions continue to exist, that aspiration will have a hollow ring'.²³ Thus, the Constitution contains a broad array of socio-economic rights.²⁴ One of the hallmarks of this inclusion is that it makes the redress of poverty a matter of fundamental constitutional concern.²⁵ This fits into the transformative project of the Constitution. As Mbazira argues, the Constitution is 'perceived as an instrument to transform South African society from a society based on socio-economic deprivation to one based on equal distribution of resources'.²⁶ In this regard, he states that the guarantee of socio-economic rights is central to the transformation project as it seeks to reverse the skewed provision of services based on racial lines that formed one of the hallmarks of apartheid.²⁷ Eide and Rosas also emphasise the central role of socio-economic rights in a transforming society. They state:

*Taking economic, social and cultural rights seriously implies a simultaneous commitment to social integration, solidarity and equality, including the issue of income distribution. Economic, social and cultural rights include a major concern with the protection of vulnerable groups, such as the poor ... Fundamental needs should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements.*²⁸

Slaughter has stated that a primary function of public international law is to influence and improve the functioning of domestic institutions.²⁹ In this regard, Scheinin forecasts that as the international implementation mechanisms of socio-economic rights are improved through, among other things, the introduction of complaint procedures, 'and as these developments and the operation of already existing procedures lead to institutionalised practices of interpretation, the possibilities for direct domestic applicability of treaties on social rights grow'.³⁰ Piovesan also argues that international human rights law, in adopting the value of the primacy of the individual, interacts with the domestic protection system 'in order to provide the greatest possible effectiveness in protecting and promoting fundamental rights'.³¹

This paper explores the vital role of international human rights law and jurisprudence, including the UN and African human rights systems and policy frameworks, in advancing socio-economic rights at the domestic level in South Africa. The paper starts by providing a



general overview of the international (including African regional) human rights system and their relevance. The paper proceeds to explore the question of the applicability of international human rights law under the South African Constitution. In this regard, the paper provides an incisive discussion of the domestic application of international socio-economic rights obligations in South Africa, paying special regard to the significance of General Comment 9 of the CESCR and the issue of minimum core obligations. The paper concludes with an exposition of some of the challenges in the application of international law in advancing socio-economic rights in South Africa and provides some recommendations.

2 OVERVIEW OF THE INTERNATIONAL HUMAN RIGHTS LAW SYSTEM

The international human rights law regime, as pointed out earlier, developed primarily within the framework of the UN but subsequently spread to the regional and sub-regional spheres. Piovesan states that the international human rights system reflects ‘a contemporary ethical conscience that is shared among states, to the degree that these invoke the international consensus on minimum protective parameters with regard to human rights’.³² Regional human rights systems include the African system, the European system and the Inter-American system.

At the normative level, the international human rights system comprises general global and regional treaties, on one hand, and subsidiary specialised treaties, on the other.³³ Global and regional treaties include the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR at the UN level; and the African Charter on Human and Peoples’ Rights (the African Charter), the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights, at the regional level. Specialised treaties include the Convention on the Rights of the Child (CRC); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), among others.



This section of the paper provides an overview of the international human rights law regime with reference to the UN and African regional contexts³⁴ as well as a synopsis of other regions.

2.1 Sources of international human rights law

International human rights law is part of international law. To properly conceptualise it, one needs to understand its sources and for these one needs to look to general international law. Only a brief outline of the sources of international law are given here. For a more elaborate exposition, other works need to be consulted.³⁵

The starting point is article 38(1) of the ICJ Statute that is generally regarded as a complete statement of the sources of international law.³⁶ There are five sources of international law recognised under the article: First, *international conventions (treaties)*, which are written agreements between states or between states and international organisations, operating within the field of international law.³⁷ Interpretation of treaties is generally governed by the Vienna Convention on the Law of Treaties, 1969.³⁸ Second, *international custom (customary international law)*, which comprises rules that are based on settled, widespread state practice, usually manifested over time (*usus*),³⁹ coupled with evidence of an intention to be bound by the practice as a legal obligation on the part of states (*opinio juris*).⁴⁰ Third, *general principles of law recognised by states*, described in article 38(1)(c) of the ICJ Statute, which are common principles of law found in national legal systems insofar as they are suited for application to international relations, in order to fill a gap in international law.⁴¹ Fourth, as subsidiary sources are *judicial decisions*, on which courts usually place heavy reliance. Fifth, *teachings of the most highly qualified publicists* (such as commentators and distinguished authors, etc.) in various nations also constitute subsidiary sources of international law according to article 38(1)(d) of the ICJ Statute. In terms of the hierarchy of norms between treaties and customary international law, Dugard states:

*Although no provision is made for a hierarchy of sources, in most instances treaties, which take the place of legislation in the domestic sphere, are viewed as the primary source while custom is the secondary source.*⁴²



2.2 The UN human rights system in a nutshell

The UN has played a pivotal role in the development of the international human rights system, firmly placing human rights as a vital item on the international agenda. The UN human rights system is divided into two principal categories: the UN Charter-based system and the UN treaty-based system. Through these systems, the UN has adopted numerous binding treaties as well as non-binding declarations and other soft-law instruments setting out fundamental norms of human rights as well as creating institutional arrangements for the effective guarantee of human rights.

Before considering the Charter- and treaty-based systems, it is important to first briefly outline the role of principal UN organs, namely the UN General Assembly (UNGA), the Security Council and the ICJ. The UNGA, established under article 7 of the UN Charter,⁴³ is the UN's representative organ, similar to Parliament in the domestic setting, with the most wide-ranging mandate under the Charter. Under article 10 of the Charter, the UNGA may discuss any questions or any matters within the scope of the Charter or relating to the powers and functions of any organs provided for in the Charter. In particular, with regard to human rights, article 13(1)(b) of the Charter states that one of the functions of the UNGA is to initiate studies and make recommendations for the purpose of promoting international cooperation in the economic, social, cultural, educational and health fields, and assisting in the realisation of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. All principal human rights instruments under the UN system have to be adopted by the UNGA.

The UN Security Council, established under article 7 of the UN Charter, does not have an express human rights mandate. According to article 24(1) of the Charter, the Security Council has the 'primary responsibility for the maintenance of international peace and security'. Notwithstanding the absence of an express mandate, the Security Council has interpreted its mandate creatively and has significantly contributed to the advancement of human rights through, among other things, the adoption of various resolutions and creation of special courts to hold perpetrators of grave human rights violations to account.

The Economic and Social Council (ECOSOC), established under



article 7 of the UN Charter, is the UN's principal organ with the primary mandate on issues relating to the advancement of human rights around the world. Article 68 of the UN Charter enjoins ECOSOC to set up commissions in economic and social fields for the promotion of human rights, as well as such other commissions as may be required for the performance of its functions. It is pursuant to this mandate that institutions such as the UN Commission on Human Rights (now HRC) and other Charter-based UN human rights bodies such as the CESCR have been set up.

The ICJ is the UN's principal judicial organ. It has also, to some extent, contributed to the international discourse on socio-economic rights.⁴⁴

2.2.1 Charter-based system

The UN Charter-based system is a combination of normative and institutional arrangements. At the normative level, the UN system includes the UN Charter, the Universal Declaration of Human Rights (UDHR) and numerous soft-law instruments adopted by the UN. In terms of the institutional framework, UN Charter-based institutional arrangements include the Human Rights Council, the Human Rights Council Advisory Committee (replacing the UN Sub-Commission on Human Rights), the UN Commission on the Status of Women, the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees and the CESCR.

2.2.1.1 *The UN Charter*

The UN Charter is a key international human rights treaty that laid the foundation for the adoption of numerous human rights instruments within the UN system and beyond.

Article 1(3) of the UN Charter expresses, as one of its purposes, the achievement of international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion. Article 55(c) provides further that 'the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as



to race, sex, language, or religion'. Furthermore, under article 56 of the Charter, UN member states 'pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. The Charter set in motion 'a process of human rights standard-setting and enforcement that was hardly conceivable at the time'.⁴⁵ The ICJ has held that articles 55 and 56 of the UN Charter 'bind Member States to observe and respect human rights'.⁴⁶

2.2.1.2 The Universal Declaration of Human Rights

The UDHR was adopted on 10 December 1948. It is a comprehensive catalogue of civil, political, economic, social and cultural rights.⁴⁷ At the time of its adoption, the UDHR was not intended to be a binding human rights instrument. Its character was merely standard setting.⁴⁸ With the passage of time, however, the UDHR has been widely relied upon as an authoritative instrument in the resolution of human rights problems around the world and has either explicitly or implicitly inspired human rights provisions in numerous national Constitutions. International human rights instruments adopted after the adoption of the UDHR have expressly included a statement of inspiration from the UDHR. It has therefore been submitted that through such widespread state practice in recognising and applying the provisions of the UDHR, coupled with implicit or explicit manifestations of a sense of legal obligation to comply with the guarantees under the UDHR, at least some of the guarantees under the declaration have subsequently crystallised into international customary law binding on all states.⁴⁹

2.2.1.3 Soft-law instruments

Apart from the UDHR, other influential Charter-based soft-law instruments bearing on socio-economic rights include the Vienna Declaration and Programme of Action, the United Nations Millennium Declaration, the Universal Declaration on the Eradication of Hunger and Malnutrition and the Declaration of Commitment on HIV/AIDS, among others. Soft-law instruments are important in international law discourse. Among other things, they provide evidence of state practice. Church observes:



There is a growing body of consensus that such instruments embody some form of pre-legal, moral or political obligation and can play a significant role in the interpretation, application and further development of binding international law norms, especially in the field of human rights law.⁵⁰

2.2.1.4 The Human Rights Council and its Advisory Committee

The Human Rights Council (HRC) was established in 2006 by a resolution of the UNGA,⁵¹ as a subsidiary body of the UNGA,⁵² charged with the responsibility of ‘promoting universal respect for the protection of all human rights and fundamental freedoms for all’.⁵³ It has been tasked to address situations of violations of human rights, including gross and systematic violations, and to make recommendations in respect thereof, and also to promote the effective co-ordination and the mainstreaming of human rights within the UN system. The HRC consists of 47 member states, elected directly and individually through secret ballot by the majority of the members of the UNGA. Membership is based on equitable geographical distribution, with Africa and Asia being the most represented regions on the Council.⁵⁴

The HRC’s mandate includes embarking on a new oversight and monitoring process called the ‘universal periodic review’ (UPR). This is a co-operative mechanism, based on an interactive dialogue and engages the full involvement of the country concerned, on the fulfilment of its human rights obligations and commitments. The mechanism is meant to complement rather than duplicate the work of various treaty bodies.⁵⁵

The Human Rights Council Advisory Committee was established by the HRC under its resolution 5/1 of 2007.⁵⁶ The Advisory Committee functions as ‘a think-tank for the Council’,⁵⁷ working under the Council’s direction.⁵⁸ Its principal function is to provide expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice.⁵⁹ The Committee comprises 18 independent experts from various regions of the world.⁶⁰

The HRC occupies a very important space in the field of human rights, being the foremost authoritative body sanctioned by the UNGA and the UN ECOSOC to oversee the fulfilment of the human rights mandate of the UN. The UPR, if creatively, candidly and boldly pursued, can be a very important supervisory mechanism of the Council.



2.2.1.5 *The Office of the High Commissioner for Human Rights*

The office of the UN High Commissioner for Human Rights (UNHCHR) was established in pursuance of one of the recommendations of the 1993 UN World Conference on Human Rights through the Vienna Declaration and Programme of Action (Vienna Declaration).⁶¹ The UNHCHR is charged with the:

*principal responsibility for the United Nations human rights activities under the direction and authority of the Secretary General, within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights.*⁶²

The current UN High Commissioner for Human Rights is Navanethem Pillay from South Africa.

2.2.1.6 *Committee on Economic, Social and Cultural Rights*

The CESCR was established by the Economic and Social Council as an oversight and monitoring body in respect of the ICESCR. This was in view of the fact that the ICESCR, unlike other principal UN human rights instruments, had no established treaty-based supervisory committee for such general oversight and monitoring, as discussed further below.⁶³

2.2.2 **Treaty-based system**

Since its establishment, the UN has adopted an impressive array of human rights treaties that are part of the corpus of international human rights law. This section outlines the UN treaty-based system, providing an overview of its normative and institutional frameworks. Only the principal instruments directly related to socio-economic rights, namely the ICCPR, ICESCR, CEDAW, CRC and CERD, are covered.

2.2.2.1 *International Covenant on Economic, Social and Cultural Rights*

The ICESCR, together with the UDHR and the ICCPR, are usually referred to as the International Bill of Rights. This is because togeth-



er they are the most general authoritative instruments at the international level, and most of the specialised treaties that have subsequently been adopted draw inspiration from them and seek to provide more clarity and content to the guarantees already contained in this 'International Bill of Rights'. The ICESCR was adopted together with the ICCPR on 16 December 1966 by the UNGA and entered into force on 23 March 1976. The ICESCR is the principal and most important international treaty in the area of socio-economic rights.⁶⁴

The ICESCR guarantees a comprehensive range of socio-economic rights, with the exception of the right to property. The rights guaranteed include the rights to self-determination,⁶⁵ work,⁶⁶ fair and just conditions of employment,⁶⁷ joining and forming trade unions,⁶⁸ social security,⁶⁹ housing,⁷⁰ food,⁷¹ clothing,⁷² health,⁷³ education⁷⁴ and culture.⁷⁵

One of the central features of the ICESCR, which has dominated discourse on socio-economic rights, is the nature of obligations of state parties as expressed in article 2(1), entailing progressive realisation. It provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

A lot of scholarly debate and jurisprudence have developed around the concepts of 'progressive realisation' and 'minimum core obligations' in respect of this article.⁷⁶

Furthermore, unlike the ICCPR, the ICESCR did not create a supervisory committee to monitor states parties' implementation of the Covenant. A number of arguments were advanced against the establishment of such a supervisory committee at the time the ICESCR was adopted. Among other things, it was doubted whether it would be possible for a supervisory committee under the ICESCR to exercise quasi-judicial functions in respect of a set of rights that were subject to progressive realisation.⁷⁷ Subsequently, however, the need was felt to come up with a supervisory committee in respect of the ICESCR. After the coming into force of the ICESCR, in 1976, ECOSOC established



a reporting mechanism under which states parties were to report to ECOSOC through the office of the UN Secretary General, on the implementation measures they had adopted pursuant to the ICESCR.⁷⁸ In examining the reports, ECOSOC established a Sessional Working Group to assist with the exercise.⁷⁹ A lot of concerns were voiced on the effectiveness of the Sessional Working Group, resulting in ECOSOC's decision to set up the CESCR as a replacement.⁸⁰ Thus, strictly speaking, the CESCR is a Charter-based rather than a treaty-based supervisory body. It was established under the direct mandate of the UN Charter by ECOSOC. The Committee comprises 18 independent experts and meets twice every year. Until recently, its two core responsibilities have been the examination of state party reports (including 'shadow' or alternate reports from civil society organisations) and the issuing of interpretive general comments that define the content of the rights in the ICESCR and the obligations of state parties.

Over the years, the arguments that were advanced against the idea of establishing a supervisory treaty body in respect of the ICESCR seem to have fallen by the wayside. Firstly, around the world, socio-economic rights have been enforced in international and domestic courts and tribunals (or forums). Thus the argument that socio-economic rights guarantees are vacuous and not claimable is no longer sustainable. Secondly, the claim made by some specialised agencies that the work of the CESCR would duplicate their work and that they have better expertise in the area of socio-economic rights than such a committee would have is again no longer sustainable. Not only has the CESCR come up with an impressive catalogue of general comments on various socio-economic rights, which clearly have not duplicated any other body's work, but it has more particularly defined the content of socio-economic rights in a more expert manner than any other body has done. Important norms that currently inform socio-economic rights discourse, such as the concept of minimum core obligations, have been developed by the CESCR.

Underscoring current understanding that socio-economic rights are justiciable, the UNGA recently adopted an Optional Protocol to the ICESCR on 10 December 2008.⁸¹ The Optional Protocol creates a mechanism for interstate communications⁸² and individual complaints⁸³ to be determined by the Committee. It also sets up a voluntary inquiry procedure whereby the CESCR, upon receiving reli-



able information indicating grave or systematic violations by a state party of any of the rights guaranteed under the ICESCR, may invite the country concerned to co-operate in the examination of the allegations.⁸⁴ This process is confidential.

As is demonstrated further below, the ICESCR and the work of the CESCR have had a profound influence in shaping South Africa's constitutional architecture insofar as socio-economic rights are concerned. It has had a significant influence as well in the development of socio-economic rights jurisprudence in the country.

2.2.2.2 *International Covenant on Civil and Political Rights*

The ICCPR is divided into six parts (apart from the preamble). Part I deals with the right to self-determination. Part II contains 'overarching or structural provisions, in light of which [the substantive] human rights established in part III of the Covenant should be applied'.⁸⁵ Part IV establishes the supervisory mechanism of the ICCPR. This includes the establishment of the Human Rights Committee and the obligation of states parties to submit periodic state party reports to this Committee on the measures they have adopted to give effect to the rights recognised in the ICCPR and on the progress made in the enjoyment of those rights. It has been stressed that the important and universal character of the ICCPR is such that, unlike many other treaties, it does not have an option for denunciation once it is ratified or acceded to by a state.⁸⁶

Article 2 of the ICCPR provides for the nature of the obligations of state parties. It provides that every state party has the obligation to respect and ensure 'to all individuals within its territory and subject to its jurisdiction' the rights recognised in the Covenant in a non-discriminatory manner. It states that these obligations include the adoption of legislative and other measures to give effect to the rights. It also specifically provides for the obligation of state parties to ensure the right of every person within their jurisdiction to legal recourse and to get an effective remedy when their rights have been violated, even if the violator was acting in an official capacity.

Article 28 of the ICCPR establishes the Human Rights Committee, which comprises 18 members, to oversee the implementation of the Covenant. Under article 40 of the ICCPR, the Human Rights Com-



mittee is mandated to receive state party reports. The initial report is required to be submitted within one year from the time of ratification/accession. After that, state party reports are due whenever the Committee requires.⁸⁷ The Committee has also adopted general comments that serve as soft-law guides in the interpretation of the ICCPR provisions.⁸⁸

With regard to complaints mechanisms under the ICCPR, article 41 provides for an inter-state communications procedure. Further, the First Optional Protocol to the ICCPR, which provides for an individual complaints mechanism, was adopted together with the Covenant on 16 December 1966. It is important to note that the Committee only receives communications from 'individuals' who 'claim to be victims'. Thus, unlike under the African Charter, *actios popularis* (public interest litigation) are not allowed under the ICCPR.⁸⁹ Individuals wishing to access this procedure must first exhaust domestic remedies and anonymous communications or communications that amount to an abuse of the process cannot be considered by the Committee.⁹⁰

Through its individual communications procedure, the Human Rights Committee has been able to invoke some ICCPR provisions to advance socio-economic rights. This has been done principally through the equality clause.⁹¹ One of the most prominent decisions in this regard is *Zwaan-de Vries v The Netherlands*⁹² where Mrs. Zwaan-de Vries was denied unemployment benefits on the grounds that she was married and was not a breadwinner. By contrast, men in similar circumstances in the Netherlands (those who were married and were not breadwinners) would still receive unemployment social security benefits. Mrs. Zwaan-de Vries claimed discrimination in terms of article 26 of the ICCPR. The Human Rights Committee found in her favour, holding that the equal protection clause under article 26 of the ICCPR is not limited to the civil and political rights guaranteed under the ICPR, but applies to socio-economic rights as well.⁹³

South Africa is a state party to the ICCPR as well as its First Optional Protocol. Thus, although South Africa has not yet ratified the ICESCR and its Optional Protocol, it would still to some extent be subject to international quasi-judicial supervision by the Human Rights Committee in terms of socio-economic rights under the UN system. In addition, the authoritative interpretation of the ICCPR by the Human Rights Committee is a very useful interpretative source as precedent for the South African Bill of Rights.



2.2.2.3 Other principal treaties with socio-economic rights obligations

Apart from the ICESCR and ICCPR, other treaties at the UN level that are very important in the field of socio-economic rights are CERD, CEDAW and CRC, all of which have been ratified by South Africa. All have supervisory committees – the CERD Committee, CEDAW Committee and the Committee on the Rights of the Child, respectively. The CEDAW⁹⁴ and the CRC⁹⁵ have provisions that directly guarantee some socio-economic rights. The CERD Committee has innovatively interpreted the CERD's non-discrimination provisions to protect socio-economic rights. In *Yilmaz Dogman v The Netherlands*⁹⁶ for instance, the CERD Committee considered a communication in which it was alleged that a labour authority and Cantonal Court had endorsed the termination of Mrs. Yilmaz, a Turkish national, from her employment. The employer's letter requesting termination alleged that foreign women workers with children were more likely to be absent from work. The Committee held that the judicial affirmation of the termination failed to address the issue of racial discrimination in the employer's letter and that in the premises, article 5(e)(i) of CERD, which prohibits discrimination in relation to the right to work, had been violated. The Committee recommended that the state party ascertain whether Mrs. Yilmaz was now gainfully employed and that it should take steps to secure alternative work for her or provide other equitable relief.

2.2.4 Special procedures

The UN human rights system has a mechanism for human rights monitoring and advocacy termed 'special procedures'. Through this mechanism, the HRC addresses either specific country situations or thematic issues in all parts of the world.⁹⁷ There are presently 30 thematic and eight country mandates. These special procedures consist in either an individual (variously called a 'Special Rapporteur', 'Special Representative of the Secretary-General', 'Representative of the Secretary-General' or 'Independent Expert'), or a working group, usually comprising five members, one from each region of the world.

Under the special procedures, mandate holders are usually called upon to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as country man-



dates, or on major phenomena of human rights violations worldwide, known as thematic mandates. Various activities undertaken under the special procedures include responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level and engaging in general promotional activities. Mandate-holders of the special procedures serve in their personal capacity and do not receive salaries or any other financial compensation for their work.⁹⁸

2.3 Regional systems

2.3.1 African human rights system

At the apex of the African human rights system is the Assembly of Heads of State and Government established under article 6 of the Constitutive Act of the African Union (AU).⁹⁹ The Assembly is the supreme organ of the AU. One of its important functions in relation to the enforcement of human rights is spelt out in article 9(1)(b) of the Act. It enjoins the Assembly to ‘consider and take decisions on reports and recommendations from the other organs of the Union’. A number of instruments address various issues of human rights at the African regional level. These include the African Charter, the African Charter on the Rights and Welfare of the Child (African Children’s Charter), the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol) and the African Union (AU) Convention Governing Specific Aspects of Refugee Problems in Africa (AU Refugee Convention).

2.3.1.1 *The African Charter on Human and Peoples’ Rights and the African Commission on Human and Peoples’ Rights*

The principal instrument under the African human rights system is the African Charter on Human and Peoples’ Rights (the African Charter, or the Charter), adopted on 27 June 1981. It is the most widely ratified regional human rights treaty, with all African countries, except one,¹⁰⁰ being state parties to it. The Charter expressly affirms the indivisibility and interconnectedness of all human rights, stating that ‘civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that



the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.¹⁰¹ The Charter's affirmation of this indivisibility, interconnectivity, interdependence and universality stands out among all human rights treaties.

Among the rights covered under the African Charter are the rights to property and development, which have been excluded from some major international human rights treaties such as the ICESCR and the ICCPR.

One of the features of the African Charter that was noted early in its history is the existence of claw-back clauses that make the enjoyment of rights under the Charter subject to the 'law'.¹⁰² It is striking that these claw-back clauses are confined to civil and political rights and not socio-economic rights, with the exception of the right to property. The clear impression one gets is that, given the climate of repression that prevailed among African states at the time the Charter was adopted, the confinement of the claw-back clauses to civil and political rights was meant to be a shield for repressive regimes against falling foul of the human rights guarantees by which they would otherwise be bound. Indeed, in practice, given the resource-based discourse on socio-economic rights, one would have expected that if the claw-back clauses were included in good faith, the converse scenario, where socio-economic rights would have been subject to the law, should have been the case. However, through creative interpretation, the African Commission on Human and Peoples' Rights (the African Commission) has emphasised that the reference to 'law' under these clauses refers to international rather than local law, stressing that a state cannot plead the provisions of its local law in order to escape international law obligations.¹⁰³

Another unique feature of the African Charter is the absence of an express limitation clause on rights, or a derogation clause. Again the African Commission has made its position on this point perfectly clear, holding that limitations on the rights and freedoms in the Charter cannot be justified by emergencies or special circumstances.¹⁰⁴

In terms of socio-economic rights, the African Charter does not have a provision similar to that in the ICESCR which clearly subjects the obligations of states parties to their resources and progressive realisation. Thus others have argued that as a result, the Charter does not permit the concept of progressive realisation and that the obligations of states with respect to these rights under the Charter



are immediate.¹⁰⁵ This is, however, not necessarily the case.¹⁰⁶ The debate was explored in *Purohit and Moore v The Gambia*,¹⁰⁷ where the African Commission held that there should be read into article 16 the obligation on the part of states party to the Charter to take concrete and targeted steps, while taking full advantage of [*sic*] its available resources, to ensure that the right to health is fully realised in all aspects without discrimination of any kind.¹⁰⁸ The decision does not definitively settle the point, though, as its context seems to have been confined to article 16(1) of the Charter, which, some of the proponents for the immediate obligations school of thought argue, is the only provision that permits progressive realisation.¹⁰⁹ It remains arguable, though, that the reasoning in *Purohit* is equally applicable to all economic, social and cultural rights under the Charter and that the concept of 'progressive realisation' with regard to socio-economic rights is implicit therein.

The supervisory mechanism devised under the African Charter is the African Commission. The Commission is established under article 30 and charged with the responsibility to ensure the promotion and protection of the rights guaranteed under the Charter, as well as interpreting the provisions of the Charter and performing other tasks entrusted to it by the Assembly of Heads of State and Government.¹¹⁰ It consists of 11 experts chosen from among African states. In interpreting the Charter, the Commission is entitled to draw inspiration from international human rights instruments and principles.¹¹¹

With regard to state party reporting, this requirement is provided for under article 62. States parties are required to submit periodic reports every two years. The African Charter requires that they report on legislative or other measures taken with a view to giving effect to the rights and freedoms guaranteed under the Charter. The African Commission has issued guidelines for states for the preparation of the reports.

On complaints mechanisms, articles 47–62 describe the interstate communications procedure through which one state party may bring a communication against another, alleging violations of human and/or peoples' rights. Articles 55–59 deal with 'other communications' – it is through this procedure that individual complaints are brought before the African Commission. The individual communications procedure under the African Charter has been applauded for having the most liberal *locus standi* requirements. Public interest litigation is al-



lowed under the Charter and one of the African Commission's biggest achievements has been the development of creative jurisprudence. With regard to socio-economic rights, there has unfortunately been a paucity of jurisprudence from the Commission. Thus in the *SERAC* case, the Commission applauded the applicants for bringing a claim based on socio-economic rights, stating that:

*The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of actio popularis, which is wisely allowed under the African Charter.*¹¹²

It would appear that this is not necessarily a problem of the Commission's own making, but rather that litigants and NGOs have not been forthright in bringing communications in this area before the Commission. This, in turn, is not surprising as it only mirrors the situation prevailing at the domestic level in most African states. Socio-economic rights issues are scarcely litigated and since the procedure before the Commission requires that domestic judicial remedies be exhausted first, it cannot be expected that there would be a flurry of cases in this area coming to the Commission.

However, in the two most notable cases that have been determined by the Commission, it has again seized the moment and demonstrated its creativity. In the *SERAC* case, the Commission, among other things:

- (a) affirmed the fourfold obligations that states have with regard to socio-economic rights, namely, the obligations to respect, protect, promote and fulfil, human rights;¹¹³
- (b) held that the rights expressly guaranteed in the African Charter do not constitute an exhaustive list and hence implied into the Charter the existence of other rights, such as the rights to food (through an interpretation of the rights to life, to the best attainable state of physical and mental health and to economic, social and cultural development)¹¹⁴ and housing (through an interpretation of the rights to property, to the best attainable state of physical and mental health and to protection of the family);¹¹⁵ and
- (c) affirmed the application of the concept of minimum core obligations under the Charter.¹¹⁶



As is argued further below, the reading into the African Charter of the concept of minimum core obligations has treaty law implications for South Africa, whose highest court (the Constitutional Court) has refused to apply the concept. In the *Purohit* case, as shown above, the Commission most notably read into the Charter the concept of ‘progressive realisation’ within available resources that the framers of the Charter seem to have inadvertently omitted to include in the instrument.

The African human rights system still has some weaknesses, though. As Hansungule points out, one of its greatest challenges has been the lack of implementation of the decisions or recommendations of the African Commission. He argues that there has been nothing tangible or concrete from the Commission’s pronouncements in instances where states are found to have violated rights guaranteed under the African Charter.¹¹⁷

2.3.1.2 *Special mechanisms*

Pursuant to its mandate under article 45 of the African Charter, the African Commission may, under article 46, ‘resort to any appropriate method of investigation’. In this regard, the African Commission has tried to be proactive in coming up with special procedures, such as the appointment of Special Rapporteurs with specific mandates to investigate human rights situations and generally promote human and peoples’ rights guaranteed under the Charter. It is a matter of serious concern, however, that notwithstanding the equal status under the Charter between civil and political rights, on one hand, and socio-economic rights, on the other, , no Special Rapporteur has been appointed to address a specific theme of socio-economic rights.¹¹⁸ On a positive note, however, the Commission has set up a Working Group on Economic, Social and Cultural Rights and one of the Commissioners, Angela Melo of Mozambique, is a member of the Working Group. Currently, the African Commission is at a consultative stage in the process of developing principles and guidelines on economic, social and cultural rights in the African Charter.¹¹⁹

Unlike the procedure in the UN system, the special procedures under the African system have generally been viewed as largely ineffective. This is for two main reasons. First, the African Commission suffers from woeful under-funding from the AU. Secondly, it has been argued that unlike the special procedures in the UN system where independ-



ent experts are appointed, Commissioners under the African system allocate the Special Rapporteur mandates among themselves and, this, combined with the fact that their work is part time and that most of them already complain of having too much work, means their work as special rapporteurs has not been as effective.¹²⁰

2.3.2 A synopsis of other regions

2.3.2.1 *European human rights system*

Socio-economic rights are guaranteed in the European Social Charter (ESC)¹²¹ and the Organisation for Security and Co-operation (OSCE).¹²² Article 25 of the ESC establishes the European Committee of Social Rights (ECSR) that, among other things, hears individual complaints from states parties on matters relating to the ESC. European institutions have demonstrated preparedness in promoting and enforcing socio-economic rights. In *European Roma Rights Centre v Greece*,¹²³ for instance, the ECSR noted that the right to housing permits the exercise of many other rights – civil and political, and economic, social and cultural – and that it was of central importance to the family.¹²⁴ The Committee noted that there was consistent case law on the point that in order to satisfy the right to family life protection, states must promote the provision of an adequate supply of housing for families and take the needs of families into account in housing policies and, further, must ensure that existing housing is of an adequate standard and includes essential services. In addition, the Committee held that ‘adequate housing’ requires a dwelling of suitable size.¹²⁵ Furthermore, the obligation to promote and provide housing extends to security from unlawful eviction.¹²⁶ The Committee also held that while illegal occupation may justify the eviction of the illegal occupants, the criteria for categorising occupation as illegal must not be unduly wide and that any eviction should take place in accordance with prescribed rules of procedure which should be sufficiently protective of the rights of the persons concerned.¹²⁷

2.3.2.2 *Inter-American human rights system*

Although socio-economic rights were expressly guaranteed under the American Declaration on the Rights and Duties of Man, 1948, the same



were left out in the subsequent and binding American Convention on Human Rights, 1969 (the American Convention).¹²⁸ However, regional supervisory institutions, such as the Inter-American Court on Human Rights and the Inter-American Commission on Human Rights (the Inter-American Commission) have consistently held that the two instruments ought to be read together, and, with that approach, they have sought to protect and enforce socio-economic rights. The Inter-American Commission in *Dilcia Yean and Violeta Bosica v Dominican Republic*,¹²⁹ for instance, recalled that while the American Convention replaced the American Declaration as the primary human rights instrument in the Inter-American system with respect to the Dominican Republic, the Convention could not be interpreted to exclude or limit the effect of the Declaration or other international instruments. In this case, the Commission found the government of the Dominican Republic to have violated the petitioners' right to education by discriminatorily depriving them of their legal identity under domestic law and thereby disqualifying them from enrolment in school. It held that the obligations under article 19 (rights of the child) of the American Convention included the right to education, since education gives rise to the possibility of children having a better standard of living and generally contributes to the prevention of unfavourable situations for children and for society.

3 THE STATUS OF INTERNATIONAL HUMAN RIGHTS LAW IN SOUTH AFRICA

There are two major schemes under which international law applies in South Africa. These two schemes, it is submitted, are the 'binding international law scheme' and the 'non-binding international law scheme'. The first scheme finds expression in sections 231–233 of the Constitution. These provisions provide for the application of international agreements¹³⁰ and customary international law¹³¹ in South Africa. They also provide interpretive guidance, stating that courts are duty bound to pay due regard to international law in the interpretation of legislation with a view to ensuring that an interpretation is adopted that favours congruence rather than inconsistency between national law and international law.¹³² In the case of *Kaunda and Oth-*



ers v President of South Africa and Others,¹³³ the Constitutional Court held that '[t]his [approach] must apply equally to the provisions of the Bill of Rights and the Constitution as a whole'.¹³⁴ Non-binding international law finds expression in chapter 2 of the Constitution – the Bill of Rights.¹³⁵

This section of the paper explores the status and application of international law in South Africa, with particular focus on international human rights law.

3.1 International agreements

The general status and effect of international treaties in South Africa is provided for in section 231 of the Constitution. The section reveals and affirms a number of features that characterise the application of international agreements in South Africa. First, the provision makes it clear that South Africa continues to adopt the dualist approach with regard to the application of international agreements. Hence, 'any international agreement becomes law in the Republic when it is enacted into law by national legislation'.¹³⁶ The same section goes further to provide that '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'. Second, section 231 seeks to balance the distribution of power with regard to the application of treaty law to, and in, South Africa.¹³⁷ Thus, while it vests the responsibility of negotiating and signing international agreements in the Executive branch of government,¹³⁸ it requires, as a general rule, that the ratification of such treaties should receive the prior approval of Parliament.¹³⁹

3.2 Customary international law

The application of customary international law in South Africa is governed by the provisions of section 232 of the Constitution. Again, in tandem with conventional practice in most dualist common law jurisdictions, customary international law automatically forms part of the domestic law unless it is inconsistent with the Constitution or national legislation.¹⁴⁰



3.3 Bill of Rights approach

In addition to the specific provisions for the general application of international law in South Africa, chapter 2 of the Constitution makes special provision for the role of international human rights law in the interpretation of the Bill of Rights. Section 39(1)(b) provides that ‘when interpreting the Bill of Rights, a court, tribunal or forum must consider international law’. This provision provides a twofold set of obligations – one binding and another non-binding. In the case of *Government of South Africa and Others v Grootboom and Others*, Justice Yacoob held that ‘section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights’.¹⁴¹ Thus in *Mazibuko and Others v City of Johannesburg and Others (Mazibuko case)*,¹⁴² pursuant to this provision, notwithstanding South Africa’s non-ratification of the ICESCR, the High Court of South Africa (Witwatersrand Division) considered articles 11 and 12 of the ICESCR that guarantee respectively the rights to an adequate standard of living and health.¹⁴³ It affirmed and applied the reasoning of the CESCR in General Comment 15 on the right to water,¹⁴⁴ including the essential elements of availability and accessibility,¹⁴⁵ in interpreting the right to water under section 27(1)(b) of the Constitution, holding that the state is under an obligation to provide the poor with water and water facilities on a non-discriminatory basis.¹⁴⁶

However, the court, tribunal or forum is not bound to apply international law, unless the same is directly applicable as domestic law in terms of sections 231 and 232 of the Constitution. The term ‘consider’ as used in section 39(1)(b) of the Constitution is inherently of non-binding import. In *Azanian Peoples Organisation v President of the Republic of South Africa*¹⁴⁷ the Court held that section 39(1)(b), and the general scheme of the Constitution, bear out a presumption of consistency between international law and domestic law. Justice Mohammed stated that lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law.¹⁴⁸

Dugard, a leading South African international law publicist, has stated that the requirement to consider international law under section 39(1)(b) refers to all the sources of international law recognised by article 38(1) of the ICJ Statute.¹⁴⁹ In this regard, a careful analysis of the jurisprudence from the Constitutional Court shows that a sys-



tematic and holistic approach to the application of international law is yet to be fully embraced by the Court. The Court's application of international law has focused on treaties and judicial or quasi-judicial decisions, frequently with footnoted references to the teachings of the most highly qualified publicists. Little attempt has been made to explore the existence and applicability of international custom and general principles of law recognised by nations, and how these can be creatively and innovatively applied in interpreting the Bill of Rights.¹⁵⁰ Botha states that an examination of South African constitutional law jurisprudence shows that 'the distinction between foreign and international law has not been fully realised';¹⁵¹ that 'reference has often been passing, cursory and largely "ceremonial"'¹⁵² and that the 'number and nature of international sources used, has, by and large, been uncreative to say the least'.¹⁵³ This view is supported by Church *et al.*, who argue that with the possible exception of the *AZAPO* and *Kaunda* cases, cursory reference to international law stands out in the judgments where individual judges have made reference to international law.¹⁵⁴ Snellman makes a similar observation, stating:

*[w]hen the Constitutional Court does use international law, it will often only be a list of relevant conventions but with no further analysis or comparison with South African law as if it is done only because the Court is obliged to [do so] by the Constitution.*¹⁵⁵

A picture therefore emerges that, although South African courts have made reference to international human rights law in dealing with Bill of Rights issues, there remains a lot of room for improvement in the analysis and interpretation of international law in constitutional (and more particularly, Bill of Rights) jurisprudence.

Furthermore, in assessing the role that international human rights law has played and ought to play on the domestic scene in South Africa, it is submitted that the principle of subsidiarity must be considered and applied where necessary. The principle is to the effect that international law should not arrogate to itself the regulation of those aspects of the polity that can be effectively addressed by national law that is closest to the people affected. This position was affirmed by the Constitutional Court in *AD and DD v DW and Others*¹⁵⁶ where Justice Sachs held that according to the principle of subsidiarity, international law applies if there is 'a paucity of statutory guidance' or



there is otherwise a lacuna in the law.¹⁵⁷ Thus the import of the principle of subsidiarity is that the primary port of call when deciding a legal point on an issue is local law, and international law applies as a subsidiary regime.

4 APPLICATION OF INTERNATIONAL SOCIO-ECONOMIC RIGHTS OBLIGATIONS IN SOUTH AFRICA

In providing specific guidance on the domestic application of the ICESCR, CESCR General Comment 9 on the Domestic Application of the Covenant¹⁵⁸ emphasises two fundamental principles in the application of international law – that a state cannot rely on its national law to evade its international obligations and that it must ensure that there are effective remedies for violations of rights guaranteed under the ICESCR.

The extent to which this General Comment is relevant in South Africa is not entirely clear in view of the fact that South Africa is yet to ratify the ICESCR. Despite this, the general principle that a state that has signed an international treaty, such as South Africa, must avoid conduct that defeats the object and purpose of the treaty¹⁵⁹ would still operate to restrain South Africa from departing from these fundamental principles. Secondly, as noted earlier, South Africa is a party to the African Charter, articles 60 and 61 of which provide that relevant international instruments can be adverted to and applied in interpreting the obligations of states under the Charter. Thus, it is submitted that, insofar as South Africa's socio-economic rights obligations under the African Charter are concerned, General Comment 9 and other general comments of the CESCR are highly persuasive, and that South Africa has a positive duty under the African Charter to recognise the concept of minimum core obligations.

4.1 State of domestication of international socio-economic rights obligations in South Africa

This section of the paper explores the extent to which South Africa, whether directly or indirectly, has domesticated international law norms whether through Constitutional or other legislative measures.



4.1.1 Influence of international law in South Africa's constitutional architecture

The framers of South Africa's Constitution were highly inspired by international law, particularly with respect to human rights. Justice Ackermann observed in the case of *Bernstein and Others v Bester and Others NO*,¹⁶⁰ that '[t]he internal evidence of the Constitution itself suggests that the drafters were well informed regarding provisions in international, regional and domestic human and fundamental rights'.¹⁶¹

The impressive extent to which socio-economic rights are guaranteed in the Constitution offers a paradox in relation to the country's non-ratification of the ICESCR, an instrument to which the overwhelming majority of states around the world are now parties.¹⁶² However it seems arguable that although South Africa is yet to ratify the ICESCR, it has, to a large extent, transformed the provisions of the Covenant into its domestic law. As Mbazira points out:

[t]here is ample evidence to suggest that the drafters of the 1996 Constitution of South Africa ... were greatly inspired by the International Covenant on Economic, Social and Cultural Rights ... which explains why most socio-economic rights provisions are drafted along the same lines as those in the ICESCR.

He continues:

*The differences between the Constitution and the ICESCR are at best nomenclatural [as] a closer scrutiny shows that the obligations engendered by the two instruments are similar in many respects.*¹⁶³

In the *First Certification* case, the Constitutional Court made express reference to the ICESCR as a fulcrum upon which it based its assessment of the conformity of the final text of the South African Constitution with the constitutional principles in guaranteeing socio-economic rights.¹⁶⁴ Among other things, the Court expressly referred to and applied the provisions of article 2(1) of the ICESCR. The Court observed that the nature and enforceability of socio-economic rights differ materially from those of other rights since they are generally not fully enforceable immediately and that each state party only binds itself 'to the maximum of its available resources' to 'achieving progressively' the full realisation of these rights.¹⁶⁵ In the *Grootboom* case, the Con-



stitutional Court similarly observed that the term progressive realisation 'is taken from international law and Article 2.1 of the Covenant in particular'.¹⁶⁶

Thus it is submitted that while the South African Constitution has not directly incorporated the provisions of the ICESCR, it has largely transformed the provisions of the ICESCR into its text; and hence, in essence, in unique circumstances, has domesticated the Covenant pre-ratification. However, it is a differently nuanced form of domestication that does not go along with concomitant binding international law obligations under the treaty thus domesticated.

With regard to the other instruments referred to above, and in relation to socio-economic rights, apart from the general statement that the framers considered them in drawing up the Constitution, there is no evidence of the direct and specific influence that they had in the language and content of the Constitution.

4.1.2 Influence of international law in legislation

Since the advent of democracy in South Africa, the country has adopted a series of legislation with a view to giving effect to the rights guaranteed in the Constitution, and in some cases, also expressly aimed at giving effect to South Africa's international human rights obligations. This section of the paper explores the role and impact of international law in the conceptualisation, interpretation and implementation of various pieces of legislation in the area of socio-economic rights. The legislation explored covers the following thematic areas: labour, housing, health and social security.

4.1.2.1 Labour rights

Labour rights are economic rights. Although South Africa has not ratified the ICESCR, which contains comprehensive provisions on labour rights, it is a party to various other treaties, most notably a series of ILO Conventions that require it to comply with certain international human rights standards relating to labour.¹⁶⁷

Also, section 23(1) of the Constitution guarantees the right of everyone to fair labour practices. Further, subsections (2)–(6) of the Constitution guarantee various associational rights pertaining to participation in labour union activities. Three principal pieces of legislation



stand out and are analysed here in relation to the country's constitutional and international law obligations.

The Labour Relations Act 66 of 1995 (LRA) was, among other purposes, enacted in order to give effect to section 23 of the Constitution and also to give effect to public international law obligations of South Africa relating to labour relations, particularly the obligations incurred by South Africa as a member state of the ILO. Section 3 of the LRA provides that:

*Any person applying this Act must interpret its provisions –
to give effect to its primary objects;
in compliance with the Constitution; and
in compliance with the public international law obligations of
the Republic.*

It is clear from these provisions that international law has a prominent role to play in the LRA framework. The obligation under section 3(c) to interpret the provisions of the Act in 'compliance with the public international law obligations' of South Africa is couched in mandatory terms. Gauging from the references to international law in the purposes of the legislation as expressed in the long title, the preamble as well as the operative provisions of the Act, it is submitted that the LRA transforms the general international law on labour relations, particularly applicable ILO Conventions, into South African domestic labour law.

The purposes for which the Basic Conditions of Employment Act 75 of 1997 (BCEA) was passed are broadly similar to those relating to the LRA and similar express references are made to South Africa's international law obligations.¹⁶⁸

The Employment Equity Act 55 of 1998 (EEA) again makes similar references to the Constitution and international law as the LRA and the BCEA. In its section 3 on interpretation, after making similar provisions to sections 3(a) and (b) of the LRA, the EEA goes further in subsection (d) to specifically provide that:

[a]ny person applying [the] Act must interpret its provisions in compliance with the international law obligations of the Republic, in particular those contained in International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.



Thus, it is submitted that this provision transforms ILO Convention 111 into South African law through the EEA.

In conclusion, it seems clear that international labour law, which forms part of the general corpus of international human rights law, has a key role to play in the interpretation and application of labour legislation in South Africa.

4.1.2.2 *Housing rights*

Article 11 of the ICESCR guarantees the right of everyone to ‘adequate housing’ and each state party is required to ‘take appropriate steps to ensure the realization of this right’. Pursuant to article 2(1) of the ICESCR, every state party is under an obligation to take steps ‘to the maximum of its available resources, with a view to achieving progressively the full realization’ of this right.

This provision is mirrored in section 26 of the South African Constitution, which provides that:

Everyone has the right to have access to adequate housing.

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In the *Grootboom* case, Justice Yacoob advanced an argument for the proposition that article 11 of the ICESCR and section 26 of the Constitution are distinguishable. He stated that:

The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

The Covenant provides for a right to adequate housing while section 26 provides for the right of access to adequate housing.

The Covenant obliges states parties to take appropriate steps which must include legislation while the Constitution obliges



*the South African state to take reasonable legislative and other measures.*¹⁶⁹

It is submitted, however, that the textual differences between the ICESCR and the Constitution are not that significant. First, the distinction between a 'right to adequate housing' and the 'right of access to adequate housing' seems superficial. Conceptually, one struggles to sift out the true difference. Secondly, Justice Yacoob states that there is a difference between 'appropriate' steps and 'reasonable' steps. Again the distinction here seems very fine and tenuous, and, it is submitted, not significant. It is hard to conceive of a situation where steps adopted could be appropriate but not reasonable, or vice versa.

With this background, it is now germane to examine various pieces of legislation on housing and locate the role played by international law in their conceptualisation and implementation. Relevant legislative frameworks in this regard include the Housing Act 107 of 1997, the Rental Housing Act 50 of 1999 (RHA), the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). All these pieces of legislation make clear in their respective preambles that they have been adopted in terms of section 26 of the Constitution, which provides that everyone has the right to have access to adequate housing, and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. It has already been demonstrated that the terms 'adequate housing', 'progressive realisation' and 'within available resources' have direct international law origins. Thus international law is a necessary interpretive tool in the enforcement of these pieces of legislation.

The RHA goes further to specifically state, among other things, that it is premised on the constitutional imperative that 'no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances'. The Act seeks to balance the rights of tenants and landlords and to create mechanisms to protect both against unfair practices and exploitation. Among the stated aims of the legislation is the promotion of availability and accessibility to adequate housing by the people of South Africa through the creation of mechanisms that ensure the proper functioning of the rental housing market. On analysis, although



the Act does not specifically make reference to its international law origins, it is evident that international law, particularly the guidance from the CESCR through its general comments, played a pivotal role in the conceptualisation of this Act. For instance, the core principle against forced evictions without due process, although directly flowing from the language of section 26 of the Constitution, seems traceable to General Comment 4 of the CESCR,¹⁷⁰ where the Committee stated, among other things, that

*notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.*¹⁷¹

With regard to section 3 of the RHA that makes provision for government rental subsidies, and other assistance measures to stimulate the supply of rental housing property for low income people, again it is clear that this directly mirrors the interpretive guidelines of the CESCR in General Comment 4 where the Committee stated that ‘States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs’.¹⁷² Hence, what emerges again with the RHA is the strong influence of international law in its conceptualisation, and hence the critical need to make reference to the same as an interpretive tool during implementation and/or enforcement.

PIE, as its name suggests, seeks to offer protection to those who would otherwise be liable to forced evictions on account of various grounds, including lack of tenure due to lack of title. It emphasises the constitutional prohibition of evictions without an order from a competent court. As Chenwi observes:

*The main criterion as to whether an eviction should proceed and how it should proceed is whether the eviction will be “just and equitable”. This amounts to asking whether the eviction will be fair. This criterion is emphasised in section 4(6) and (7) and section 6(1) of PIE.*¹⁷³

According to section 6(3) of PIE:

In deciding whether it is fair to grant an order for eviction, the court must have regard to – (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure; (b) the period the unlawful occupier and his or her family



have resided on the land in question; and (c) the availability to the unlawful occupier of suitable alternative accommodation or land.

In *Port Elizabeth Municipality v Various Occupiers*,¹⁷⁴ Justice Sachs held in this context that:

*justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them.*¹⁷⁵

It is observable that some of the guidelines of the CESCR in General Comment 7 on the right to adequate housing in the context of forced evictions are mirrored in PIE. The CESCR has stated that there are instances where evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause,¹⁷⁶ but that in such instances, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.¹⁷⁷ The CESCR notes that in such cases, it is incumbent upon the relevant authorities to ensure that evictions are carried out in a manner warranted by a law and that all the legal recourses and remedies are available to those affected.¹⁷⁸ The CESCR has further stated that evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. It stresses that where those affected are unable to provide for themselves, the state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available. A close reading of PIE shows that these guidelines, arguably, influenced its consideration and enactment.

4.1.2.4 Social security rights

The right to social security is guaranteed under section 27(1)(c) of the Constitution that provides that '[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Giving effect to



this provision is the Social Assistance Act 13 of 2004. Among other things, the Social Assistance Act provides for some safety-net grants and these include child protection grants, disability grants, old-age grants and other direct financial or material provisioning from the state with regard to social security.¹⁷⁹ All of the grants mentioned in section 4 are tied to citizenship, and, with the decision in the *Khosa* case,¹⁸⁰ they extend to permanent residents. However, there is provision for the Minister to make exceptions under section 5(1)(c) of the Act, with the concurrence of the Minister of Finance, and extend the application of the Act to other groups or categories of persons. In addition, section 13 of the Act provides that the Minister may provide social relief of distress to a person who qualifies for such relief as may be prescribed.

The preamble to the Act states that it was passed in view of the right to social security as guaranteed under the Constitution. In the *Khosa* case, Justice Mokgoro, delivering the majority judgment, stated that the Director-General of the Department of Social Development had stated in his evidence that 'social security legislation is part of the government's strategy to combat poverty'¹⁸¹ and that 'the legislation is directed at realising the relevant objectives of the Constitution and the Reconstruction and Development Programme, and giving effect to South Africa's international obligations'.¹⁸²

It is unclear what specific international law obligations influenced the drafting of the legislation and which the legislation is aimed at advancing. This is the more so considering that South Africa has neither ratified the ICESCR nor the ILO Social Security (Minimum Standards) Convention of 1952 (ILO Convention 102). Be that as it may, the Director-General's message is clearly that the legislation aims at giving effect to South Africa's international law obligations. The Director-General's position is also significant as it shows that at least some policy makers in Government are sensitised about the importance of heeding the country's international human rights law obligations.

4.1.3 International human rights law and South African Courts

This section explores the extent to which South African courts in particular have invoked international law in their jurisprudence, focusing again on labour, housing, health and social security.



4.1.3.1 Labour rights jurisprudence

An examination of South African labour legislation has shown that international law, particularly the various conventions adopted by the ILO, feature very prominently in their concept and design. However, the best test of the impact of international human rights law in their enforcement, it is submitted, would best be reflected in the manner in which courts have interpreted and enforced these instruments. It appears that perhaps more than any other branch of human rights law, international labour law has been highly influential in the work of the courts in determining labour disputes. In *Discovery Health Limited v Commissioner for Conciliation, Mediation and Arbitration and Others*,¹⁸³ the Labour Court of South Africa stated that ‘the importance of international standards as both a substantive and an interpretational tool is underscored by sections 232 and 233 of the Constitution’.¹⁸⁴ Further, in terms of section 39(1)(b) of the Constitution, Justice O’Reagan held in *South African National Defence Union V Minister of Defence and Another*¹⁸⁵ that:

*Section 39 of the Constitution provides that when a court is interpreting chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of ... section 23 of our Constitution.*¹⁸⁶

In that case, the Constitutional Court applied the ILO Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the ILO Convention on the Right to Organise and Collective Bargaining 98 of 1949 in arriving at a decision that soldiers had the right to form their own workers’ union although they are not necessarily employees in the normal sense. Justice O’Reagan stated that:

*If the approach of the ILO is adopted, it would seem to follow that when section 23(2) speaks of ‘worker’, it should be interpreted to include members of the armed forces, even though the relationship they have with the Defence Force is unusual and not identical to an ordinary employment relationship.*¹⁸⁷

She held that although members of the Defence Force may not be



employees in the full contractual sense of the word, their conditions of enrolment in many respects mirror those of people employed under a contract of employment.¹⁸⁸ This case provides a classic instance in which the reasoning of the Court was clearly influenced by international conventions on labour.

In *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another*,¹⁸⁹ the Constitutional Court, again applying the two ILO Conventions mentioned above, proceeded to emphasise the importance of the supervisory committees of the ILO: the Committee of Experts on the Application of Conventions and Recommendations¹⁹⁰ and the Freedom of Association Committee. The Court held that the work of these Committees engenders 'an authoritative development of the principles...contained in the ILO conventions',¹⁹¹ and that '[t]he jurisprudence of these committees...will be an important resource in developing the labour rights contained in our Constitution'.¹⁹²

Justice Chaskalson held in *S v Makwanyane* that international law, within the meaning of section 39(1)(b) of the Constitution, includes both binding as well as non-binding law.¹⁹³ A classic exemplification of this position in the context of labour rights arose in the *Discovery Health* case (above) where the Labour Court considered and applied the International Convention on the Rights of all Migrant Workers and Members of their Families, 1990, although South Africa has neither signed nor ratified the instrument. The Court said:

*The Convention aims ultimately to discourage and even eliminate irregular migration, but at the same time, it aims to protect the fundamental rights of migrants, taking into account their vulnerable position. Although the Convention has not been ratified by a significant number of countries (South Africa has not ratified it) it remains a significant statement of international norms in relation to the rights of migrant workers. The Court is therefore required to consider its terms when interpreting domestic legislation.*¹⁹⁴

The Court then proceeded to examine and apply various ILO conventions, observing in particular that 'ILO Convention 143 (Migrant Workers [Supplementary Provisions] Convention 1975) builds on Convention 97 Migration for Employment Convention (Revised) 1949, and sets out the general obligation of members states to respect the basic human rights of all migrant workers (see Article 1)',¹⁹⁵ while 'at



the same time, the Convention addresses problems associated with clandestine immigration'.¹⁹⁶ All in all, it is evident that international human rights law has played a pivotal role in the interpretation, development and enforcement of labour rights in South Africa.

4.1.3.2 *Housing rights jurisprudence*

In section 4.1.2.2 above, this paper demonstrated that South African legislation in this important area of human rights is, to some extent, reflective of international law. In this section, the influence that international law has had on the judicial enforcement of the right to housing is explored.

Most prominent in the panoply of jurisprudence that has developed around the right to housing is the *Grootboom* case. In that case, the Court extensively considered international law, particularly the provisions of the ICESCR and the general comments of the CESCR. The Court elaborately engaged the concept of minimum core obligations as defined under CESCR General Comment 3, and the decision is renowned for its refusal to adopt the concept within the context of the right to housing in South Africa, and opting instead to adopt the reasonableness test for addressing the socio-economic rights of those in desperate circumstances and ensuring that government policies adopted to address such rights do not leave out significant sectors of the population. The implications of the Court's approach in this regard are discussed in more detail below. Apart from its refusal to embrace the concept of the minimum core, the decision is significant for, among other things, its affirmation of the important role that international human rights law, particularly the ICESCR, played in fashioning the socio-economic rights provisions of the Constitution. The Court stated that the term 'progressive realisation' under the Constitution 'is taken from international law and Article 2.1 of the [ICESCR] in particular'.¹⁹⁷ The Court then commended the CESCR for helpfully analysing the term in the context of housing in paragraph 9 of its General Comment 3,¹⁹⁸ which clarifies the meaning of the term 'progressive realisation'.¹⁹⁹ In applying the General Comment to its interpretation of the meaning of the term 'progressive realisation' with reference to socio-economic rights generally, and the right to housing in particular as used under the South African Constitution, the Court observed that:



Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.²⁰⁰

In the *Joe Slovo* case, Justice Ngcobo, applying the guidelines of the CESCR in its General Comment 7, said:

General Comment No. 7 provides a useful guide to determining the obligations of government when it seeks to relocate people for the purposes of providing them with adequate housing. The requirement of genuine consultation with the people affected by relocation under General Comment No. 7 is consistent with the requirement of engagement that we have insisted upon before people are evicted. It is also consistent with our jurisprudence on PIE. In my view General Comment No. 7 must, as a general matter, be followed in relocations such as the ones involved in this case.²⁰¹

The general picture that emerges is thus that international human rights law, particularly the ICESCR and the general comments of the CESCR, have played a very important role in the judicial enforcement of the right to housing.

4.1.3.3 Health rights jurisprudence

The right to health is guaranteed under sections 27(1)(a) and 27(3) of the Constitution. Section 27(1)(a) provides that '[e]veryone shall have access to health care services, including reproductive health care', while section 27(3) provides that 'no-one may be refused emergency medical treatment'.

In its earliest decision directly engaging the right to health care, more particularly the right to emergency medical treatment under section 27(3) of the Constitution – *Soobramoney* case – the Constitutional Court decided the case without referring at all to international law. It is unclear why this was so, but considering that section 39(1)(b) of the Constitution makes it mandatory for the Court to consider international law when interpreting the Bill of Rights, it is submitted



that this decision should be regarded as having been made *per incuriam* (decided without reference to an appropriate authority which would have been relevant to the judgment), as the Court clearly failed to apply its mind to a relevant body of law, and its precedential value on the basis of its *ratio decidendi* (the rule or principle on which the case is ultimately decided) is therefore, at the very least, highly attenuated. This is particularly so considering that the decision of the Court was adverse to the applicant.

In the subsequent case of *Minister of Health and Others v Treatment Action Campaign and Others*,²⁰² the Court took cognisance of, and indeed applied international law, but only to a narrow extent. The Court's consideration of international law was limited to the concept of 'minimum core obligations' that it had earlier engaged in *Grootboom* in the context of the right to housing. The Court essentially affirmed the approach adopted in *Grootboom*, refuting the application of the concept in South Africa. The case is rather disappointing as the Court does not proceed to define the content of the right that the case engaged. Reference to the general comments of the CESCR is limited to General Comment 3 that defines the general nature of the obligations of states parties to the ICESCR as spelt out in article 2(1) of the ICESCR. One would have expected that even if, as was the case, the Court had decided to adopt reasonableness as a standard by which to measure the state's compliance with its constitutional socio-economic rights obligations, it should have elaborated on the scope of the right and, in that regard, engaged CESCR General Comment 14 on the right to the highest attainable standard of health.²⁰³ The essential elements of the right to health as defined under the General Comment, namely availability, accessibility, acceptability and quality, could in any given case be useful in deciding a matter that turns on this right.²⁰⁴ In addition, the Court would have benefited from an analysis of the minimum core obligations in relation to the right that, under the General Comment, include the duty to provide essential drugs, as from time to time defined under the World Health Organization (WHO) Action Programme on Essential Drugs²⁰⁵ and to ensure equitable distribution of all health facilities, goods and services.²⁰⁶ In terms of section 39(1)(b) of the Constitution, it is submitted that the Court was bound to at least consider General Comment 14 that directly relates to the right to health. While the Court in the *Soobramoney* case failed to pass the constitutional test by not considering international law, it excelled in



another sense over its subsequent decision in *TAC*, as it extensively considered the content of the right to emergency medical treatment as provided for under section 27(3) of the Constitution.

4.1.3.4 *Social security rights jurisprudence*

The question of social security was considered by the Constitutional Court in the *Khosa* case. The Court, specifically addressing the right to social security, held that given that the Constitution expressly provides that the Bill of Rights enshrines the rights of all people in the country, and in the absence of any indication that the rights under section 27(1) of the Constitution are to be restricted to citizens as in other provisions in the Bill of Rights, ‘the word “everyone” in this section cannot be construed as referring only to “citizens”’.²⁰⁷ Millard argues that the *Khosa* case ‘signalled a departure from the introspective and nationalistic approach towards social assistance that previously characterised the South African system’.²⁰⁸

However, the Court made no reference at all to international law. This is so notwithstanding the requirements of section 39(1)(b) of the Constitution and the fact that the Director-General responsible for social security stated in evidence before the Court that the impugned social security legislation was aimed at, among other things, giving effect to South Africa’s international law obligations. There are numerous decisions on the question of non-discrimination in the area of social security that the Court could have drawn on, from various international and regional human rights tribunals, including the European and the Inter-American systems, as well as jurisprudence from the Human Rights Committee of the UN.

4.2 **Minimum core obligations and the South African approach: *Grootboom* and subsequent jurisprudence**

One of the defining features of socio-economic rights is that generally the obligation of states relating to their implementation is to take steps to the maximum of their available resources in order to achieve, progressively, the full realisation of the rights. There are a number of ways in which the phrase ‘progressive realisation’ may be open to misinterpretation. One of them is the possibility of states interpreting the provision as entitling them to postpone indefinitely the taking of



steps aimed at realising the rights. In this regard, the CECSR has made it clear that the fact that realisation over time is foreseen under the ICESCR should not be misinterpreted as depriving the obligation of all meaningful content.²⁰⁹ The CECSR has thus stressed that while the ICESCR provides for progressive realisation and acknowledges the constraints faced by states due to the scarcity of resources, ‘it also imposes various obligations which are of immediate effect’.²¹⁰ These are the obligations to ensure that the rights under the ICESCR are enjoyed without discrimination,²¹¹ and the obligation of states parties ‘to take steps’,²¹² which obligation, according to the CESCR, ‘is not qualified or limited by other considerations’.²¹³

In addition, most notable has been the CESCRs elaboration on what it has termed the ‘minimum core obligations’.²¹⁴ Although others have doubted whether the Committee should indeed be credited with developing the idea of minimum core obligations, it seems that while it is true that the idea is inherent in the very nature of socio-economic rights, the CESCR was the first to give it expression and meaning and should therefore accordingly be credited with developing, though perhaps not necessarily originating, the concept.²¹⁵ In paragraph 10 of General Comment 3, the Committee gave expression to the minimum core obligations in the following terms:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core



obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

Bilchitz, in a seminal article on the concept, concisely describes how the notion of minimum core obligations is to be understood within the broader framework of the progressive realisation of socio-economic rights. He argues that what progressive realisation entails is a recognition that the government is under an obligation to:

*provide core services to everyone without delay that meet their [urgent] survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the state is required to protect.*²¹⁶

He argues:

*[w]ithout protecting people's survival interests, all other interests and rights that they may have – whether civil, political, social or economic – become meaningless.*²¹⁷

and that the

*recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.*²¹⁸

Bilchitz's approach is germane as it rests on the underlying philosophy of the inherent and universal nature of fundamental rights, and the fact that the content of rights and the means to realising them are two issues that should not be conflated.²¹⁹

As indicated above, the Constitutional Court extensively considered the concept of minimum core obligations, as elaborated by the CESC, in the *Grootboom* case. The Court rejected the concept of minimum core obligations as a benchmark for the determination of the minimum essential level, or 'the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation'²²⁰ to ensure the realisation of the right, in the *Grootboom* case, of access to adequate housing. The *amici curiae* in the case – the South African Human Rights Commission and the Community Law Cen-



tre (University of the Western Cape) – argued that the right under section 26 had to be interpreted in the light of international human rights law and consistent with guidance from the general comments of the CESCR. In particular, emphasis was placed on the need to adopt the concept of minimum core obligations expressed in General Comment 3 (cited above).²²¹

The Court stated that there are difficult questions relating to the definition of minimum core in the context of the right, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people.²²² The Court reckoned that there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable, but went on to state that ‘even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context’.²²³ In this case, the Court held that it did ‘not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution’.²²⁴ Thus the Court concluded that ‘the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable’. In terms of what would constitute ‘reasonableness’, in the context envisaged by the Court, it held that:

*To be reasonable...those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*²²⁵

The Court’s stance in refusing to apply the minimum core concept has received a barrage of criticism.²²⁶ Bilchitz argues that the only logical way for the Court to arrive at the conclusions it reaches in *Grootboom* about what would constitute reasonable measures would necessarily have to entail some form of the minimum core. He contends that in holding that it is unacceptable for people in desperate need to be left



without any form of assistance the Court in essence implies recognition of the minimum core concept. Another instance he highlights is where the Court states that 'a society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality'.²²⁷ Bilchitz thus concludes by arguing that:

*[i]n attempting to avoid recognising a minimum core obligation, [Justice Yacoob] ends up smuggling an obligation to meet short-term needs into the very notion of reasonableness itself. It would certainly be more transparent and theoretically coherent to recognise what he is actually doing outright.*²²⁸

Indeed, on critically examining *Grootboom*, it is submitted that the Court did implicitly accede to the concept of minimum core content. This is so in light of its holding that for persons in desperate need, the state is bound to take *immediate interim measures of relief*, even if they do not constitute housing, provided that they fulfil the requisite standards of durability, habitability and stability. The Court thus seems to unwittingly hold that these measures constitute the minimum core content for the right to housing.²²⁹

These critiques notwithstanding, the importance of the *Grootboom* case in infusing into South African jurisprudence the application of international human rights law cannot be understated. For instance, although the Court did not follow the interpretation of the CESCR, the Court observed that determining the requirements of a minimum core obligation might assist in determining the scope of the state's obligation to develop reasonable legislative and other measures. It also held that courts are competent to determine what might constitute a minimum core if sufficient information is available and presented to them.²³⁰ In addition, the Court affirmed that the meaning and understanding of the term 'progressive realisation' under the ICESCR is the same as that under the Constitution. As De Vos puts it:

*In Grootboom, the Court relied directly on General Comment 3 issued by the [CESCR] to explain the parameters of the justiciability of social and economic rights, and explicitly endorsed a passage from General Comment 3 regarding the meaning of the term "progressive realisation" in the context of the South African Constitution.*²³¹



Further, the fact that the Court was prepared in the first place to extensively consider and interrogate the role of international law norms in articulating the human rights obligations of the state is also very significant.

In the subsequent *TAC* case, the issue of the application of minimum core obligations was again raised by two of the three *amici curiae* – the Institute for Democracy in South Africa (IDASA) and the Community Law Centre. The Court started by recognising that although the minimum core might not be easy to define, it includes

*at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court.*²³²

With such a statement, one would think that in a society founded on the values of human dignity, freedom and equality, the recognition of minimum core obligations would be held to be indispensable. However, the Court then strays from its recognition of the importance of the minimum core and raises two major objections to the application of the minimum core in South Africa. The first objection is content based, with the Court stating that:

*it is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.*²³³

The Court stated that although Justice Yacoob indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights under the Constitution should not be construed as entitling everyone to demand the provision of the minimum core as of right.²³⁴

The second objection is based on institutional competence. The Court held that in dealing with socio-economic rights:

*courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards...should be, nor for deciding how public revenues should most effectively be spent.*²³⁵



The Court proceeded to argue that courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.²³⁶ The Court preferred instead:

*a restrained and focused role for the courts...to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.*²³⁷

The Court stated that such determinations of reasonableness may have budgetary implications, 'but are not in themselves directed at rearranging budgets'.²³⁸

It seems that although the Court declined to expressly allow for the application of the minimum core concept, it in essence used that very conception in defining the basic requisites under the reasonableness approach, such as the need to ensure that at a minimum, provision is made to those in desperate need. The Court in the *TAC* case thus lends itself to a similar fallacy as that in *Grootboom* in rejecting the application of the concept.

In the *Mazibuko case*, the High Court sought to make a case that the Constitutional Court did not reject the applicability of the minimum core concept in South Africa. Justice Tsoka held that the Court in *Grootboom* did not reject the concept but only emphasised the difficulties associated with its application and that the same could be said of the decision in the *TAC case*.²³⁹ His argument however, does not appear convincing. In *Grootboom*, Justice Yacoob concluded his analysis on the minimum core by saying that '[i]t is not in any event necessary for a court to determine in the first instance the minimum core content of a right'.²⁴⁰ In *TAC*, the Court said 'the socio-economic rights of the Constitution should not be construed as entitling anyone to demand that the minimum core be provided to them'²⁴¹ and further that 'it is impossible'²⁴² to give everyone access even to a "core" service immediately'.²⁴³ These conclusions by the Court seem inconsistent with the conclusion that Justice Tsoka draws and clearly suggest a rejection of the concept's applicability in South Africa.

In connection with the African Charter, there is a problem in the refusal of South African courts to apply the minimum core obligations concept. While South African courts might perhaps safely rest on the fact that the country has not yet ratified the ICESCR and is thus not bound by it, and nor is it bound to follow guidance from the CESC, South Africa has indeed ratified the African Charter. The African



Commission in the *SERAC* case observed that the minimum core obligation forms part of the socio-economic rights obligations of state parties under the Charter.²⁴⁴ Thus, it is submitted, South Africa is bound in terms of the African Charter to apply the concept of minimum core obligations.

5. CHALLENGES ON THE USE OF INTERNATIONAL LAW IN SOUTH AFRICA

The foregoing discussion has located the space occupied by international human rights law in policy- and law-making, as well as in the enforcement of socio-economic rights through the courts in South Africa. This is so notwithstanding the courts' refusal to apply the important concept of minimum core obligations, opting instead to adopt a test of reasonableness that, it is submitted, does not help much in defining the content of socio-economic rights. It has been clear, nevertheless, that the effect of international law was very significant in the *Grootboom*, *TAC*, *Discovery Health* and *Joe Slovo* cases, among others. South African courts have in varying but yet significant degrees used international human rights law to define the content and nature of socio-economic rights obligations under the Constitution.

However, as Brand argues, despite the valuable guidance international law provides for the interpretation of socio-economic rights in the Constitution and the significant contribution it has made in this respect, one of the problems surmounted has been the continued absence of case law from other domestic jurisdictions.²⁴⁵ Brand adds:

*The absence of any effective method for the actual enforcement of the norms developed by the [CESCR] has meant that little attention has been devoted in international law to the difficult issues of separation of powers and institutional capacity that arise at the domestic level in the enforcement of court orders with respect to socio-economic rights.*²⁴⁶

He concludes that both these difficulties thus tend to:

*dilute the usefulness of international norms as interpretative sources for socio-economic rights at the domestic level, particularly as the South African socio-economic rights jurisprudence develops and becomes more concrete and specific.*²⁴⁷



Another concern, raised by Okafor, is that in comparison with the UN system, the overall impact of the African system in South Africa has been rather minimal.²⁴⁸ He argues, quite correctly it is submitted, that socio-economic rights norms arising from the provisions of the African Charter have percolated in much less measure into the reasoning when compared with those under the ICESCR. In addition, he argues, again convincingly, that in the deliberations or decision-making processes of the relevant South African domestic institutions, there has been a skewed pattern of the percolation of the African Charter into judicial reasoning in South Africa, with civil and political rights featuring more than socio-economic rights.²⁴⁹

This is a stinging, yet justified indictment of the rather ambivalent manner in which South African institutions have approached the African human rights system's instruments and institutions, especially insofar as socio-economic rights are concerned, and there is need for courts and the other relevant actors to orient themselves towards a better recognition and application of these instruments in the interpretation and enforcement of the Bill of Rights.

Another challenge, as the above discourse demonstrates, is that with the exception of a few legislative themes, most notably labour law, the legislature has not expressly informed the legislation it passes with international law, even in cases where a large pool of international law resources exists, as is the situation with regard to housing and social security. Express references to international law in legislation, such as is the case with labour legislation, creates a better platform for the courts to refer to and apply international law when enforcing socio-economic rights and also generally gives effect to the country's international law obligations to adopt legislative measures.

6 GENERAL CONCLUSION

International law occupies significant space in South Africa's constitutional framework. South Africa has generally adopted a dualist approach in the direct application of international law, though this seems to be nuanced by some exceptions where international law is directly applicable without a further act of domestication. These are instances where an international agreement concluded by South Africa is self-executing or where a rule of customary international law that



is not inconsistent with the Constitution or other legislation applies. Another avenue in the Constitution through which international law applies, particularly international human rights law, is pursuant to section 39(1)(b) as an interpretive tool for the Bill of Rights. The law that courts, tribunals and other forums are bound to consider in this regard includes both binding and non-binding international law. Mediating the importance, relevance and universality of international human rights law norms with local law and circumstances is the principle of subsidiarity that essentially states that law-making and implementation are often best achieved at a level that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness and to population diversity.

Some concern is expressed, however, that in most instances, courts have not gone beyond making reference to a list of international law provisions that relate to a particular point they are considering without further elaboration. This has left the impression that perhaps their reference to these provisions is just a veneer to show that they complied with the fiat under section 39(1)(b) of the Constitution when in fact, they did not practically consider such law in a manner such that it would influence their decision.

In the field of socio-economic rights, one of the major setbacks is the fact that South Africa has not yet ratified the ICESCR and its Optional Protocol. This is so notwithstanding that South Africa has a very progressive Constitution in this regard and that the courts have equally been vigilant in asserting their competence to adjudicate on these matters.

Another setback has been the refusal by the Constitutional Court to directly embrace the notion of minimum core obligations. As a result of the Court's approach of rejecting to apply the concept of minimum core obligations and adopting that of reasonableness instead, Currie and De Waal accurately observe that the Court's approach to the positive obligations imposed on the state by socio-economic rights provisions under the Constitution has been to avoid giving content to those rights in favour of an adjudication of the reasonableness of the measures taken by the state to implement the rights.²⁵⁰ However, the reasonableness approach adopted by the Court, when taken to its logical conclusion, cannot achieve the desired results in the absence of an appreciation and application of minimum core obligations. Minimum core obligations, it is submitted, make real the recognition that



socio-economic rights are basic fundamental rights and that no interpretation thereof should be such as to empty them of all content. It is, however, appreciated that the nature of most of these rights is such that after meeting the requisite basic survival interests of the people, the obligation of the state is to take progressive steps within its available resources to achieve these rights.

An additional major challenge that has been noted is the dearth of reference to the African Charter and the jurisprudence, albeit admittedly sparse, of the African Commission. These various concerns notwithstanding, international law remains a prominent regime of law in the South African constitutional fabric and has played a significant role in shaping the country's constitutional landscape. This paper has demonstrated that international human rights law has played a key role in the shaping of the Constitution and the Bill of Rights, in particular, as well as legislation and jurisprudence in the field of socio-economic rights. Considering the important role of international law, the following recommendations are therefore made:

1. South Africa should urgently ratify the ICESCR and the Optional Protocol thereto.
2. The Constitutional Court, at the earliest opportunity presented before it, should revisit its reluctance to recognise the concept of minimum core obligations and hold that the same is applicable in the South African context. Not only will this be important in defining the content of socio-economic rights under the Constitution in their proper context, but it will also be a way of giving effect to South Africa's existing international law obligations under the African Charter.
3. The Courts, in dealing with international human rights law, should get even more creative and, where appropriate, they should be able to get beyond the confines of treaty law to exploring other sources of international human rights law, such as custom and general principles of law. This they can do by, among other things, exploring state practice in the area.
4. Courts also need to get deeper in their analysis of international human rights law, as in many instances they have simply made fleeting references thereto.
5. South African courts should place sufficient weight on the African human rights system and its instruments in their work.
6. Civil society and other organisations that bring claims before the



courts or appear from time to time as *amicus curiae* also need to play a role in ensuring the desired creativity by the courts in taking a broader approach to international law, including the application of regional law in this regard.

7. The legislature should include references to international law obligations when passing legislation. Thus the approach adopted by Parliament in couching labour law should be applied generally.



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NOTES

- 1 Franklin and Eleanor Roosevelt Institute, *Eleanor Roosevelt*, <http://www.udhr.org/history/Biographies/bioer.htm> (accessed: 25 August 2009).
- 2 See Craven (1995: 6).
- 3 J Humphrey, The international law of human rights, in *The present state of international law and other essays* (1973), quoted in Sieghart (1983: 11).
- 4 See Church *et al.* (2007: 226).
- 5 Preambular para 1.
- 6 Opening Address of the former UN Secretary General Boutros Boutros-Ghali at the World Conference on Human Rights, Vienna, Austria, 14 June 1993, UN doc. A/CONF 157/22 (1993).
- 7 See Slaughter (2000: 246).
- 8 *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Reports 32, para 33 [*Barcelona Traction* case].
- 9 Carozza (2003: 58).
- 10 Carozza (2003: 7–8). These include the International Convention on the Elimination of All Forms of Racial Discrimination, the ICESCR, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Migrant Workers Convention and the Convention on the Rights of People with Disabilities, among others.
- 11 Carozza (2003: 8–9).
- 12 Maluwa (1999: 127) states that the ‘International Bill of Rights’ as well as regional human rights conventions have ‘influenced the drafting of some national bills of rights... In some instances, even the phraseology employed in these instruments has been adopted almost verbatim in the relevant provisions of national constitutions’.
- 13 See Porter (1999: 2).
- 14 *Ibid.*
- 15 See Liebenberg (2006: 33–4).
- 16 Olivier (2002: 123).
- 17 Olivier (2002: 123).
- 18 See the Namibia Opinion (1971) ICJ; 1966 South West Africa cases; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971 at 31 (the Namibia Opinion); and International Convention on the Suppres-



- sion and Punishment of the Crime of Apartheid, GA Res. 3068(XXVI-II) of 30 November 1973.
- 19 See Preamble to the Constitution.
- 20 See Liebenberg (2007).
- 21 1998 (1) SA 765 (CC) [*Soobramoney* case].
- 22 Ibid, para 8.
- 23 Ibid.
- 24 See Liebenberg (2006: 33–1).
- 25 Liebenberg (2006: 33–2).
- 26 Mbazira (2008: 6).
- 27 Mbazira (2008: 6).
- 28 Eide and Rosas (1995: 17–18).
- 29 Slaughter (2000: 246).
- 30 Scheinin (1995: 41, 61).
- 31 Piovesan (2004: 25).
- 32 Piovesan (2004: 24).
- 33 Sieghart (1983: 16).
- 34 What is discussed below is simply a synopsis of the international human rights system. A more comprehensive discussion and analysis of this system is beyond the scope of this paper.
- 35 See Brownlie (1990) and Dugard (2005).
- 36 See Brownlie (1990: 3).
- 37 Dugard (2005: 28).
- 38 United Nations, *Treaty Series*, vol. 1155, p. 331
- 39 See Church et al. (2007: 164).
- 40 See Dugard (2005: 29).
- 41 See Dugard (2005: 38).
- 42 See Dugard (2005: 27).
- 43 The UN Charter is discussed further below.
- 44 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion* ICJ Reports 2004 at 136. This is a very significant decision, being the first decision from the ICJ authoritatively pronouncing on the socio-economic rights guarantees under various UN instruments including the ICESCR and the CRC.
- 45 Church et al. (2007: 226).
- 46 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, ICJ Reports (1971) 16 [the Namibia Opinion].
- 47 Articles 2–15 of the UDHR provide for civil and political rights; articles 17–28 provide for economic, social and cultural rights; articles 29 and 30 make provision for duties that individuals have towards their communities, limitations on rights, and a prohibition against



any activities aimed at the proscription of the rights set forth under the UDHR. It is important to note that the UDHR sets forth some rights that are not provided for in the two subsequent general human rights treaties (the ICCPR and ICESCR). These include article 14 that guarantees the right to seek and enjoy asylum in other countries and article 17 that guarantees the right to property.

- 48 See E Roosevelt, *Address to the United Nations General Assembly*, 10 December 1948.
- 49 See *Filartiga v Pena Irala* 19 I.L.M 966 (1980). See also the Namibia Opinion at 454; *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, *Second Phase* 37 ILR (1966) 243 and 454.
- 50 See Church *et al.* (2007: 217–218). See also Shelton (1997: 119); Bothe (1980: 65); Rodley (1991: 233).
- 51 UNGA Res. 60/251 of 15 March 2006.
- 52 Ibid, para 1.
- 53 Ibid, para 2.
- 54 Each of the two regions has 13 members on the Council. See <<http://www2.ohchr.org/english/bodies/hrcouncil/groups0809.htm>> (accessed: 20 August 2009)
- 55 South Africa's UPR Session was held on 15 April 2008. See <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/ZASession1.aspx> (accessed: 25 August 2009). General information on the Human Rights Council can be accessed at <http://www2.ohchr.org/english/bodies/hrcouncil/>.
- 56 See OHCHR, *Human Rights Council Advisory Committee*, available at <http://www2.ohchr.org/English/bodies/hrcouncil/advisorycommittee.htm> (accessed: 30 July 2009).
- 57 HRC Res. 5/1 of 2007, para 65.
- 58 Ibid.
- 59 Ibid, para 75
- 60 Ibid, para 65.
- 61 Vienna Declaration, para 18.
- 62 UNGA Res. 48/141 of 20 December 1993, para 4.
- 63 Two main forms of supervisory systems exist at the international level: the reporting system and the complaints system. Reporting systems require states to submit periodic reports on the domestic implementation of the rights within the treaty concerned. The reports are then considered by a supervisory body entitled to review them and make general recommendations (often referred to as concluding observations). Complaints systems are generally considered the most effective means for the protection of human rights at the international level. Under the system, individuals or states parties submit complaints alleging violations of the treaty concerned. The supervisory



body takes on a 'quasi judicial' function in interpreting the treaty and making decisions or recommendations on the merits of each case. See Sieghert (1983: 31-32).

64 See Currie and De Waal (2005: 574).

65 Article 1 (which is similar to article 1 of the ICCPR).

66 Article 6.

67 Article 7.

68 Article 8.

69 Article 9.

70 Article 11.

71 Ibid.

72 Ibid.

73 Article 12.

74 Article 13.

75 Article 15.

76 See section 4.3 below.

77 See Sieghert (1983: 35).

78 See Sieghert (1983: 39).

79 The Sessional Working Group was established in 1978. See ECOSOC Decision 1978/10 of 3 May 1978, UN doc. E/C.12/1989/4 (1988), at 6.

80 ECOSOC Res. 1985/17, para (a), UN doc. E/1985/85(1985). See also Sieghert (1983: 42).

81 UNGA Res. A/RES/63/117 of 10 December, 2008,

82 Article 10.

83 Article 2.

84 Article 11 of the Optional Protocol.

85 Batalla (2006).

86 Human Rights Committee, General Comment 26, para 3. This proposition also suggests that the ICESCR as well does not allow for denunciation.

87 See article 40(1)(b).

88 These general comments can be accessed at <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>> (accessed: 25 August 2009).

89 See article 1 of the First Optional Protocol.

90 Article 2 and 3 of the First Optional Protocol, respectively.

91 Article 26 of the ICCPR.

92 Communication 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990).

93 Another decision of the Committee on this point is *Edward Young v Australia*, [Communication No 941/2000 U.N Doc. CCPR/C/78/D/941/2000]. The Applicant was in a same-sex relationship with a Mr. C for 38 years. Mr. C was a war veteran, for whom the Applicant cared in the last years of his life. After Mr. C's death the Applicant applied for a pension under section 13 of the Veteran's Entitlement



Act ('VEA') as a veteran's dependant. The Repatriation Commission denied the application on the ground that the Applicant was not a dependant as defined by the Act. The Applicant was also denied a bereavement benefit under the Act, as he was not considered to be a 'member of a couple'. The Applicant complained before the Human Rights Committee that Australia's refusal, on the basis of him being of the same sex as his partner, that is, due to his sexual orientation, to provide him with a pension benefit violated his right to equal treatment before the law and was contrary to article 26 of the ICCPR. He relied on *Broeks v the Netherlands*, *Zwaan de Vries v the Netherlands*, and *Danning v the Netherlands*, where the Committee had, in principle, found social security legislation to be subject to article 26. He also relied on *Toonen v Australia* where the Committee recognised sexual orientation as a proscribed ground for differentiation under article 26. The Human Rights Committee found that the facts revealed a violation by Australia of article 26 of the Covenant. It found that pursuant to article 2, paragraph 3(a), of the Covenant, the author had been a victim of a violation of article 26 and was entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, and, if necessary through an amendment of the law. The Committee further held that the State party was under an obligation to ensure that similar violations of the Covenant did not occur in the future.

94 See articles 14–16 of CEDAW.

95 See articles 23–33 of the CRC.

96 Communication 1/1984, CERD/C/36/D/1/1984(1988).

97 And the UN Commission on Human Rights before it.

98 For more information, see <http://www2.ohchr.org/english/bodies/chr/special/index.htm>.

99 Adopted on 11 July 2000.

100 Morocco that pulled out of the Organisation of African Unity (OAU) (the predecessor to the AU) in 1984 in protest against the recognition by the OAU of the Western Sahara as a state.

101 See Preamble para 7 of the African Charter.

102 Such claw-back clauses are evident in, among others, article 6 (liberty and security of the person), article 8 (freedom of conscience and religion), article 9 (freedom of expression), article 10 (freedom of association), article 11 (freedom of assembly), article 12 (freedom of movement), article 13 (right to participate in government) and article 14 (right to property).

103 See *Amnesty International v Zambia* Communication 212/98, 12 Activity Report 1998–1999, para 50.

104 See *Media Rights Agenda and Others v Nigeria* Communications 105/93,



- 128/94, 130/94 and 152/96, Twelfth Activity Report 1998–1999, Annex V (Documents of the African Commission.), 18, paras 67–70.
- 105 Odinkalu (2002: 196).
- 106 Kapindu (2004).
- 107 Communication No. 241/2001, Sixteenth Activity report 2002–2003, Annex VII.
- 108 Ibid., para 84.
- 109 Odinkalu (2002: 196).
- 110 See generally, article 45.
- 111 See articles 60 and 61. Also see *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* [SERAC case]. Communication No. 155/96, Fifteenth Activity Report 2001–2002, Annex V, para 49.
- 112 Para 49.
- 113 Paras. 45–47.
- 114 Paras. 64–65.
- 115 Para 60.
- 116 Paras 61 & 65.
- 117 Hansungule (2009:233)
- 118 Thus far, the Special Rapporteur mandates have been in respect of (a) the right to life and protection from extra-judicial killings; (b) the rights of prisoners in Africa; (c) the rights of women in Africa; (d) press freedom and the right of information, (e) human rights defenders and (f) refugees and internally displaced persons. See Hansungule (2009: 257).
- 119 http://www.achpr.org/english/_info/news_en.html (accessed 27 August 2009)
- 120 Hansungule (2009: 257–258).
- 121 The ESC was adopted by the Council of Europe on 18 October 1961 and entered into force on 26 February 1965. By and large, the principal treaty (the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe on 4 November 1950 and entered into force on 3 September 1953) does not guarantee socio-economic rights.
- 122 Odinkalu (2002: 184).
- 123 Communication 15 of 2003 (ECSR), available at http://www.coe.int/t/dg3/romatravellers/jurisprudence/charter_en.asp (accessed: 20 August 2009).
- 124 Para.24.
- 125 Ibid.
- 126 Ibid.
- 127 Para.51.
- 128 The American Convention only contains a rather vacuous general



- statement in article 26 that enjoins member states to adopt measures aimed at the progressive realisation of the rights ‘implicit’ in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States. See also Odinkalu (2002: 185).
- 129 Case 12.189, Report 28/01, 22 February 2001 (Inter-American Commission).
- 130 Section 231 contains a comprehensive catalogue of the manner in which binding international agreements on South Africa can be invoked as national law.
- 131 Section 232 of the Constitution. See also Church et al. (2007: 163).
- 132 Section 233 of the Constitution.
- 133 2005 (4) SA 235 (CC) [*Kaunda* case].
- 134 Ibid, para 33. See also the case of *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) [*Daniels* case].
- 135 Section 39. See also Section 37(4)(b)(i).
- 136 Section 231(4).
- 137 In the dualist conception of international treaty law, there is a distinction between the application of a treaty ‘to’ a state and its application ‘in’ the state. The treaty applies to the state upon ratification as it is the act of ratification that binds the state to the obligations assumed under that treaty. This is irrespective of whether the treaty has been incorporated into domestic law through an Act of Parliament. The treaty applies in the state upon either express incorporation of the treaty or transformation of the same through an Act of Parliament. Incorporation and transformation are different though somehow related processes. A treaty gets incorporated where an Act of Parliament simply adopts the treaty, either wholesale or in part, as forming part of the domestic law. Transformation, on the other hand, occurs when, instead of simply adopting the treaty, the state, with a view to giving effect to its provisions, passes a piece or pieces of legislation premised on the provisions of the treaty but ‘transformed’ to suit the particular circumstances of the state concerned. Both processes entail what is called the ‘domestication’ of the treaty.
- 138 Section 231(1) of the Constitution provides that ‘the negotiating and signing of all international agreements is the responsibility of the national executive’.
- 139 Section 231(2) of the Constitution provides that ‘an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)’. Subsection (3) provides that ‘an international agreement of a technical, administrative or executive nature, or an agreement which does not



- require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time’.
- 140 Section 232 of the Constitution provides that ‘customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’.
- 141 2000 (11) BCLR 1169 (CC) [*Grootboom case*]. See also *S v Makwanyane* 1995 (3) SA 391 (CC), paras. 35, 39, 304 and 362, which is an important case on the point of the application of international law in interpreting the Bill of Rights. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* [2002 (6) BCLR 625 (W)] the High Court of South Africa (Witwatersrand Division) stated that ‘international law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language which is similar to that which has been used in international instruments. The jurisprudence of the International Covenant on Economic, Social and Cultural Rights, which is plainly the model for parts of our Bill of Rights, is an example of this. It assists in understanding the nature of the duties placed on the state’. At para 15.
- 142 [2009] ZASCA 20. The matter proceeded to the Supreme Court of Appeal where the decision, albeit with some differences on, among others, remedial issues, was affirmed. The Court made similar references to the ICESCR and General Comment 15 of the CESCR, but did not make any comments on Justice Tsoka’s sentiments on the minimum core concept. See paras. 17 and 28.
- 143 Para 35.
- 144 HRI/GEN/1/Rev.9 (Vol. I) 97.
- 145 Para 36.
- 146 Ibid.
- 147 1996(4) SA 671 (CC) [*AZAPO case*]
- 148 Ibid, para 26.
- 149 Dugard (1994: 193–194).
- 150 Customary international law has only been expressly referred to and applied in a handful of cases. See, for instance, *Van Zyl and Others v Government of the Republic of South Africa and Others* 2005 (11) BCLR 1106 (T).
- 151 Botha (2001: 255).
- 152 Botha (2001: 255).
- 153 Botha (2001: 255).
- 154 Church et al. (2007: 218). See also Olivier (2003).
- 155 See A Snellman, ‘The development of a socio-economic rights jurisprudence in South Africa – A minor field study’ available at <http://www>.



- afrikagrupperna.se/usrd/agm488.pdf (accessed: 7 August 2009).
- 156 2008 (4) BCLR 359 (CC) [*DW case*].
- 157 Ibid, para 36
- 158 HRI/GEN/1/Rev.9 (Vol.I) 47.
- 159 Art.18(a) of the 1969 Vienna Convention on the Law of Treaties.
- 160 1996 (4) BCLR 449 (CC).
- 161 Ibid, para 106.
- 162 As at 10 August 2009, there were 160 states parties to the ICESCR, of which 48 are African states.
- 163 Mbazira (2006; 1).
- 164 *First Certification case* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), paras. 15, 32.
- 165 *Second Certification case*, 1997 (12) BCLR 1653; 1998 (1) SA 655, para 19.
- 166 *Grootboom*, para 45.
- 167 These include: The Minimum Age Convention No. 138 (1973)- ratified on 30 March 2000; Convention on the Worst Forms of Child Labour No. 182 (1999) – ratified on 7 June 2000; Convention concerning Freedom of Association and Protection of the Right to Organize No 87 (1948) – ratified on 19 February 1996; and the Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively No 98 (1949) – ratified on 19 February 1996.
- 168 See the Long Title to the Act and Section 2 that states the purposes of the Act. Among other things, that section, in subsection (b), provides that '[t]he purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'.
- 169 Para 28.
- 170 HRI/GEN/1/Rev.9 (Vol.I) 11.
- 171 Para 8(a).
- 172 Para 8(c).
- 173 Chenwi (2008: 38).
- 174 2004 (12) BCLR 1268 (CC) [*PE Municipality case*].
- 175 Ibid., para30.
- 176 Para 11.
- 177 Para 14.
- 178 Para 11.
- 179 Section 4 of the Act.
- 180 *Khosa and Others v Minister of Social Development and Others; Mahlale and Another v Minister of Social Development* 2004 (6) SA 505 (CC) [*Khosa case*].
- 181 Ibid, para 51.



- 182 Ibid.
- 183 Case No. JR 2877/06 (Unreported, Decision of 28 March 2008, Labour Court of South Africa [*Discovery Health* case], Johannesburg).
- 184 Ibid., para 42.
- 185 1999 (6) BCLR 615 (CC).
- 186 Ibid., para 25.
- 187 Para 27.
- 188 Para 28.
- 189 2003 (2) BCLR 182 (CC).
- 190 A useful account of the observations and surveys of the Committee of Experts on issues relating to freedom of association is to be found in the ILO (1983).
- 191 Para.30.
- 192 Ibid.
- 193 *Makwanyane*, para 35.
- 194 Para 46. Emphasis added.
- 195 Para 47.
- 196 Ibid.
- 197 Para 45
- 198 HRI/GEN/1/Rev.9 (Vol.I) 7.
- 199 In Paragraph 9 of General Comment 3, the CESCR states: ‘nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.’
- 200 *Grootboom*, para 45. Emphasis added.
- 201 *Joe Slovo*, para 237. Emphasis added.
- 202 [*TAC* case] 2002 (5) SA 703; 2002 (10) BCLR 1075.
- 203 RI/GEN/1/Rev.9 (Vol.I) 78.
- 204 General Comment 14, para12.
- 205 Ibid., para 43(d).
- 206 Ibid, para 43(e).



- 207 *Khosa*, para 47.
- 208 Millard (2008: 37, 42).
- 209 General Comment 3, para 9.
- 210 *Ibid.*, para 1.
- 211 *Ibid.*
- 212 *Ibid.*, para 2
- 213 *Ibid.*
- 214 *Ibid.*, para 10.
- 215 Bilchitz (2003: 13) argues: ‘The [Constitutional] Court credits the UN Committee with developing the concept of a minimum core obligation. But, it is arguable that the origins of the concept do not merely lie with the third General Comment released in 1990, but rather that its emergence has to do with its usefulness in addressing questions of importance in the enforcement of rights.’
- 216 Bilchitz (2003: 12).
- 217 Bilchitz (2003: 12).
- 218 Bilchitz (2003: 12).
- 219 For a broader philosophical argument, see Bilchitz (2007).
- 220 *Grootboom*, para 31.
- 221 *Ibid.*, paras 18 and 29.
- 222 *Ibid.*, para 44.
- 223 *Ibid.*
- 224 *Ibid.*
- 225 *Ibid.*
- 226 See generally Bilchitz (2007); also see Chirwa (2003: 174), Kapindu (2006: 510), and Sacco (2005: 105–128). There is also some sporadic praise for the approach adopted by the Court (see generally Fitzpatrick and Slye (2003: 669-680); and Wesson (2004: 284).
- 227 *Khosa* case, para 52.
- 228 Bilchitz (2007: 149).
- 229 Kapindu (2006: 510).
- 230 See *Grootboom* case, para 33; also Fitzpatrick and Slye (2003: 677).
- 231 De Vos (2005: 91).
- 232 *TAC*, para 28.
- 233 *Ibid.*, para 35.
- 234 *Ibid.*, para 34.
- 235 *Ibid.*, para 37.
- 236 *Ibid.*, para 38.
- 237 *Ibid.*
- 238 *Ibid.*
- 239 Paras 131 and 133 respectively.
- 240 Para 33.
- 241 Para 34.



- 242 My emphasis.
- 243 Para 35.
- 244 *SERAC*, paras. 61 and 65. After finding that the right to food, though not directly provided for under the Charter, is implied in, among others, the right to human dignity, the African Commission proceeded to state at para 65 that ‘Without touching on the duty to improve food production and to guarantee access, *the minimum core of the right to food* requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves’ (emphasis added).
- 245 Brand (2005: 8).
- 246 Brand (2005: 9)
- 247 Brand (2005: 9)
- 248 Okafor (2007: 207).
- 249 Okafor (2007: 207).
- 250 Currie and De Waal (2005: 591).