

**Improving domestic enforcement of socio-economic rights through  
international law: Ratification of the International Covenant on  
Economic, Social and Cultural Rights by South Africa**

**Dissertation submitted in partial fulfilment of the requirements of the degree LLM  
(Human Rights and Democratisation in Africa)**

**by**

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**Date of Submission: 30 October 2009**

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## List of abbreviations and acronyms

African Charter	African Charter on Human and Peoples' Rights
African Children's Charter	African Charter on the Rights and Welfare of the Child
African Commission	African Commission on Human and Peoples' Rights
African Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
BCLR	Butterworths Constitutional Law Review
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPRs	Civil and Political Rights
CC	Constitutional Court
CRC	Convention on the Rights of the Child
ESCR	Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OP-ICESCR	The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SA	South Africa
SAHRC	South African Human Rights Commission
SERs	Socio-Economic Rights
UN	United Nations
UN Committee on ESCR	United Nations Committee on Economic, Social and Cultural Rights
Universal Declaration	Universal Declaration of Human Rights
ZACC	Constitutional Court of South Africa

## Table of contents

Plagiarism declaration.....	ii
List of abbreviations and acronyms .....	iv
Table of contents .....	v

### Chapter 1 - Introduction

1.1	Background of the study .....	1
1.2	Problem Statement .....	3
1.3	Research questions.....	4
1.4	Significance of the study .....	5
1.5	Objectives of the study .....	5
1.6	Literature review .....	5
1.7	Methodology .....	6
1.8	Summary of chapters.....	6
1.9	Limitations of the study .....	7

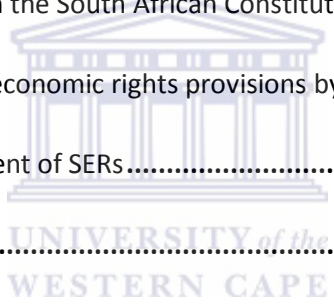
### Chapter 2 - An overview of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol

2.1	Introduction .....	8
2.1.1	The rationale for the distinction between civil and political rights and socio-economic rights .....	8
2.2	The interdependence and interrelatedness of human rights .....	9
2.2.1	The normative differences between the ICCPR and the ICESCR.....	10

2.2.2	Towards a universal interdependency of civil, political and socio-economic rights.....	11
2.3	The obligations of states parties under the ICESCR .....	12
2.4	The application of the ICESCR at the domestic level.....	13
2.5	Monitoring the implementation of the ICESCR .....	14
2.6	Conclusion .....	16

**Chapter 3 - Enforcement of socio- economic rights in the South African context**

3.1	Introduction.....	17
3.2	The South African approach to the enforceability of SERs .....	18
3.3	Socio-economic rights in the South African Constitution and the ICESCR distinguished ..	19
3.4	Interpretation of socio-economic rights provisions by the Constitutional Court .....	21
3.5	Remedies for infringement of SERs.....	28
3.6	Conclusion .....	30



**Chapter 4 - The likely benefits of ratifying the International Covenant on Economic Social and Cultural Rights and its Optional Protocol for South Africa**

4.1	Introduction.....	31
4.2	The added benefits of ratifying the ICESCR for South Africa.....	32
4.2.1	State reporting mechanism.....	32
4.2.2	The effects of ratification on the interpretation of SERs provisions of the Constitution ..	33
4.2.3	The ‘mobilisation of shame’ principle.....	34
4.2.4	The interdependence and interrelatedness of CPRs and SERs .....	35
4.2.5	The introspection of incompatible legislation .....	35

4.2.6	The insufficiency of the South African Bill of Rights .....	36
4.2.7	The principle of continuity .....	36
4.3	The added value for South Africa to ratify the Optional Protocol .....	36
4.3.1	The dynamic interpretation of the Committee on ESCR.....	37
4.3.2	The alleged helplessness of a state party in front of the Committee on ESCR.....	38
4.3.3	Enhancing compliance with ICESCR provisions.....	38
4.3.4	Complementing the state reporting procedure.....	39
4.3.5	Overjudicialisation of human rights .....	40
4.3.6	Assuming a leadership role in human rights at the regional level.....	40
4.4	Conclusion .....	41
<b>Chapter 5 - Conclusion and recommendations .....</b>		<b>42</b>
5.1	Conclusion .....	42
5.2	Recommendations .....	43
5.2.1	State actors .. ..	43
5.2.2	Non-state actors.....	45
5.2.3	The role of the SAHRC.....	45
5.2.4	The role of the African Commission.....	46
<b>Bibliography .....</b>		<b>47</b>



# Chapter 1

## Introduction

### 1.1 Background of the study

Pre-1994 South Africa was characterised by apartheid, that is, structured and legitimate discrimination practices based on race. As a result of international pressure and internal resisting forces, the year 1994 marked the end of that regime, after which a new history of South Africa had started. Post-1994 saw the adoption of the Constitution of South Africa (1996) with a range of rights – civil and political rights (CPRs) as well as socio-economic rights (SERs). The end of apartheid was also marked by South Africa signing the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup> and the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>2</sup> The latter is the primary treaty at the United Nations (UN) level on economic, social and cultural rights.<sup>3</sup>

Considering the South African Constitution's far reaching commitment to economic, social and cultural rights, it was hoped that signature of the ICESCR would, without any substantial delay, be followed by ratification. In 1995, Professor Sandra Liebenberg wrote that 'following the signature of the Covenant (the ICESCR), the Department of Foreign Affairs has indicated that ratification on behalf of South Africa can be expected in the near future.'<sup>4</sup>

However, until now, the ICESCR has not yet been ratified. In terms of its human rights commitment, South Africa has ratified five of the six major treaties protecting human rights<sup>5</sup> namely, the ICCPR, the International Convention on the Elimination of All Forms of Racial

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<sup>1</sup> The ICCPR was adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. South Africa signed the ICCPR on 3 October 1994 and ratified it on 10 October 1998.

<sup>2</sup> The ICESCR was adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. South Africa signed the ICESCR on 3 October 1994 but has not yet ratified it.

<sup>3</sup> See chapter 2 of this dissertation for further discussion on the ICESCR.

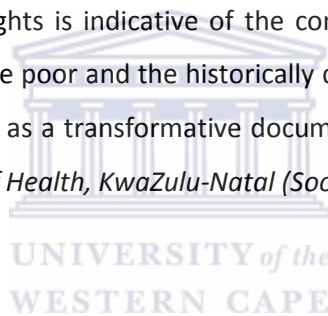
<sup>4</sup> S Liebenberg 'The International Covenant on Economic, Social and Cultural rights and its implications for South Africa' (1995) 11(3) *South African Journal on Human Rights* 371.

<sup>5</sup> L Mashava 'Time to ratify the International Covenant on Economic, Social and Cultural Rights' (2000) 2(3) *ESR Review* 18.



Discrimination (CERD)<sup>6</sup>, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>7</sup>, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>8</sup> and the Convention on Rights of the Child (CRC).<sup>9</sup> The ICESCR is therefore the outstanding major human rights treaty which South Africa has not ratified to date. It is to be noted that the ICESCR is considered as part of the International Bill of Rights along with the ICCPR and the Universal Declaration of Human Rights (Universal Declaration).<sup>10</sup> Moreover, as will be seen subsequently, South Africa's Constitution is modelled on the ICESCR.<sup>11</sup> Hence, one may question why the ICESCR, as one of the major international human rights instrument, was singled out from the ratification process, especially considering the extensive SERs guarantees in its Constitution.

SERs<sup>12</sup> are included in the South African Constitution (the Constitution) as justiciable rights. This inclusion was preceded by objections relating to separation of powers and institutional competence concerns, which the Constitutional Court did not find to be valid.<sup>13</sup> The inclusion of SERs in the Constitution as justiciable rights is indicative of the commitment of the new constitutional order to redress the situations of the poor and the historically disadvantaged groups.<sup>14</sup> Accordingly, the Constitution is viewed by many as a transformative document. As Justice Chaskalson succinctly puts it in *Soobramaney v Minister of Health, KwaZulu-Natal (Soobramaney)*:<sup>15</sup>



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<sup>6</sup> The CERD was adopted by UN General Assembly resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969. South Africa signed the CERD on 3 October 1994 and ratified it on 10 October 1998.

<sup>7</sup> The CEDAW was adopted by the UN General Assembly resolution 34/180 of 18 December 1979 and entered into force on 3 September 1981. South Africa signed the CEDAW on 29 January 1993 and ratified it on 15 December 1995.

<sup>8</sup> The CAT was adopted by UN General Assembly resolution 39/46 of 10 December 1984 and entered into force on 26 June 1987. South Africa signed the CAT on 29 January 1993 and ratified it on 10 December 1998.

<sup>9</sup> The CRC was adopted by UN General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990. South Africa signed the CRC on 29 January 1993 and ratified it on 16 June 1995.

<sup>10</sup> The Universal Declaration was adopted by the UN General Assembly on 10 December 1948.

<sup>11</sup> See chapter 3 of this dissertation.

<sup>12</sup> The use of the terminology SERs does not exclude cultural rights, when discussing these rights in the international or general context.

<sup>13</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC). (*First Certification judgment*) The justiciability debate is discussed further in chapter 3 of this dissertation.

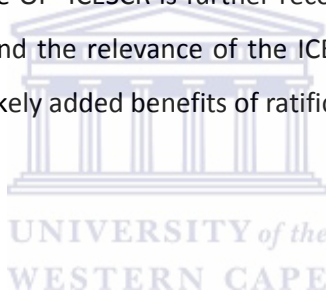
<sup>14</sup> S Liebenberg 'Socio-economic rights' in Chaskalson *et al Constitutional Law of South Africa* (1998) 41-1.

<sup>15</sup> 1997 (12) BCLR 1696 (CC) para 8.

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.

However, over a decade since the Constitution was adopted and the subsequent interpretation of SERs by the courts<sup>16</sup>, access to health care, housing, education and social security for the poor remain matters of deep concern. Though the Constitutional Court's jurisprudence has been progressive, there is need for improvement, especially for poor people who are not able to get redress.

Therefore, the ratification of the ICESCR and its Optional Protocol (OP-ICESCR)<sup>17</sup> may complement the role of the Constitutional Court and promote the SERs of the poor more efficiently and adequately. The adoption of the OP-ICESCR is further recognised at the international level and confirms the justiciability of SERs and the relevance of the ICESCR in fighting poverty. As a result, there may be a case to discuss the likely added benefits of ratification of the ICESCR and OP-ICESCR.



## 1.2 Problem Statement

Poverty is still a challenge in South Africa and the poor still do not have adequate access to clean water, health services or housing. South Africa has 10.7%<sup>18</sup> of a population of 49.32 million<sup>19</sup> living below the poverty line, that is, below \$1 a day. In addition, the country has an unemployment rate

<sup>16</sup> See chapter 3 section 3.4 of this dissertation.

<sup>17</sup> The OP-ICESCR was unanimously adopted on 10 December 2008 and has been opened for signature last September this year. For further reading, see L Chenwi 'Correcting the historical asymmetry between rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2009) 9 *African Human Rights Law Journal* 23.

<sup>18</sup> The Ibrahim Index of African Governance 'Poverty rate at \$1 per person per day National poverty rate Income inequality (gini index)' (2008) 2 <[http://site.moibrahimfoundation.org/index-2008/pdf/final%20papers/Final%20SSC%20Files%20pdf/V%20Final%20Human%20Development%20pdf/Poverty/Poverty%20\\$1%20per%20day.pdf](http://site.moibrahimfoundation.org/index-2008/pdf/final%20papers/Final%20SSC%20Files%20pdf/V%20Final%20Human%20Development%20pdf/Poverty/Poverty%20$1%20per%20day.pdf)> (accessed 21 October 2009).

<sup>19</sup> Statistics South Africa 'Mid-year population estimates, 2009' (2009) 7 <<http://www.statssa.gov.za/PublicationsHTML/P03022009/html/P03022009.html>> (accessed 21 October 2009).

of 23.6%.<sup>20</sup> Hence, these statistics show inadequate enforcement of SERs in the country, which establishes the need to consider the ICESCR in completing domestic efforts.

The Constitutional Court, in interpreting and enforcing the SERs in the Constitution, has referred to the interpretation of these rights in the ICESCR by the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR). However, the Constitutional Court has not accepted the minimum core approach which caters more adequately for the needs of the poor in providing more specific and effective remedies.<sup>21</sup> Hence, it is important to consider the ratification of the ICESCR as this could compel the Constitutional Court to consider this approach in addition to the reasonableness standard of reviewing SERs.<sup>22</sup>

Furthermore, the ultimate court at the national (South African) level where victims of SERs violations can appeal is the Constitutional Court and if no adequate remedy is granted, they can only have recourse to the African Commission on Human and Peoples' Rights (African Commission) as South Africa has ratified the African Charter on Human and Peoples' Rights (African Charter).<sup>23</sup> However, the OP-ICESCR, if signed and ratified by South Africa, would provide claimants with a choice between the regional system and the UN system.<sup>24</sup>

### 1.3 Research questions

The research questions which flow from the background and the problem statement are two-fold:

1. Is the domestic protection and enforcement of SERs sufficient *per se* without the ratification of the ICESCR and the OP-ICESCR; and

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<sup>20</sup> Statistics South Africa 'Quarterly labour force survey, Quarter 2, 2009' (2009) 5 <<http://www.statssa.gov.za/PublicationsHTML/P02112ndQuarter2009/html/P02112ndQuarter2009.html>> (accessed 21 October 2009).

<sup>21</sup> See *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC) (*Grootboom*); *Minister of Health and Others v Treatment Action Campaign* 2002 5 SA 721 (CC) (*TAC*); and the most recent case of *Lindiwe Mazibuko & Others v City of Johannesburg & Others* Case CCT 39/09 2009 ZACC 28 (*Mazibuko*).

<sup>22</sup> See chapter 3 section 3.4 of this dissertation.

<sup>23</sup> The African Charter was adopted on 27 June 1981 by the OAU and entered into force on 21 October 1986. South Africa ratified the African Charter on 9 July 1996.

<sup>24</sup> See chapter 2 section 2.5 of this dissertation where the OP-ICESCR is discussed in more detail and see chapter 4 section 4.3 of this dissertation in view of the latter's benefits for South Africa.

2. Would the ratification of the ICESCR and the OP-ICESCR enhance the domestic protection and enforcement of SERs in South Africa?

## 1.4 Significance of the study

The value that this study will bring will be two-fold. Firstly, it would contribute to the literature on SERs in South Africa through the assessment of not only the added benefits the ratification of the ICESCR will bring but also the advantages of ratifying the OP-ICESCR. At present, academics have mostly focused on the need of ratifying the ICESCR but not really assessing it in depth. Moreover, as to date no study has been done on the likely benefits of South Africa becoming a party to the OP-ICESCR. Secondly, on the practical side, the study would also provide general recommendations as to how the various actors, be it state or non state actors, can contribute in enhancing the protection of SERs through the use of the ICESCR and the OP-ICESCR. The importance of this study is its illustration of how the provisions of the ICESCR and the OP-ICESCR, upon ratification, can be of help in alleviating poverty and providing better SERs provisions to South Africans.

## 1.5 Objectives of the study

This study aims to:

- Argue the added benefits for South Africa to ratify the ICESCR and the OP-ICESCR as well as their implications.
- Explore some key laws, policies and case law which would give a clear picture as to where South Africa stands in its delivery of SERs.
- Expose some of the key areas of difficulties in the implementation and enforcement of SERs in South Africa.

## 1.6 Literature review

There is limited literature on the implications of South Africa ratifying the ICESCR. Liebenberg,<sup>25</sup> for instance, analysed the implications of the ratification of the ICESCR at the time the interim

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<sup>25</sup> Liebenberg (n 4 above) 359 – 378.

Constitution of South Africa was in place. However, the interim Constitution, unlike the 1996 Constitution, did not include the right to adequate housing, social security and to the highest attainable standard of physical and mental health. This study differs substantially from Liebenberg's as the evaluation is undertaken at a time when the Constitution incorporates justiciable SERs, which have been implemented and enforced for more than a decade now.

In addition, a relevant work to this study is that of De Vos<sup>26</sup> who scrutinizes the justiciability of SERs under the 1996 Constitution and explains how in practice it might be properly applied. The work of Eide *et al.*<sup>27</sup> is also relevant to this study with regard to the discussion on the ICESCR.

Also, recent studies which deal with the ratification of the OP-ICESCR have not focussed on South Africa, for instance the study of the process and consequences of ratifying the OP-ICESCR by Norway is used in this study.<sup>28</sup> This study would add to the existing literature as it discusses the ratification by South Africa of the recently adopted OP-ICESCR, its likely implications and the added benefits it would bring in furthering the protection of SERs in the country.

## 1.7 Methodology

The methodology employed was mainly Desktop research, relying on books, journals, reports and statistics as well as case law and legislation on SERs in South Africa. In addition, documents such as the ICESCR, OP-ICESCR and the general comments of the UN Committee on ESCR were used.

## 1.8 Summary of chapters

**Chapter 1** is the introduction. **Chapter 2** focuses on the ICESCR and the OP-ICESCR, explaining its present status with regard to South Africa and if ratified, its legal status and mechanisms for its enforcement at the national level. **Chapter 3** introduces the substantive content of the domestic

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<sup>26</sup> P de Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13(1) *South African Journal on Human Rights* 67 – 101.

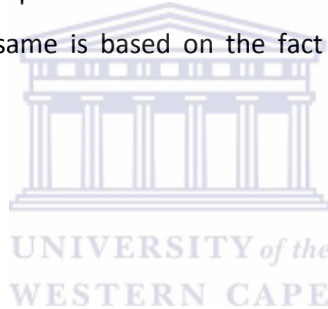
<sup>27</sup> A Eide *et al* (eds) *Economic, Social and Cultural Rights: A Textbook* (2001).

<sup>28</sup> See BA Simmons 'Should states ratify? - Process and consequences of the Optional Protocol to the ICESCR' (2009) 27 *Nordisk Tidsskrift Menneskerettigheter* 64; and IL Backer 'Ideals and implementation – Ratifying another complaints procedure?' (2009) 27 *Nordisk Tidsskrift Menneskerettigheter* 91.

protection of SERs in comparison with the ICESCR. An overview of key domestic case law on SERs is also provided. This is followed by an assessment of the contribution or use of the ICESCR in domestic jurisprudence. **Chapter 4** focuses on the likely added benefits of ratification of the ICESCR and the OP-ICESCR, that is, the impact on the domestic legal order. Lastly, **Chapter 5** provides a conclusion to the study, including the role of the various players in the promotion of SERs in South Africa through the ICESCR.

## **1.9 Limitations of the study**

This study, due to the limited length, only gives a ‘snapshot,’ that is, just an overview of the likely added benefits of ratifying the ICESCR and the OP-ICESCR without really going into details on the specific rights and provisions. In addition, being an overview, the dissertation only makes reference to key South African case law on the matter, engaging in an in depth study of all the SERs jurisprudence. The focus on the jurisprudence of the Constitutional Court might also be seen as a limitation, but the reason behind same is based on the fact that it is the highest jurisdiction in constitutional matters.



## Chapter 2

### An overview of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol

#### 2.1 Introduction

The foundation of international human rights law has been laid by the Universal Declaration. Following the adoption of the Universal Declaration, the process of translating the rights recognised in it into binding international conventions gave birth to the ICCPR<sup>29</sup> and the ICESCR.<sup>30</sup> The three of them taken together are known as the International Bill of Rights. It is to be borne in mind that the Universal Declaration contains both sets of rights; that is, CPRs and SERs.<sup>31</sup> Hence, the question arises as to why two separate international treaties were adopted for each set of rights. Does it mean that SERs are different from CPRs? This raises the need to briefly explore the rationale for such a distinction.

##### 2.1.1 The rationale for the distinction between civil and political rights and socio-economic rights

There were political reasons which led to the distinction between these two sets of rights. During the Cold War, the states from the East, that is socialist countries, recognised SERs whereas states from the West, which were capitalist countries emphasised CPRs. This division in political ideologies gave rise to academic and legal foundations justifying the separation of these two sets of rights. Those advocating for two separate covenants were of the opinion that, on the one hand, CPRs were

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<sup>29</sup> 165 countries are party to the ICCPR. All African countries are party to the ICCPR except Comoros, Guinea Bissau and Sao Tome and Principe. See <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en)> (accessed 5 October 2009).

<sup>30</sup> As at 30 October 2009, it had 160 member states. 5 African countries have not ratified the ICESCR including South Africa, namely, Botswana, Comoros, Mozambique and Sao Tome and Principe. <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)> (accessed 5 October 2009).

<sup>31</sup> Arts 3 to 21 provide for CPRs to which everyone is entitled. These CPRs are: the right to life, liberty and personal security, including freedom from slavery, torture and arbitrary arrest, as well as the rights to a fair trial, free speech and free movement and privacy. Whereas arts 22 to 27 provide for the economic, social and cultural rights that is, the right to social security, right to work, fair remuneration and leisure, right to an adequate standard of living for health, well-being and education, and the right to participate in the cultural life of the community.

‘enforceable, or justiciable, or of an “absolute” character’ while on the other hand, SERs could not be immediately enforced as they were to be implemented progressively, hence were seen as programmatic rights.<sup>32</sup> Nevertheless, those in favour of one document containing both sets of rights argued that human rights could not unequivocally be distinguished in different categories nor ‘could they be so classified as to represent a hierarchy of values.’<sup>33</sup> International support weighed more in favour of capitalist countries and two separate instruments were drawn. However, those political standpoints did not truly portray that the war between political ideologies in fact involved two sets of rights which are ‘universal, indivisible, interdependent and interrelated.’<sup>34</sup>

## 2.2 The interdependence and interrelatedness of human rights

The Vienna Declaration was the international instrument that explicitly declared that all human rights must be treated ‘in a fair and equal manner, on the same footing, and with the same emphasis.’<sup>35</sup> This interdependency is also reflected in the preambles of both the ICCPR and the ICESCR, which provide that the ultimate freedom of human beings can be achieved only when every human being enjoys CPRs as well as SERs.<sup>36</sup> In addition, since the Universal Declaration contains both sets of rights, it can be concluded that it was drafted in the letter and spirit of indivisibility and interdependency between CPRs and SERs.

At the African regional level, the African Charter explicitly recognises this interdependency by stating that CPRs and SERs cannot be dissociated both in their conception and universality and further stipulates that the enjoyment of SERs is essential for the full realisation of CPRs.<sup>37</sup> Hence, the distinction between the two seems to be one motivated by mainly political ideologies as mentioned

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<sup>32</sup> H Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* (2000) 245.

<sup>33</sup> Steiner & Alston (n 32 above) 245.

<sup>34</sup> The Vienna Declaration and Programme of Action (Vienna Declaration), adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5 <<http://www2.ohchr.org/english/law/vienna.htm>> (accessed 17 August 2009).

<sup>35</sup> Steiner & Alston (n 32 above) 245.

<sup>36</sup> Para 3 of the Preambles to the ICCPR and ICESCR.

<sup>37</sup> Preamble 6 to the African Charter. It is to be noted that all African states have ratified the African Charter with the exception of Morocco.



above. To further show that these rights cannot be practically alienated, two examples are cited by Steiner and Alston:<sup>38</sup>

- (1) The right to form trade unions is contained in the ICESCR, while the right to freedom of association is recognized in the ICCPR.
- ...
- (3) While the right to education and parental liberty to choose a child's school is dealt with in the ICESCR,<sup>39</sup> the liberty of parents to choose their child's religious and moral education is recognised in the ICCPR<sup>40</sup>.

Thus, because all human beings are 'born free and equal in dignity and rights',<sup>41</sup> the optimal human rights protection will only be achieved if states recognise that both sets of rights are 'two sides of the same coin' and start treating them with the same prominence. In line with the above, the international community is increasingly moving towards a universal acceptance of the indivisibility and interdependency of human rights. Despite their undisputed link, there are however normative differences between the ICCPR and the ICESCR which need to be highlighted.

### 2.2.1 The normative differences between the ICCPR and the ICESCR

The first difference lies in the way article 2(1) of both covenants have been framed whereby that of the ICCPR provides for a state party to 'undertake to respect and to ensure to all individuals ... the rights recognized' in the ICCPR, whereas the ICESCR provides for a state party to 'take steps ... to the maximum of its available resources ... [towards] achieving progressively the full realization of the rights ...' This clearly shows that the obligation on the state party under the ICCPR is different from that under the ICESCR. The ICESCR aims at progressive realisation of SERs whereas CPRs are to be immediately enforced. However, the ICESCR not only perceives full realization of SERs in a progressive manner while giving recognition to the limited resources available to a state party, but 'it also imposes various obligations which are of immediate effect.'<sup>42</sup>

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<sup>38</sup> Steiner & Alston (n 32 above) 247.

<sup>39</sup> Art 13 of the ICESCR.

<sup>40</sup> Art 18 of the ICCPR.

<sup>41</sup> Art 1 of the Universal Declaration.

<sup>42</sup> UN Committee on ESCR General Comment No 3, The nature of states parties obligation, UN Doc E/1991/23 (1990), para 1. An example would be the exercise of the rights without discrimination as set forth by article 2(2) of the ICESCR.

Another difference lies in the phraseology of the different rights set forth in the two covenants. The ICCPR, in defining its rights, uses terms such as '[e]veryone has' or '[n]o one shall' whereas the ICESCR uses the terminology '[s]tates parties ... recognize'<sup>43</sup> The difference in terminology can be explained by the fact that SERs are seen as positive rights which involve positive duties on the state whereas CPRs are seen as negative rights suggesting that states should refrain from intervening in peoples' private lives and in the exercise of their freedoms. Nonetheless, despite these differences, there exist substantive indivisibility, interdependency and interrelatedness between those two sets of rights. For instance, the right to vote which is known to be a CPR also contains positive duties which require resource allocations on behalf of the state. In other words, the state needs to provide huge financial resources for elections to be held and allow citizens to cast their votes. Hence, the argument that CPRs are seen as having only negative duties and not positive ones does not seem to apply.

### **2.2.2 Towards a universal interdependency of civil, political and socio-economic rights**

The indivisibility and interdependency of CPRs and SERs were seen through the drafting of subsequent international human rights treaties. Three treaties at the UN level would be used briefly as examples here, namely the CRC<sup>44</sup>, CERD<sup>45</sup> and CEDAW.<sup>46</sup> The three aforesaid treaties all respectively contain both sets of rights, that is, CPRs and SERs. For instance, article 2(2) of the CERD and article 3 of the CEDAW set forth explicitly the equal exercise and enjoyment of SERs and CPRs. Concerning the CRC, it provides for freedom of expression,<sup>47</sup> freedom of association<sup>48</sup> along with other CPRs together with the right to education<sup>49</sup> and the right to health,<sup>50</sup> among other SERs. With the ratification of the CRC by 193 states<sup>51</sup>, it can be said that there is a universal recognition of the indivisibility and interdependency of CPRs and SERs. Despite the interrelatedness that exists

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<sup>43</sup> Steiner & Alston (n 32 above) 246.

<sup>44</sup> See chapter 1 section 1.1 of this dissertation.

<sup>45</sup> See chapter 1 section 1.1 of this dissertation.

<sup>46</sup> See chapter 1 section 1.1 of this dissertation.

<sup>47</sup> Art 13 of the CRC.

<sup>48</sup> Art 15 of the CRC.

<sup>49</sup> Art 28 of the CRC

<sup>50</sup> Art 24 of the CRC.

<sup>51</sup> As of 21 October 2009. See <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)> (accessed 21 October 2009)

between these two sets of rights, the effect and nature of obligations under the ICESCR are distinct and unique. For that reason, the obligations which arise under the latter have to be dealt with.

### 2.3 The obligations of states parties under the ICESCR

The obligations of states parties under the ICESCR include both obligations of conduct and result.<sup>52</sup> The ICESCR provides that the full realisation of SERs cannot be achieved immediately; therefore the state party should take steps to progressively achieve these rights within its available resources.<sup>53</sup> There may be an impression that the rights under the ICESCR only seem to be of progressive realisation. However, the ICESCR also provides for rights of immediate implementation.<sup>54</sup> In addition, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines)<sup>55</sup> states that the ICESCR imposes three types of obligations namely, the obligations to respect, protect and fulfil<sup>56</sup> and that each of these obligations contains both obligations of conduct and result.<sup>57</sup> In fact, the Committee on ESCR has applied this 'tripartite typology'<sup>58</sup> and this has been



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<sup>52</sup> General Comment No 3 (n 42 above) para 1. The obligation of conduct refers to the actions by the state party aimed at meeting the realisation of SERs whereas the obligation of result refers to the requirement of a state party to achieve a particular specific target.

<sup>53</sup> General Comment No 3 (n 42 above) para 1 & 2 and art 2(1) of the ICESCR. In addition, the steps to be taken should be 'deliberate, concrete and targeted ... towards meeting the obligations ...'

<sup>54</sup> General Comment No 3 (n 42 above) para 1 & 5. The rights of immediate implementation are equal rights of men and women (article 3), equal pay for equal work (article 7(a)(i)), the right to form trade unions and the right to strike (article 8), the right of children to special protection (article 10(3)), the right to free primary education (article 13(2)(a)), the freedom of choice of school (article 13(3)), the freedom to establish schools (article 13(4)), and the freedom for scientific research (article 15(3)).

<sup>55</sup> 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691 - 705.

<sup>56</sup> Maastricht Guidelines (n 55 above) 693.

<sup>57</sup> Maastricht Guidelines (n 55 above) 694.

<sup>58</sup> M Sepulveda *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 15.

expressly done with regard to the rights to adequate food<sup>59</sup>, education<sup>60</sup> and health.<sup>61</sup> According to the Maastricht Guidelines:<sup>62</sup>

The obligation to respect requires the state to refrain from interfering with the enjoyment of [SERs] ...  
The obligation to protect requires states to prevent violations of such rights by third parties [and] ...  
[t]he obligation to fulfil requires the state to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of those rights.

In addition, the South African Bill of Rights recognises not only the three aforesaid levels of obligations, but also explicitly recognises the obligation to promote human rights.<sup>63</sup> Further, the Maastricht Guidelines consider that the 'failure to perform any of these three obligations constitute a violation of these rights.'<sup>64</sup>

The effect of ratification of the ICESCR would also include its status in the domestic jurisdiction of the state party and the approach to be adopted to implement its obligations.

## 2.4 The application of the ICESCR at the domestic level

The domestic application of the ICESCR follows the general principles of public international law, that is, 'a party cannot invoke the provisions of its internal law as justification for its failure to perform a treaty'<sup>65</sup> and '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating ...[his] fundamental rights.'<sup>66</sup> Flowing from these two principles, international law requires a state, upon ratification of a treaty, to set up national remedies in case of breach of rights set forth in the treaty. There is clearly a 'primacy of national remedies'<sup>67</sup> as even

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<sup>59</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No 12, Right to adequate food, UN Doc E/C.12/1999/5 (1999) para 15.

<sup>60</sup> UN Committee on ESCR General Comment No 13, The right to education, UN Doc E/C.12/1999/10 (1999) para 46.

<sup>61</sup> UN Committee on ESCR General Comment No 14, The right to the highest attainable standard of health, UN Doc E/C.12/2000/4 (2000) para 34 – 37.

<sup>62</sup> Maastricht Guidelines (n 55 above) 694.

<sup>63</sup> Article 7(2) of the Constitution; further discussed in chapter 3 of this dissertation.

<sup>64</sup> Maastricht Guidelines (n 55 above) 694.

<sup>65</sup> UN Committee on ESCR General Comment No 9, The domestic application of the Covenant, UN Doc E/C.12/1998/24 (1998) para 3, citing article 27 of the Vienna Convention on the Law of Treaties 1969.

<sup>66</sup> General Comment No 9 (n 65 above) para 3, citing article 8 of the Universal Declaration.

<sup>67</sup> General Comment No 9 (n 65 above) para 4.

before having recourse to international complaints mechanisms, domestic remedies have to be exhausted. In the event that violations of treaty obligations take place, international avenues are 'only supplementary to effective national remedies.'<sup>68</sup> In view of the importance of national remedies and the fact that the ICESCR does not precisely set forth what measures are to be adopted by states parties in order to give effect to its provisions, the Committee on ESCR has designed principles to be followed in that line of action.<sup>69</sup> In addition, the remedies need not necessarily be judicial remedies, but need to be 'accessible, affordable, timely and effective.'<sup>70</sup> It is worth noting at this point that, though South Africa has not ratified the ICESCR, it has constitutionally entrenched SERs which are justiciable.<sup>71</sup> However, for international norms of SERs to be recognised in domestic jurisdictions, states should at least express their consent in ratifying the ICESCR. Upon ratification, states would have to implement the ICESCR and ensure, as directed by the Committee on ESCR, that they adopt judicial or other effective remedies for the implementation of SERs.<sup>72</sup>

The adoption of appropriate means to give effect to the provisions of the ICESCR<sup>73</sup> is incomplete without an assessment of the monitoring system which ensures compliance with the ICESCR provisions at the international level.

## 2.5 Monitoring the implementation of the ICESCR

The Committee on ESCR<sup>74</sup> is responsible for monitoring the implementation of the ICESCR.<sup>75</sup> It consists of 18 independent experts. States parties to the ICESCR are under a legal obligation to

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<sup>68</sup> General Comment No 9 (n 65 above).

<sup>69</sup> General Comment No 9 (n 65 above) paras 7& 8 provide for the following principles: First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations... [and] justiciability; second, account should be taken of the means which have proved to be most effective in the country concerned; third, while the Covenant does not formally oblige states to incorporate its provisions in domestic law, such an approach is desirable.

<sup>70</sup> General Comment No 9 (n 65 above) para 9.

<sup>71</sup> See chapter 3 for further discussion of the South African context.

<sup>72</sup> General Comment No 3 (n 42 above) para 4.

<sup>73</sup> General Comment No 9 (n 65 above) para 1.

<sup>74</sup> According to Part IV of the ICESCR, the UN Economic and Social Council (ECOSOC) is supposed to be the body responsible for ensuring compliance at international level. However, the Committee on ESCR was established under ECOSOC resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the ICESCR.

<sup>75</sup> ECOSOC resolution 1985/17 (n 74 above).

submit an initial report within two years of ratifying the ICESCR and thereafter periodic reports<sup>76</sup> every 5 years.<sup>77</sup> The Committee on ESCR also provides its interpretation of the provisions of the ICESCR in the form of general comments.<sup>78</sup> The only monitoring system which existed to ensure effective implementation of the ICESCR was the submission of periodic reports to the Committee on ESCR which would in turn prepare concluding observations expressing, amongst others, the areas of concern and make recommendations to the state party. Such a monitoring system may be effective if widely published, thereby, allowing non-governmental organisations (NGOs) and civil society to exert pressure on the government to implement the proposed recommendations. However, in no way does this provide an effective and timely remedy to individual or group complainants living in jurisdictions where SERs are not justiciable. Hence, the need arises for recognising the international justiciability of SERs.

With regard to individual or group complaints, on 10 December 2008 as noted earlier, the UN General Assembly unanimously adopted the OP-ICESCR,<sup>79</sup> which empowers the Committee on ESCR to receive and consider communications. The latter is not yet in force, but opened for signature on 24 September 2009 and has been signed by 30 countries as at 22 October 2009.<sup>80</sup> It will come into force after 10 ratifications.<sup>81</sup> Under the OP-ICESCR, communications can be submitted either by individuals (including groups of individuals)<sup>82</sup> or by states parties<sup>83</sup> to the Committee on ESCR. Submissions should be made within the time limit of one year after exhaustion of domestic remedies

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<sup>76</sup> The reports must follow specific guidelines known as Guidelines on Treaty-Specific Documents developed by the Committee on ESCR and these reports are to be submitted by states parties under arts 16 & 17 of the ICESCR which were adopted by the Committee at its 49<sup>th</sup> meeting (forty-first session) on 18 November 2008, UN Doc E/C.12/2008/2.

<sup>77</sup> ECOSOC resolution 1985/17 (n 74 above).

<sup>78</sup> General Comment No 1, Reporting by state parties, UN Doc E/1989/22 (1989), para 1 where it was stated as follows: 'At its second session, in 1988, the Committee decided (E/1988/14, para 366 and 367), pursuant to an invitation addressed to it by the Economic and Social Council (resolution 1987/5) and endorsed by the General Assembly (resolution 42/102), to begin, as from its third session, the preparation of general comments based on the various articles and provisions of the International Covenant on Economic, Social and Cultural Rights with a view to assisting the States parties in fulfilling their reporting.'

<sup>79</sup> UN General Assembly resolution A/RES/63/117.

<sup>80</sup> The following countries have signed the OP-ICESCR: Argentina, Armenia, Azerbaijan, Belgium, Chile, Congo, Ecuador, El Salvador, Finland, Gabon, Ghana, Guatemala, Guinea-Bissau, Italy, Luxembourg, Madagascar, Mali, Montenegro, Netherlands, Portugal, Senegal, Slovakia, Slovenia, Solomon Islands, Spain, Timor-Leste, Togo, Ukraine, Uruguay. See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en) (accessed 22 October 2009).

<sup>81</sup> Art 18 of the OP-ICESCR. See also Chenwi (n 17 above) 28 - 29.

<sup>82</sup> Art 1 of the OP-ICESCR.

<sup>83</sup> Art 10 of the OP-ICESCR. However, a communication can only be submitted by a state party if the latter has recognised the competence of the Committee in this regard.

and the communications should not be exclusively based on media reports for them to be admissible.<sup>84</sup>

The contribution of the OP-ICESCR to the protection of SERs can be seen through the powers granted to the Committee on ESCR, in addition to receiving complaints, to adopt interim measures ‘to avoid possible irreparable damage to the victims,’<sup>85</sup> the power to conduct inquiries into grave and systematic violations, along with the follow-up procedures.<sup>86</sup> The OP-ICESCR, as a result of its operation within the international sphere, which forces states parties to act through the concept of ‘mobilisation of shame’ (discussed subsequently) has the potential to improve the delivery of SERs even in states which have justiciable SERs like South Africa. Also, the South African Constitutional Court has adopted the reasonableness approach while rejecting the minimum core approach.<sup>87</sup> However, should the ICESCR be ratified along with the OP-ICESCR, the Court would, arguably, have to rethink its position on the minimum core approach since the ICESCR will become binding.

## 2.6 Conclusion

The ICESCR, along with the ICCPR as well as the Universal Declaration, represent the concretisation of values and ideals of human rights into obligations on states parties. Due to historical political reasons, distinctions were made between CPRs and SERs. However, with the principles of interdependence of these two sets of rights being reiterated by the Vienna Declaration, this distinction seems to weaken. Furthermore, the breakthrough of the OP-ICESCR shows that there is an increasing international recognition of the justiciability of SERs. However, the international obligations of respecting, protecting and fulfilling SERs can only be achieved if countries ratify both the ICESCR and its Optional Protocol. In essence, the realisation of SERs requires action to translate the commitments in legislation and normative instruments into reality. Consequently, the question arises as to whether South Africa needs to ratify the ICESCR knowing that it has justiciable SERs. Nevertheless, prior to embarking on the benefits of South Africa in ratifying these treaties, a study of the extent to which the rights have been enforced in South Africa is necessary.

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<sup>84</sup> These are only the essential criteria for admissibility; art 3 of the OP-ICESCR provides for others such as it should not be anonymous and it should be compatible with the ICESCR, amongst others.

<sup>85</sup> Art 5 of the OP-ICESCR.

<sup>86</sup> Art 9 of the OP-ICESCR.

<sup>87</sup> See chapter 3 section 3.4 of this dissertation.

## Chapter 3

### Enforcement of socio- economic rights in the South African context

#### 3.1 Introduction

The inclusion of SERs in the South African Constitution was not an easy task. Arguments as to whether SERs are justiciable were not only the subject matter of international discussions<sup>88</sup>, but similar arguments also repeated themselves in South Africa.<sup>89</sup> Despite having dealt with the objections of justiciability of SERs at the international level in the previous chapter, it further remains important to highlight the arguments in the South African context, mainly because these arguments are ongoing through scholarly critics and judgments of the Constitutional Court. The two main arguments were that firstly, SERs were not universally accepted rights and secondly, should the courts adjudicate on such rights, it would breach the sacrosanct principle of separation of powers. Hence, this chapter briefly revisits this debate in the domestic context and in order to show how those arguments have been counteracted.

During the past 15 years of its constitutional democracy, the South African Constitutional Court<sup>90</sup> has delivered some key judgments on SERs which shall be critically analysed, especially with regard to their interpretation and application. In analysing the jurisprudence of the Constitutional Court, reference will also be made to instances where the latter has explicitly used the provisions of the ICESCR and general comments of the Committee on ESCR as interpretative guides. This is followed by a pragmatic examination of the remedies granted by the Constitutional Court along with other remedies which may be available in such matters.

It should be noted that the judiciary is not the only organ constitutionally mandated to watch over the effective realisation of SERs. The South African Human Rights Commission (SAHRC), as per section 184(3) of the Constitution, is mandated on a yearly basis to collect information on

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<sup>88</sup> See chapter 2 section 2.1.1 of this dissertation.

<sup>89</sup> M Pieterse 'Possibilities and pitfalls in the domestic enforcement of social rights: Contemplating the South African experience' (2004) 26 *Human Rights Quarterly* 885.

<sup>90</sup> As mentioned in the previous chapter, the focus of the dissertation is on the jurisprudence of the Constitutional Court, as it is the highest court in constitutional matters.



measures that have been taken by the organs of the state for realising SERs. However, the role of the SAHRC is not analysed as the focus is on the judiciary.

### 3.2 The South African approach to the enforceability of SERs

The 1996 South African Constitution, also known as the final Constitution had to be approved by the Constitutional Court and it was in the *First Certification judgment*<sup>91</sup> that the inclusion of SERs in the Constitution was approved. The objections raised to their inclusion related more specifically to the issue of legitimacy and competency of the courts and, to that effect, the Constitutional Court observed:<sup>92</sup>

It is true that the inclusion of socio-economic rights may result in Courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications ... In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon this court so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers ... The fact that socio-economic rights will almost inevitably give rise to [budgetary] implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

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Thus, though South Africa has not ratified the ICESCR, it has nevertheless gone a step ahead by incorporating explicit SERs in its Constitution. Hence, in the South African context, the issue is no longer about whether SERs are justiciable, but now relates to how to 'enforce them in a given case.'<sup>93</sup> Before considering how these rights have been enforced, a comparison of the SERs provisions in the ICESCR and the Constitution is undertaken.

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<sup>91</sup> *First Certification Judgment* (n 13 above).

<sup>92</sup> *First Certification Judgment* (n 13 above) para 77-78.

<sup>93</sup> *Grootboom* (n 21 above) para 20.

### 3.3 Socio-economic rights in the South African Constitution and the ICESCR distinguished

As pointed out earlier, South Africa has not ratified the ICESCR, but it has constitutionally guaranteed SERs, thereby warranting a comparison between the SERs provisions of the South African Constitution and those of the ICESCR. The comparison of the ICESCR and the South African Bill of Rights will involve both similarities and differences in their wordings and the rights they provide for.

Firstly, the second subsections of articles 26 and 27 of the Bill of Rights are akin to article 2(1) of the ICESCR except for its reference to 'reasonable' measures against the international standard of 'appropriate' measures. In addition, there is a slight difference in the way the resource constraint is phrased; whereby under article 2(1) of the ICESCR, states are obliged to the 'maximum of available resources', the Bill of Rights uses the term 'within available resources.' The ICESCR recognises, in its preamble<sup>94</sup>, human dignity as an underpinning principle and in the South African context, the Constitution explicitly mentions dignity as a value<sup>95</sup> which needs to be used to interpret SERs. Further, the same has been reiterated in its jurisprudence, for instance, in the *Grootboom* case.<sup>96</sup> With regard to the right to self determination,<sup>97</sup> the ICESCR lays emphasis on the latter as a stepping stone to realising SERs. Another right which is both of interpretative value and guaranteed in the South African Constitution is the right to equality,<sup>98</sup> which is also provided for in the ICESCR.<sup>99</sup>

Nevertheless, the Constitution is quite lacking when it comes to the provision of the right to work,<sup>100</sup> when compared to the ICESCR. While the Constitution does not explicitly guarantee the right to work, the ICESCR provides not only for the right to seek employment freely, but also imposes a specific obligation on the state to work towards achieving that right, including having in place technical and vocational guidance and training programmes, policies and techniques. However, as a party to the African Charter and the CEDAW,<sup>101</sup> such obligations are incumbent on

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<sup>94</sup> Para 1 of the Preamble to the ICESCR.

<sup>95</sup> Secs 7(2) & 10 of the Constitution.

<sup>96</sup> *Grootboom* (n 21 above)

<sup>97</sup> Art 1 of the ICESCR.

<sup>98</sup> Secs 7(2) & 9 of the Constitution.

<sup>99</sup> Art 2(2) of the ICESCR.

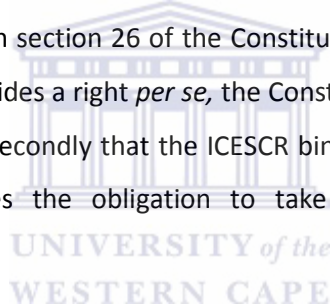
<sup>100</sup> Sec 22 of the Constitution.

<sup>101</sup> Art 15 of the African Charter; & art 11(1) of the CEDAW.

South Africa since it has ratified these instruments. Linked to the above, is the right to strike and to freely join trade unions, provided by both the ICESCR<sup>102</sup> and the Constitution.<sup>103</sup>

Concerning the rights to food, housing and clothing, both the ICESCR<sup>104</sup> and the Constitution<sup>105</sup> provide for progressive realisation of these rights. However, while the ICESCR provides for these rights as part of the right to an adequate standard of living, the South African Constitution provides for the rights in separate sections. As regard the achievement of the highest attainable standard of physical and mental health, both the Constitution<sup>106</sup> and the ICESCR<sup>107</sup> provide for the right to health. Lastly, concerning the right to education, the provision in the ICESCR<sup>108</sup> is far more extensive than that in the Constitution.<sup>109</sup>

Though the rights might be present in the Constitution as well as the ICESCR, the interpretation of these rights by the Constitutional Court does not necessarily concur with those of the Committee on ESCR as will be seen in the section below. For instance, as will be seen below, the Constitutional Court has distinguished in *Grootboom* the right to adequate housing as provided for in article 11 of the ICESCR from that in section 26 of the Constitution. The Court observed that firstly, compared to the ICESCR which provides a right *per se*, the Constitution provides for the right to have 'access' to adequate housing, and secondly that the ICESCR binds states to take 'appropriate steps' whereas the Constitution imposes the obligation to take 'reasonable legislative and other measures'.<sup>110</sup>



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<sup>102</sup> Art 6 of the ICESCR.

<sup>103</sup> Sec 23 of the Constitution.

<sup>104</sup> Art 11 of the ICESCR.

<sup>105</sup> Secs 26 & 27 of the Constitution. See also secs 28 and 35(2) (e) in relation to children and detainees, respectively.

<sup>106</sup> Sec 27 of the Constitution.

<sup>107</sup> Art 12 of the ICESCR.

<sup>108</sup> Art 13(2) of the ICESCR.

<sup>109</sup> Sec 29(1) of the Constitution.

<sup>110</sup> *Grootboom* (n 21 above) para 28.

### 3.4 Interpretation of socio-economic rights provisions by the Constitutional Court

Prior to embarking on the interpretation of the SERs provisions embedded in the Constitution, it would be important to generally explore the obligations which flow from the latter. First, the Bill of Rights is binding on the three arms of the government, that is, the legislature, the executive and the judiciary.<sup>111</sup> It applies not only vertically, between the state and the citizens, but also horizontally, in that it binds the natural and juristic persons.<sup>112</sup>

In its broad application, the South African Constitution imposes, on the states, certain obligations which are to 'respect, protect, promote and fulfil'<sup>113</sup> the rights while upholding democratic values such as human dignity, equality and freedom.<sup>114</sup> In the *First Certification Judgment*, it was clearly spelt out that at least the negative duties in relation to SERs should be protected from 'invasion' and are of immediate application.<sup>115</sup> However, the positive duties are seen from sections 26(2)<sup>116</sup> and 27(2) which impose on the state the obligation to 'take reasonable measures within its available resources to achieve progressive realisation' of the listed SERs. The terms 'progressive realisation' show that the full achievement of SERs is not immediate in nature. The Constitutional Court in *Grootboom*<sup>117</sup> endorsed the meaning of progressive realisation in General Comment No 3<sup>118</sup> and further stated that the latter 'is in harmony with the context in which the phrase is used in our Constitution.'<sup>119</sup>

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<sup>111</sup> Sec 8(1) of the Constitution.

<sup>112</sup> Sec 8(2) of the Constitution.

<sup>113</sup> Sec 7(1) of the Constitution.

<sup>114</sup> Sec 7(2) of the Constitution.

<sup>115</sup> *First Certification Judgment* (n 13 above) para 77-78.

<sup>116</sup> It should be noted that even where a negative right such as the right not to be evicted without a court order provided for in sec 26(3), the Constitutional Court has read in positive obligations to this right. See *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) (*Port Elizabeth*).

<sup>117</sup> *Grootboom* (n 21 above).

<sup>118</sup> General Comment No 3 (n 42 above) para 9.

<sup>119</sup> *Grootboom* (n 21 above) para 45.

Unlike these two sections, all other SERs<sup>120</sup> provided for in the Bill of Rights have no express reference to the resource availability constraint as a limitation,<sup>121</sup> thereby being of immediate application. However, it is important to note that some academics have argued that though children's SERs do not *per se* contain any internal qualifications, they are not rights claimable upon demand as the SERs in section 28 of the Constitution are still subject to section 7 of the Constitution which provides for the obligation to fulfil, which would be interpreted as facilitating the realisation of the right, that is, subjecting it to progressive realisation.<sup>122</sup> The key jurisprudence of the Constitutional Court analysed here mainly focus on the positive duties under sections 26 and 27. The negative duties which have been adjudicated upon were based on sections 26(3) and 27(3).

The first SERs case to be heard by the Constitutional Court was the case of *Soobramaney*,<sup>123</sup> where the Constitutional Court stated that there was no violation of the appellant's right to emergency care as it was 'an ongoing state of affairs which ... is incurable.'<sup>124</sup> The Court considered whether his right to health under sections 27(1) and (2) had been breached. The eventual conclusion was that since the sections uses the terms 'everyone' and 'within available resources', there needs to be a prioritisation<sup>125</sup> in providing for dialysis treatment in view of budgetary and resource constraints. Therefore, the standard of review in assessing the hospital policy in relation to qualifying patients for the dialysis program was as follows: 'A Court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with such matters.'<sup>126</sup> Following the decision of *Soobramaney*, there was the landmark decision

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<sup>120</sup> The SERs which fall in that category are the right not to be evicted prior to a court order under section 26(3), the right not to be refused emergency medical treatment under section 27(3), rights of children under section 28 and rights of detained persons under section 35 of the SA Constitution.

<sup>121</sup> Liebenberg (n 14 above) 41-37.

<sup>122</sup> See, for instance, DM Chirwa 'Child Poverty and children's rights of access to food and basic nutrition in South Africa' (2009) *Socio-Economic Rights Project Research Series* 7 18. Section 28(1)(c) guarantees to children the rights to basic nutrition, shelter, basic health care services and to social services.

<sup>123</sup> In *Soobramaney* (n 15 above), the applicant was suffering from chronic renal failure along with a series of other diseases and was disqualified from a renal dialysis program as his health situation was irreversible, as a result of which he was not entitled to a kidney transplant. The renal dialysis program was his only chance to prolong his life. He challenged his disqualification to the dialysis program under the said hospital policy guidelines on the ground of section 27(3) of the SA Constitution, in that he could not be refused emergency medical treatment.

<sup>124</sup> *Soobramaney* (n 15 above) para 21.

<sup>125</sup> *Soobramaney* (n 15 above) para 19.

<sup>126</sup> *Soobramaney* (n 15 above) para 29, showing the application of the 'rationality' and 'good faith' test.

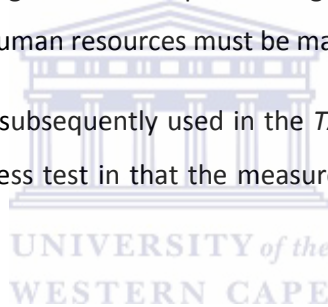
of *Grootboom*,<sup>127</sup> where the Court departed from the 'rationality' and 'good faith' tests and adopted the 'reasonableness' standard of review. The Constitutional Court explains it as follows:<sup>128</sup>

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.

In determining whether measures are reasonable, the Constitutional Court gave the following indicators:

1. The measures must be coherent, balanced and flexible catering for short and long term needs.<sup>129</sup>
2. Those who are in desperate need must be catered for.<sup>130</sup>
3. The measures should be designed to accomplish their goals 'expeditiously and effectively'.<sup>131</sup>
4. Appropriate financial and human resources must be made available for its enforcement.<sup>132</sup>

The reasonableness test was again subsequently used in the *TAC*<sup>133</sup> case, where a new component was introduced to the reasonableness test in that the measures should be transparent and widely known to the public.<sup>134</sup>



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<sup>127</sup> In *Grootboom* (n 21 above), the respondents (390 adults and 510 children) were living in lamentable conditions: low income population, overcrowded shacks of which 95% had no electricity, water or sewage. Being on a low cost housing waiting list for years and facing indefinite intolerable conditions they moved to a private owned land which was earmarked for low cost housing. The owner brought court proceedings which led to eviction orders against them and their shacks were destroyed. Eventually, they took shelter in a sports field with temporary structures. The respondents appealed to the government to provide them with housing under section 26 of the Constitution while they wait for formal housing.

<sup>128</sup> *Grootboom* (n 21 above) para 41.

<sup>129</sup> *Grootboom* (n 21 above) para 41- 43.

<sup>130</sup> *Grootboom*(n 21 above) para 43 and the Court even went further to say that in order to meet the test of reasonableness, it was not sufficient to show that the measures have the potential of realising statistical advance in the realisation of the right.

<sup>131</sup> *Grootboom* (n 21 above) para 46.

<sup>132</sup> *Grootboom* (n 21 above) para 39.

<sup>133</sup> *TAC* (n 21 above). The facts were that the government restricted the distribution of nevirapine only to pilot sites relying on arguments such as efficacy, safety as well as lack of resources Therefore, the application sought to challenge the reasonableness of its restrictive distribution by the government.

<sup>134</sup> *TAC* (n 21 above) para 123.

The finding in *Grootboom* was that the government's project was unreasonable as it failed in its obligation of providing adequate housing to those in desperate need.<sup>135</sup> In coming to its decision, the Constitutional Court also referred to international law. In *Grootboom*, it was reiterated, based on section 39(1)(c) of the Constitution, that relevant international law can be a tool of interpretation with varying degrees of weight.<sup>136</sup> The relevant law referred to included General Comment No 3 of the Committee on ESCR which was used to interpret the meaning of progressive realisation and to decide on whether to adopt the minimum core approach as seen below. A distinction was made in *Grootboom* between the right to housing as provided by article 11 of the ICESCR and section 26 of the Constitution as noted above<sup>137</sup> However, academics have argued that the distinction is 'superficial' and not significant as it is difficult to conceive a situation where steps taken by the state could be 'appropriate but not reasonable or vice versa.'<sup>138</sup> The argument was raised in *Grootboom* as to whether section 26(1) provided an absolute obligation on the state to provide for the right to adequate housing to individuals on demand. The Court rejected the argument and held that it was not a self standing right to be enforced without consideration of the resource limitation under section 27(2).<sup>139</sup>

Similarly, in the case of *Jaftha*<sup>140</sup>, in deciding the meaning to be given to 'adequate housing', the Constitutional Court referred to article 11(1) of the ICESCR and General Comment No 14 before reaching its conclusion.

Also, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (*Joe Slovo case*), the Court relied on General Comment No 7 of the Committee on ESCR. It observed that General Comment No 7 is in line with the law regulating evictions and should be followed in cases of relocations as a result of evictions.<sup>141</sup>

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<sup>135</sup> *Grootboom* (n 21 above) para 66.

<sup>136</sup> *Grootboom* (n 21 above) para 26.

<sup>137</sup> *Grootboom* (n 21 above) para 28.

<sup>138</sup> RE Kapindu 'From the global to the local: The role of international law in the enforcement of socio-economic rights in South Africa' (2009) *Socio-Economic Rights Project Research Series* 6, 33.

<sup>139</sup> *TAC* (n 21 above) para 39.

<sup>140</sup> *Jaftha v Schoeman & Others* 2005 1 BCLR 78 (CC) para 24 (*Jaftha*).

<sup>141</sup> CCT 28/08 2009 16 ZACC para 237 and see UN Committee on ESCR, General Comment 7, The right to adequate housing (art 11.1 of the Covenant) forced evictions, UN Doc E/1998/22 (1998).

With regard to approaches to enforcing SERS, in the *TAC* case, the *amici*<sup>142</sup> raised the argument that article 27(1) has a minimum core<sup>143</sup> component. The Constitutional Court, in deciding on the use of the minimum core, relied on General Comment No 3 of the Committee on ESCR. The Constitutional Court endorsing its position in *Grootboom*, without explicitly rejecting the minimum core component of sections 26 and 27 of the Constitution, held as follows:<sup>144</sup>

Although Yacoob J [in *Grootboom*] 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 in the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them....

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 acts reasonably to provide access to socio-economic rights in sections 26 and 27 on a progressive basis...

However, there were reasons advanced by the Constitutional Court as to why they could not apply the minimum core content and it was as follows:<sup>145</sup>

Courts are not institutionally equipped to make the wide ranging factual and political enquiries necessary for determining what the minimum core standards should be ... [and added that] courts are ill suited to adjudicate upon issues where the court order could have multiple social and economic consequences for the community. The Constitution contemplates rather a more restrained and focused role for the courts.

Recently, in the *Mazibuko*<sup>146</sup> decision handed down on 8 October 2009, the Constitutional Court was again unwilling to adopt the minimum core approach. It referred to General Comment No 3 as well

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<sup>142</sup> The *amici* in the case of *Grootboom* also raised the same point.

<sup>143</sup> The minimum core obligation has been defined in General Comment No 3 (n 42 above) in para 10. The Committee on ESCR observed an '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.'

<sup>144</sup> *TAC* (n 21 above) para 34-35.

<sup>145</sup> *TAC* (n 21 above) para 37 & 38.

<sup>146</sup> *Mazibuko* (n 21 above) paras 52 – 68. This case concerned the right to water, specifically, the the sufficiency of water provided by the City of Johannesburg in terms of its free basic water policy, and the lawfulness of the prepaid water meters.



as its decisions in *Grootboom* and *TAC* in which it refused to accept the concept. The Court refused to set a minimum core for water on the bases that 'what the right requires will vary over time and in context' as well as institutional and democratic concerns, stating as follows:<sup>147</sup>

[O]rdinarily it is institutionally inappropriate ordinarily for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.

It can be deduced that the 'polycentric' argument has been heavily relied upon by the Constitutional Court to reject the minimum core approach. It is to be noted that the reasonableness test has got certain benefits in that it is a context sensitive tool which allows the executive the required space, without the judiciary trespassing their terrain, to design and formulate appropriate policies.<sup>148</sup> Nevertheless, the rejection of the minimum core approach in favour of the reasonableness approach has been criticised as it does not recognise the minimum basic interests of vulnerable people in their survival needs. In other words, it does not provide them with the most basic socio-economic goods without which any socio-economic right protection becomes meaningless.<sup>149</sup> In view of meeting the transformative vision of the Constitution, academics have proposed measures as to how to strengthen the reasonableness approach, including the following: (1) the burden of proving the reasonableness of the programme should be shifted to the state,<sup>150</sup> and (2) in the event that a state fails to ensure that vulnerable groups have access to basic services, the state should be required to show that their resources were 'demonstrably inadequate.'<sup>151</sup>

It seems that the Constitutional Court is able reject the minimum core because South Africa has not yet ratified the ICESCR. However, Kapindu has observed that since South Africa has

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<sup>147</sup> *Mazibuko* (n 21 above) paras 60, 61 & 62.

<sup>148</sup> S Liebenberg 'Enforcing positive socio-economic rights claims: The South African model of reasonableness review' in J Squires *et al* Thiele (eds) *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 81.

<sup>149</sup> D Bilchitz 'Towards a reasonable approach to the minimum core' (2003) 19 *South African Journal on Human Rights* 11-12.

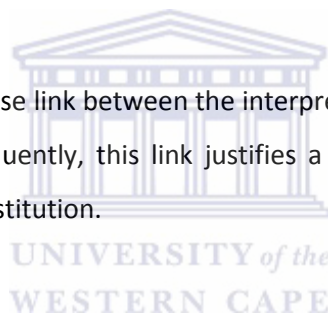
<sup>150</sup> S Liebenberg (n 148 above) 83.

<sup>151</sup> S Liebenberg (n 148 above) 83.

ratified the African Charter and in the *SERAC*<sup>152</sup> case the African Commission found that the minimum core obligations form part of state party obligations and states are bound to apply them in order to be in conformity with the African Charter. Hence, since South Africa is bound by the African Charter it finds itself under the obligation to apply the minimum core concept.<sup>153</sup>

However the Constitutional Court should at least be commended for enforcing the negative duties in sections 26(1)<sup>154</sup> and 27(1)<sup>155</sup> to 'desist from preventing or impairing access' to the listed SERs. In *Jaftha*,<sup>156</sup> the Constitutional Court held that the negative duties in relation to the right of access to adequate housing are not subject to any internal limitations of 'progressive realisation' and the 'availability of resources,'<sup>157</sup> hence being of immediate application. Consequently, the decision of the Court as to whether there is a violation of a SER is dependent upon the interpretation adopted by the Court. If the Court adopts the 'rationality' and 'good faith' tests of *Soobramaney*, this will merely rubberstamp the executive's action and leave the victim without an effective remedy;<sup>158</sup> though the Constitution is aimed at 'establishing freedom and equality in a grossly disparate society.'<sup>159</sup>

There is therefore a very close link between the interpretation adopted by the Court and the remedies that are granted. Consequently, this link justifies a study of remedies available for the infringement of SERs under the Constitution.



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<sup>152</sup> Communication 155/96 *The Social and Economic Rights Action Centre & Another v Nigeria (SERAC)*, Fifteenth Annual Activity Report, para 65 which endorses the minimum core of the right to food. <[http://www.achpr.org/english/activity\\_reports/activity15\\_en.pdf](http://www.achpr.org/english/activity_reports/activity15_en.pdf)> (accessed 21 October 2009).

<sup>153</sup> Kapindu (n 138 above) 49.

<sup>154</sup> *Grootboom* (n 21 above) para 34.

<sup>155</sup> *TAC* (n 21 above) para 46.

<sup>156</sup> *Jaftha* (n 140 above) where there was a constitutional challenge of the Magistrate's Court Act which allowed the sale of the debtor's home so as to reimburse debts. The arguments raised were that this violated the debtor's right to housing as it prevented his access to adequate housing.

<sup>157</sup> *Jaftha* (n 140 above) paras 31-34 where the Court added that they are instead subject to the general limitations under section 36 of the Constitution.

<sup>158</sup> M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 410.

<sup>159</sup> *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 147.

### 3.5 Remedies for infringement of SERs

Having dealt with the interpretation part, it is necessary to consider the types of remedies that the Constitution empowers the Constitutional Court to grant when it finds that a law or conduct is unconstitutional. Prior to embarking on the South African context, it has to be pointed out that General Comment No 9 of the Committee on ESCR provides that national remedies should be 'accessible, affordable, timely and effective' and that international complaints mechanisms are only supplementary to domestic remedies.<sup>160</sup> However, in the South African context, though the ICESCR has not been ratified, the Constitution does provide for the following remedies. Section 172(1)(a) of the Constitution provides that in case of a finding of an unconstitutional law or conduct, the Court must declare the provision or conduct unconstitutional to the extent of its inconsistency. Moreover, section 172(1)(b) of the Constitution provides for the Court to make any order that is just and equitable, along with section 38 which allows the Court to grant an appropriate relief. The issue of an appropriate relief has been dealt with in the *TAC* case where that the Court stated as follows:

The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of a supervisory jurisdiction.<sup>161</sup>

The Court's duty is to provide not only an appropriate, but also an effective remedy. In the case of *Fose v Minister of Safety and Security (Fose)*,<sup>162</sup> the Constitutional Court held that 'the Courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve this goal'. Therefore, the Court can always, under the guise of appropriateness and effectiveness, have recourse to tailor-made remedies which will do justice to the aggrieved parties.

Having gone through the conceptual legal framework available to judges to decide on remedies, the remedies granted by the Constitutional Court in its SERs jurisprudence shall then considered in the subsequent paragraphs.

In the very first SERs case before the Constitutional Court, that is, *Soobramaney* the applicant lost his case; hence no relief was granted to him and he died two days after the judgment

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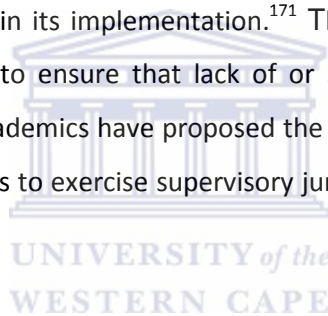
<sup>160</sup> General Comment No 9 (n 65 above) para 7 & 8.

<sup>161</sup> *TAC* (n 21 above) para 106.

<sup>162</sup> *Fose* 1997 3 SA 786 (CC) para 69.

was delivered.<sup>163</sup> In the *TAC* case, the Court made a declaratory order as well as a mandatory order, extending the provision of the required drugs and counselling facilities to other sites apart from the pilot sites.<sup>164</sup> In *Khosa v Minister of Social Development (Khosa)*,<sup>165</sup> which was based on the equality principle, the Court read in 'the excluded group of people' for them to benefit from social security.<sup>166</sup> In the *Port Elizabeth*<sup>167</sup> case, the Court read positive obligations into article 26(3) of the Constitution, which imposes negative duties.<sup>168</sup> In addition, in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others (Modderklip)*,<sup>169</sup> the Court awarded, based on the principle of the rule of law, compensation to the landowner for failure of the government to remedy the invasion of his land by squatters.<sup>170</sup>

However, it would seem that compliance with the orders remains a key issue. For example, the Grootboom community continues to live in appalling conditions, Irene Grootboom died eight years after the judgment while still living in a shack and the implementation of the emergency housing programme has been rather slow; and the *TAC* case, though subsequently implemented, was followed by a lack of urgency in its implementation.<sup>171</sup> Therefore, the Court should come up with novel and creative remedies to ensure that lack of or slow compliance is not a bar to an effective remedy. Consequently, academics have proposed the adoption of the remedy of structural interdicts which will allow the courts to exercise supervisory jurisdiction on the government to have



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<sup>163</sup> MS Kende *Constitutional rights in two worlds* (2009) 251.

<sup>164</sup> *TAC* (n 21 above) para 135.

<sup>165</sup> 2004 (6) SA 505 (CC). This case concerned access to social assistance for permanent residents.

<sup>166</sup> *Khosa* (n 165 above) para 43.

<sup>167</sup> *Port Elizabeth case* (n 116 above).

<sup>168</sup> *Port Elizabeth* (n 116 above), para 28 -29, where the Court held that prior to an eviction order being granted, it will have regard to whether reasonable alternative accommodation is available.

<sup>169</sup> 2005 8 BCLR (CC). The case concerned the right to have access to adequate housing of those faced with evictions, as well as the property rights of the owner of the land.

<sup>170</sup> *Modderklip* (n 169 above) para 43& 48.

<sup>171</sup> See L Chenwi 'Socio-economic gains and losses: The Constitutional Court and social change' (2009) 12. Paper presented at the symposium 'Fifteen years of democracy in South Africa: Gains and challenges' held at the University of the Western Cape from 21 to 22 May (on file with author); F Hweshe "'Herione" dies while still waiting' <[http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn20080804110512425C272924](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20080804110512425C272924) (accessed 28 October 2009).

them report back within a specific time period<sup>172</sup>, thereby providing a solution to the problem of lack of compliance by the executive.

### 3.6 Conclusion

It can be said that, by integrating SERs in its Constitution, South Africa has travelled a long way compared to other developed countries such as the United Kingdom or the United States, which are reputed as champions of human rights. It should also be commended for its jurisprudence which it is slowly building on justiciable SERs, having in mind the cautious approach of the Constitutional Court in interpreting SERs and in granting remedies. Yet, as seen in the discussions above, the jurisprudence of the Constitutional Court has still not met the full transformative vision of the Constitution as poverty is still rampant in South Africa, and worst of all, the interpretative approach of the Court has been mostly evasive in providing content to the rights while the remedies granted have not always provided justice to the parties.

As observed earlier in this chapter, the SAHRC also has a role to play in the implementation of SERs. In its SERs reports, the SAHRC assesses the information it collects from the various organs of government and this could be used as indicators to monitor the progress made in the realisation of SERs chronologically.<sup>173</sup> However, its efficacy can seriously be doubted in the realisation of SERs due to its lack of consistency in publishing its annual reports. Consequently, the concrete and effective enjoyment of SERs will depend on the eagerness of the Constitutional Court to develop a robust jurisprudence that mirrors international standards. It would seem that the justiciable SERs *per se*, are not sufficient to fully respect, protect and fulfil SERs in South Africa, thereby justifying a study of the likely added benefits for South Africa to ratify the ICESCR and its Optional Protocol.

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<sup>172</sup> Pieterse (n 158 above) 414.

<sup>173</sup> DG Newman 'Institutional monitoring of social and economic rights: A South African case study and a new research agenda' (2003) 19 *South African Journal on Human Rights* 189.

## Chapter 4

### The likely benefits of ratifying the International Covenant on Economic Social and Cultural Rights and its Optional Protocol for South Africa

#### 4.1 Introduction

For years now, international treaties have been the means to effectively promote and protect human rights. International treaties usually ensure compliance through reporting mechanisms and individual complaints mechanisms as well as inquiry procedures in some instances. These have been operating through international treaty bodies set up by the international conventions. For international bodies to be an integral actor in the promotion of SERs in domestic affairs of a state, the latter should ratify the treaty establishing the treaty monitoring body.

In the case of this study, the treaty being referred to is the ICESCR under which the Committee on ESCR operates. The Committee, as noted earlier, was not established by the ICESCR, but rather by a resolution of the ECOSOC, which was the supervisory body set up under the ICESCR.<sup>174</sup> As noted earlier in this study, South Africa signed the ICESCR in 1994, but has not yet ratified it. As a matter of fact, South Africa has both regional and international commitments with regards to SERs. At the regional level, South Africa has already ratified the African Charter, the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>175</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),<sup>176</sup> which provide for both CPRs and SERs.<sup>177</sup> At the international level, South Africa, as mentioned earlier, has ratified the CEDAW and the CRC both of which provide for CPRs and SERs in relation to women and children respectively.<sup>178</sup> Since both CPRs and SERs are

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<sup>174</sup> See chapter 2 section 2.5 of this dissertation.

<sup>175</sup> This treaty was adopted on 11 July 1990 and entered into force on 29 November 1999. South Africa ratified the African Children's Charter on 7 January 2000. The African Children's Charter provides for SERs in relation to children.

<sup>176</sup> This Protocol was adopted on 11 July 2003 and entered into force on 25 November 2005. South Africa ratified the African Women's Protocol on 17 December 2004. The African Women's Protocol provides for SERs specifically in relation to women.

<sup>177</sup> South Africa ratified the African Charter on the 9 July 1996.

<sup>178</sup> See chapter 1 section 1.1 of this dissertation.

interdependent,<sup>179</sup> there exist no plausible reasons as to why South Africa has not yet ratified the ICESCR. Indeed, with this ratification, there would have been several benefits in ensuring the effective protection of SERs of vulnerable South Africans.

## 4.2 The added benefits of ratifying the ICESCR for South Africa

### 4.2.1 State reporting mechanism

Protection and enforcement of SERs under the ICESCR are ensured by state reporting procedures.<sup>180</sup> The state reporting process is the process by which a state party sends periodic reports on a regular pre-determined frequency, on its human rights situation in its domestic jurisdiction along with measures it has taken to meet its obligations under the treaty it has ratified.<sup>181</sup> This procedure uses diplomatic means to engage in a constructive dialogue<sup>182</sup> with the state party, based on which the Committee on ESCR then delivers concluding observations. The concluding observations contain the positive measures taken by the state parties in protecting the rights, the negative aspects noted by the treaty monitoring body and provides recommendations thereto.<sup>183</sup> The effectiveness of the concluding observations can be seen through civil societies which use them to force the government to abide by same.<sup>184</sup>

In the event that South Africa ratifies the ICESCR, it will subject itself to the treaty monitoring procedures. In other words, it will have to submit periodic reports on the implementation of the SERs to the Committee on ESCR. As a result, NGOs will be able to participate

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<sup>179</sup> See chapter 2 section 2.2 of this dissertation.

<sup>180</sup> See chapter 2 section 2.5 of this dissertation.

<sup>181</sup> Guidelines on Treaty-Specific Documents to be Submitted by States Parties under articles 16 and 17 of the International Covenant on Economic, Social And Cultural Rights, 24 March 2009, UN Doc E/C.12/2008/2 (2009). Usually, states must report initially within two years of accepting the ICESCR and thereafter every five years. See <<http://www2.ohchr.org/english/bodies/cescr/>> (accessed 13 September 2009).

<sup>182</sup> Steiner & Alston (n 32 above) 306.

<sup>183</sup> Steiner & Alston (n 32 above) 306.

<sup>184</sup> Steiner & Alston (n 32 above) 306.

by submitting shadow reports<sup>185</sup> on the real life situations, equipping the Committee with better information for them to engage with the representatives of the government in a constructive dialogue process. In addition, the dynamism with which NGOs operate in South Africa will contribute to better implement SERs, since they will urge the government to abide by the recommendations of the Committee, when devising its policies.

It might be argued that the process of preparing periodic reports might be an onerous one in terms of resource implications. However, reports on SERs implementation are already prepared under the African Charter, submitted to the African Commission. Since the African Charter itself has been largely inspired by the ICESCR with regard to its SERs provisions, it will not be too onerous of a burden for the state to report to the ICESCR. In addition, the guidelines relating to SERs under the African Charter are largely inspired by the general comments of the Committee on ESCR, showing the intertwined contents of the SERs in both instruments.<sup>186</sup>

#### **4.2.2 The effects of ratification on the interpretation of SERs provisions of the Constitution**

The Committee on ESCR, as noted earlier, also issues general comments<sup>187</sup> which interpret the provisions of the ICESCR. These are authoritative interpretations by the Committee of the rights in the ICESCR. The ratification of the ICESCR will have a direct impact on the interpretation of the constitutional SERs provisions in South Africa. The Constitution provides that in interpreting the Bill of Rights, reference must be made to international law.<sup>188</sup> In addition, in the case of *Grootboom*, it was stated that where a relevant 'principle of international law binds South Africa, it may be directly applicable.'<sup>189</sup> Hence, the ratification of the ICESCR will bind South Africa and will enhance the interpretation of the SERs provisions in the Constitution. For example, the Constitutional Court has

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<sup>185</sup> NGO participation in activities of the Committee on Economic, Social and Cultural Rights, Economic and Social Council, 12 May 1993, UN Doc E/C.12/1993/WP.14  
<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1993.WP.14.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1993.WP.14.En?Opendocument)> (accessed 13 September 2009).

<sup>186</sup> See Draft Principles and Guidelines on Economic, Social and Cultural Rights on the African Charter on Human and Peoples' Rights (2009) (On file with author).

<sup>187</sup> The CESCR has until now issued 20 general comments, the latest being in 2009 on article 2(2) of the ICESCR. See <<http://www2.ohchr.org/english/bodies/cescr/comments.htm>> (accessed 13 September 2009).

<sup>188</sup> Section 39(1) (b) of the Constitution.

<sup>189</sup> *Grootboom* (n 21 above) para 45.



adopted the reasonableness approach at the expense of the minimum core<sup>190</sup> approach, as designed by the Committee on ESCR, which has resulted in severe criticisms of its judgments in this regard in the academic circles.<sup>191</sup> Therefore, if the South African government ratifies the ICESCR, it would enhance the interpretation of SERs with a better chance of incorporating the minimum core obligations. In so doing, the Constitutional Court would be fulfilling its international law obligations which the executive expressly and consensually acceded to by ratification. Further, the Constitutional Court has relied on polycentric, institutional and democratic reasons and the lack of sufficient information to support its rejection of the minimum core concept.<sup>192</sup> Hence, with the ratification of the ICESCR, not only will the authoritative interpretation of the Committee on ESCR bind the judiciary, but it will also bind the executive. In other words, the executive which has the expertise, the necessary resources and information will have to abide by the general comments in designing their policies. As a result, this will enhance the implementation of SERs in South Africa.

#### 4.2.3 The 'mobilisation of shame' principle

The effectiveness of international law relies on the 'mobilisation of shame'<sup>193</sup> principle. In other words, states in order to preserve their international image and reputation act and abide by international treaties. The same applies for South Africa when it comes to the ICESCR. South Africa is famous for its justiciable SERs provisions;<sup>194</sup> however it is reluctant to ratify the ICESCR. As a result, the international reputation of South Africa in international forums on SERs is affected in a negative way. In addition, the ratification would act as an opportunity for the South African government to boost its international reputation by 'reiterating its commitment to alleviating poverty and ensuring social justice.'<sup>195</sup>

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<sup>190</sup> See chapter 3 section 3.4 of this dissertation.

<sup>191</sup> See chapter 3 section 3.4 of this dissertation.

<sup>192</sup> See chapter 3 section 3.4 of this dissertation

<sup>193</sup> F Viljoen *International human rights law in Africa* (2007) 9.

<sup>194</sup> Kende (n 163 above) 244.

<sup>195</sup> Mashava (n 5 above) 18

#### 4.2.4 The interdependence and interrelatedness of CPRs and SERs

As discussed previously, SERs are interdependent with CPRs.<sup>196</sup> This is clearly shown by the South African Constitution itself which provides for both CPRs and SERs.<sup>197</sup> This can be perceived through an analysis of General Comment 20<sup>198</sup> which speaks about equality and links it to SERs.<sup>199</sup> Therefore, the failure by South Africa to ratify the ICESCR seems to be pointing in the direction that South Africa is giving undue priority to CPRs. Ratification of the ICESCR would reaffirm South Africa's acceptance of the interdependence of all human rights.<sup>200</sup> In fact, South Africa should have no difficulty in ratifying the ICESCR which will simply reiterate its stand that SERs and CPRs are interrelated as seen from the African Charter to which the country is already a party.

#### 4.2.5 The introspection of incompatible legislation

The ratification process also involves the introspection of all existing legislations and policies in order to align them with provisions of the ICESCR.<sup>201</sup> Hence, if South Africa ratifies the ICESCR, it would have to carry out a proper introspection of its legislation and policies. As a consequence, laws and policies which run counter to the letter and spirit of the ICESCR will have to be repealed. It can be argued that this exercise may save substantial financial and human resources which otherwise could potentially have been used to challenge these laws in court.

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<sup>196</sup> See chapter 2 section 2.2 of this dissertation.

<sup>197</sup> See the Bill of Rights of the Constitution.

<sup>198</sup> UN Committee on ESCR, General Comment 20, Non-discrimination in economic, social and cultural rights, UN Doc E/C12/GC/20 (2009).

<sup>199</sup> Art 2(2) of the ICESCR.

<sup>200</sup> Centre for Human Rights (University of Pretoria) in collaboration with the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) 'Should South Africa ratify the International Covenant on Economic, Social and Cultural Rights' Memorandum to the Department of Justice and Constitutional Development, South Africa (12 June 2009) 2 (on file with author).

<sup>201</sup> Mashava (n 5 above) 18.

#### **4.2.6 The insufficiency of the South African Bill of Rights**

One persistent objection of South Africa to ratify the ICESCR has been that the Bill of Rights sufficiently provides for SERs.<sup>202</sup> However, as noted in the previous chapter, the nature and scope of some of the SERs provided for in the Bill of Rights are not the same as those in the ICESCR.<sup>203</sup> For instance, the right to work is not as explicitly provided for in the Bill of Rights and the right to education is not extensive as in the ICESCR.<sup>204</sup> Therefore, the ratification of the ICESCR will cure the lacunas of the South African Bill of Rights by obliging the government to implement its provisions, using the ICESCR as a guide.

#### **4.2.7 The principle of continuity**

The principle of continuity in international law ensures that a state party to an international treaty continues to fulfil its obligations under the treaty despite changes in the government of the country. Therefore, by ratifying the ICESCR, the government is committing itself for the benefit of the people, particularly the poor, and safeguarding them against the potential tyranny of any subsequent government in power even if the Constitution is to be amended by a required majority.<sup>205</sup>



### **4.3 The added value for South Africa to ratify the Optional Protocol**

The ratification of the OP-ICESCR has not really been an issue in the South African context,<sup>206</sup> considering that South Africa has not yet ratified the mother treaty and the OP-ICESCR was recently adopted. This also explains the lack of literature on ratification of the OP-ICESCR. This therefore warrants a consideration of comparative debates that could have some relevance for South Africa. In Norway, for instance, there have been academic debates about whether to ratify the OP-ICESCR or not. Hence, to the extent that the reasons in the context of Norway are relevant and applicable in

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<sup>202</sup> The Centre for Human Rights (n 199 above) 2.

<sup>203</sup> See chapter 3 section 2.2.1 of this dissertation.

<sup>204</sup> See chapter 3 section 2.2.1 of this dissertation.

<sup>205</sup> Sec 74 of the Constitution.

<sup>206</sup> South Africa was, however, actively involved in the drafting process of the OP-ICESCR and its SERs jurisprudence was influential in the discussions of the provisions of the Protocol. See the Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/100 (2009) 18. South Africa, however, did not sign the OP-ICESCR when it opened for signature on 24 September 2009.

the South African context; they will be used to justify the ratification of the OP-ICESCR. It is also important to consider the arguments that have been raised in other contexts, so as to counter them from being raised in the South African context. In addition, the assessment of the benefits in ratifying the OP-ICESCR and the objections raised in the process by academics will further be tackled.

It is worth noting from the onset that the ratification of the OP-ICESCR will not only benefit the general protection of human rights, but may also reaffirm a good faith position of government policies. In other words, victims seeking redress from the Committee on ESCR through the complaints mechanism might find themselves in a situation where they do not have a valid case because their respective government is fulfilling its obligations in good faith. As a result, victims are not only empowered to make complaints, but are also educated on the limits of their claims.<sup>207</sup>

#### **4.3.1 The dynamic interpretation of the Committee on ESCR**

There has been the argument that the 'evolutive or dynamic' interpretation of international bodies on human rights treaty provisions transfers the 'legislative powers from the national parliament based on general elections' to the international body of experts.<sup>208</sup> Concerning the issue of transferring legislative powers to an international body of experts, this argument does not stand as the state, through ratification, has wilfully committed itself to fulfilling its obligations and recognising the competence of the supervisory body of the treaty. Therefore, in view of the consensual act of binding itself, the state has expressly given a victim the right to address its complaints to an international body while the state undertakes to fulfil all its obligations in good faith. In any case, the Committee on ESCR will not be legislating for the state; it will only provide recommendations on which the state will have to act to remedy the situation of the victims. It would be a fallacy for this objection to mean that, similar to laws from parliament, the recommendation of the Committee will have force of law and will be enforceable in courts.

Another point that has been advanced is that there is no need for incorporating the OP-ICESCR as national courts already have the means of enforcing justiciable SERs while simultaneously taking into consideration 'national legislature and the national situation' especially in view of the dynamic interpretation of international bodies.<sup>209</sup> This objection was raised in the case of Norway. It

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<sup>207</sup> Simmons (n 28 above) 69.

<sup>208</sup> Backer (n 28 above) 93.

<sup>209</sup> Backer (n 28 above) 93.

is relevant to consider this objection in the South African context as the latter already has a court which applies and interprets its constitutionally guaranteed SERs. As has already been seen in the previous chapter, the Constitutional Court of South Africa has not been that effective in its remedies and interpretation, hence warranting the ratification of the OP-ICESCR which may correct such defects through the Committee's views and recommendations. That is, if a victim does not obtain a remedy from the national court, the latter can always have recourse to the Committee on ESCR.

#### **4.3.2 The alleged helplessness of a state party in front of the Committee on ESCR**

When a case is brought to the Committee on ESCR, the state will have the opportunity to influence the Committee through its arguments or submissions. However, it has been argued in Norway that it is doubtful that the Committee would be influenced, as it will base its findings on previous case law.<sup>210</sup> This objection is also applicable in the South African context as it relates to the Committee on ESCR.

A state party may not be able to influence the Committee on ESCR if it is in blatant breach of its obligations under the ICESCR. However, if the state party has been consistent in fulfilling its obligations and in view of the peculiarities of each case, the state party can definitely influence the Committee in its favour, as is the case at the domestic level where the state convinces the court that it is in fact meeting its obligations. It would be wrong for states parties to view the Committee on ESCR as a body that wants to authoritatively impose human rights obligations on them, as they themselves have, through ratification, expressed their willingness to abide by these obligations.

#### **4.3.3 Enhancing compliance with ICESCR provisions**

In the event that South Africa ratifies the ICESCR, the ratification of the OP-ICESCR should follow suit since the latter would help, through the Committee on ESCR's jurisprudence, in elucidating its obligations under the ICESCR, which will arguably improve both implementation and compliance.<sup>211</sup> In addition, there is always the possibility that the individual complaints at the international level

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<sup>210</sup> Backer (n 28 above) 93.

<sup>211</sup> Simmons (n 28 above) 65. Since the recommendations issued by the Committee on ESCR would be accessible to NGOs and the media, the latter can make use of those recommendations to pressurise the government, hence improving the general implementation of SERs.

may help 'to improve rights outcome on average',<sup>212</sup> thereby justifying its ratification. Further, South Africa should ratify the OP-ICESCR since, if cases are brought before the Committee on ESCR, this will deepen knowledge on economic, social and cultural rights.<sup>213</sup> Moreover, it will give an opportunity, though limited, for vulnerable South African victims of SERs violations to make the executive accountable.<sup>214</sup>

#### 4.3.4 Complementing the state reporting procedure

The ratification of the OP-ICESCR becomes more important having regard to the insufficiencies associated with the state reporting procedures. Often, periodic reports are overdue or the state sugar coats the facts and figures in the reports.<sup>215</sup> Though there may be submissions of shadow reports by NGOs, there is always the risk that these 'assessments become ritualised and formulaic.'<sup>216</sup> Hence, the individual complaints mechanism will complement the ICESCR by providing a better understanding of its provisions, which will help states to prepare reports in line with those obligations.<sup>217</sup> Also, the complaints mechanism under the OP-ICESCR will empower both civil society and individuals to have a last resort forum to address any state deficiency in its provision of SERs, thereby helping in the interpretation of the same, through 'the lives and experiences of living individuals'.<sup>218</sup> That is, the Committee on ESCR would be exposed to concrete cases and not general statistics as in state reporting or even shadow reporting.

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<sup>212</sup> Simmons (n 28 above) 66.

<sup>213</sup> Report of the Open-Ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, UN Doc E/CN.4/2004/44 (2004), para 70.

<sup>214</sup> Simmons (n 28 above) 65.

<sup>215</sup> Simmons (n 28 above) 68.

<sup>216</sup> Simmons (n 28 above) 68.

<sup>217</sup> Simmons (n 28 above) 68.

<sup>218</sup> Simmons (n 28 above) 69.

#### 4.3.5 Overjudicialisation of human rights

Critics against the ratification of the OP-ICESCR have also argued that this is an example of 'overjudicialisation of human rights',<sup>219</sup> and will divert resources from the true problems that states face.<sup>220</sup> Nevertheless, it needs to be pointed out that the OP-ICESCR only complements and does not replace any government plans, and to push the argument further, it cannot compensate for any 'severe resource constraints, corrupt and inefficient governments or ill-conceived developmental plans.'<sup>221</sup> This argument of overjudicialisation may be relevant to the South African context especially in view of the fact that it already has justiciable SERs. However, the Constitutional Court is bound by the letter and spirit of the Constitution and it has already been seen that in areas such as education and the right to work, the Bill of Rights is lacking. Hence, through the ratification of the OP-ICESCR, this will provide a better protection of SERs under the wider provisions of the ICESCR.

#### 4.3.6 Assuming a leadership role in human rights at the regional level

In the context of Norway, the argument was made that though the country may feel that ratification will not bring any substantial change in the quality of lives of its citizens, it should nevertheless proceed with the ratification, as this will encourage other states to do so,<sup>222</sup> and may finally assume a leadership position in the region in terms of human rights protection, thereby boosting its regional and international political influence and reputation<sup>223</sup>. This is a useful point for South Africa that has always reiterated its commitment to being a world leader in human rights.<sup>224</sup> Based on the above argument, it is submitted that, if South Africa ratifies the OP-ICESR, it might make the country

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<sup>219</sup> Simmons (n 28 above) 70.

<sup>220</sup> Simmons (n 28 above) 70.

<sup>221</sup> Simmons (n 28 above) 70.

<sup>222</sup> Simmons (n 28 above) 77 where it is said that 'Emulation effects could very well contribute to a virtuous spiral in which rights leaders ratify, others follow their example, the dialogue over individuals' complaints begins, expectations converge, local political pressure for compliance increases, and responsible government agencies and legislatures consider their policy alternatives in the light of the new interpretive information about the legitimate range of ways a state may fulfil its international obligations'.

<sup>223</sup> Simmons (n 28 above) 80.

<sup>224</sup> JG Zuma 'State of the Nation Address by His Excellency, President of the Republic of South Africa, Joint Sitting of Parliament, Cape Town' 3 June 2009 <<http://www.info.gov.za/speeches/2009/09060310551001.htm>> (accessed 21 October 2009)

assume a leadership position in the African region in its human rights protection regime, thus impacting positively in its regional political influence.

#### **4.4 Conclusion**

The benefits laid down in this chapter are aimed at promoting a better human rights protection regime in South Africa. It seems that the state is hiding behind its own Bill of Rights as its main justification for non-ratification of the ICESCR and its failure to sign and ratify the OP-ICESCR. However, if the domestic regime is so effective, how would one explain the level of poverty which is plaguing the country?<sup>225</sup> Clearly, the domestic provisions are not sufficient and there is a need for international pressure to improve the situation. For instance, the Constitutional Court is limited in its interventions as it can direct the executive only in matters which reach its doorsteps and is restricted by separation of powers concerns. However, the ICESCR with its general comments and views on complaints, would exert more pressure on the government in all spheres of its actions exposing the latter's policies to be measured against international standards. Full protection of SERs can only be achieved if South Africa ratifies both the ICESCR and the OP-ICESCR. After having analysed the obligations of the ICESCR, the enforcement of SERs in South Africa and the likely benefits of the ratification the ICESCR and its Optional Protocol, the subsequent chapter draws a general conclusion as well as offers recommendations and the role of key players in promoting SERs in South Africa.

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<sup>225</sup> See chapter 1 section 1.2 of this dissertation.



## Chapter 5

### Conclusion and recommendations

#### 5.1 Conclusion

This study has provided a preview of the ICESCR<sup>226</sup> and its provisions and the approach of the South African Courts in enforcing the justiciable SERs in the South African Constitution.<sup>227</sup> The study has also highlighted the likely benefits that South Africa might reap from ratifying the ICESCR and its Optional Protocol, having regard to the provisions of the ICESCR and the interpretation of the Constitutional Court.<sup>228</sup> As seen earlier, despite the South African Bill of Rights provision for SERs, it is still lacking in some major areas like the right to education and the right to work. Nevertheless, the South African Bill of Rights should at least be commended for making SERS justiciable while western countries are still debating about the latter's justiciability. With the breakthrough of the OP-ICESCR, a major step has been made at the international level in favour of justiciability of SERs. In view of the fact that South African courts already adjudicate on SERs, it is recommended for South Africa to ratify both the ICESCR and the OP-ICESCR, as this will enhance the protection of SERs in its domestic application.

It is true that the ratification of the ICESCR will not result in an 'overnight' change in the provision of SERs. However, international law has an important role to play in the South African jurisdiction be it for the purpose of interpreting laws or legislating or for advancing the enforcement of rights in general. Cases such as *Grootboom* and *Joe Slovo* show how international law in the form of general comments from the Committee on ESCR have impacted on the interpretation of SERs provisions.

However, in *Grootboom*, *TAC* and *Mazibuko* cases, the Constitutional Court rejected the minimum core approach, which has left some poor litigants without direct relief. The reasonableness approach that the Court has adopted, though more substantive than the 'rationality' test in *Soobramoney*, poses some difficulties for poor litigants without legal representation as they will not

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<sup>226</sup> See chapter 2 of this dissertation.

<sup>227</sup> See chapter 3 of this dissertation.

<sup>228</sup> See chapter 4 of this dissertation.

be able to put together all the resources required to prove their case. Hence, by ratifying the ICESCR, South Africa will be bound to also give effect to the minimum core concept, in addition to its obligation to do so under the African Charter. Academics have nevertheless expressed concerns as to the impact of the African regional system of human rights in the South African jurisdiction. They have argued that the impact of the latter compared to the UN system has been 'quite minimal'.<sup>229</sup> Considering the impact that the UN system has in the domestic jurisdiction, it is of paramount importance for South Africa to ratify the ICESCR and the OP-ICESCR for there to be a real hope coupled with international pressure to improve the interpretation and the enforcement of SERs in the country. In light of the setbacks identified in this dissertation and the recommendations below, the ratification of the ICESCR and the OP-ICESCR will definitely provide a boost in the domestic protection of SERs in South Africa.

## 5.2 Recommendations

This section provides a number of suggestions that can be taken into account in order to ensure the ratification and effective implementation of the ICESCR as well as the effective enforcement of the SERs guaranteed in the South African Constitution. The recommendations are directed at state actors such as the judiciary, executive and legislature, non-state actors such as NGOs and the media, the SAHRC and the African Commission.

### 5.2.1 State actors

The contribution of state actors in the South African constitutional democracy within the context of this study would be to provide a more effective domestic implementation of SERs. The ICESCR calls upon all member states to promote and give effect to it.<sup>230</sup>

The ratification of the ICESCR should not be an end in itself; hence courts have a role to play in ensuring that the provisions of the ICESCR are domesticated and used in interpreting constitutionally guaranteed rights. As seen from the cases discussed in the study where international law has been referred to, the Constitutional Court has picked and chosen which principles of the ICESCR to give effect to, especially as South Africa has not ratified the treaty. For

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<sup>229</sup> Kapindu (n 138 above) 50.

<sup>230</sup> Art 2(1) of the ICESCR.

instance, as stated above, the Constitutional Court rejected the minimum core approach in favour of the reasonableness one, thus, focusing more on the procedural part rather than providing content to the SERs. It is further submitted that even if South Africa has not ratified the ICESCR, the Constitutional Court could have been a major player in domesticating the contents of its provisions through its judgments and make it the law of the land through common law.

Further, despite the fact that the Constitutional Court in the case of *Grootboom*,<sup>231</sup> for instance, decided in favour of the applicants, there are still two reasons why the jurisprudence is not in its effect pro poor. Firstly, due to the rejection of the minimum core concept, the judgment did not provide 'direct, substantive relief' to the applicants, thereby providing little prospects to the poor to knock at the doors of courts in case they seek relief.<sup>232</sup> Secondly, the reasonableness review adopted by the court requires applicants to have the complex understanding of policies and budgetary issues, hence acting as a disincentive for the poor to bring cases to courts.<sup>233</sup>

Therefore, it is recommended that the ICESCR be ratified so that the Constitutional Court will have no excuse to depart from the minimum core obligations which would lessen the onus of proof on the victims. Moreover, the Constitutional Court is recommended to embark on remedies such as structural interdicts which will give a supervisory role to the Court and ensure that the remedies it prescribes are duly executed by the executive branch.

Also, the appropriate ministry which will undertake to implement the ICESCR upon ratification has got a very important role. Since all human rights are interrelated and are matters of primary concern in any democratic society, the respective ministry should ensure that all government departments collaborate in meeting the obligations under the ICESCR, especially reporting obligations. It should also act as a peer pressure mechanism for other departments to act promptly. Moreover, it is common knowledge that many poor South Africans are not aware of their rights as well as the various mechanisms available for enforcing them. The role of government authorities and officials in this regard is important in ensuring that there are appropriate human rights education programmes.

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<sup>231</sup> See chapter 3 of this dissertation.

<sup>232</sup> J Dugard & T Roux 'The Record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in R Gargarella et al (eds) *Courts and Social Transformation in New Democracies An institutional voice for the poor* (2006) 113.

<sup>233</sup> Dugard & Roux (n 232 above) 113.

Further, the legislature is the only body which can, through incorporation in national laws, effectively implement the ICESCR. Parliament, within its mandate, has the duty to make the government conform to the Constitution. Therefore, it is the primary function of parliament to use the parliamentary processes to allow the domestication of the provisions of the ICESCR. Hence, parliament can be instrumental in encouraging the government to ratify the ICESCR. In other words, members of parliament including the opposition can pressurise the executive, through parliamentary debates, to ratify the ICESCR.

### **5.2.2 Non-state actors**

With respect to the role of non-state actors such as NGOs, training and education are of prime importance. Education and training workshops should be organised more frequently so as to sensitise people about their SERs and the means available for them to seek redress in case of violation or threats of violation; and also how NGOs can assist them in this regard. In addition, the target groups of those workshops should not exclude the municipal officers, journalists and academics, for them to properly and efficiently address different SERs issues. NGOs can also support and improve state protection of SERs through getting involved in, for instance, the appointments of officials who will be occupying posts in constitutional bodies.

The media is a powerful instrument as well, which can frame public opinion if proper use is made of it. The media can also be used in disseminating information on SERs in a most comprehensive way to the different categories of people in society, and in reporting violations made and the means sought to redress same, thereby nurturing the support of the public in respecting and making others respect human rights standards.

### **5.2.3 The role of the SAHRC**

Monitoring the realisation of SERs is important and constitutional institutions such as the SAHRC have a role to play in this regard. As mentioned previously in this study, the SAHRC is mandated by the Constitution to monitor the implementation of these rights. However, the government needs to ensure that the SAHRC is well resourced to be able to effectively carry out this task. Government departments must also be responsive to the SAHRC's call for information, on the extent of implementation of rights so as to facilitate assessment of the progress being made and identification of challenges. Ratification of the ICESCR and its Optional Protocol will be important in ensuring that

the SAHRC's role is complemented by the Committee on ESCR through the state reporting and complaints procedure.

#### **5.2.4 The role of the African Commission**

Lastly, the African Commission can also play a role in promoting the ratification process of the ICESCR by South Africa. Since South Africa is a party to the African Charter and submits periodic reports to the African Commission and also makes statements during the sessions of the Commission, the latter can exert pressure on South Africa for it to ratify the ICESCR.



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