

# **A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa**

August 2019

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa

© Copyright International Commission of Jurists, 2019

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists  
P.O. Box 91  
Rue des Bains 33  
Geneva  
Switzerland

This publication has been produced with the financial support of the European Union. The contents of this publication are the sole responsibility of the ICJ and can in no way be taken to reflect the views of the European Union.



# **A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa**

August 2019

## **Acknowledgments**

This Guide was written and researched by Timothy Fish Hodgson between August 2017 and August 2019. Editorial assistance with footnoting was provided by Simphiwe Sidu. Ian Seiderman provided comprehensive Legal Review. Invaluable external review was provided by Professor David Bilchitz. The Guide draws on an excellent body of academic work and research publications by local NGOs in South Africa on Economic, Social and Cultural Rights. In particular the work of David Bilchitz, Lilian Chenwi, Jackie Dugard and Sandra Liebenberg was helpful throughout. The Guide builds directly on the ICJ's Practitioners Guide No. 8 "Adjudicating Economic, Social and Cultural Rights at National Level" in particular.

The ICJ partners with a range of organizations within South Africa including: Abahlali BaseMjondolo; the Amadiba Crisis Committee; the Marievale Community Association; the Socio-Economic Rights Institute of South Africa; the Centre for Applied Legal Studies; the South African Institute for Advanced Constitutional, Public, Human Rights and International Law; the Southern African Human Rights Defenders Network; the Southern African Litigation Centre; Lawyers for Human Rights; the Legal Resources Centre; the South African Human Rights Commission; Legal Aid South Africa; the South African Judicial Education Institute; the National Association of Democratic Lawyers; and Probono.Org. The ICJ has also undertaken partnerships with the Right to Education for Children With Disabilities Alliance and South Africa's Ratification Campaign of the International Covenant on Economic, Social and Cultural Rights. Though none of these partners gave direct input and advice on the drafting of this Guide, nonetheless, the ICJ recognizes the importance of its interactions with these local partners, organizations and coalitions in better understanding and appreciating the socio-economic context of ESCR litigation, research and advocacy in South Africa.

The provision of input and advice by individuals or groups and/or the recognition of their contribution and/or influence do not imply their endorsement of the content of the Guide for which the ICJ remains solely responsible.

## TABLE OF CONTENTS

<b>List of Acronyms.....</b>	<b>6</b>
<b>I. PURPOSE OF THIS GUIDE.....</b>	<b>7</b>
<b>II. SCOPE AND FORMAT OF THE GUIDE.....</b>	<b>14</b>
<b>III. CONSTITUTIONAL INTERPRETATION AND INTERNATIONAL LAW.....</b>	<b>17</b>
<b>IV. GENERAL STANDARDS APPLICABLE TO ESCR RIGHTS IN SOUTH AFRICA.....</b>	<b>27</b>
<b>A. STATE DUTIES RELATING TO ESCR: RESPECT, PROTECT, FULFILL (PROMOTE?).....</b>	<b>33</b>
1. The duty to respect.....	34
2. The duty to protect.....	35
3. The duty to fulfill .....	38
4. The duty to promote .....	40
5. State obligations and rights holders .....	42
<b>B. IMMEDIATE OBLIGATIONS: MINIMUM CORE, NON-RETROGRESSION AND NON-DISCRIMINATION</b>	<b>45</b>
1. Obligation to take steps.....	46
2. Obligation to avoid retrogressive steps .....	46
3. Obligation of non-discrimination .....	47
4. Minimum core obligations .....	48
<b>C. MINIMUM CORE OBLIGATIONS.....</b>	<b>48</b>
1. Minimum core or obligations of immediate effect under the ICESCR .....	49
2. What is the relationship between progressive realization and minimum core? .....	51
3. What is the minimum core of specific ESCR? .....	53
4. International justiciability and the minimum core... ..	61
5. Indeterminacy of minimum core in international law 66	
6. Minimum core in South African law .....	68
7. Judicially determined minimum core v judicial enforced minimum core .....	75
8. Applying the minimum core consistently with the requirements of international and South African law .....	77
9. Can South Africa's ratification of ICESCR be harnessed to modify the Constitutional Court's approach to minimum core? .....	82

<b>D. THE OBLIGATION OF “PROGRESSIVE REALIZATION” .....</b>	<b>85</b>
1. Purposive Progressive Realization .....	87
2. Elimination of barriers and hurdles.....	87
3. Continuous improvements: access to a “larger number” and “wider range” .....	88
4. Prohibition of deliberate retrogression .....	89
5. Perpetual, continuous, and varying .....	91
6. Flexible and dynamic.....	94
7. Achieved through clear, well-communicated plans and strategies.....	94
8. Compliance with the obligation of progressively realization .....	95
<b>E. REASONABLE LEGISLATIVE AND OTHER MEASURES.....</b>	<b>98</b>
1. Reasonableness and the provisions of the Constitution 102	
2. Reasonable “legislative <i>and</i> other measures”.....	103
3. Reasonable measures are not necessarily “perfect” measures.....	107
4. Purposive measures .....	108
5. Reasonable measures in conception and implementation.....	109
6. Contextually-informed measures .....	111
7. Comprehensive and Coordinated measures .....	113
8. Coherent measures.....	117
9. Flexible, adapting and updating measures .....	118
10. Transparent measures.....	120
11. Measures addressing “desperate” or “compelling” need.....	121
12. Specific measures for marginalized individuals and groups.....	123
13. Proportionality and measures at relatively or comparatively low cost .....	125
14. Measures with an (adverse) impact on other human rights.....	127
15. Meaningful engagement and consultation as reasonable measures.....	128
16. Conclusion: developing reasonableness, defining the content of rights .....	131
<b>F. WITHIN (MAXIMUM) AVAILABLE RESOURCES ..</b>	<b>133</b>

1. Available resources and the text of the Constitution	135
2. Is there a duty on the State to budget for the fulfillment of ESCR?.....	136
3. Budgeting and ESCR .....	138
4. Available resources in specific circumstances.....	155
<b>G. OBLIGATIONS RELATING TO PRIVATE ENTITIES</b>	<b>167</b>
1. State obligations to respect, protect and fulfill under international human rights law.....	168
2. The duty to protect: the State's duty to prevent human rights abuses by private entities.....	169
3. Direct human rights duties owed by private entities under domestic law .....	175
4. Direct obligations on private entities in South African law	177
5. Future development of positive duties on private entities .....	180
6. Private entities performing public functions.....	182
<b>H. EQUALITY, NON-DISCRIMINATION AND ESCR.....</b>	<b>188</b>
1. Equality and non-discrimination and ESCR in international law .....	190
2. Equality, non-discrimination and ESCR in South African law .....	192
3. What is discrimination?.....	195
4. Prohibited grounds of discrimination.....	196
5. Multiple and intersectional discrimination.....	198
6. Which entities are prohibited from discriminating?	200
7. Consequences of the prohibition of substantive discrimination .....	201
8. Reasonable accommodation: equality for persons with disabilities.....	212
9. Equality and the content of ESCR: the example of gender.....	218
10. Equality, sexual orientation, gender identity.....	222
<b>V. REMEDIES AND AVENUES FOR REDRESS FOR ESCR VIOLATIONS.....</b>	<b>226</b>
1. International Redress .....	228
2. Regional Redress .....	233
3. Domestic Redress .....	238
<b>VI. ANNEXURES.....</b>	<b>244</b>

## List of Acronyms

ESCR	Economic, Social and Cultural rights
CESCR	United Nations Committee on Economic, Social and Cultural Rights
ICESCR	United Nations Convention on Economic, Social and Cultural Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
GC/GR	General Comment/General Recommendation
ACHPR	African Charter on Human and Peoples' Rights
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
CRC	United Nations Convention on the Rights of the Child
CCPR	United Nations Covenant on Civil and Political Rights
CRPD	United Nations Convention on the Rights of Persons with Disabilities
HRC	United Nations Human Rights Committee
ICJ	International Commission of Jurists
ILO	International Labour Organization
SAHRC	South African Human Rights Commission
UDHR	Universal Declaration of Human Rights



## I. PURPOSE OF THIS GUIDE

The South African Constitution contains extensive guarantees aimed at ensuring social and economic transformation, in part through the entrenchment of an extensive range of economic, social and cultural rights (ESCR).<sup>1</sup> In its Concluding Observations to South Africa issued on 12 October 2018, the Committee on ESCR (CESCR) acknowledged:

“The Constitution in force since 4 February 1997 is particularly progressive in the area of economic, social and cultural rights, and its impact has been further strengthened by the interpretation of the Constitutional Court.”<sup>2</sup>

Though often falling short in practice in implementing its constitutional obligations with regard to ESCR, the current government has, at least rhetorically, recently recommitted itself to the redoubling of its efforts to pursue what it describes as “radical socio-economic transformation”.<sup>3</sup> Although, at present, “there is not complete consensus on the meaning of radical socio-economic transformation”, the South African Human Rights Commission considers that “it is clear that government’s long-standing strategy is reconcilable with the achievement of various constitutional and international human rights, including the right to work, labour rights, socio-economic rights, property and land rights”.<sup>4</sup>

---

<sup>1</sup> For consistency with international law terminology “ESCR” is used to describe the full set of rights discussed in this guide as opposed to “socio-economic rights” or “social and economic rights” which is the more common nomenclature in the South African context.

<sup>2</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on South Africa*, UN Doc.

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/ZAF/CO/1&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/ZAF/CO/1&Lang=En), 29 November 2018, para 4.

<sup>3</sup> “2018 is the Year of ‘Radical Socio-economic Transformation’ – President Zuma”, *Mail & Guardian*, 31 December 2017, <https://mg.co.za/article/2017-12-31-2018-is-the-year-of-radical-socio-economic-transformationpresident-zuma>.

<sup>4</sup> The South African Human Rights Commission, *Equality Report 2017/2018: Achieving Substantive Economic Equality through Rights-based Radical Socio-economic Transformation in South Africa*, (2018) p.17.

Both the government's compliance with its legal obligations in terms of ESCR and its progress in achieving transformation can and must "therefore be evaluated through the prism of human rights generally, and the achievement of substantive socio-economic equality, in particular."<sup>5</sup>

The purpose of this Guide is to provide a resource to legal practitioners and human rights defenders encompassing both South African constitutional standards and international law standards on ESCR. While South African law, to some extent, incorporates and reflects international law, international law principles have particularities that will be especially applicable and practically useful to practitioners in South Africa. It is expected that this resource will be practically useful for a wide range of legal practitioners operating within South Africa: judges, magistrates, advocates, lawyers, governmental administrators and legal advisors, paralegals, legal researchers, human rights defenders and academics. It is also expected that, in basing its analysis of ESCR in the present South African context, the Guide can also assist in evaluating South Africa's compliance with human rights obligations.

Moreover, the Guide should be useful to international human rights practitioners and domestic and international practitioners in other jurisdictions. The standards for justiciability, evaluation and interpretation of ESCR set out by the South African Constitutional Court in interpreting ESCR have been instrumental in developing and shaping standards for justiciability, evaluation and interpretation of ESCR in international law.<sup>6</sup> For example, the Optional Protocol to the International Convention on Economic, Social and Cultural Rights (OP-ICESCR), in certain respects, adopts some of the wording in leading South African decisions directly.<sup>7</sup>

---

<sup>5</sup> Id.

<sup>6</sup> Aoife Nolan et al, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, <http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf> (2007), pp. 6 -7.

<sup>7</sup> Frans Viljoen and Nicholas Orago, "An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications", in *Potchefstroom Electronic Journal*, Volume 17, 2014, pp. 2579 - 580.

On the other hand, the International Covenant on Economic, Social and Cultural Rights (ICESCR) itself includes protections of some rights entirely omitted from the South African Constitution. Examples include the right to work (as opposed to rights at work); a right to an adequate standard of living (which includes but is not limited to specific rights to shelter, water and other basic services); and the right to *free* primary education (as opposed to basic education) and the right to enjoy the benefits of scientific progress. Other international treaties, such as the Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of Discrimination Against Women (CEDAW) also include further unique or nuanced additions to the set of ESCR in both the ICESCR and the South African Constitution.

South Africa is a party to the ICESCR, CRC, CEDAW, CRPD, along with most of the other core human rights treaties.<sup>8</sup> The General Comments of the supervisory treaty bodies established under these treaties describe in depth the nature and scope of States' obligations under the respective treaties. These General Comments, together with the observations, statements and commentary of the treaty bodies upon the review of States parties' periodic reports are crucial. Along with the jurisprudence developed under their respective communications procedures of treaty bodies, this integrated jurisprudence is indispensable in understanding the legal obligations of South Africa in terms of ESCR. Indeed, beginning with its earliest judgments on ESCR the Constitutional Court noted that General Comments are "helpful in plumbing the meaning" of ESCR in the Constitution.<sup>9</sup>

Of particular importance for purposes of this Guide is the application of ESCR in the context of persons from "marginalized", "disadvantaged" or "vulnerable" groups". Though South African constitutional law has developed a

---

<sup>8</sup> For a full list of treaties see <http://indicators.ohchr.org> or refer to Annexure A.

<sup>9</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19; 2001 (1) SA 46 (CC) para 45.

detailed equality and non-discrimination jurisprudence, the Court itself has not fully grappled with the application of equality and non-discrimination principles in the context of ESCR.<sup>10</sup>

Moreover, despite some differences between the South African Constitution and international human rights law, key concepts used in the Constitution to qualify ESCR such as “progressive realisation” and “available resources” undoubtedly have their own genesis in the ICESCR and the jurisprudence of the CESCR.<sup>11</sup>

More generally, pursuant to the interpretative direction required by section 39(2)<sup>12</sup> of the Constitution, the Constitutional Court has maintained consistently in its jurisprudence that treaties to which South Africa is bound *must* be used in interpreting rights in the Bill of Rights.<sup>13</sup> Indeed, in terms of the general constitutional duty placed on the State to “respect, protect and promote and fulfill” the rights in the Bill of Rights, the Court has held that even certain international instruments which do not give rise to strict international legal obligations on South Africa may create constitutionally binding obligations for South Africa.<sup>14</sup> This, the Court has reasoned, is because steps taken to comply with the State’s general obligations in terms of the Bill of Rights “must be reasonable and effective” and compliance with even declarative international standards may well be legally required in absence of detailed local policies, laws and principles.<sup>15</sup>

---

<sup>10</sup> See, however, *Khosa & Others v Minister of Social Development & Others, Mahlaule and Another v Minister of Social Development* 2004 (6) BCLR 569 (CC).

<sup>11</sup> See ss 26(2) (the right to housing), s 27 (2) (The right to healthcare, food, water and social security), and s 29(1)(b) (The right to basic education) of the Constitution of South Africa.

<sup>12</sup> Section 39(2) of the Constitution provides: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

<sup>13</sup> *De Vos N.O & Others v Minister of Justice And Constitutional Development & Others* 2015 (2) SACR 217 (CC), para 29.

<sup>14</sup> *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC), para 181.

<sup>15</sup> *Id*, para 189.

The Constitutional Court has from the outset of its jurisprudence indicated that comparative law sources from outside of South Africa or universal international jurisdictions must be considered in interpreting the Bill of Rights.<sup>16</sup> However, in the context of ESCR cases the Court has not typically drawn on burgeoning jurisprudence from courts around the world to inform its decisions. Despite rhetorically acknowledging their value, the Court appears sometimes to express an understanding South African ESCR as *sui generis* in nature. Legal practitioners should guard against claims of South African jurisprudential exceptionalism or exclusivity.<sup>17</sup> To highlight alternative or complementary approaches, decisions of leading African jurisdictions from elsewhere in the world – particularly those in the Global South such as Colombia and India – may well therefore prove to be useful to legal practitioners in the further development and definition of ESCR in South Africa.

With this context, this Guide brings together international and South African constitutional and human rights law and standards on ESCR. In this way it aims to assist legal practitioners and human rights defenders in invoking these complimentary and overlapping sources of law. Ultimately this is what international law requires. It is a fundamental precept of international law, reflected in article 27 of the Vienna Convention on the Law of Treaties, that a State may not invoke its domestic law as justification for its failure to perform its international legal obligations.<sup>18</sup> In that respect, from an

---

<sup>16</sup> *S v Makwanyane & Another* 1995 (2) SACR 1, paras, 34-39, 302-304 and 379.

<sup>17</sup> For some broader context of South African exceptionalism, see: S Msimang "Making South Africa Great Again" *New York Times* (8 December 2016) <https://www.nytimes.com/2016/12/08/opinion/making-south-africa-great-again.html>.

<sup>18</sup> Article 27 reads in full: "**INTERNAL LAW AND OBSERVANCE OF TREATIES**

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

Article 46 reads:

"Article 46. **PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES**

international law perspective, not only must the ICESCR and other ESCR treaty obligations be taken into account where useful, but they should also be implemented irrespective of South African constitutional and statutory law.<sup>19</sup> The CESCR has been clear in reiterating that, “at a minimum, domestic judges should interpret domestic law consistently with the States obligations under the ICESCR”.<sup>20</sup>

This holistic human rights-oriented position allows for tailored, contextualized domestic standards to be developed through bolstering the international law (universal and regional) baseline, with domestic law protections. To assist legal practitioners and human rights defenders in the practical application of human rights standards at the highest level of protections, the approach throughout this Guide is for international human rights standards to be generally applied so far as is reasonably possible consistently with South African constitutional standards.

Though one aim of this Guide is to foster the development of domestic South African ESCR jurisprudence so as to accord with its international legal obligations on ESCR, it is expected

---

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

<sup>19</sup> Though the South African Constitution is the “supreme law” of South Africa, from international law perspective not even a domestic Constitution may violate the requirements of international human rights law. Though potential conflicts between “constitutional supremacy” and “international human rights supremacy” are real, as this guide illustrates they are often resolvable as a result of 1) the broad (though guided) latitude international treaties provide states’ in relation to their binding obligations; and 2) the requirement in both South African and international law that any reasonable interpretations of both sets of binding standards that are consistent with each other should prevail over even other potentially reasonable (but conflicting) interpretations.

<sup>20</sup> The International Commission of Jurists, “Practitioners Guide on Adjudicating Economic, Social and Cultural Rights at National Level, No.8” (2014), available at: <https://www.icj.org/wp-content/uploads/2015/07/Universal-ESCR-PG-no-8-Publications-Practitioners-guide-2014-eng.pdf>, p. 28.

that this exercise will also serve to improve the ability of international legal practitioners (as applied by international and other domestic courts and quasi-judicial authorities) to benefit from South Africa's dynamic constitutional jurisprudence.

The exercise is not an abstract one. It is made more dynamic both by:

- The recent expansion of South Africa's international obligations in terms of ESCR, most notably by its ratification of the International Covenant on Economic, Social and Cultural Rights and;
- An increase in local, regional and international recognition that the levels of inequality and poverty globally are not sustainable and require urgent rectification.

Understood in this light, the Constitution's dual commitments that "[p]eople's needs must be responded to..."<sup>21</sup> and that "all constitutional obligations" – including those emanating from or informed by international law – "must be performed diligently and without delay",<sup>22</sup> require a coherent reconciliation between and streamlining of South African's local and international human rights obligations relating to ESCR. Indeed, this is an imperative of increasing global import in and outside of South Africa. Short of such an undertaking, executives, legislatures, judiciaries (and indeed increasingly relevant private actors) across the world risk continuing to integrate international human rights obligations in policies, laws and jurisprudence in a haphazard, confusing and potentially counterproductive manner. Legal practitioners and human rights defenders have a vital role in ensuring that these risks do not materialize and to ensure that ESCR can play a meaningful role in combatting the harsh and cruel realities of poverty and inequality.

---

<sup>21</sup> s 195 (e), Constitution of South Africa.

<sup>22</sup> s 237, Constitution of South Africa.

## II. SCOPE AND FORMAT OF THE GUIDE

To ensure the Guide's practical usefulness to a wide range of legal practitioners, the scope of it is significantly circumscribed. The Guide is not intended to be a comprehensive analysis of all ESCR standards and issues arising globally or even in South Africa.

The Guide builds on the more general guidance articulated by the International Commission of Jurists (ICJ) in its 2014 *Practitioners' Guide on "Adjudication Economic, Social and Cultural Rights at the National Level"*.<sup>23</sup> This Guide can also be read along with the ICJ's earlier publication on *"Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability"*.<sup>24</sup>

The ICJ co-convened the processes which elaborated of three critical sets of ESCR-related standards developed by international experts, namely: the Limburgh Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights;<sup>25</sup> the Maastricht Guidelines on Violations of ESCR;<sup>26</sup> and the Maastricht Principles on Extraterritorial Obligations of States in the area of ESCR.<sup>27</sup> These resources are cross-referenced throughout for ease of reference and to ensure consistency.<sup>28</sup>

---

<sup>23</sup> *supra*, note 20.

<sup>24</sup> International Commission of Jurists, "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability", *Human Rights and Rule of Law Series: No. 2* (2008), available at: <http://icj.wpenline.netdna-cdn.com/wp-content/uploads/2009/07/Courts-legal-enforcement-ESCR-Human-Rights-Rule-of-Law-series-2009-eng.pdf> .

<sup>25</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, (1987).

<sup>26</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), available at: [http://hrlibrary.umn.edu/instreet/Maastrichtguidelines\\_.html](http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html).

<sup>27</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (2011), available at: <https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf>.

<sup>28</sup> See International Commission of Jurists "Bangalore Declaration and Plan of Action" (1995), available at: <https://www.icj.org/bangalore-declaration-and-plan-of-action/>.



Moreover, it is hoped that legal practitioners, academics and civil society organizations will find the framework set out in this Guide to be useful in furthering research and publication on the full range of ESCR rights in South African and international human rights law.

Third, this Guide approaches its analysis of specific rights using the commonly adopted approach of international human rights treaty mechanisms. Though some variation exists, this approach generally divides the entitlements created by ESCR into sub-components or elements such as “availability”, “accessibility”, “adequacy” and “acceptability”. State obligations are analysed, wherever possible, in terms of the common international human rights law language of obligations to respect, protect and fulfill (including both the duties to facilitate, provide and promote) ESCR.<sup>29</sup> Though South African courts have not consistently adopted these analytical frames directly, as this Guide illustrates, nothing in the Court’s jurisprudence contradicts or disrupts the use of these categories either as a way of thinking about or defining the content of ESCR.

Finally, this Guide generally seeks to avoid important though abstract, academic debates that may be relevant elsewhere in the world but have been rendered redundant by authoritative decisions of South African courts that are unlikely to be reversed. For example, the ICJ considers that there is no debate as to whether ESCR are fully justiciable – this has been long settled. Justiciable ESCR may be the “the Cinderella of the international human rights corpus”<sup>30</sup> but these rights are accepted as fully legally binding in South Africa. This issue was decisively laid to rest in the South African context when the Constitutional Court confirmed the justiciability of ESCR in terms of the South African Constitution as early as its *First Certification* judgment and, in its subsequent jurisprudence on

---

<sup>29</sup> Henry Shue, *Basic Rights Subsistence, Affluence, and U.S. Foreign Policy*, Princeton University Press, 1980.

<sup>30</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2008, p.2.

this issue.<sup>31</sup> The question of justiciability is fully covered in other ICJ publications.<sup>32</sup>

Other similar debates, including standards applicable to determining the content of human rights obligations (such as minimum core, immediate obligations and progressive obligations) are dealt with to the extent necessary and practically useful in the South African context. The debate about the minimum core, in particular, requires a flexible and creative reading of international and South African law to ensure consistency between the two and to ensure analyses that can be practically useful to legal practitioners and human rights defenders. It is also necessary for the South African executive, legislature and judiciary to adopt a coherent approach to minimum core obligations consistent with South Africa's binding commitments in terms of ICESCR.

The Guide proceeds in the following sections:

- **Section III** briefly sets out the South African approach to constitutional interpretation with a focus on the role played by both binding and non-binding sources of international human rights law.
- **Section IV** brings together general standards applicable to ESCR litigation in South Africa. The majority of this section focuses on defining and understanding the terms "progressive realisation", "reasonableness" and "available resources" in terms of South African and international human rights law. This section also emphasizes South Africa's "immediate" obligations in terms of ESCR including non-retrogression, non-discrimination, minimum core and the obligation to take steps.
- **Section V** summarizes some of the available measures for redress for violations of ESCR in South Africa. It broadly covers international, regional and domestic mechanisms for redress and access to justice.

---

<sup>31</sup> *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) paras 76-78.

<sup>32</sup> *supra*, note 24.

### **III. CONSTITUTIONAL INTERPRETATION AND INTERNATIONAL LAW**

This section of the Guide illustrates why legal practitioners and human rights defenders should ensure that arguments developed and presented for litigation and advocacy purposes, integrate *both* international and South African human rights standards. Though “helpful” in “plumbing the meaning” of ESCR in the Bill of Rights according to the Constitutional Court, international human rights standards are also binding on South Africa in terms of international and domestic law.

There is a large array of international law that is applicable to the interpretation and application of ESCR in South Africa. This includes internationally binding treaties (listed in Annexure A), regional covenants and protocols both emanating from the African Union and the Southern African Development Community and authoritative interpretations of these agreements.

In addition to treaties, which form the backbone of international human rights law, relevant declarations of the United Nations General Assembly, the Human Rights Council and the African Union must also be considered in the interpretation of ESCR.

For example, in 2004 the African Commission appointed a Working Group on Economic, Social and Cultural Rights,<sup>33</sup> which produced “Principles and Guidelines on The Implementation of Economic, Social and Cultural Rights in the African Charter on Human, and Peoples’ Rights” and “Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights” adopted by the Commission in 2010.<sup>34</sup> These guidelines built on a resolution

---

<sup>33</sup> African Commission on Human and People’s Rights “Working Group on Economic, Social and Cultural Rights” (2004), available at: <http://www.achpr.org/mechanisms/escr/>.

<sup>34</sup> African Commission on Human and People’s Rights “Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights” (2010), available at: <http://www.achpr.org/instruments/economic-social-cultural/>.

issued by the Commission in 2004, which formally adopted a statement it developed in discussion with government officials and NGOs.<sup>35</sup> They are referenced where relevant throughout this Guide.

Moreover, both the United Nations Human Rights Council and African Union empower special procedures mechanisms by, for example, appointing Special Rapporteurs with mandates pertaining directly to ESCR.

Particularly important UN Human Rights Council Special Rapporteurs include:<sup>36</sup>

- Special Rapporteur in the field of cultural rights;
- Special Rapporteur on the right to development;
- Special Rapporteur on the right to education;
- Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment;
- Special Rapporteur on the right to food;
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living;
- Special Rapporteur on extreme poverty and human rights;
- Special Rapporteur on contemporary forms of slavery, including its causes and its consequences; and
- Special Rapporteur on the human rights to safe drinking water and sanitation.

---

<sup>35</sup> African Commission on Human and People's Rights "Statement from Seminar on Social, Economic and Cultural Rights in the African Charter" (2004), available at:

[http://www.ahrlj.up.ac.za/images/ahrlj/2005/ahrlj\\_vol5\\_no1\\_2005\\_seminar\\_statement.pdf](http://www.ahrlj.up.ac.za/images/ahrlj/2005/ahrlj_vol5_no1_2005_seminar_statement.pdf); See also Resolution on Economic, Social And Cultural Rights in Africa, ACHPR /Res.73 (XXXVI) 04 (2004).

<sup>36</sup> For a full list see:

<https://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>.

The mandate holders of these positions seek and receive information related to laws, policies and practices of particular countries in relation to their respective thematic areas. In addition, with the express cooperation of the government of a particular country, the mandate holders conduct country visits, after which they issue reports commenting on the state of realization of particular ESC rights. In addition, special rapporteurs often perform conceptual analyses regularly report to the UN Human Rights Council and the UN General Assembly on their general activities thereby contributing to the progressive development of ESCR in international human rights law and standards.<sup>37</sup>

Country reports relating to South Africa by Human Rights Council Special Rapporteurs include reports on the right to housing (2007) and the right to food (2011). At the time of publications visits had been requested by Special Rapporteurs pertaining to water and sanitation (2015), health (2018), housing (2018), extreme poverty (2018).<sup>38</sup> Though the status of these requests is unclear, in 2003 the South Africa government issued a “standing invitation” for such requests which according to the Human Rights Council “is an open invitation extended by a Government to all thematic special procedures” because “by extending a standing invitation States announce that they will always accept requests to visit from all special procedures”.<sup>39</sup>

Finally, because “developments in the understanding of the nature and scope of State obligations have been greatly contributed to by the work of international legal experts” which

---

<sup>37</sup> See Reports to the UN Human Rights Council:  
<https://www.ohchr.org/EN/HRBodies/SP/Pages/GAReports.aspx>;  
Reports to UN General Assembly:  
<https://www.ohchr.org/EN/HRBodies/SP/Pages/GAReports.aspx>.

<sup>38</sup> For a full list of country visits of Special Procedures of the Human Rights Council since 1998, see:  
<https://spinternet.ohchr.org/Layouts/SpecialProceduresInternet/ViewCountryVisits.aspx?Lang=en&country=ZAF>.

<sup>39</sup> See United Nations Human Rights Office of the High Commissioner “Standing Invitations”  
<https://spinternet.ohchr.org/Layouts/SpecialProceduresInternet/StandingInvitations.aspx>.

have “in turn inspired the CESC in its own interpretive function”,<sup>40</sup> established sets of expert-developed principles including the Limburg Principles, the Maastricht Guidelines and the Maastricht ETO Principles, carry significant weight in the interpretation and application of domestic human rights standards.

The South African Constitution itself reflects a similar appreciation of the importance of international human rights standards in the interpretation and application of South African law in general and human rights standards in particular. The Constitution, which affirms emphatically its supremacy<sup>41</sup> and seeks to “build a united and democratic South Africa *able to take its rightful place as a sovereign state in the family of nations*.”<sup>42</sup> Consistently with this internationalist approach, it continues to extensively detail its relationship with international law.

In sections 231-233, the Constitution deals respectively with “international agreements”,<sup>43</sup> “customary international law”<sup>44</sup> and the “application of international law”.<sup>45</sup> The executive is required to negotiate and sign international agreements and the legislature to ensure that they are rendered legally binding in terms of domestic law (ie. through ratification or accession) by approving them by “resolution”.<sup>46</sup> This step is required to convert an international legal obligation, which accrues at the time at which the executive deposits an instrument of ratification to the relevant international entity, into a

---

<sup>40</sup> *supra*, note 20, pp. 33-34.

<sup>41</sup> Section 2 of the Constitution of South Africa provides that “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

<sup>42</sup> Preamble of the Constitution of South Africa. Emphasis Added.

<sup>43</sup> s 231, Constitution of South Africa.

<sup>44</sup> s 232, Constitution of South Africa provides: “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

<sup>45</sup> s 233, Constitution of South Africa provides: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

<sup>46</sup> s 231 (1)-(2), Constitution of South Africa.

simultaneously binding domestic legal obligation. This renders South Africa's system formally "dualist" in nature.

Although binding under international law, only a limited category of such agreements "of a technical, administrative or executive nature" carry the force of domestic law without "either ratification or accession" by the legislature.<sup>47</sup> Any other agreements, though binding upon a resolution of parliament falling short of legislation, "become law in the Republic when it is enacted into law by national legislation".<sup>48</sup> Though CESCR has noted that judicial and other organs of States should treat a number of ICESCR's provisions as "inherently self-executing",<sup>49</sup> there is no indication in South African jurisprudence at present that treaties such as ICESCR will be considered self-executing. Customary international law, whether relating to ESCR or any other subject matter, on the other hand, is automatically "law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".<sup>50</sup>

As a matter of authoritative interpretation of "any legislation" international law as a whole (including international customary law and international agreements) have a central role to play. The Constitution is explicit that "courts must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that

---

<sup>47</sup> s (3) of the Constitution of South Africa, reads in full:

"(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time".

<sup>48</sup> Section 231(2) and (4) of the Constitution of South Africa provide:

"(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."

"(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

<sup>49</sup> Committee on Economic, Social and Cultural Rights, General Comment no.

3, UN Doc. E/1991/23, (1990), para 5.

<sup>50</sup> s 232, Constitution of South Africa.

is inconsistent with international law”.<sup>51</sup> In the context of ESCR, Liebenberg notes that this includes both legislation that is expressly directed towards the realization of ESCR and “legislation that affects peoples socio-economic rights”.<sup>52</sup>

This requirement is further specified in the context of interpretation of the Bill of Rights, which, importantly, includes a large range of ESCR discussed in this Guide.<sup>53</sup> In sections 39(1)(b) and (c) the Constitution specifically requires that, when interpreting the Bill of Rights any court, tribunal or forum, “must consider international law” and “may consider foreign law”.<sup>54</sup> In this context, no distinction is made between customary international law and treaty law, nor is any reference made to binding or non-binding sources of international law. In a sense these provisions soften the effects of the dualist system outlined above as international standards can, and must, be utilized in interpretation of the Bill of Rights even if they have not expressly been incorporated by Parliament.

This essential and extensive role for international law in the authoritative interpretation of the Constitution and law in South Africa must be understood in the broader context of the Constitutional Court’s purposive, generous and contextual approach to constitutional interpretation.<sup>55</sup> The Constitution requires that the Bill of Rights must be interpreted in such a way as to “promote the values that underlie and open and democratic society based on human dignity, equality and freedom.”<sup>56</sup> All legislation, the common law and customary law must be construed in a manner that “promote[s] the spirit, purport and objects of the Bill of Rights”.<sup>57</sup> In the context of legislative interpretation, but of more general application the

---

<sup>51</sup> s 233, Constitution of South Africa.

<sup>52</sup> Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution*, Juta Law, 2010, p. 105.

<sup>53</sup> Bills of Rights are found in Chapter 2 of the Constitution of South Africa.

<sup>54</sup> s 39 (1) (b) – (c), Constitution of South Africa.

<sup>55</sup> See *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC), para 8.

<sup>56</sup> s 39(1)(a), Constitution of South Africa.

<sup>57</sup> s 39(2), Constitution of South Africa.



Court has understood this interpretative obligation to mean that:

"all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."<sup>58</sup>

Broadly, this approach has been characterized as requiring a "purposive" approach to interpretation, which entails fully considering the purpose and objects of a provision when seeking to determine its meaning.<sup>59</sup> It has also involved extensive and ubiquitous reference to both binding and non-binding sources of international law and foreign law in the Constitutional Court's jurisprudence.

In general, the Court has clarified that the constitutional provisions detailed above "demonstrate that *international law has a special place in our law* which is carefully defined by the Constitution".<sup>60</sup> In particular, it has held "our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with

---

<sup>58</sup> *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others In re: Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12; 2001 (1) SA 545 (CC), para 21.

<sup>59</sup> Sandra Liebenberg "The Interpretation of Socio-Economic Rights", in *Constitutional Law of South Africa*, Chapter 33, 2012; See also: *S v Zuma & Others* [1995] ZACC 1; 1995 (2) SA 642; *S v Makwanyane & Another* [1995] ZACC 3; 1995 (3) SA 391, para 9.

<sup>60</sup> *supra*, note 14, para 97. Emphasis Added.

*international law, in particular international human rights law.*"<sup>61</sup>

The Court has therefore expressly drawn directly on international human rights law treaties which the South African parliament has not enacted into law, indicating that the Constitution "still requires this Court to consider international law when interpreting the Bill of Rights".<sup>62</sup> This is, in part, as a result of an acknowledgment that once a treaty is signed (pursuant to (s 231(1)) and accepted by a resolution of parliament (s 231(2)), it becomes binding in terms of both domestic and international law even in the absence of domestic legislation formally enacting such treaties.

Reading the Constitution's mandate to adopt reasonable interpretations of domestic law consistent with international law, the Constitutional Court has concluded "there is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty". By doing so, the Court describes as "an intrinsic part of the Constitution" the "rights and duties" created by "international obligations" which have not been acknowledged by a resolution of parliament or the subsequent enactment through legislation.<sup>63</sup>

Indeed, even international law treaties that South Africa is specifically precluded from signing and ratifying – such as instruments from the European or Inter-American human rights systems – can and will be considered in the rights interpretation process.<sup>64</sup> In the same vein, declaratory or "soft law" such as declarations or resolutions of UN and regional

---

<sup>61</sup> *Id*, para 97. Emphasis Added.

<sup>62</sup> *De Vos N.O & Others v Minister of Justice And Constitutional Development & Others* [2015] ZACC 21; 2015 (2) SACR 217 (CC), para 29. The Court noted in full: "The United Nations Convention and its Optional Protocol were ratified by Parliament on 30 March 2007. Although the United Nations Convention has not been enacted into law in terms of section 231(4) of the Constitution, section 39(1)(b) still requires this Court to consider international law when interpreting the Bill of Rights."

<sup>63</sup> *supra*, note 14, para 202.

<sup>64</sup> *supra*, note 52, p. 102.

bodies; reports and guidelines of special rapporteurs; and "reports of specialized agencies such as the International Labour Organisation will be used as 'tools of interpretation'".<sup>65</sup>

In the context of ESCR and ICESCR these decisions and interpretative approaches are crucial. South Africa signed the ICESCR on 3 October 1994, prior even to the adoption of the Constitution. However, it only ratified ICESCR through a resolution of parliament on 12 January 2015, 21 years later.<sup>66</sup> It is yet to adopt specific legislation to "enact" ICESCR into law consistently with s 231(4) of the Constitution. Nevertheless, the government itself states clearly in its submissions to the CESCR committee that the "legislative, administrative and policy measures in place for the attainment of socio-economic rights" it has taken "even prior to the ratification of the ICESCR" enact many of ICESCR's provisions into law.<sup>67</sup>

Moreover, in in the same submissions made to CESCR, the South African government indicates: "Acceding to the Covenant represented an important step forward, giving the ICESCR greater force in domestic law. South Africa's accession of the ICESCR has and will continue to deepen the enforcement of ESCR in the country."<sup>68</sup> Although it has not signed or ratified the OP-ICESCR its report indicates that the "accession" to the protocol is "receiving attention".<sup>69</sup> In any event, CESCR, in its concluding observations to South Africa has "encouraged" South Africa "to ratify the Optional Protocol".<sup>70</sup>

---

<sup>65</sup> *supra*, note 52, p. 102; *supra*, note 16, para 35. Indeed one critic of the Court's approach has expressed the view that the Court's approach to interpretation has "collapsed binding law and non-binding 'soft' law" completely. See Juha Tuovinen, "What to Do with International Law? Three Flaws in Glenister", in *Constitutional Court Review*, Volume 5, 2015, p. 435.

<sup>66</sup> For further detail, see the United Nations Treaty Collection web database for ICESCR:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsq\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsq_no=IV-3&chapter=4&clang=en)

<sup>67</sup> Committee on Economic, Social and Cultural, "Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/C.12/ZAF/1 (2017), para 5.

<sup>68</sup> *Id.*, para 1. The government's statement that it "acceded" to the Covenant is, perhaps more accurately stated as its "ratification" of the Covenant.

<sup>69</sup> *Id.*

<sup>70</sup> *supra*, note 2, para 78.

Furthermore, the government acknowledges that ICESCR “served as a major source of inspiration for the drafting of the provisions on socio-economic rights in the Constitution. It helps to ensure that our laws, policies and jurisprudence on socio-economic and cultural rights develop in harmony with the standards set by the ICESCR”.<sup>71</sup>

This acknowledgment mirrors and reinforces the Constitutional Court’s specific finding – long before South Africa’s ratification of ICESCR – that both ICESCR itself and CESCR’s analysis in its general comments play the dual role of “explain[ing] the scope of States Parties’ obligations under the Covenant” and “plumbing the meaning” of the South African Constitution though the “weight to be attached to any particular principle or rule of international law will vary”.<sup>72</sup> The weight will be particularly strong, regardless of the binding nature of the source of law, according to the Court, when the meaning ascribed to key terms in the ICESCR by CESCR, is “in harmony with the context in which the phrase is used in the Constitution”. When this is the case “*there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived*”.<sup>73</sup>

The importance of such a reading of the South African ESCR jurisprudence is vitally important particularly in the context in which to date “only a few ESC rights cases have been brought before the African Commission”<sup>74</sup> and, despite the operation of the Optional Protocol to ICESCR for a full decade, there is a relatively slim substantive jurisprudence produced by CESCR in this period.

---

<sup>71</sup> *supra*, note 67, para 166.

<sup>72</sup> *supra*, note 9, paras 26 and 45.

<sup>73</sup> *Id*, para 45. Emphasis added. Departures from international law standards are only permitted in terms of international law when they provide a higher threshold of protection for human rights.

<sup>74</sup> Manisuli Ssenyonjo “Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter”, in *Netherlands Quarterly of Human Rights*, Volume 29, 2011, p. 360.

#### IV. GENERAL STANDARDS APPLICABLE TO ESCR RIGHTS IN SOUTH AFRICA

The standard of review set by ESCR in the South African Constitution and international human rights law vary both from right to right and also within specific rights. Generally, however, the State has at least the following domestic and international obligations in terms of all ESCR:

- To take **reasonable and proactive** legal, policy and practical measures **to the maximum of its available resources** to ensure that rights are **progressively realized**. These measures include the *actual provision of resources, goods and services*.
- To ensure compliance with **immediate obligations**, including: **to take steps** immediately towards the progressive realization of ESCR; to ensure **compliance with minimum core obligations**; to avoid, except where absolutely necessary, any **retrogressive measures**; and to **ensure all measures are undertaken without discrimination**.
- To ensure where it claims that there is an unavailability of resources, that it can **provide real and demonstrable evidence** to illustrate this claim.
- To **regulate private entities**, particularly those entities who trade in goods and services which are the subject matter of ESCR, in order to ensure that these entities do not violate ESCR or contribute to such a violation.
- To prevent ESCR violations by **ensuring co-operative governance** between different levels and branches of government and by ensuring **meaningful engagement in good faith** with all relevant parties to a conflict or disagreement relating to ESCR.
- To **provide effective remedies and reparation** for the violation of ESCR.

Throughout, the Guide scrutinizes text of the Constitution in detail. The Constitutional Court indicated in *Grootboom* that the ESCR in the Constitution had been “carefully crafted”<sup>75</sup>

---

<sup>75</sup> *supra*, note 9, para 21.

within a “carefully constructed constitutional scheme”.<sup>76</sup> In turn, as has been explained, the Constitution deliberately seeks to embody international human rights law standards. Therefore, this Guide will involve close consideration of the impact that international human rights law has on the meaning of ESCR in the South African context. In particular, the general obligations of States which are detailed in CESCR’s General Comment 3 on the “Nature of States’ Parties Obligations” is crucial in this regard,<sup>77</sup> though other sources of international human rights law, as they are continuously developed, are also essential in understanding South Africa’s ESC obligations.

In keeping with the Constitution’s instruction that “reasonable interpretations” of South African law that are “consistent with international law” must be prioritized, key concepts, in South African law are construed consistently with the CESCR’s interpretations. To ensure their ability to persuade governmental decision makers and judges alike, legal practitioners are well advised to continue to take the text of the Constitution seriously even where it may be tempting to rely exclusively on international human rights law.

The remainder of this section proceeds as follows:

- In **section A**, the State’s general duties to respect, protect, promote and fulfill ESCR are outlined. This is done drawing on the approach of CESCR to ICESR, the African Commission’s understanding of the African Charter and the South African Constitutional Court’s interpretation of section 7(2) of the Constitution. Though the duty to promote is not necessarily a self-standing duty in international human rights law, the South African Constitution’s inclusion of it is consistent with the African Charter and not in conflict international law.
- In **section B** States’ “immediate obligations” in terms of ESCR obligations are briefly sketched out. These

---

<sup>76</sup> Id, para 71.

<sup>77</sup> *supra*, note 49.

obligations include obligations to: take steps immediately towards the progressive realization of ESCR; ensure compliance with minimum core obligations; avoid, except where absolutely necessary, any retrogressive measures; and ensure all measures are undertaken without discrimination. Substantial attention is given to the minimum core standard and its application in South African law.

- In **section C**, the content and meaning of one of these immediate obligations – the obligation to ensure compliance with minimum core obligations – extensively discussed. The scope and content of States’ minimum core obligations under ICESCR and the African Charter as interpreted by CESCR and the African Commission are detailed. This section reconciles South Africa’s international human rights obligations in terms of the minimum core with the South African Constitutional Court’s disinclination to make a *judicial determination* of the content of the minimum core. The Court, it is observed, has nonetheless accepted the role of the judiciary in the *judicial enforcement* or *judicial application* of minimum core obligations. Minimum core obligations cannot be ignored and may require reconsideration since South Africa’s ratification of ICESCR. Nevertheless, a nuanced appreciation of the standards in international law significantly reduces some apparent conflicts between the South African Constitutional Court’s approach to the minimum core and that of CESCR.
- In **section D**, the obligation to “progressively realize” ESCR is detailed. This obligation, which is described by CESCR as States’ “primary” or “general” obligation is fleshed out. It is concluded that “progressively realization” has virtually identical meanings in both South African and international law. Legal practitioners are provided with a non-exhaustive list of components of progressive realization that can be discerned from international and South African law sources and principles.

- In **section E**, the evaluation standard of review for assessing compliance with this requirement in South African law – “reasonable legislative and other measures” – is investigated. It is noted that the OP-ICESCR contains a very similar standard of evaluation for the adjudication of ESCR by CESCER to the South African Constitutional Court’s approach. The standard applied for *domestic justiciability* of ESCR in South African courts therefore aligns closely with the standard for *international justiciability* in terms of CESCER’s communications procedures. It is, however, notable that the Optional Protocol does not seek to set a global standard for domestic justiciability of ESCR to the exclusion of any potentially more protective domestic standards in compliance with Covenant. The reasonableness review standard in terms of the OP-ICESCR therefore does not allow the South African Constitutional Court’s approach to escape scrutiny in terms of international human rights law. It is nevertheless useful for South African practitioners and human rights defenders to attempt to draw from both CESCER and the Constitutional Court’s approaches to reasonableness review. An understanding of reasonableness consistent with the existence of some “immediate” obligations must be developed.
- In **section F**, the obligation to consider “available resources” in assessing the reasonableness of measures taken by states to progressively realize ESCR rights is scrutinized. It is established that the State’s duty in this regard includes a duty to proactively ensure the provision of resources for the realization of ESCR and to ensure performance of a State’s obligations in specific situations. Despite the different wording in international law (“a maximum of available resources”) and South African law (“within available resources”), a purposive interpretation of both standards suggests their functional equivalence. It is therefore useful for South African practitioners to attempt to draw from both CESCER and the Constitutional Court’s approaches to



“available resources”. CESCR’s concluding observations to South Africa also draw clear attention to the broader duties in terms of this requirement, which extend to the legislature and the executive, perhaps most crucially in the fulfillment of their budgetary obligations.

- In **section G**, the relevance and importance of the obligations under the ICESCR and the Constitution to non-State actors is investigated. In terms of the “duty to protect” ESCR, the State is required to take measures that prevent third parties from interfering with their enjoyment. In practice this may, in the appropriate circumstances, amount to a duty to regulate private entities operating in markets for goods and services forming part of the content of ESCR. Though the private entities can include various non-state actors, the focus of the analysis in this guide is on business entities. Under international human rights law, private entities have not generally been recognized to have legal “obligations” emanating directly from human rights, even though this position is becoming increasingly contested. However, as part of their obligation to protect ESCR, States are very much expected to impose human rights duties on private entities. CESCR has recently acknowledged the importance of the recognition of such direct obligations in domestic legal regimes. In South African law, private entities have been determined to have, in the appropriate circumstances, both negative and positive duties in terms of ESCR and indeed all human rights. These positive obligations are particularly pronounced in situations in which private entities agree to perform public functions on behalf of the State. Given the Constitutional Court’s willingness to develop these obligations, legal practitioners and human rights defenders are encouraged to pursue legal arguments and advocacy aimed at further definition of such direct obligations.
- Finally, **section H** explores the “immediate” obligation to ensure that ESCR are realized without discrimination

in keeping with the right to substantive equality. This obligation stems from both the Constitution and ICESCR. Giving detail to the prohibited grounds of discrimination, the section also explores multiple, intersecting compounding discrimination. Several consequences of the acceptance of a substantive approach to equality are considered including: obligations to eliminate systemic discrimination; temporary special measures; and the duty to provide reasonable accommodations. The approaches of South African and international law are broadly capable of reasonable, consistent interpretation in this regard. As illustrative examples, the Guide includes brief sections on aspects of the equality principle as it directly applies to: persons with disabilities; women and girls; and persons whose gender identity and/or sexual orientation expose them to increased risk and vulnerability in accessing ESCR. Legal practitioners and human rights defenders are advised to remain cognizant of equality-specific aspects of ESCR cases and it is suggested that international law may provide substantial assistance in advancing ESCR claims that are tailored towards the needs and rights of vulnerable and marginalized groups.

## **A. STATE DUTIES RELATING TO ESCR: RESPECT, PROTECT, FULFILL (PROMOTE?)**

"CESCR has identified three types or levels of obligations that apply to the substantive rights under the ICESCR: 1) The obligation to respect, requiring States to refrain from measures or conduct that hinder or prevent the enjoyment of rights; 2) The obligation to protect, which requires States to act to prevent third parties, such as businesses or armed groups, from interfering with or impairing the enjoyment of these rights; and, 3) the obligation to fulfil rights by taking positive measures towards their realization."<sup>78</sup>

The African Commission has broadly applied this same typology in its interpretation of states' duties in terms of ESCR. In *Zimbabwe Human Rights NGO Forum*, for example, it held:

"both civil and political rights and social and economic – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely, the duty to respect, protect, promote, and fulfill".<sup>79</sup>

The addition of the "duty to promote" to the duties to respect, protect and fulfill appears to be intentional given its consistent repetition in the Commission's jurisprudence and reference made to it by the Commission in various other resolutions and guidelines.<sup>80</sup> CESCR, for its part, refers to a separate duty to "promote" in at least three of its General Comments.<sup>81</sup>

This broad, categorization of the states duties in terms of ESCR is explicitly affirmed by the text of s 7(2) of the South African Constitution which requires that the state "the state must

---

<sup>78</sup> *supra*, note 20, p.53.

<sup>79</sup> *Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication* 245/2002, African Commission on Human and People's Rights, 2006, 39<sup>th</sup> Ordinary Session, para 152.

<sup>80</sup> *supra*, notes 33, 34 and 34.

<sup>81</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4, (2000), para 33; Committee on Social, Cultural and Economic Rights, General Comment No.15, UN Doc. E/C.12/2002/11, (2003); Committee on Social, Cultural and Economic Rights, General Comment No.19, UN Doc. E/C.12/GC/19, (2008), paras 47-49.

respect, protect, promote and fulfil the rights in the Bill of Rights.”<sup>82</sup> This provision, consistently with the approach of the African Commission, clearly applies to all rights including ESCR rights. Moreover, the Constitutional Court has clarified that all of “the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective”.<sup>83</sup>

Finally, it is generally important in analyzing all four of these state duties or obligations to distinguish between what the Maastricht Guidelines refer to as the “inability” and “unwillingness” of States “to comply with its treaty obligations”. A failure by a State to perform any of its legal duties to respect, protect, fulfill or promote ESCR can only be attributed to an “inability” to comply where such a state overcomes “the burden of proving that this is the case”.<sup>84</sup>

## **1. The duty to respect**

When discharging public functions and exercising public power the duty to respect requires the State to “refrain from itself interfering with the existing enjoyment of a right by rights-holders”.<sup>85</sup> Such interference can be “direct” or indirect”.<sup>86</sup>

In *SERAC*, for example, the African Commission articulated the duty to respect the right to housing as requiring states to:

“abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.”<sup>87</sup>

---

<sup>82</sup> Section 7(2), Constitution of South Africa.

<sup>83</sup> *supra*, note 14, paras 189-202.

<sup>84</sup> *supra*, note 26, para 13.

<sup>85</sup> *supra*, note 20, p. 57.

<sup>86</sup> *supra*, note 27, paras 20-21.

<sup>87</sup> *SERAC and CESR v. Nigeria, African Commission on Human and Peoples’ Rights, Communication No. 155/96, African Commission on Human and People’s Rights (2001), paras 61 and 62.*

Such “practices” violating the duty to respect the right to housing, the Commission found, included the destruction of houses and villages, but extended to obstruction, harassment, intimidation, beating and killing of “innocent civilians who have attempted to return to rebuild their ruined homes”.<sup>88</sup> The state must, more generally, therefore, refrain from both “direct” and “indirect” interference with ESC rights.<sup>89</sup>

Though often cast as a “negative obligation”, or a duty to avoid harming existing enjoyment of or access to ESCR, the duty to respect will often require States to take positive measures to prevent interference with ESCR. This may include, as examples:<sup>90</sup>

- the establishment of appropriate institutions to ensure the respect of ESCR;
- the provision for an effective system of administration of justice to conduct proper investigations relating to the violation of ESCR; and
- the provision for remedy and reparation in response to any violation by State agents of ESCR.

In its guidelines on the implementation of ESCR, the African Commission therefore clarifies that the duty to respect includes an obligation “to take positive measures to ensure that all branches of government (legislative, executive and judicial) at all levels (national, regional and local), as well as all organs of state, do not violate economic, social and cultural rights”.<sup>91</sup> It is therefore evident that the duty to respect may carry both negative and positive obligations with which states must comply.

## **2. The duty to protect**

CESCR’s standard articulation of this duty indicates that “the obligation to protect requires States parties to take measures

---

<sup>88</sup> Id, paras 61-62.

<sup>89</sup> Id, paras 5-6.

<sup>90</sup> Id, paras 5-6.

<sup>91</sup> Id, paras 5-6.

that prevent third parties from interfering” with ESCR.<sup>92</sup> This obligation applies generally to any interference by any “third party”. As the African Commission’s guidelines indicate more directly such third parties may include a wide range of “non-state actors” such as “multi-national corporations, local companies, private persons, and armed groups”.<sup>93</sup>

The obligation, which applies generally, “may involve a heightened measure when there is a power imbalance between an individual and a third party, such as in respect of large business enterprises”.<sup>94</sup> According to the UN Guiding Principles on Business and Human Rights, the obligations of states to protect individuals from human rights abuses by business enterprises requires them to take “appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”<sup>95</sup>

Moreover, under international law, States themselves “are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors”.<sup>96</sup> This standard, articulated in this manner in the Maastricht Guidelines, was first laid down a decision of the Inter-American Court of Human Rights in *Velasquez v Honduras*.<sup>97</sup>

The duty to protect, as the African Commission recognizes explicitly, “requires the State to take positive measures” including “regulating and monitoring the commercial and other

---

<sup>92</sup>Committee on Economic, Social and Cultural Rights, *General Comment No. 18*, UN Doc. E/C.12/GC/18, (2006).

<sup>93</sup> *supra*, note 34, para 7.

<sup>94</sup> *supra*, note 20, p. 59: Such a “heightened measure” may involve the state taking a greater degree of vigilance in enacting measures to protect ESCR and/or the eventual enactment of stronger regulatory measures to ensure the protection of ESCR.

<sup>95</sup> Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, “UN Protect, Respect and Remedy”, (2008), principle 1, available at: <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>

<sup>96</sup> *supra*, note 26, para 18.

<sup>97</sup> Judgment of 29 July 1988, Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, para 172.

activities of non-state actors that affect people's access to and equal enjoyment" of ESCR.<sup>98</sup> The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights describe the duty to protect as including an "obligation to regulate" non-state actors where states are in a position to do so to ensure they "do not nullify or impair" the enjoyment of ESCR.<sup>99</sup>

CESCR General Comments indicate that these positive measures may include, as examples:<sup>100</sup>

- the adoption of legislation, policies and programmes relating ESCR;
- the provision of protection against "threats" to ESCR emanating from private sector activity;
- the control and regulation of products and services relating to ESCR;
- the securing of compliance with certain standards for professionals providing services impacting on ESCR;
- the prevention of harmful practices limiting access to ESCR; and
- the monitoring and regulation of activities and actions of any third parties to ensure that they do not limit access to information relating to ESCR.

The Constitutional Court has, in substance, largely confirmed this approach. In *New Clicks* it held, for example it held that the "government is entitled to adopt, as part of its policy to provide access to health care, measures designed to make [health care services] more affordable than they presently are".<sup>101</sup> This finding, though not strictly requiring adoption of such measures, is consistent with the duty to protect the right to access to health care services in terms of international law

---

<sup>98</sup> Id, para 7.

<sup>99</sup> *supra*, note 27, para 24.

<sup>100</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4 (2000), para 35.

<sup>101</sup> *Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others* [2005] ZACC 14; 2006 (2) SA 311 (CC), para 32.

and section 7(2) of the Constitution.<sup>102</sup> Legal practitioners may find a fuller exposition of the duty to protect provided below in this Guide useful in understanding human rights obligations relating to business activities in particular.<sup>103</sup>

### **3. The duty to fulfill**

According to CESCR, “the obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide”.<sup>104</sup> Broadly, these obligations require states to take “legislative, administrative, budgetary, judicial and other measures towards the full realization of rights”,<sup>105</sup> including by means of international assistance and cooperation.<sup>106</sup> Similarly, the African Commission suggests that the duty to fulfill creates “a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights”.<sup>107</sup> As a prerequisite to taking such action, States are required to “identify problematic situations” and assess the need to provide relief in the absence of which individuals will not enjoy access to ESCR.<sup>108</sup>

Although “the precise scope and content of the obligation necessarily depends on the particular context”, the duty to fulfill, at the most basic level, “generally involves establishment by a State of institutional machinery essential for the realization of rights”.<sup>109</sup> The establishment of such institutional machinery is one aspect of the duty to fulfill, namely, the duty to facilitate. The CESCR has expanded on the duty to facilitate in its jurisprudence indicating that it requires “positive measures” including those that:

---

<sup>102</sup> Marius Pieterse, *Can Rights Cure? The Impact of Human Rights Litigation on South Africa's Health System*, Pretoria University Law Press, 2014, p. 128.

<sup>103</sup> See section IV G below.

<sup>104</sup> Committee on Social, Cultural and Economic Rights, General Comment No.19, UN Doc. E/C.12/GC/19 (2008), para 47.

<sup>105</sup> *supra*, note 26, para 6.

<sup>106</sup> *supra*, note 20, p. 61.

<sup>107</sup> *supra*, note 34, para 10.

<sup>108</sup> *Id*, para 10.

<sup>109</sup> *Id*, para 10.



- “enable and assist individuals to enjoy the right to work and to implement technical and vocational education plans to facilitate access to employment.”<sup>110</sup>
- “assist individuals and communities to enjoy the right to social security”.<sup>111</sup>
- “enable and assist individuals and communities to enjoy the right to health.”<sup>112</sup>
- “[are] intended to strengthen people’s access to and utilization of resources and means to ensure their livelihood, including food security.”<sup>113</sup>

The duty to facilitate therefore captures forms of ESCR fulfillment that, though falling short of direct provision, are more specific than general promotion through educational and awareness-raising activities. In other words, it involves “creating conditions that would allow right-holders to manage their own access to the provisions protected by rights” and “removing obstacles to the full enjoyment of rights”.<sup>114</sup> For example, CESCR has indicated that the duty facilitate the right to work requires states to “implement technical and vocational education plans to facilitate access to employment” thus reducing existing barriers to employment.<sup>115</sup> This understanding is furthermore consistent with the African Commission’s indication that “the duty to fulfil includes the adoption of measures that enable and assist individuals and communities to gain access to these rights on their own”.<sup>116</sup>

The sub-duty to provide ESCR is placed on States directly “when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal” or with the mere assistance by the state in facilitating such access.<sup>117</sup> On the same basis this duty “applies

---

<sup>110</sup> *supra*, note 92, para 27.

<sup>111</sup> *supra*, note 100, para 48.

<sup>112</sup> *supra*, note 100, para 37.

<sup>113</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 12, UN Doc.E/C.12/1999/5 (1999), para 15.

<sup>114</sup> *supra*, note 20, p. 61.

<sup>115</sup> *supra*, note 92, para 27.

<sup>116</sup> *supra*, note 34, para 11.

<sup>117</sup> *supra*, note 92, para 26; *supra*, note 100, para 37; *supra*, note 113, para 15.

for persons who are victims of natural or other disasters”.<sup>118</sup> In these circumstances, as the African Commission highlights, States are required to “take measures necessary to ensure that each person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction”.<sup>119</sup>

In its jurisprudence, CESCR provides a range of other rights-specific content to the duty to fulfill. Violations of the duty common to the full range of ESC rights include:<sup>120</sup>

- Failures to meet substantive standards regarding the quality of services for the provision of an ESCR;
- Failures to meet procedural standards for planning, implementing or monitoring services for the provision of an ESCR;
- Insufficient allocation of resources for the provision of goods or services which form the content of an ESCR;
- Failure to implement statutory obligations for the provision of an ESCR; and
- Failure to provide goods and services to eligible individuals for the provision of an ESCR.

The duty to promote is detailed separately in the next subsection.

#### **4. The duty to promote**

In General Comment 14, CESCR indicates that the duty to fulfill “contains obligations to facilitate, provide and promote” and stresses: “the obligation to fulfil also incorporates an obligation to promote because of the critical importance of health promotion in the work of WHO [World Health Organization] and elsewhere”.<sup>121</sup> In General Comment 15, CESCR builds on this, explaining “the obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water

---

<sup>118</sup> *supra*, note 113, para 15; *supra*, note 100, para 50.

<sup>119</sup> *supra*, note 34, para 11.

<sup>120</sup> *supra*, note 20, p. 62.

<sup>121</sup> *supra*, note 100, para 33; *supra*, note 20.

wastage".<sup>122</sup> In General Comment 19, CESCR further defines the obligation to promote as requiring that States "take steps to ensure that there is appropriate education and public awareness concerning access to social security schemes".<sup>123</sup>

The African Commission, for its part, separates the duty to promote from the duty to fulfill. Referring directly to Article 25 of the African Charter,<sup>124</sup> it indicates that this obligation requires States to "adopt measures to enhance people's awareness of their rights, and to provide accessible information relating to the programmes and institutions adopted to realise them".<sup>125</sup> In addition to this obligation to adopt educational and awareness-raising measures, the Commission is clear that the obligation to promote places a duty on States to "promote the values and objectives of economic, social and cultural rights in administrative and judicial decision-making" and expressly indicates that this requires that "training of the judiciary and administrative officials should expressly include economic, social and cultural rights".<sup>126</sup>

The South African Constitution explicitly includes a separate duty to promote in addition to the duty to fulfill.<sup>127</sup>

Consistently with the approach of CESCR and the African Commission's understanding of the obligation, it has been argued that this additional obligation, at very least, "requires the state to promote the right by disseminating information and educating people as to their rights".<sup>128</sup> The duty to educate "cannot be fulfilled by symbolic, unstructured or token efforts"

---

<sup>122</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15*, UN Doc. E/C.12/2002/11, 20 January 2003, para 25.

<sup>123</sup> *supra*, note 100, para 49.

<sup>124</sup> Article 25 reads in full:

"States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood."

<sup>125</sup> *supra*, note 34, para 8.

<sup>126</sup> *Id.*, para 9.

<sup>127</sup> Section 7(2), Constitution of South Africa.

<sup>128</sup> *supra*, note 30, p.70.

and therefore must “be fulfilled in a manner which is co-ordinated, comprehensive, reasonable and effective.”<sup>129</sup>

## **5. State obligations and rights holders**

A key focus of this Guide is to detail the State’s obligations under international, regional and domestic human rights law. Nevertheless, at the outset, it is useful to clarify who the holders of such ESCR are, since these are the individuals and entities to which obligation holders will owe their respective duties.

### *“Everyone”, citizenship and ESCR*

Under international human rights law, the vast majority of rights, with very few exceptions, must be guaranteed to all persons, irrespective of citizenship status. One such exception is article 25 of the ICCPR, which, unlike the other provisions in the ICCPR, limits the guarantees of certain political rights to citizens. As the Human Rights Committee has made clear in its General Comment 15, with the exception of article 25 “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness”. All of the provisions of the CESCPR and other international treaties containing ESCR, such as the CEDAW and CRC are therefore guaranteed to all persons regardless of citizenship status.

The Constitutional Court’s judgment in *Grootboom* begins with the following, referring directly to preamble of the Constitution: “the people of South Africa are committed to the attainment of social justice and the improvement of the quality

---

<sup>129</sup> Tim Fish Hodgson, “Bridging the Gap between People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy - Part ii: Reflections on Justice Langa’s Court and Philosophy”, in *Civil Society and International Criminal Justice in Africa: Challenges and Opportunities*, Sarah Williams and Hannah Woolaver, Juta Law (2016), p. 204.

of life *for everyone*".<sup>130</sup> The preamble itself indicates that South Africa "belongs to *all* who live in it" and aims to "free the potential of *each person*". From a very early stage in its jurisprudence the Court confirmed that the Constitution prohibited discrimination based on citizenship as analogous prohibited ground though it is not listed in the constitutional text. It came to this conclusion unanimously and "with no doubt" because "foreign citizens are a minority in all countries, and have little political muscle".<sup>131</sup>

The Bill of Rights, with the exception of sections on political rights, citizen rights and the right to freedom of trade, occupation and profession frames all rights as being the entitlements of "everyone".<sup>132</sup> In *Khosa*, the Court explained, "equality in respect of access to socio-economic rights is implicit in the reference to 'everyone'" in various constitutional provisions entrenching ESCR.<sup>133</sup> The Court is clear that on a textual and purposive interpretation "'everyone' cannot be construed as referring only to 'citizens'".<sup>134</sup> The Court therefore concluded:

"The Constitution vests the right to social security in 'everyone'. By excluding permanent residents from the scheme for social security, the legislation limits their rights in a manner that affects their dignity and equality in material respects. Dignity and equality are founding values of the Constitution and lie at the heart of the Bill of Rights. Sufficient reason for such invasive treatment of the rights of permanent residents has not been established. The

---

<sup>130</sup> This is important variation of the phrasing in the preamble that reads: "Improve the quality of life of all citizens and free the potential of each person".

<sup>131</sup> See *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & another* [1997] ZACC 16; 1998 (1) SA 745 para 19, in the context of permanent and temporary residents employment opportunities as teachers.

<sup>132</sup> See the exceptions Constitution ss 3, 19, 20, 22. See also subsections 21(3)-(4) (movement in and out of the country) and 25(5) (land redistribution).

<sup>133</sup> *supra*, note 10, para 42.

<sup>134</sup> *Id*, para 43.

exclusion of permanent residents is therefore inconsistent with section 27 of the Constitution.”<sup>135</sup>

This reasoning has been reinforced in the context of other ESCR, including those not explicitly listed in the Constitution such as the right to participation informal trade to ensure one’s survival,<sup>136</sup> the right to family<sup>137</sup> and the right to work.<sup>138</sup>

These interpretations are not departures from the seemingly intended meaning of the constitutional text by activist judges. As Klaaren observes it is “striking” that the constitutional drafting process evidences the “relative (though not completely uncontested) ease with which the Constitution was understood to provide nearly all its nonpolitical substantive benefits to everyone, not just to those with South African nationality”.<sup>139</sup> He concludes correctly therefore that the Constitution is “characterized by a language of remarkable universalism, even within its provisions regarding citizenship and migration”.<sup>140</sup>

### *Juristic persons and human rights*

Section 8 of the Constitution leaves open the possibility of “juristic persons” having both obligations and entitlements in terms of rights in the Bill of Rights. Obligations and or responsibilities attributed to “juristic persons”, such as companies, are discussed below in this Guide. With regard to the rights held by juristic persons, the Supreme Court of Appeal has, for example, appeared to consider companies to

---

<sup>135</sup> Id, para 85.

<sup>136</sup> See *Somali Association of South Africa & Others v Limpopo Department of Economic Development Environment and Tourism & Others* [2014] ZASCA 143; 2015 (1) SA 151 (SCA): In the context of asylum seekers.

<sup>137</sup> See *Dawood & Another v Minister of Home Affairs & Others; Shalabi and Another v Minister of Home Affairs & Others ; Thomas and Another v Minister of Home Affairs & Others* [2000] ZACC 8; 2000 (3) SA 936: In the context foreign spouses of South African residents.

<sup>138</sup> *Minister of Home Affairs & Others v Watchenuka & Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA): In the context of asylum seekers.

<sup>139</sup> Jonathan Klaaren, “Constitutional Citizenship in South Africa”, in *International Journal of Constitutional Law*, Volume 8, 2010, p. 99.

<sup>140</sup> Id.

potentially hold a legally actionable right to dignity<sup>141</sup> including a “right to reputation and the right to a sense of self-worth” of itself and its employees and a right “privacy”.<sup>142</sup>

## **B. IMMEDIATE OBLIGATIONS: MINIMUM CORE, NON-RETROGRESSION AND NON-DISCRIMINATION**

CESCR differentiates between “immediate” and “progressive” obligations in terms of ESCR. As the ICJ has noted elsewhere “a specific ESC right can therefore be translated into a series of obligations, some of which are of an immediate nature and others of which are subject to progressive realization”.<sup>143</sup>

In General Comment 3, CESCR describes these “immediate” obligations as “obligations which are of immediate effect” but in a manner that is not clearly connected to a “minimum core”. It then highlights the obligation to realize ESCR without discrimination (Article 2) and the obligation on states “to take steps towards the realization of ESCR as examples of such obligations of “immediate effect”.<sup>144</sup> Although CESCR refers to “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”<sup>145</sup> in General Comment 3, it is only in subsequent General Comments on specific ESCR that it describes this particular obligation as an obligation of “immediate effect”<sup>146</sup> or as an “immediate obligation”.<sup>147</sup>

The African Commission takes an almost identical approach. It notes that at least “some of the obligations imposed on States parties to the African Charter are immediate upon ratification of the Charter” including but “not limited to” the obligations to:<sup>148</sup>

---

<sup>141</sup> *Media 24 Ltd & Others v SA Taxi Securitisation (Pty) Ltd* [2011] ZASCA 117; 2011 (5) SA 329 (SCA), para 39.

<sup>142</sup> *Id.*, paras 44, 47 and 49.

<sup>143</sup> *supra*, note 20, p.37-38.

<sup>144</sup> *supra*, note 49, paras 1-2.

<sup>145</sup> *Id.*, para 10.

<sup>146</sup> See for example *supra*, note 92, para 19.

<sup>147</sup> *Id.*

<sup>148</sup> [http://www.achpr.org/files/instruments/economic-social-cultural/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf) *supra*, note 34, para 16.

1. **Take steps** towards the realization of ESCR;
2. Abstain from taking **retrogressive steps** which decrease existing access to ESCR;
3. **Prevent discrimination** in the enjoyment of ESCR; and
4. Ensure compliance with **minimum core obligations** relating to specific ESCR.

### **1. Obligation to take steps**

The “immediate” obligation to take steps imposes obligations of immediate effect to take deliberate and targeted steps and use all appropriate means with regard to all ESCR. It therefore requires immediate action towards the progressive realization of ESCR. The obligation of progressive realization, which has been described by CESCR as the “principal” or “general” obligation in terms of the Covenant, is detailed in full below.<sup>149</sup>

This obligation includes a vast array of actions including “legislative measures, such as the incorporation of the ICESCR into domestic law, and the provision of judicial or administrative remedies” and “other appropriate means such as administrative, financial, educational or social measures”.<sup>150</sup>

### **2. Obligation to avoid retrogressive steps**

As a logical corollary of the obligation to secure the progressive realization of ESCR, any *retrogressive steps*, which by definition move in the opposite direction of *progressive steps*, are “*prima facie* incompatible with the Covenant”.<sup>151</sup> The obligation to avoid retrogressive measures is of immediate effect. There is a “strong presumption of impermissibility of any retrogressive measures” taken in relation to any ESCR right.<sup>152</sup>

---

<sup>149</sup> See Section D of this Guide entitled “The Obligation of Progressive Realization.”

<sup>150</sup> *supra*, note 26, para 37-38.

<sup>151</sup> *Id.*, para 37-38

<sup>152</sup> Committee on Economic, Social and Cultural Rights, General Comments No. 13, UN Doc. E/C.12/1999/10 (1999), para 45; *supra*, note 100, para 32; Committee on Social, Cultural and Economic Rights, *General Comment No.15*, UN Doc. E/C.12/2002/11 (2003), para 19; *supra*, note 33, para 42.



This presumption, which must be overturned if retrogressive steps are to be justifiable, is even greater when such steps are “deliberate”. In such instances, “deliberately retrogressive measures” require the “most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.<sup>153</sup> The obligation to avoid retrogressive steps is detailed in full below.<sup>154</sup>

In *Mohamed Ben Djazia and Naouel Bellili v Spain*,<sup>155</sup> CESCR reaffirmed the importance of this principled position against “deliberately retrogressive measures” which, though permissible in “certain circumstances” can only be justified if states “demonstrate that the decision was based on the most thorough consideration possible and was justified in respect of all the rights under the Covenant and that all available resources were used”.<sup>156</sup> In that case, despite the existence of an economic crisis in Spain, CESCR concluded that the “State party has not convincingly explained why it was necessary to adopt the retrogressive measure described ... which resulted in a reduction of the amount of social housing precisely at a time when demand for it was greater owing to the economic crisis.”<sup>157</sup>

### **3. Obligation of non-discrimination**

Article 2(2) of ICESCR requires states to “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>158</sup> The

---

<sup>153</sup> *supra*, note 49, para 9.

<sup>154</sup> See Section D of this Guide entitled “The Obligation of Progressive Realization.”

<sup>155</sup> *Mohamed Ben Djazia and Naouel Bellili v. Spain*, CESCR, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (2015).

<sup>156</sup> *Id.*, para 17.6.

<sup>157</sup> *Id.*

<sup>158</sup> Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

obligation to ensure non-discrimination in the enjoyment of ESCR is of immediate effect.

This obligation is fleshed out in significant detail in a wide range of CESCR's General Comments. It is also further detailed by the provisions of various other international treaties such as the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination.

The obligation to guarantee ESCR rights without discrimination is detailed in full below in a separate section of this Guide.<sup>159</sup>

#### **4. Minimum core obligations**

The minimum core content of ESCR, also sometimes referred to as a "vital minimum", "minimum core obligations", "essential content" or a "minimum essential level" requires states to meet a minimum level of compliance with regard to its ESCR obligations "with immediate effect".<sup>160</sup>

CESCR has given detail to the minimum core obligations of states with regard to specific ESCR in each of its General Comments on specific rights. A summary of the minimum core content of specific rights is included below.<sup>161</sup> The following section details the content of states' minimum core obligations in relation to ESCR.

### **C. MINIMUM CORE OBLIGATIONS**

"On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of

---

<sup>159</sup> See Section H of this Guide entitled "Equality and Non-Discrimination."

<sup>160</sup> *supra*, note 20, p. 40.

<sup>161</sup> See Section IV C (3) of this Guide.

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*.”

– CESCR in General Comment 3

### **1. Minimum core or obligations of immediate effect under the ICESCR**

While ICESCR makes no mention of a “minimum core obligation” or “minimum essential levels” of ESCR, this notion has been developed in the General Comments as a necessary component of State ESCR obligations under the CESCR.<sup>162</sup>

CESCR’s authoritative interpretation of ESCR consistently embodies a sensible acknowledgement of the context-sensitivity of ESCR and the variety of political and economic systems and histories of States that were involved in drafting and later acceding to ICESCR. In CESCR’s own words, the obligation “reflect[s] the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights”.<sup>163</sup>

CESCR also considers the obligations that are explicit in the text of ICESCR – that of progressive realization – to be a “principal obligation of result” binding States.<sup>164</sup> CESCR has

---

<sup>162</sup> Article 2(1) of the International Covenant on Economic, Social Cultural Rights: For the purposes of this Guide, a “minimum core obligation” and “minimum essential level” are treated as one and the same. Some other sources also refer to the obligation as a “vital minimum” or “essential content” of ESCR with similar meaning; See *supra*, note 20, p.40.

<sup>163</sup> *supra*, note 49, para 9.

<sup>164</sup> *Id.*, para 9.

shown awareness in its jurisprudence of the possibility that states may attempt to construe the progressive realization obligation as an opportunity indefinitely to delay their full realization. It has therefore, emphasized, for example, that "the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content".<sup>165</sup> The obligation to progressively realize rights, according to CESCR, must therefore be "read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question."<sup>166</sup> It therefore concludes that ICESCR "imposes an obligation to move as expeditiously and effectively as possible towards that goal".<sup>167</sup>

This obligation to take expeditious and effective steps towards progressive realization of ESCR is referred to as an "immediate" obligation. In addition to this "immediate" obligation and in contrast to the progressive realization obligation, CESCR describes the source of such a minimum core obligation as being "on the basis of the extensive experience gained by the Committee ... over a period of more than a decade of examining States parties' reports the Committee".<sup>168</sup> The obligation is further motivated, according to the CESCR, because if the Covenant were to be read in such a way as to exclude such a minimum core it would be rendered ineffective.<sup>169</sup> In simple terms, therefore, the minimum core obligation stems from CESCR's purposive interpretation of ICESCR.<sup>170</sup>

In outlining the South African Constitutional Court's jurisprudence and the CESCR's approach to minimum core

---

<sup>165</sup> Id, para 9.

<sup>166</sup> Id, para 9.

<sup>167</sup> Id, para 9.

<sup>168</sup> Id, para 10.

<sup>169</sup> Id, para 10.

<sup>170</sup> For a more detailed exposition see David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* Oxford University Press: Oxford, 2007.

obligations, this section of the guide hopes to assist legal practitioners and human rights defenders in a process of its reevaluation toward the more effective, more expeditious realization of ESCR. The emphasis throughout is on assisting legal practitioners to argue for the development of a consistent and coherent understanding and application of the minimum core obligation in South African law, which fully domesticates and clarifies this obligation that already exists in international human rights law.

## **2. What is the relationship between progressive realization and minimum core?**

One important observation to make at the outset is that this reading of ICESCR was developed during the course of CESCR performing a non-adjudicative function: the publication of General Comment 3. Indeed, in 1990, at the time the General Comment was produced, CESCR did not have any judicial or quasi-judicial function.<sup>171</sup> In fact, in General Comment 3 itself, CESCR proceeds from the position that ESCR “may” (not must) be “considered justiciable”.<sup>172</sup> The “extensive experience gained by the Committee” leading it to interpret ICESCR as including a minimum core obligation therefore did not include any adjudicative experience at all.

Given this context, it is unsurprising that the CESCR specifically places the minimum core obligation on the state as whole – including the executive, legislature and judiciary. Though minimum core obligations are most often discussed as a standard that should be determined (“judicially determined”) and/or enforced by a judiciary (“judicially enforced”), like all other international law obligations ascribed to states, they are binding on all branches of government and all organs of state.

Minimum core content has been understood as “an intangible baseline that must be guaranteed for all individuals in all

---

<sup>171</sup> CESCR has only had such a function since the adoption of the Optional Protocol on Economic, Social and Cultural Rights.

<sup>172</sup> *supra*, note 49, para 5.

situations and from which States parties can envisage further progressive realization".<sup>173</sup> In this way minimum core obligations are "immediate" obligations on the state to establish a "floor" below which ESCR should not fall.

Despite describing the minimum core obligation as "immediate", CESCR does not consider the obligation to be absolute or unqualified. In General Comment 3 CESCR does not describe the minimum core obligation as an "immediate obligation" or an obligation of "immediate effect".<sup>174</sup> This description appears to have been developed later on its jurisprudence.<sup>175</sup> More directly, CESCR accepts that though minimum core obligations must be understood as requiring significant prioritization by States, the obligation is not absolute or unqualified. It therefore qualifies this "immediate" obligation explicitly in the following terms: "it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned".<sup>176</sup>

CESCR then proceeds to explain that the difference between the resource consideration with regard to the progressive realization and minimum core obligations in the following terms: "In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate *that every effort has been made to use all resources* that are at its disposition in an effort to satisfy, *as a matter of priority*, those minimum

---

<sup>173</sup> *supra*, note 20, p. 41. This statement also implies that minimum core obligation fulfillment is a component of the fulfillment of progressive realization.

<sup>174</sup> The UN *General Comment No. 3 on Nature of State Parties* uses the word "immediate" three times. First, in para 1 CESCR contrasts obligations of progressive realization with "various obligations which are of immediate effect" without referring to minimum core. Second, in para 5 CESCR refers to obligations "which would seem to be capable of immediate application by judicial and other organs in many national legal systems" in the context of justiciability of ESCR. Third, in para 9, and again without reference to minimum core, it CESCR contrasts the progressive realization obligation with an "immediate obligation to respect and ensure all of the relevant rights" in the International Covenant on Civil and Political Rights.

<sup>175</sup> See for example *supra*, note 92, para 19.

<sup>176</sup> *supra*, note 49, para 10.

obligations".<sup>177</sup> The difference then, between the minimum core obligation and the progressive realization obligation, is primarily a "matter of priority" and "effort".

So, although the minimum core obligations bind states "irrespective of the availability of resources of the country concerned or any other factors and difficulties", states may still be able to justify failures to achieve minimum essential levels in terms of minimum core obligations "immediately".<sup>178</sup> Such a justification, however, would require significant evidence of effort and prioritization on the part of the state. Similarly, the African Commission frames the minimum core obligation as existing "regardless of the availability of resources" and as "non-derogable" to the effect that "when a State claims that it has failed to realize minimum essential levels of economic, social and cultural rights *it must be able to show that it has allocated all available resources* towards the realisation of these rights, and particularly towards the realisation of the minimum core content."<sup>179</sup>

### **3. What is the minimum core of specific ESCR?**

CESCR has since given further content to minimum core obligations in its General Comments on specific rights, though, the "core content is clearer for some rights than for others".<sup>180</sup> Nor is the core content of any right "stagnant" over time and context.<sup>181</sup> For example, in warmer climates the minimum core of the right to water will necessarily be different in some respects, and in colder climates the minimum core standards relating to the housing and clothing may be higher. The table below provides a summary of the minimum core content of rights described by CESCR in General Comments.<sup>182</sup>

---

<sup>177</sup> Id, para 10.

<sup>178</sup> *supra*, note 26, para 9.

<sup>179</sup> *supra*, note 34, para 17. Emphasis Added.

<sup>180</sup> *supra*, note 20, p. 42.

<sup>181</sup> Id, p.42

<sup>182</sup> Id, pp. 44-46.

Right a article of the ICESCR	Core content and General Comment of the UN CESCR
Right to work (Article 6)	<p>GC 18</p> <ul style="list-style-type: none"> <li>• <b>Access:</b> "Ensure the right to access to employment" generally and "especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity".</li> <li>• <b>Non-discrimination:</b> "Avoid any measure that results in discrimination and unequal treatment in the public and private sectors".</li> <li>• <b>Strategy:</b> "Adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process".</li> </ul>
Right to social security (Article 9)	<p>GC 19</p> <ul style="list-style-type: none"> <li>• <b>Access:</b> "Ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential healthcare, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education".</li> <li>• <b>Risk mitigation and core protection:</b> "If a State party cannot provide this minimum level for all risks and contingencies within its</li> </ul>



	<p>maximum available resources” then “after a wide process of consultation, select a core group of social risks and contingencies”:</p> <ul style="list-style-type: none"> <li>○ To ensure non-discriminatory access.</li> <li>○ Respect existing schemes and protect them from unreasonable interference.</li> <li>○ Adopt a national strategy and plan of action.</li> <li>○ Target steps to implement existing schemes.</li> <li>○ Monitor the extent of the rights realization.</li> </ul>
<p>Right to an adequate housing (Article 11)</p> <p><i>Neither General Comment 4 nor General Comment 7 refer directly to either a minimum core obligation or a minimum essential level.</i></p> <p><i>General Comment 4 refers to obligations of “immediate effect” repeatedly.</i></p> <p><i>General Comment 7 refers only to an</i></p>	<p>GC 4 and 7</p> <ul style="list-style-type: none"> <li>• <b>Security of Tenure:</b> “Take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups”</li> <li>• <b>Monitoring:</b> “Effective monitoring of the situation with respect to housing is another obligation of immediate effect”.</li> <li>• <b>Strategy:</b> “adoption of a national housing strategy.... Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect</li> </ul>

<p><i>"essential basis" and intermittently words rights in such a strong way that the immediacy of an obligation can possibly be implied. This Guide therefore describes the content detailed here based on an analysis of the domestic and international application of the right to housing and the jurisprudence of the CESCR and other international authorities.</i></p>	<p>extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies".</p> <ul style="list-style-type: none"> <li>• <b>Requests for aid:</b> "To the extent that any such steps are considered to be beyond the maximum resources available to a State party, it is appropriate that a request be made as soon as possible for international cooperation."</li> <li>• <b>Legislation on forced evictions:</b> "It is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out." This includes "Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions".</li> </ul>
---	---

Right to adequate food (Article 11)	<p>GC 12</p> <ul style="list-style-type: none"> <li>• <b>Availability:</b> "Availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights."</li> <li>• <b>Hunger Alleviation:</b> "Necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters". Later it adds: "Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger".</li> <li>• <b>Dietary Composition:</b> "Ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake".</li> </ul>
Right to Water (Article 11)	<p>GC 15</p> <ul style="list-style-type: none"> <li>• <b>Access:</b> Ensure "the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease", including "physical access to water</li> </ul>

	<p>facilities or services that provide sufficient, safe and regular water” with:</p> <ul style="list-style-type: none"> <li>○ A sufficient number of water outlets at a reasonable distance from the household;</li> <li>○ Non-prohibitive waiting times; and</li> <li>○ Personal security.</li> </ul> <ul style="list-style-type: none"> <li>• <b>Non-discrimination:</b> “access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups” and “equitable distribution of all available water facilities and services”. In addition, “to adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups”.</li> <li>• <b>Strategy:</b> “Adopt and implement a national water strategy and plan of action addressing the whole population” which “ should be devised, and periodically reviewed, on the basis of a participatory and transparent process” which give “particular attention to all disadvantaged or marginalized groups”.</li> <li>• <b>Monitor:</b> “monitor the extent of the realization, or the non-realization, of the right to water”.</li> <li>• <b>Disease prevention:</b> “To take measures to prevent, treat and control diseases linked to</li> </ul>
--	---

	water, in particular ensuring access to adequate sanitation."
<p>Right to Health (Article 12)</p> <p><i>In addition to these core obligations CESCR notes that obligations of "comparable priority" include:</i></p> <ul style="list-style-type: none"> <li>• Ensuring reproductive, maternal (prenatal as well as post-natal) and child health care;</li> <li>• Providing immunization against the major infectious diseases</li> <li>• Taking measures to prevent, treat and control epidemic and endemic diseases;</li> <li>• Providing education and access to information concerning the main health</li> </ul>	<p>GC 14</p> <ul style="list-style-type: none"> <li>• <b>Non-discrimination:</b> "Access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups" and "to ensure equitable distribution of all health facilities, goods and services".</li> <li>• <b>Access to Food:</b> "To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone".</li> <li>• <b>Access to Basic Services:</b> To "ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water".</li> <li>• <b>Provision of Essential Drugs:</b> "To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs".</li> <li>• <b>Strategy:</b> "To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population" which "must be devised, and periodically reviewed, on the basis of a participatory and transparent process" and give</li> </ul>

<p>problems including methods of preventing and controlling them;</p> <ul style="list-style-type: none"> <li>• Providing appropriate training for health personnel, including education on health and human rights.</li> </ul>	<p>"particular attention to all vulnerable or marginalized groups".</p>
<p>Right to education (Article 13)</p>	<p>GC 13</p> <ul style="list-style-type: none"> <li>• <b>Non discrimination:</b> "ensure the right of access to public educational institutions and programmes on a non-discriminatory basis";</li> <li>• <b>Quality and purpose:</b> "to ensure that education conforms to the objectives set out in article 13 (1)" which include: <ul style="list-style-type: none"> <li>○ Ensuring "the full development of the human personality and the sense of its dignity"</li> <li>○ Strengthening "the respect for human rights and fundamental freedoms."</li> <li>○ Enabling "all persons to participate effectively in a free society"; and</li> <li>○ Promoting "understanding, tolerance and friendship among all nations and all</li> </ul> </li> </ul>

	<p>racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace”.</p> <ul style="list-style-type: none"> <li>• <b>Free and compulsory primary education:</b> The “primary education for all in accordance” as “compulsory and available free to all”.</li> <li>• <b>Strategy on Secondary, Higher and Fundamental education:</b> “to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education”.</li> <li>• <b>Free choice and non-interference:</b> “to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards”.</li> </ul>
--	---

#### **4. International justiciability and the minimum core**

While the notion of the minimum core has its genesis in the Committee’s General Comment 3, subsequently issued General Comments and jurisprudence have embellished and expanded its reach. Though minimum core obligations have had their defenders and critics,<sup>183</sup> they undoubtedly remain an aspect of

---

<sup>183</sup> See for example: Gillian McNaughton, “Beyond a Minimum Threshold: The Right to Social Equality”, in *The State of Economic and Social Human Rights*, Cambridge University Press, 2013, pp. 281-282, arguing (“on its face, the ICESCR does not guarantee minimal rights” but instead entrenches rights “necessary to human dignity, not to survival”, that the approach creates a “hierarchy of rights” and that it “is in danger of encouraging minimalism in

states' obligations to realize ESCR in terms of international human rights law.

Regarding the *justiciability* of ESCR through judicial and/or quasi-judicial means, CESCR has consistently evolved its position towards an increasing acknowledgment of the importance of both international *and* domestic justiciability. In 1998, in General Comment 9, for example, it affirmed that "[w]hile the re general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions."<sup>184</sup> This, CESCR reasoned, was in part because non-judicial means of redress "could be rendered ineffective if they are not reinforced or complemented by judicial remedies."<sup>185</sup> This has been reinforced by CESCR's consistent emphasis on the right to an effective remedy.<sup>186</sup>

The recent establishment of various adjudicatory mechanisms consolidating the *international* justiciability of ESCR has further fortified this evolution. These mechanisms include those set up in terms of the OPP- ICESR, the Optional Protocol to the Convention of the Rights of the Child and the Optional Protocol on the Rights of Persons with Disabilities. Moreover, these protocols take domestic justiciability of ESCR as a given since they require the exhaustion of domestic remedies for the

---

social provisioning"). Sandra Liebenberg, *supra*, note 52, p. 168. Indicates correctly that there is an "inherent arbitrariness" to minimum core standards.

<sup>184</sup> Committee on Economic, Social and Cultural Rights, UN General Comment No.9, UN Doc. E/C.12/1998/24, (1998), para 9.

<sup>185</sup> *Id.*, para 3.

<sup>186</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 12*, UN Doc. E/C.12/1999/5, (1999), paras 32-35; *supra*, note 100, paras 56-52; *supra*, note 127, paras 55-59; *supra*, note 92 paras 48-51; *supra*, note 109, paras 77-81; Committee on Economic, Social and Cultural Rights, *General Comment No.20*, UN Doc. E/C.12/GC/20 (2009), para 40; Committee on Economic, Social and Cultural Rights, General Comment No. 21, UN Doc. E/C.12/GC/21 (2009), para 72; Committee on Economic, Social and Cultural Rights, General Comment No. 22, UN Doc. E/C.12/GC/22 (2016), para 64; Committee on Economic, Social and Cultural Rights, General Comment No. 23, UN Doc. E/C.12/GC/23 (2016), para 80; Committee on Economic, Social and Cultural Rights, General Comment No. 24, UN Doc. E/C.12/GC/24 (2017), para 38-57.



admissibility of communications.<sup>187</sup> The African Commission more explicitly requires that states must “ensur[e] appropriate administrative and judicial remedies for the violation” of ESCR.<sup>188</sup>

When evaluating standards of *international* judicial or administrative review of ESCR rights under these international communication mechanisms, it should be underscored that the optional protocols were negotiated by States based on what they were prepared to accept as competencies and jurisdiction for adjudication by the non-judicial treaty bodies administering those mechanisms. The standards for review at this level therefore do not attempt to set a global standard for review for the *domestic* adjudication of ESCR consistent right to a remedy. The standard of review necessarily provides a minimum threshold for, but will not always be appropriate for application by domestic judicial authorities in many jurisdictions. Indeed, CESCR itself has, in practice, continuously acknowledged the variation between standards governing international and domestic judicial or administrative review in determining whether domestic judicial mechanisms are effective and appropriate in realizing ESCR.

This interaction between domestic and international adjudication has been particularly important in the context of CESCR’s approach in its evaluations of communications that:

“it is in the first place for the courts of States parties to evaluate the facts and evidence in each particular case and the application of the relevant law, and that the Committee is called upon to express its views only as to whether the evaluation of the evidence or the application of domestic law was clearly arbitrary or

---

<sup>187</sup> Article 3, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008), available at: [https://www.ohchr.org/Documents/HRBodies/CESCR/OPProtocol\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/CESCR/OPProtocol_en.pdf); Article 7, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, A/RES/66/138 (2014), available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx>; Article 2, *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (2008), available at: [https://treaties.un.org/doc/source/RecentTexts/IV\\_15a\\_english.pdf](https://treaties.un.org/doc/source/RecentTexts/IV_15a_english.pdf).

<sup>188</sup> *supra*, note 34, para 2.

amounted to a denial of justice that entailed the violation of a right recognized in the Covenant.”<sup>189</sup>

This shows CESCR’s clear emphasis on the importance of the full *domestic* justiciability of ESCR, irrespective of any limitations – whether in regard to admissibility requirements and review standards – which may circumscribe the scope of judicial or quasi-judicial adjudication of ESCR at the international level.

With these caveats in mind, nonetheless, the relevant optional protocols can offer some interpretative guidance in determining the content of ESCR rights and the review standards for their adjudication.

Noticeably, the OP-ICESCR (like ICESCR) makes no distinction whatsoever between “progressive realization” and “minimum core” obligations. It simply requires an evaluation of all communications for their reasonableness taking into account both the availability of resources and the range of possible reasonable measures available to a state. This is an acknowledgment from the drafters of the Protocol that:

“The implementation of ESCR is not simple and will rarely involve a singular policy option. There will, in most cases, be a range of measures and a multiplicity of choices available. Remedies will often need to recommend a process through which compliance can be achieved, rather than recommending the precise details of the solution.”<sup>190</sup>

The Optional Protocol to the CRC contains an almost identical provision requiring the considering of the “reasonableness” of

---

<sup>189</sup> *Miguel Ángel López Rodríguez (represented by counsel Valentin J. Aguilar Villuendas of the Asociación Pro Derechos Humanos de Andalucía) v. Spain*, UN Doc. E/C.12/57/D/1/2013, 6 December 2013, para 12.

<sup>190</sup> Bruce Porter, “The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins”, 2009, available at: [https://www.escr-net.org/sites/default/files/Bruce Porter The Reasonableness 0.pdf](https://www.escr-net.org/sites/default/files/Bruce%20Porter%20The%20Reasonableness%200.pdf), p. 49.

steps taken by a state when examining communications to the CRC.<sup>191</sup>

The Optional Protocol to the CRPD, on other hand, does not mention either reasonableness or minimum core obligations. It has therefore been suggested the “standard of reasonableness to be developed by the UNCESCR must be harmonised with the standard of reasonableness to be developed by the CRPD Committee, through its jurisprudence under the individual communication procedure”.<sup>192</sup> Such an approach would need to be “carefully balanced with the minimum core content” of ESCR.<sup>193</sup>

It is perhaps also noteworthy that no substantive reference has been made to either a “minimum core” standard of a “minimum essential level” of ESCR by the Committee in its adjudication of communications thus far.<sup>194</sup> CESCR’s evaluations of compliance with ICESCR obligations in terms of Article 8(4) have used the standards of “reasonableness” and “proportionality” almost exclusively thus far.<sup>195</sup>

The substantive ESCR-related jurisprudence based on its communications decisions also do not appear to refer to

---

<sup>191</sup> Article 10(4), Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, UN Doc. A/RES/66/138 (2014), available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCR.C.aspx>

<sup>192</sup> Andrea Broderick “Harmonisation and Cross-Fertilisation of Socio-Economic Rights in the Human Rights Treaty Bodies: Disability and the Reasonableness Review Case Study”, in *MPDI Open Access Journals*, Volume 5, 2016 , p. 5.

<sup>193</sup> *Id.*, p. 5.

<sup>194</sup> Though passing reference is made to “minimum essential level” in *Miguel Ángel López Rodríguez (represented by counsel Valentin J. Aguilar Villuendas of the Asociación Pro Derechos Humanos de Andalucía) v Spain*, *supra*, note 194, paras 10.3, 13.3 and obligations of “immediate effect” *I.D.G. (represented by counsel, Fernando Ron and Fernando Morales) v Spain* UN Doc. E/C.12/55/D/2/2014, para 11.3, (2014).

<sup>195</sup> For a full list see:

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en). Substantive decisions include *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Doc. E/C.12/63/D/10/2015, 26 Mar 2018; *Mohamed Ben Djazia and Naouel Bellili v Spain* UN Doc. E/C.12/61/D/5/2015, 20 June 2017; *I.D.G. v Spain*, UN Doc. E/C.12/55/D/2/2014, 17 June 2015; *Miguel Ángel López Rodríguez v. Spain* UN Doc. E/C.12/57/D/1/2013, 4 March 2016.

minimum core obligations at all.<sup>196</sup> There is as yet no ESCR related decision of the CRC based on its communications procedure.<sup>197</sup>

Legal practitioners and human rights defenders pursuing communications to international treaty body mechanisms such as CESCR, while remaining cognizant of the heightened priorities relating to minimum core obligations, should therefore also ensure that their arguments are couched in the language of “reasonableness” and “proportionality”.

## **5. Indeterminacy of minimum core in international law**

Due in part to the changes in membership, evolving approaches to its work, and the changing global human rights landscape, CESCR’s own approach to the content of a minimum core content has varied from right to right and over time. For example, neither of its General Comments relating to the right to housing refer to the concepts of minimum core obligations or minimum essential levels at all.<sup>198</sup> CESCR’s more recent General Comments generally provide significantly more detail on minimum core obligations than earlier ones. In some instances, certain “minimum levels” are left to be determined

---

<sup>196</sup> For a full list see: <http://juris.ohchr.org/search/results> *HM v Sweden* CRPD/C/7/D/3/2011, 19 April 2012; *Budjdoso v Hungary* CRPD/C/10/D/4/2011, 09 Sep 2013; *Groninger v. Germany* CRPD/C/D/2/2010, 04 Apr 2014; *X v Argentina* CRPD/C/11/D/8/2012 (11 Apr 2014); *Jungelin v Sweden* CRPD/C/12/D/5/2011, 02 Oct 2014; *Bacher v Austria* CRPD/C/19/D/26/2014, 16 Feb 2018; *D.R v Australia* CRPD/C/17/D/14/2013, 24 Mar 2017; *A.F v Italy* CRPD/C/13/D/9/2012, 27 Mar 2015.

<sup>197</sup> For a full list of the CRC’s communications decisions see: <http://juris.ohchr.org/search/results/1?typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0>.

<sup>198</sup> Although General Comment 4 refers to obligations of “immediate effect” repeatedly and General Comment 7 refers to an “essential basis” and intermittently words rights in such a strong way that the immediacy of an obligation is possibly implied; See UN Committee on Economic, Social and Cultural Rights, General Comment No. 4, UN Doc. E/1992/23 (1991), para 13; UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, UN Doc. E/1998/22 (1997), para 9.

domestically and others are to be determined by identified authorities, such the World Health Organization in its General Comment on the Right to Health.

Moreover, the minimum core content defined by the CESCR's General Comments are now, in some instances, somewhat out of kilter with later developments in international human rights law. In some instances, the Committee will take those developments into account in later periodic review of States reports or individual communications under the ICESCR. Legal practitioners and human rights defenders should therefore look to those developments, reading them with General Comments, in order to better understand CESCR's approach to the minimum core of specific ESCR. This is particularly necessary with regard to older General Comments. For example, the only core content CESCR describes for the rights to secondary, higher and fundamental education (all education beyond a primary level) in its General Comment on education is "to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education".<sup>199</sup> It is likely that CESCR would accept and acknowledge a far broader minimum core to the right to education today.

Finally, legal practitioners and human rights defenders should be aware that some of CESCR's definitions of minimum core obligations are vague and appear to overlap substantially with the separate "immediate" obligation to adopt and implement strategies, plans and policies to realize an ESCR in general or a specific aspect of a particular right. Legal practitioners should carefully attempt to distinguish these separate and distinct immediate obligations in presenting arguments about the content of minimum core obligations so as to not dilute each obligation's independent significance.

---

<sup>199</sup> *supra*, note 152, para 57.

## **6. Minimum core in South African law**

Basing their arguments in good measure on the jurisprudence of CESCR, South African litigants have asked the Constitutional Court to define a minimum core of the rights to health,<sup>200</sup> housing<sup>201</sup> and water<sup>202</sup> in separate cases. In decisions handed down in 2000 (*Grootboom*), 2001 (*TAC*) and 2009 (*Mazibuko*), the Constitutional Court has repeatedly declined the invitation by litigants to *judicially determine* a minimum core of ESCR. Instead it has presented the constitutional standard of reasonableness as an exclusive standard of review for ESCR rights that are “progressively realizable” in terms of the text of the Constitution.

The Court has not, however, in any of these decisions, “rejected” the concept of the minimum core entirely. Its clearly stated position is that “there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation”<sup>203</sup>, but, it has nevertheless categorized the “ultimate question” even in cases in which a minimum core obligation may be applicable to be “whether the legislative and other measures taken by the state are reasonable”.<sup>204</sup>

The Court’s reasons for reluctance in applying a judicially determined minimum core are linguistic (based on a strict textual construction of the South African Constitution); practical (based on the perceived lack of information and expertise it has at its disposal); substantive (based on its own understanding of the nature and scope of ESC rights); and institutional (based on its conception of the appropriate role of the judiciary).<sup>205</sup>

---

<sup>200</sup> *Minister of Health & Others v Treatment Action Campaign & Others*, [2002] ZACC 15; (2002) 5 SA 721 (CC).

<sup>201</sup> *supra*, note 9.

<sup>202</sup> *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28; 2010 (4) SA 1 (CC).

<sup>203</sup> *supra*, note 9, para 33.

<sup>204</sup> *Id*, para 41.

<sup>205</sup> *supra*, note 52, p. 149, Sandra Liebenberg describes the objections succinctly as “principled, textual, pragmatic and institutional objections to the concept”.

### *The Constitution and minimum core*

In *Grootboom*, the Court's rejection of arguments based on minimum core obligations was based on several grounds, the first of which was rooted in its interpretation of the text of the right of access to adequate housing in section 26 of the Constitution.

Section 26(1) of the Constitution simply asserts: "everyone has the right to have access to adequate housing". Section 26(2) proceeds to detail the state's obligations in terms of the right: "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". The text therefore makes no express mention of a minimum core obligation but does contain the word "reasonable" repeatedly. The Court seized upon this fact to set reasonableness as the standard of evaluation for the performance of all of the state's obligations in terms of the right to adequate housing. The Court therefore concluded that: "the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable."<sup>206</sup>

This textual argument is relevant to the housing right and all similarly worded rights (eg. environment,<sup>207</sup> land,<sup>208</sup> health,<sup>209</sup> social security,<sup>210</sup> food,<sup>211</sup> water<sup>212</sup> and further education<sup>213</sup>), which all require reasonable measures in the pursuit of the rights' progressive realization within available resources. It may however, not be relevant to other ESCR rights that the text of the Constitution does not qualify in a similar fashion. For example, the Court has, without more explanation, described the right to basic education as "unqualified" and "immediately realizable" based on the absence of a

---

<sup>206</sup> *supra*, note 9, para 33.

<sup>207</sup> s 24, Constitution of South Africa.

<sup>208</sup> s 25, Constitution of South Africa.

<sup>209</sup> s 27, Constitution of South Africa.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> s 29, Constitution of South Africa.

“progressive realization” qualifier in the text of s 29(1)(a) of the Constitution.

*Lack of information to define a minimum core*

The *Grootboom* case involved the government’s failure to provide for and implement a policy catering for emergency housing needs. After their eviction, the applicants had been left destitute, sleeping on an open field in the driving rain only with plastic sheets to cover them.<sup>214</sup> The Court described their housing situation as “desperate” and indicated that their plight was “compounded by rampant unemployment and poverty”. Overall it concluded: “many of the families ... are living in intolerable conditions”.<sup>215</sup>

In *Grootboom*, the Court concluded while “there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable” that “it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context”.<sup>216</sup>

In this regard, the Court also differentiated its position in defining a minimum core to that of the CESCRC Committee, noting “the Committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information”.<sup>217</sup> This, according to the Court, rendered it unsuited for the task in light of the “complexity of the task of determining a minimum core obligation”.<sup>218</sup> This is an indication by the Court that its ad-hoc adjudicative role on ESCR does not give it the opportunity to access as much information about housing and housing rights as CESCRC can. It is also, perhaps, an indication that the Court, may, over time and repeated adjudication, develop sufficient experience and expertise to undertake a

---

<sup>214</sup> *supra*, note 9, paras 10-11.

<sup>215</sup> *Id.*, para 59.

<sup>216</sup> *Id.*, note 9, para 33.

<sup>217</sup> *Id.*, note 9, para 32.

<sup>218</sup> *Id.*



judicial determination of the minimum core of a particular ESCR.

Legal practitioners and human rights defenders making arguments relating to a minimum core obligation in South African courts should take heed of this and ensure that sufficient factual and expert information and evidence is placed in front of courts in ESCR cases.

### *Institutional incapacity*

The *TAC* case involved a challenge to the government's policy decision not to provide anti-retroviral drugs across the whole of South Africa to HIV positive, pregnant women. Such medication, known as Nevirapine, could allow for the pregnant women to prevent transmission of HIV to their children during the birthing process. The medication was also offered to the government for free or charge for an initial period by the manufacturer. In deciding the case, the Court rejected an invitation to determine a minimum core of the right to health. The Court observed the following:

"It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse.

...

Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this

way, the judicial, legislative and executive functions achieve appropriate constitutional balance.”<sup>219</sup>

In rejecting a further invitation to *judicially determine* a minimum core of the right to water, quoting from *TAC*, the Court added:

“Ordinarily it is institutionally inappropriate 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.”<sup>220</sup>

#### *Substantive objections to a judicially determined minimum core*

In its most emphatic rejection of an invitation to *judicially determine* a minimum core obligation, in *Mazibuko* the Court declined to prescribe a specific amount of litres of water per month to which all individuals must be entitled in terms of the right to water. In its declination the Court noted that what the realization of the right to water requires of the State “will vary over time and context”. It therefore concluded that:

“Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment

---

<sup>219</sup> *supra*, note 202, paras 61.

<sup>220</sup> *Id*, para 60.

of context to determine whether a government programme is indeed reasonable.”<sup>221</sup>

Many commentators have criticized the Court’s reasoning, arguing that its logic would effectively strip ESCR of meaningful content.<sup>222</sup> The *Mazibuko* judgment itself attracted a great deal of such criticism.<sup>223</sup> Others have echoed the Court’s criticism of a *judicially determined* minimum core as rigid and inflexible on the basis that it may not allow Courts to respond to “the diversity of important needs faced by differently situated groups”.<sup>224</sup>

Instead of adopting a minimum core standard, the Court proffered an alternative grounded in its understanding of democratic accountability. In explaining the purpose of the entrenchment of ESCR in the Constitution despite its refusal to judicially determine minimum core obligations the Court held that:

“Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for

---

<sup>221</sup> Id, para 59.

<sup>222</sup> *supra*, note 170.

<sup>223</sup> Id. See also: Stuart Wilson and Jackie Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights", in *Stellenbosch Law Review*, Volume 22, 2011; Lucy Williams "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study", *Constitutional Court Review*, Volume 3, 2011, pp. 141-199; Jackie Dugard and Malcolm Langford "Art or Science?: Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism", *South African Journal on Human Rights* Volume 27 , 2011, pp. 39-64; David Bilchitz, "Towards a Reasonable Approach to the Minimum Core: Laying the Foundations For future Socio-Economic Rights Jurisprudence" *South African Journal of Human Rights*, Volume 19, 2003; David Bilchitz, "Is the Constitutional Court Wasting Away the Rights of the Poor? (*Nokotyana v Ekurhuleni Metropolitan Municipality*)" *South African Law Journal*, Volume 127, 2010.

<sup>224</sup> *supra*, note 54, pp. 169-170.

the manner in which it seeks to pursue the achievement of social and economic rights.<sup>225</sup>

...

"The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy."<sup>226</sup>

### *Unfeasibility*

The Court has repeatedly questioned whether it is possible for the State to provide even a core set of goods or services in terms of a minimum core obligation to all South Africans "immediately". In *TAC*, the Court was blunt in this regard:

"It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis."<sup>227</sup>

In *Mazibuko*, the Court further indicated that "immediate" provision of all the basic necessities of life "for millions of South Africans" was not what was contemplated during the Constitution's drafting "nor could it have been":

"At the time the Constitution was adopted, millions of South Africans did not have access to the basic necessities of life, including water... It was not expected, nor could it have been, that the state would

---

<sup>225</sup> *supra*, note 202, para 58.

<sup>226</sup> *Id*, para 160.

<sup>227</sup> *supra*, note 200, para 35.

be able to furnish citizens immediately with all the basic necessities of life."<sup>228</sup>

## **7. Judicially determined minimum core v judicial enforced minimum core**

It should be noted that all of these rejections of arguments based on minimum core obligations by the Constitutional Court are not rejections of the concept of minimum core itself. The Court is denying carrying the obligation, ability and desirability to *judicially define* a minimum core. The Court has repeatedly indicated that it may well take a different approach to *judicial enforcement* of a minimum core that has already been defined by the legislature or the executive.

In fact, in *Mazibuko*, directly after rejecting a *judicially determined* minimum core, the Court explicitly leaves open the possibility of *judicially enforcing* a minimum core determined by the executive and/or the legislature in the following terms:

"The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. *By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.*"<sup>229</sup>

...

"*The minimum standard set by the Minister informs citizens of what government is seeking to achieve. In so doing, it enables citizens to monitor government's performance and to hold it accountable politically if the standard is not achieved. This also empowers citizens to*

---

<sup>228</sup> *supra*, note 202, para 58.

<sup>229</sup> *Id*, para 66. Emphasis Added.

*hold government accountable through legal challenge if the standard set is unreasonable.*<sup>230</sup>

This finding suggests that the executive and legislature could define and determine the minimum core content of ESCR and the Court would then perform its judicial review function with full recognition of such a minimum core obligation. The Court would, after the executive or legislature defines the minimum core content of a particular ESCR:

1. Ensure that the government complies with the standard it has set by enforcing the minimum core as defined by the government itself; and
2. Evaluate whether the “standard set” by the minimum core obligation is reasonable.

This second point is most clearly expressed by the Court in its reasoning in *Mazibuko*. Assuming that the “national government legislates for a national minimum” thereby giving content to a minimum core obligation, the Court asks: “do other steps taken by other levels of government escape scrutiny as long as they comply with the national minimum, despite the fact that other spheres of government share the obligation to take reasonable steps”. The Court ultimately concludes that the mere fact that a municipality has prescribed a minimum level of a particular right will not automatically lead to a conclusion that it has acted reasonably and in compliance with its constitutional obligations.<sup>231</sup> Simply put, “reasonableness” may require it to do more than comply with such a pre-set minimum level.

Legal practitioners and human rights defenders may therefore, in applying existing Constitutional Court jurisprudence, argue that courts are required to insist that the legislature and/or executive undertake the procedural steps necessary in terms of their own powers, functions and obligations and define the content of minimum core obligations of specific ESCR. Critically, legal practitioners may also ask the Court to review

---

<sup>230</sup> Id, para 70. Emphasis Added.

<sup>231</sup> Id, para 74.

not only whether the standard set in this manner has been applied and implemented, but also whether the standard itself is “reasonable”. In making this determination courts should be invited to fully take into account the South Africa’s obligations in respect of minimum core obligations of specific ESCR in international human rights law.<sup>232</sup>

#### **8. Applying the minimum core consistently with the requirements of international and South African law**

Both South African law and international law support the need for reasonable interpretations of domestic and international standards that are consistent.<sup>233</sup> Where the Court’s approach to the minimum core can be construed in a manner consistent with CESC’s approach to minimum core obligations that construction should be applied. Nevertheless, the Constitutional Court has indicated that because interpretation is not “divination” the Constitution “does not mean whatever we might wish it to mean”.<sup>234</sup> The same would presumably be true for the provisions of ICESCR.

In order to faithfully discharge its international legal obligations, the South African state, including the judiciary, must apply a minimum core standard consistent with the terms of the ICESCR. CESC provides the authoritative interpretations of those terms. South Africa may adopt a minimum core that goes beyond (ie. is less “minimal” than) that which is prescribed by the CESC, but should not go below that minimum. What is therefore clear is that, if South African courts were to reject the existence of any minimum core obligations, *in any form*, however defined and determined, this would not accord with its obligations under the ICESCR. Moreover, if South African courts were to reject *any role* for the judiciary in defining, interpreting or enforcing a minimum core obligation this too would be inconsistent with

---

<sup>232</sup> See section IV C(3) above.

<sup>233</sup> See Section III of this Guide.

<sup>234</sup> *S v Zuma & Others* ZACC 1; 1995 (2) SA 642 (CC) paras 17-18.

rule of law principles regarding the role of judiciary and its essential function of being arbiters as to what the law provides.

However, in *Grootboom* the Court rightly noted that CESCR's General Comment on housing "does not specify precisely what that minimum core is". While adopting somewhat divergent approaches, other aspects of the Court's jurisprudence may also share this imprecision, though it will be important for a practitioner to dig deeper in the CESCR's jurisprudence to see how it has applied the concept more pointedly to individual States.<sup>235</sup> The Court's observation in *Grootboom* is that what CESCR has indicated is a minimum core must still be "tangibly" and "practically" defined in a specific context by some obligation holding. In the context of housing, for example, a minimum core obligation to provide shelter to prevent homelessness still requires a further specification about what specific form of shelter should be provided "immediately" and how, when, by whom and to whom it should be provided as a matter of priority.

Similarly, in *TAC*, the Court was asked to decide that a specific type of drug to prevent mother to child transmission of HIV was part of the minimum core of the State's obligation to realize the right to health. The CESCR notes that the minimum core obligation in terms of the right to health includes the provision of "essential drugs", indicating that essential drugs are those which are "from time to time defined under the WHO Action Programme on Essential Drugs".<sup>236</sup> What assisted the Court in coming to its decision is that Nevirapine – the drug requested by the applicants – was already the government's "drug of choice for this purpose"<sup>237</sup> and the drug was available for five years "free of charge".<sup>238</sup> Therefore, in the exceptional circumstances of the case, it was "unthinkable that government would gamble with the lives or health of thousands of mothers and infants".<sup>239</sup>

---

<sup>235</sup> *supra*, note 9, para 30.

<sup>236</sup> *supra*, note 100, para 43(d).

<sup>237</sup> *supra*, note 200, para 4.

<sup>238</sup> *Id*, para 19.

<sup>239</sup> *Id*, para 63.



In most circumstances, a similar conclusion on a specific drug by the Court – ie. a definition of a minimum core of this “essential drug” – would have been extremely difficult and highly risky. Nevertheless, to prevent judicially-ordered harm, the Court included in its order a proviso that “[t]he orders made ... do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV”.<sup>240</sup>

This approach, at least as applied in that case, is likely to be consistent with the purpose and substance of CESCR’s designation of a minimum core to the right to health. CESCR clearly intends its definition of the minimum core relating to essential drugs to set a very broad framework instead of becoming prescriptive and inflexible, for example, on exactly which drugs States should or should not provide.

Finally, and most perhaps most clearly, in *Mazibuko*, the Court was asked to define that the minimum core obligation in terms of the right to water included access to a minimum “free basic water supply of 50 litres per person per day” which the applicants presented as a “quantified standard determining the content of the right not merely its minimum content”.<sup>241</sup>

As far as quantity is concerned, all that CESCR’s General Comment on water indicates is that States must ensure the provision of “the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease”.<sup>242</sup> It does not specify what this minimum essential amount is in exact quantitative terms. In its description of the progressively realizable components of the right to water CESCR indicates instead that, “the quantity of water available for each person should correspond to the World Health Organization (WHO) guidelines” and “some individuals and

---

<sup>240</sup> Id, para 135.

<sup>241</sup> *supra*, note 202, para 55. The strategic decision to refer to the standard requested as such was in an attempt to circumnavigate the Court’s findings in *Grootboom* and *TAC* on minimum core standards.

<sup>242</sup> Committee on Social, Cultural and Economic Rights, General Comment No.15, UN Doc. E/C.12/2002/11 (2003), para 37(a).

groups may also require additional water due to health, climate, and work conditions”.<sup>243</sup> The Court in *Mazibuko* again considered this flexible and moving standard set by CESCR to be incompatible with the *judicial determination* of a minimum core. Instead, as explained above, it preferred an approach to the minimum core obligation that requires the executive and legislature – in context and with the guidance such WHO guidelines and other expert information – to determine the minimum core of the right to water.

Overall the Court’s indication in *Grootboom* about the need for flexibility in definition of ESCR obligations remains instructive and arguably consistent with CESCR’s approach:

“The determination of a minimum core in the context of ‘the right to have access to adequate housing’ presents difficult questions. *This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance.* There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people.”<sup>244</sup>

In this full context, given the Constitutional Court’s extensive jurisprudence understood as interpreted above, legal practitioners and human rights defenders may argue that courts can, consistently with international human rights law and South African law, adopt the following position:

1. **Minimum Core obligations are binding in South Africa:** Minimum core obligations exist with regard to all ESCR rights as a binding requirement of international human rights law;

---

<sup>243</sup> Id, para 12(a).

<sup>244</sup> *supra*, note 9, para 33.

2. **Minimum Core obligations may, consistently with international law, be determined by the executive and/or legislature:** Minimum core obligations are established under international law, but precisely how they are met – taking into account particularized prevailing domestic conditions – may, as a general matter, be determined by the executive and/or the legislature, consistent with the obligations under the CESCR and other human rights treaties;
3. **Minimum core obligations must, at very least, be interpreted, assessed and enforced by the judiciary:** Minimum core obligations as defined by the executive and/or legislature must generally be consistent with the Constitution, ICESCR and CESCRR's jurisprudence;
4. **Minimum core and specific judicial obligations:** Minimum core obligations, so understood, engage the judiciary in ESCR litigation the following ways:
  - a. Judicial Prioritization: Minimum core obligations indicate prioritization of specific components of ESCR, often speaking to the rights of those in most desperate need. These will be heavily considered and weighted by a Court in the evaluation of the reasonableness of measures adopted by the State;
  - b. Judicial Evaluation: Both the State's definition of a minimum core and its implementation of obligations in terms of this minimum core will be evaluated by a Court in determining the reasonableness of such measures;
  - c. Judicial Determination: Where a full range of relevant information is available to the court, where minimum core standards can be clearly determined by a court, and where there are no overriding domestic separation of powers concerns, a Court may determine what will be

needed to satisfy a minimum core obligation in a given case or situation; and

- d. Judicial Direction: It is possible that where the executive and legislature fail collectively to proactively take “reasonable and effective measures” to give minimum core content to a particular right, in line with ICESCR, a Court will require the appropriate state entity to take “legislative and other measures” to do so.

### **9. Can South Africa’s ratification of ICESCR be harnessed to modify the Constitutional Court’s approach to minimum core?**

Some commentators have suggested that the approach of the South African judiciary to minimum core may need to be evaluated now that South Africa has ratified the ICESCR.<sup>245</sup> A number of legal practitioners, academics and activists, many of whom have been taken issue with the Court’s failure to establish minimum core content for ESCR, are likely to support this approach.<sup>246</sup> The argument is that the Court could and should accept that pursuant to international legal obligations, it is required to *judicially determine* minimum core obligations.

While the Constitutional Court may be reluctant in the near future to revisit such clear and repeatedly reiterated positions in *Grootboom*, *TAC* and *Mazibuko*, it will be useful for such legal practitioners to look for opportunities by giving consideration to the fast-evolving treatment of ESCR doctrine

---

<sup>245</sup> Jackie Dugard “The right to Sanitation in South Africa”, *Foundation for Human Rights*, 2016, p.5, available at: <https://www.fhr.org.za/files/1315/1247/0387/Sanitation.pdf>.

<sup>246</sup> In pleading with the Court to adopt a definition of the right that includes a minimum core, one senior lawyer put the following to the Court: “The way you have interpreted the Constitution [means that] nobody has a right to anything in particular, and therefore, everyone has a right to nothing at all.” For detailed academic critique of the Court’s approach see: David Bilchitz “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance” *South African Law Journal*, Volume 119, 2002, pp. 484-501; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* Oxford University Press, 2008.

from international authorities, including in the newly empowered CESCER with respect to adjudication of individual communications. Though CESCER's communications jurisprudence has, at the time of this writing, omitted explicit reference to "minimum core" obligations or "minimal essential levels" of ESCR, this may simply reflect the limited range of communications it has substantively engaged with thus far.

Moreover, as "the incorporation of wording from the *Grootboom* judgment suggests, as does the drafting history, that just as the South African Constitutional Court has incorporated jurisprudence from the CESCER into its own domestic jurisprudence, so has South African jurisprudence now informed the text of an international human rights instrument".<sup>247</sup> Legal practitioners may argue with some force that the increased recognition of minimum core obligations by the Constitutional Court is the next logical step in the evolving and symbiotic relationship between ICESCER and South Africa's ESCR jurisprudence.<sup>248</sup>

Regardless of the Court's future posture, the ratification of ICESCER both requires and provides the opportunity for the Court to reevaluate its approach to minimum core obligations. The responsibility of the judiciary, as an organ of State, is engaged in respect of ICESCER obligations, and, to the extent of its judicial powers, it must act reasonably to realize ESCR. Reasonable measures include continuous review and reevaluation of the Court's interpretation of standards, particularly in light of the ratification of applicable treaties such as ICESCER.

In its Concluding Observations to South Africa, CESCER explicitly draws attention to the need for capacity building of the judiciary and legal profession on ESCR in general and ICESCER in particular. It recommended that: "the State party

---

<sup>247</sup> *supra*, note 190, pp. 50-51.

<sup>248</sup> Though it should be noted that the Court's decision in *Grootboom* to reject a judicially determined minimum core was not, in the first place, dependent on the bindingness of ICESCER or CESCER's general comments. Indeed the Court's approach to ESCR recognized from the outset the need to fully consider the standards set by CESCER in its General Comments.

enhance training for judges, prosecutors, lawyers and public officials on the Covenant and strengthen the capacity of the South African Judicial Education Institute to that end".<sup>249</sup> Such increased efforts would present an opportunity for South African judicial officers and lawyers to engage constructively, creatively and comprehensively with the Constitutional Court's jurisprudence towards ensuring future application and development consistent with the binding minimum core obligations at international law.

This type of development will be necessarily continuous and incremental and should be undertaken conscious of the need for sufficient flexibility for the simultaneous application and revision of minimum core obligations consistently with the Covenant. Similarly, CESCR may also be prepared to review and adjust its approach to the minimum core concept over time.<sup>250</sup>

---

<sup>249</sup> *supra*, note 2, para 5.

<sup>250</sup> *supra*, Liebenberg, notes 54 and 59.

#### D. THE OBLIGATION OF “PROGRESSIVE REALIZATION”

“The term ‘progressive realization’ is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time... Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question.”<sup>251</sup>

- CESCR in General Comment 3

In respect of the aspects of ESCR that are not subject to immediate realization, the doctrine of “progressive realization” is applicable. The CESCR has clarified the meaning of progressive realization under the ICESCR in its jurisprudence, beginning with its General Comment 3 on the Nature of State Parties’ Obligations.<sup>252</sup> The Committee describes the “principal obligation of result” of States to ensure “*progressively* the full realization of the rights recognized in the present Covenant *by all appropriate means*”.<sup>253</sup> On the whole, although some variation exists, the South African Constitution repeatedly lifts the language of “progressive realization” from ICESCR.<sup>254</sup> As

---

<sup>251</sup> *supra*, note 49, para 9.

<sup>252</sup> *supra*, note 52.

<sup>253</sup> Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

<sup>254</sup> ss 24, 25, 26, 27 and 29, Constitution of South Africa.

the Constitutional Court notes “the phrase is taken from international law”<sup>255</sup> and “there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.”<sup>256</sup>

Generally speaking then, the principal obligation of result under the South African Constitution and ICESCR are substantially similar: progressive realization of ESCR. Unsurprisingly, given this consistency, the Constitutional Court has drawn on the General Comments of CESCR directly in this regard.<sup>257</sup> The same is true of the African Commission’s jurisprudence. The Commission’s guidelines on ESCR accept that “while the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter”.<sup>258</sup>

The wider realization of all aspects of ESCR, however, cannot be perpetually put off in the name of *progressive* realization. This point has been emphasized by the Committee, which has said that the fact that realization is to occur “over time” should not “be misinterpreted as depriving the obligation of all meaningful content”.<sup>259</sup> The obligation to realize ESCR progressively should also not act as a veil to obscure “deliberately retrogressive measures” for which there is a “strong presumption of impermissibility.”<sup>260</sup>

Despite the potential vagueness of the requirement to progress over time, CESCR, in a passage quoted with approval by the Constitutional Court, notes that the progressive realization obligation requires States to move “as expeditiously and effectively as possible” toward full realization.<sup>261</sup> Legal practitioners and human rights defenders are advised to use

---

<sup>255</sup> *supra*, note 9, para 45.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *supra*, note 34, para 13.

<sup>259</sup> *supra*, note 49, para 9.

<sup>260</sup> *supra*, note 20, p. 39.

<sup>261</sup> *supra*, note 9, para 45; *supra*, note 49, para 9.



the following list of constitutive factors of progressive realization to inform the concrete content of this obligation.

### **1. Purposive Progressive Realization**

The first requirement of progressive realisation is that it must be approached purposively. The obligation itself must “be read in the light of the overall objective, indeed the *raison d’être* of the Covenant which is to establish clear obligations for States parties in respect of the *full realization* of the rights in question”.<sup>262</sup> Progressive realization therefore requires that “the State must take steps to achieve [the] goal [of full realization]”.<sup>263</sup> This is consistent with Constitutional Court’s approach: “the term progressive realization”, according to the Court, merely “shows that it was contemplated that the right could not be realized immediately”.<sup>264</sup>

Progressive realization must therefore always be undertaken with a view to full realization. The fact that “only” progressive realization is required does not diminish the scope of obligations. The obligation of progressive realization should, according to Liebenberg, “thus primarily be understood to refer to the State’s obligation to improve the nature and quality [of ESCR] to which people have access”.<sup>265</sup>

Moreover, steps taken towards the full achievement of the right must be immediately initiated, continuously undertaken and reassessed, and must be “deliberate, concrete and targeted as clearly as possible towards meeting the obligations” in terms of ESCR.<sup>266</sup>

### **2. Elimination of barriers and hurdles**

The second discernable requirement, according to the Court, relates to the nature of the steps to be taken towards the full realization of ESCR.

---

<sup>262</sup> Id.

<sup>263</sup> Id.

<sup>264</sup> *supra*, note 9, para 45.

<sup>265</sup> *supra*, note 52, p. 188.

<sup>266</sup> Id, para 9.

Progressive realization is not simply aimed at the proactive elimination of barriers or hurdles that may hinder access to ESCR. The Court notes “accessibility should be progressively facilitated” by lowering “legal, administrative, operational and financial hurdles” to access “over time”.<sup>267</sup> Here the Court uses the word “accessibility” within its meaning in the text of the Constitution and not in reference to the international law formulation of rights as including four components: accessibility, availability, adequacy and acceptability.<sup>268</sup>

### **3. Continuous improvements: access to a “larger number” and “wider range”**

Building on this, the Court’s third requirement in terms of the obligation of progressive realization is that the steps taken towards accessibility must be continuously capable of achieving progress over time.

ESCR, the Court has held, “must be made more accessible *not only to a larger number of people but to a wider range of people* as time progresses”.<sup>269</sup> In *New Clicks* the Court suggested that this means that the State “must *accelerate* reasonable and progressive schemes to ameliorate vast areas of deprivation”.<sup>270</sup> While not directly explained by the Court, this “acceleration” to a “large number” and “wider range” of people is logically understood as alluding to a larger number of persons living within South Africa, and a wider demographic, geographic and absolute range of persons and groups.

This obligation is best understood together with the CESCR’s prescription that States ensure progress occurs as “expeditiously and effectively as possible”.<sup>271</sup> This is also

---

<sup>267</sup> Id.

<sup>268</sup> Accessibility in the context of the Constitution should nevertheless be read consistently with international standards so as to include accessibility, availability, adequacy and acceptability.

<sup>269</sup> *supra*, note 9, para 45. Emphasis Added.

<sup>270</sup> *supra*, note 106, para 705. Emphasis Added.

<sup>271</sup> *supra*, note 49, para 9.

consistent with the Constitution, which requires that all constitutional obligations “must be performed diligently and without delay”.<sup>272</sup>

#### **4. Prohibition of deliberate retrogression**

A fundamental principle in respect of ESCR under international law is that States are generally and presumptively prohibited from taking “deliberately retrogressive measures”.<sup>273</sup> Where States consider it necessary to derogate from this general rule, retrogressive measures must be “fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.<sup>274</sup> Any such measures are therefore highly likely to violate the State’s obligations and will be strictly scrutinized. Deliberately retrogressive measures include “the calculated obstruction of, or halt to, the progressive realization of a right”.<sup>275</sup>

International human rights law therefore takes a strong stance on retrogressive measures, which are “prima facie incompatible with the Covenant”:

“As a rule, adoption of a deliberately retrogressive measure, whether through direct action of the State or resulting from a failure of the State to regulate or otherwise protect against the misfeasance of non-State entities, which adversely affects any of the ESC rights would likely be in breach of obligations imposed by the ICESCR. There is in this regard a ‘strong presumption of impermissibility of any retrogressive measures’ taken in relation to substantive right. Retrogressive measures are in this way prima facie incompatible with the Covenant.”<sup>276</sup>

---

<sup>272</sup> Section 238, Constitution of South Africa.

<sup>273</sup> *supra*, note 202, para 9.

<sup>274</sup> *Id.*

<sup>275</sup> *supra*, note 26, para 14(f).

<sup>276</sup> *supra*, note 20, p.39

Thus, the onus is on States to prove that any retrogressive measures they may adopt comply with ICESCR. "States have a resulting burden of proof to justify the lawfulness of any such measures with due regard for the limitations provisions of article 4 of the ICESCR."<sup>277</sup>

This may require a State to illustrate, for example, that such retrogressive measures are: taken in pursuit of a compelling goal; strictly necessary; and that there are no alternative or less restrictive measures available.<sup>278</sup> The Constitutional Court has taken the same approach to retrogressive measures.<sup>279</sup>

The African Commission's guidelines on ESCR provide further guidance on what will be considered a retrogressive measure in violation of the African Charter. The Commission will consider whether or not:<sup>280</sup>

- a. There was reasonable justification for the action;
- b. Alternatives were comprehensively examined and those which were least restrictive of protected human rights were adopted;
- c. There was genuine participation of affected groups in examining the proposed measures and alternatives;
- d. The measures were directly or indirectly discriminatory;
- e. The measures would have a sustained impact on the realisation of the protected right;
- f. The measures had an unreasonable impact on whether an individual or group was deprived of access to the minimum essential level of the protected right; and
- g. There was an independent review of the measures at the national level.

Moreover, though it is *deliberately* retrogressive measures that require "*the most careful* consideration", interpreted purposively, the obligation to ensure progressive realization

---

<sup>277</sup> *supra*, note 20, p.40.

<sup>278</sup> *Id.*

<sup>279</sup> *supra*, note 9, para 45. This approach adopts what can be regarded as a "proportionality" analysis.

<sup>280</sup> *supra*, note 34, para 20.

calls into question any reasonable foreseeable retrogressive measures, whether such “measures” are in the form of state action or inaction.<sup>281</sup> Retrogressive measures are also discussed above in regard to “immediate obligations”.<sup>282</sup>

## **5. Perpetual, continuous, and varying**

The CESC notes from the outset of its articulation of the progressive realization obligation that full realization of ESCR “will generally not be able to be achieved in a short period of time... reflecting the realities of the real world and the difficulties involved for any country in ensuring [their] full realization”.<sup>283</sup> This is because this “necessary flexibility device” is deliberately crafted to ensure it is “susceptible of realization within the context of a wide variety of economic and political systems”.<sup>284</sup>

The Constitutional Court has observed that “conditions do not remain static” and therefore measures taken “will require continuous review”.<sup>285</sup> The progressive realization obligation may therefore be understood as perpetual and continuous and varying.<sup>286</sup> This is consistent with the constitutional requirement that “people’s needs must be responded to”<sup>287</sup> which applies regardless of the state of development of the country at a particular time.

This is consistent with Chenwi’s view that a “state’s performance in terms of the progressive realisation would depend on, among other things, both the actual ESCR people

---

<sup>281</sup> *supra*, note 52, p.190.

<sup>282</sup> See Section B of this Guide entitled “Immediate Obligations: Minimum Core, Non Retrogression And Non-Discrimination.”

<sup>283</sup> *supra*, note 49, para 9.

<sup>284</sup> *Id.*

<sup>285</sup> *supra*, note 9, para 43.

<sup>286</sup> For present purposes the ordinary grammatical meanings of “perpetual” and “continuous” are instructive. Perpetual can be understood as “never ending” (<https://en.oxforddictionaries.com/definition/perpetual>) and continuous can be understood as “progressive” and “without interruption” (<https://en.oxforddictionaries.com/definition/continuous>).

<sup>287</sup> Section 195(1)(e), Constitution of South Africa.

enjoy at a given moment as well as the society's capacity of fulfilment (in terms of the resources available to the state)".<sup>288</sup> It is also an understanding evident from CESCR's own jurisprudence. CESCR has therefore, for example:

"expected a more sophisticated form of social security from [Canada] (a social assistance scheme not just an 'initiative') and a safety net that would provide an adequate standard of living, not a bare minimum like in Senegal."<sup>289</sup>

On the one hand, this means that the obligation may require different measures from some States than others, or in different parts of a single State. In the African context, this is consistent with the African Commission's acknowledgment in *Purohit and Moore v The Gambia* that "African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right".<sup>290</sup>

On the other hand, because a contextual understanding of progressive realization "goes beyond achieving the minimum essential levels of a right; and beyond ensuring access to goods and services to improvements in access over time",<sup>291</sup> those differing levels may require more (or different) measures from one State than another and more from the same State over time. The Constitutional Court, for its part has held that the State must constantly "accelerate reasonable and

---

<sup>288</sup> Lillian Chenwi "Unpacking "Progressive Realisation", its Relation to Resources, Minimum Core and Reasonableness, and some Methodological Considerations for Assessing Compliance", in *De Jure Law Journal*, Volume 39, 2003, p. 742.

<sup>289</sup> Malcolm Langford "Substantive Obligations" p 235. This refers to Langford's chapter 7 in this book he co-edited [http://socialprotection-humanrights.org/wp-content/uploads/2017/06/2016\\_optional\\_protocol\\_international\\_covenant\\_economic\\_social\\_cultural\\_rights.pdf](http://socialprotection-humanrights.org/wp-content/uploads/2017/06/2016_optional_protocol_international_covenant_economic_social_cultural_rights.pdf).

<sup>290</sup> *Purohit and Moore v. The Gambia*. Cited as: Communication No. 241/2001, African Commission on Human and People's Rights, 2003, para 84.

<sup>291</sup> *Id.*

progressive schemes to ameliorate vast areas of deprivation".<sup>292</sup>

Importantly, CESCR indicates that ICESCR requires all States, regardless of their stage of development, to take expeditious and effective efforts to increase access to these rights and thereby improve the quality of life of its entire people.<sup>293</sup> This approach is consistent with the Constitution's commitment in its preamble to "improve the quality of life of all citizens and free the potential of *each person*".<sup>294</sup>

In consideration of this obligation, which is also bolstered by the principle of substantive equality in international human rights law and the Constitution,<sup>295</sup> the obligation to progressively realize ESCR in ICESCR contradicts the view that "a marginally tolerable life nonetheless passes the human rights test".<sup>296</sup>

The realization of a certain level or standard of protection of a particular ESCR should therefore always give rise to a fresh consideration of whether a higher standard is reasonably attainable at any particular time, within a State's maximum available resources. It should be kept in mind that the "progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant".<sup>297</sup>

---

<sup>292</sup> *supra*, note 101, para 705.

<sup>293</sup> Indeed the obligation therefore represents a legal, ideological and political commitment to the "achievement of quality" entrenched as a founding value in s 1 of the South African Constitution.

<sup>294</sup> Preamble, Constitution of South Africa.

<sup>295</sup> *Id*, s 9.

<sup>296</sup> Margot E. Salomon "Why should it matter that others have more? Poverty, inequality, and the potential of international human rights law", *Review of International Studies*, Volume 37, 2011, pp. 2137–2155. Salomon in fact argues that there has been a failure by CESCR in that it "has not transitioned from a focus on poverty and the idea of universal basic rights to one more sensitive to demands of global equality" with the result of perpetuating this dominant view.

<sup>297</sup> *supra*, note 25, para 24.

## **6. Flexible and dynamic**

To be sufficiently flexible, the standard of realization must be capable of “reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights”.<sup>298</sup> This suggests that the *obligation itself* and what it requires will necessarily evolve over time and from context to context.

In *Mazibuko*, the Constitutional Court held expressly that “the obligation of progressive realization imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realized”.<sup>299</sup> This review process, should, however, be more fundamental and involve the State continually reassessing the requirements of the obligation of progressive realization itself in the full context.

Since the context and circumstances, in terms of resources, of both people and the State change regularly, so too must the measures demanded by the obligation. This, again, should not simply be used by States as an excuse for half-hearted measures in the context of, for example, a recession.<sup>300</sup> It should also be understood as a requirement to increase efforts during periods of high economic growth, economic booms or even relative improvements in economic stability.

## **7. Achieved through clear, well-communicated plans and strategies**

The requirement of flexibility exists alongside a requirement that measures are not ad hoc. In *Modderklip* the Constitutional Court noted that progressive realization “requires careful

---

<sup>298</sup>*supra*, note 49, para 9.

<sup>299</sup>*supra*, note 202, para 67. See also para 40: “The concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively achieved”.

<sup>300</sup> *Id*, para 12.



planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital”.<sup>301</sup>

Such a requirement is consistent with the fundamental requirements of the rule of law requiring the State to act rationally and in a non-arbitrary fashion when taking measures to progressively realize ESCR.<sup>302</sup> The need for a fair procedure and clear communication is also consistent with rule of law requirements such as procedural fairness as well as compliant with the constitutional imperative “to ensure accountability, responsiveness and openness”.<sup>303</sup>

## **8. Compliance with the obligation of progressively realization**

Overall, given the necessarily flexible and varying nature of the progressive realization obligation, “the challenge for policy-makers and oversight bodies alike is how best we are able to evaluate government programmes and budget allocations against this binding obligation on the state”.<sup>304</sup> It is the same challenge faced by lawyers and human rights defenders in seeking to define the precise obligations of states in front of judicial or quasi-judicial mechanisms such as the Constitutional Court, CESCR and the African Commission.

The Maastricht Guidelines indicate that despite “the fact that the full realization of most economic, social and cultural rights can only be achieved progressively”, States have to take “certain steps ... immediately and others as soon as possible”. They therefore, indicate “the burden is on the State to

---

<sup>301</sup> *President of the Republic of South Africa & Another v Modderklip Boerdery*, [2005] ZACC 5; 2005 (5) SA 3 (CC), para 49.

<sup>302</sup> s 1 of the Constitution super-entrenches the rule of law as a founding value of the Constitution.

<sup>303</sup> s 1, Constitution of South Africa.

<sup>304</sup> Studies in Poverty and Inequality Institute (H Dawson & D McLaren), *A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-Economic Rights in South Africa*, February 2015, p. 4, available at: <http://spii.org.za/wp-content/uploads/2018/02/SPII-A-Framework-for-Monitoring-the-Progressive-Realisation-of-SERs-....pdf>.

demonstrate that it is making measurable progress toward the full realization of the rights in question".<sup>305</sup>

In meeting this burden, various international and localized attempts have been made to develop "indicators" to assist in the evaluation of whether the State has complied with its obligation to progressively realize ESCR. Though such indicators are useful, it should be noted that:

"Exhaustive lists of potential indicators can be overwhelming to apply in practice. The challenge is therefore to strike a balance between developing a tool which on the one hand is sufficiently comprehensive ... and on the other, is selective, focused and responsive to the limitations of data-availability and the ultimate users of such a tool."<sup>306</sup>

These include structural indicators (to "help evaluate the state's implementation of the standards it has accepted in the ratification and adoption of legal instruments"); process indicators (which "measure duty bearers' ongoing efforts to implement its commitments on the ground"); and outcomes indicators (which reflect the state of enjoyment of rights in a given context).<sup>307</sup>

In South Africa the South African Human Rights Commission has endorsed a methodology developed by civil society, which develops tools to allow for the evaluation of the progressive realization of ESCR. This methodology, which is a useful though non-exhaustive heuristic for such an evaluation, is summarized in a publication of the Studies in Poverty and Inequality Institute.<sup>308</sup>

In its concluding observations to South Africa, CESCR has recommended that the State "take steps to progressively develop and apply appropriate indicators on the implementation of economic, social and cultural rights, in order

---

<sup>305</sup> *supra*, note 26, para 8.

<sup>306</sup> *Id.*, para 10.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* See in particular an extremely useful diagram produced in this publication *supra*, note 304, p. 11.

to facilitate the assessment of progress achieved by the State party in complying with its obligations under the Covenant".<sup>309</sup> Such indicators could build on both the efforts of the SAHRC detailed above and the considerable international guidance provided by Office of the United Nations High Commissioner for Human Rights.<sup>310</sup>

---

<sup>309</sup> *supra*, note 2, para 81.

<sup>310</sup> See *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, International Human Rights Instruments, HRI/MC/2008/3, (2008): explicitly referred to by CESCR in its recommendations to South Africa.

## **E. REASONABLE LEGISLATIVE AND OTHER MEASURES**

"In many respects reasonableness review provides the courts with a flexible and context-sensitive basis for evaluating socio-economic rights claims. It allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. At the same time, it subjects government's choices to the requirements of reasonableness, inclusiveness, and particularly, the threshold requirement that all programmes must provide short-term measures of relief for those whose circumstances are urgent and intolerable."<sup>311</sup>

– Sandra Liebenberg

"The standard of 'reasonableness' may be invoked in a variety of contexts and for different purposes in ESC rights litigation. Not all such invocations are identical or parallel concepts, so importing the standard from one case to another will not always be appropriate. The degree of deference to the choices of legislative and administrative authorities will also vary significantly. Still, it is striking to note how often one variant or another of the concept has been relied upon by judicial and quasi-judicial bodies, especially in cases involving positive obligations of the State to fulfill ESC rights."<sup>312</sup>

CESCR does not offer a single standard against which to measure a particular State's conduct at any given point in time in order to determine whether it is complying with the obligation of progressive realization. Without a standard for the evaluation of state (non)compliance, it is difficult for courts or other actors to hold elected officials to account, and for others to evaluate the conduct of the courts.

---

<sup>311</sup> *supra*, note 54, p. 174.

<sup>312</sup> International Commission of Jurists, *supra*, note 20, p. 191.

Before detailing the “reasonableness” standard in South African law and international law, it is therefore important briefly to consider the possible reasons for the omission of a standard of evaluation by CESCR in General Comment 3 and elsewhere in its jurisprudence. Seemingly acknowledging the significance of this omission, the Maastricht Guidelines indicate that States are required to take “action reasonably calculated to realize the enjoyment of a particular right”.<sup>313</sup>

One possible reason for this omission is that for the bulk of its existence CESCR has had no adjudicative or quasi-judicial function, as has been noted above. The CESCR also did not initially take the view that States were duty bound to provide for the domestic justiciability of ESCR. This is clear from CESCR’s approach in General Comment 3 that ESCR “may” (not must) be “considered justiciable”.<sup>314</sup> This means that at the time at which the CESCR gave detailed content to States’ obligations it did not necessarily promote the idea that all ESCR were internationally and/or domestically justiciable. This much is separately evidenced by the Limburg Principles which note that while “the application of some rights can be made justiciable immediately ... other rights can become justiciable over time”.<sup>315</sup>

However, in the ICJ’s experience of the application of international law principles relating to ICESCR, this is largely water under the bridge at this juncture. The CESCR appears to have moved on, as evidenced, among other places in: 1) CESCR’s 2007 statement, prior to the adoption of the OP-ICESCR, on what it saw as States’ obligations of the future Optional Protocol;<sup>316</sup> and 2) CESCR’s fledgling jurisprudence emanating from the OP-ICESCR’s complaints mechanism.<sup>317</sup>

---

<sup>313</sup> *supra*, note 26, para 7. Though this standard is more general and not exclusively relating to the review of compliance with the requirement of “progressive realization”.

<sup>314</sup> *supra*, note 49, Article 5.

<sup>315</sup> *supra*, note 25, para 8.

<sup>316</sup> An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant, Committee on Economic, Social and Cultural Rights, E/C.12/2007/1, 2007, para 9.

<sup>317</sup> For a full list see:

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang)

Reasonableness is now quite evidently the primary standard of review in terms of the OP-ICESCR.

The African Commission, for its part, though not clearly adopting a reasonableness standard of review, has noted that “the concept of progressive realization means that States must implement a reasonable and measurable plan”,<sup>318</sup> an approach which appears to echo its *SERAC* decision.<sup>319</sup>

It is also important to note from the outset that Article 8(4) of the Optional Protocol does not set the standard for review of all ESCR adjudication. Its direct application is strictly for the purposes of the jurisdictional competence of CDESCR in terms of the OP-ICESCR when reviewing State compliance with ICESCR. It therefore is not dispositive of domestic supervision of ESCR in South Africa or the approach that other international and regional mechanisms may take in other adjudicative processes, although it clearly sets the floor.

Outside of CDESCR’s own adjudicative jurisdiction, it will also be required to evaluate the compliance of all States Parties with ICESCR. This includes review of judicial decisions on ESCR. Importantly, Article 8(4) of the OP-ICESCR itself does not, for example, necessarily bind the Committee to limit itself to the reasonableness standard of review in its consideration of State reports.

As a general principle international law, the right to an effective remedy for human rights violations applies to all rights, and includes an imperative of access to justice including access to judicial remedy for rights violations.<sup>320</sup> This has been

---

=en. Substantive decisions include *Marcia Cecilia Trujillo Calero v. Ecuador* E/C.12/63/D/10/2015, 26 Mar 2018; *Mohamed Ben Djazia and Naouel Bellili v. Spain* E/C.12/61/D/5/2015, 20 Jun 2017; *I.D.G. v. Spain* E/C.12/55/D/2/2014 17 Jun 2015; *Miguel Ángel López Rodríguez v. Spain* E/C.12/57/D/1/2013, 4 March 2016.

<sup>318</sup> *supra*, note 34, para 14.

<sup>319</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, African Commission on Human and People’s Rights, 30<sup>th</sup> Ordinary Session, para 52.

<sup>320</sup> *supra*, note 20, p. 24 (“It is a general principle of law that every right must be accompanied by the availability of an effective remedy in case of its

affirmed and reinforced by the UN General Assembly.<sup>321</sup> The Maastricht Guidelines also affirm “any person or group who is a victim of a violation of an economic, social or cultural right *should have access to effective judicial or other appropriate remedies at both national and international levels*”.<sup>322</sup>

---

violation. For a remedy to be effective, those seeking it must have prompt access to an independent authority, which has the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress harm.”).

<sup>321</sup> “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, Resolution 60/147, 2005, available at:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>;

Article 3 reads:

“3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation...”

<sup>322</sup> *supra*, note 34, paras 22-24, The Maastricht Guidelines provide for the following remedies for ESCR violations:

“(22.) Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

*Adequate reparation*

(23.) All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

*No official sanctioning of violations*

(24.) National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as

As with any other right, justiciability of ESCR is therefore a logical and legal consequence of the recognition of rights and corresponding state obligations. Section VI of this Guide deals more comprehensively with measures for redress and reparation of ESCR violations.

Before proceeding to evaluate the standard of review required by the Constitution as interpreted by the Constitutional Court, it is noteworthy that the OP-ICESCR appears to adopt a reasonableness standard that is significantly similar to that in South African law,<sup>323</sup> which appears, in part, as a result of the influence of the judgments of the Constitutional Court.<sup>324</sup> This is a further illustration of the historical symbiosis between South African constitutional law and international human rights law relating to ESCR.<sup>325</sup>

Nevertheless, compliance with the reasonableness standard in South African law and the reasonableness requirement in terms of Article 8(4) of the Optional Protocol, while overlapping, are not entirely congruous. While it is useful to record similarities between the two standards, particularly as CESCER's jurisprudence goes, it will also be crucial to remain alert to differences in these standards so as to ensure South Africa complies with its international human rights law obligations in terms of ICESCR.

## **1. Reasonableness and the provisions of the Constitution**

Drawing on the text of the majority of the Constitution's provisions on ESCR,<sup>326</sup> the Constitutional Court has applied a

---

an interpretive aide in formulating any decisions relating to violations of economic, social and cultural rights."

Emphasis Added.

<sup>323</sup> *supra*, note 190.

<sup>324</sup> *Id.*

<sup>325</sup> *supra*, note 20, footnote 247.

<sup>326</sup> ss 24, 25, 26, 27 and 29, Constitution of South Africa.



"reasonableness test" when evaluating State conduct for compliance with its ESCR obligations.<sup>327</sup>

The text of these provisions of the Constitution repeatedly requires the State to take "reasonable legislative and other measures... to achieve the progressive realization" of each of these rights.<sup>328</sup> The fact that there are several provisions that do not include the idea of "reasonableness", despite its presence in the majority of ESCR provisions, suggests that this qualification is deliberate and must be given meaning.<sup>329</sup> Despite repeated criticism of an overly administrative approach to ESCR law that deprives them of meaningful content,<sup>330</sup> the Constitutional Court has repeatedly reaffirmed the "reasonableness test".

## **2. Reasonable "legislative and other measures"**

According to the Constitutional Court, reasonableness may "require framework legislation at national level" which sets the

---

<sup>327</sup> *supra*, note 9. Though academic commentators cited in this Guide have repeatedly and accurately pointed out that various other interpretations of the text of the Constitution were *possible*, the Court has repeatedly adopted this interpretation, which is authoritative in South African constitutional law.

<sup>328</sup> *Id.*

<sup>329</sup> Clear examples of exceptions include: s 27(3) (emergency medical treatment); s 28 (children-specific ESCR); and s 29(1) (basic education) which do not mention "reasonable measures" and have been described by the Constitutional Court as "unqualified". See *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

<sup>330</sup> Carol Steinberg, "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence", in *South African Law Journal*, Volume 123: citing Advocate Wim Trengrove SC, who perhaps puts the criticism most eloquently ("The way [the Constitutional Court has] interpreted the Constitution... nobody has a right to anything in particular, and therefore, everyone has a right to nothing at all"). See generally, Geo Quinot and Sandra Liebenberg "Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa", in *Stellenbosch Law Review*, Volume 22(3), 2011, pp. 639-663; and Stuart Wilson and Jackie Dugard "Constitutional Jurisprudence: The First and Second Waves", in *Socio-Economic Rights in South Africa: Symbols or Substance?*, Cambridge University Press, 2014, pp. 35-62.; Danie Brand "The proceduralisation of South African socio-economic rights Jurisprudence or 'What are Socio-Economic Rights for?', in *Rights and Democracy in a Transformative Constitution*, 2004, pp. 33-56.

legal basis for State measures to realize a particular ESCR.<sup>331</sup> CESCR has also, for example, suggested, "States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food".<sup>332</sup>

Framework legislation, or even more detailed legislation with exacting and specific ESCR content, consistent with international human rights law standards, has various advantages in comparison to a "piecemeal" legislative approach.<sup>333</sup> The benefits include:

- **The Rule of Law:** Unlike policies, guidelines, plans and general strategies, legislation cannot ordinarily be easily – or quickly – altered without consultation and a significant democratic process. This allows for clarity about the law and legal process, which is critical to the rule of law.<sup>334</sup>
- **Content and Definition:** Legislation provides the invaluable perspective of elected legislators on the content and scope of ESCR. This is crucial in the context of ESCR in relation to which courts are likely to defer to the legislature in defining the content thereof, where possible.<sup>335</sup> It could also clarify legislative purposes in rights language.<sup>336</sup>
- **Democratic Accountability:** The existence of framework legislation allows individuals, civil society groups and national human rights institutions more effectively to hold elected officials to account for their constitutional obligations in terms of ESCR. Such

---

<sup>331</sup> *supra*, note 9, para 40.

<sup>332</sup> *supra*, note 113, para 29.

<sup>333</sup> Sibonile Khoza, "Realising the Right to Food in South Africa: Not by Policy Alone – a need for Framework Legislation", in *South African Journal on Human Rights*, Volume 20, 2004, p.679.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* pp. 679-670.

<sup>336</sup> *supra*, note 113, para 29 indicates that framework laws on the right to food should include "provisions on its purpose" and "the means by which the purpose could be achieved".

legislation should also specify recourse and remedies for ESCR violations.<sup>337</sup>

- **Rationalization:** The elaboration and enactment of framework legislation presents an opportunity to rationalize existing laws and, in so doing, eliminate duplication and inconsistencies, as well as filling in gaps and removing obstacles to the realization of a particular right.<sup>338</sup>
- **Stakeholder consultation:** The rationalization process involved in compiling framework legislation may provide platforms for participation from a wide range of stakeholders including civil society, the broader public and the international community.<sup>339</sup>
- **Monitoring and evaluation:** Firm legislative direction in framework legislation can allow for the determination and inclusion of benchmarks against which compliance with international human rights standards can be evaluated. This should provide for more effective monitoring of the realization of ESCR.<sup>340</sup>

Although legislative measures, including the enactment of legislation, may constitute an important and necessary measure in the fulfillment of a State's obligation they are not sufficient to establish the reasonableness of the States' measures taken to realize ESCR. Because the State as a whole must take reasonable measures to realize ESCR, the executive (including administrative authorities) and the judiciary must also take measures, which are also required to be reasonable.

---

<sup>337</sup> Id. General Comment No.12 also indicates that framework laws on the right to food should include "possible recourse procedures".

<sup>338</sup> *supra*, note 333, p. 672.

<sup>339</sup> Id p. 673; General Comment No: 12, para 29 indicates that framework laws on the right to food should include "intended collaboration with civil society and the private sector and with international organizations"; and "actively involve civil society organizations" in "developing the benchmarks".

<sup>340</sup> *supra*, note 333, p. 674-675; General Comment No:12 para 29 indicates that framework laws on the right to food should include "the targets or goals to be achieved and the time frame to be set for the achievement of those targets"; and "and the national mechanisms for its monitoring".

The executive is therefore required to take reasonable measures to produce and implement “well-directed policies and programmes” consistent with the Constitution and legislation.<sup>341</sup>

In its jurisprudence, CESCR also affirms that specific measures from the executive are required in realizing ESCR. In the context of the right to work, for example, CESCR clearly indicates that States are required to: 1) “adopt a national policy on the right to work”; 2) “adopt a detailed plan for its realization”;<sup>342</sup> and 3) “adopt a national strategy, based on human rights principles aimed at progressively ensuring full employment for all.”<sup>343</sup>

Furthermore, as examples, in its concluding observations to South Africa, CESCR explicitly recommends a number of legislative measures from South Africa to ensure protection of ESCR. The relevant recommendations include recommendations that South Africa should:

- “adopt framework legislation protecting the right to adequate food and nutrition”;<sup>344</sup>
- “introduce a legislative framework to regulate the informal economy”;<sup>345</sup>
- “extend the coverage of the labour and social security legislation to these workers”;<sup>346</sup> and
- “harmonize all its relevant legislation to ensure that the minimum age for marriage for boys and girls”.<sup>347</sup>

---

<sup>341</sup> *supra*, note 9, para 42.

<sup>342</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20, (2009), para 26.

<sup>343</sup> *Id.*, para 41.

<sup>344</sup> *supra*, note 2, para 57(d).

<sup>345</sup> *Id.*, para 31(a).

<sup>346</sup> *Id.*, para 31(b).

<sup>347</sup> *Id.*, para 53.

### **3. Reasonable measures are not necessarily “perfect” measures**

In *Mazibuko*, the Constitutional Court warned: “the Constitution does not require government to be held to an impossible standard of perfection”.<sup>348</sup> This echoed its admonition in *Joe Slovo*, where the Court had explained that when “examining the reasonableness of the implementation, courts will be particularly cautious about allowing the best to become the enemy of the good”.<sup>349</sup> The Court’s most definitive, influential and far-reaching statement in this regard was made as early as *Grootboom*:

*“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. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.”*<sup>350</sup>

Overall, the Court’s aim in adopting this approach appears to have been to ensure that the Court itself does not “take over the tasks that in a democracy should properly be reserved for the democratic arms of government”.<sup>351</sup> The contributing influence<sup>352</sup> of the South African standard outlined above to the drafting of the Optional Protocol is self-evident. Article 8(4) of the protocol reads as follows:

---

<sup>348</sup> *supra*, note 202, para 161.

<sup>349</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* [2009] ZACC 16; 2010 (3) SA 454 (CC), para 381.

<sup>350</sup> *supra*, note 9, para 41. Emphasis Added.

<sup>351</sup> *supra*, note 202, para 161.

<sup>352</sup> To be specific, Porter, *supra*, note 190 at p 49 notes: “Eventually, wording was taken from the *Grootboom* decision of the South African Constitutional Court, where that Court first described its approach to reasonableness review in relation to the right of access to adequate housing in Article 26 of the South African Constitution.”

"When examining communications under the present Protocol, *the Committee shall consider the reasonableness of the steps taken* by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that *the State Party may adopt a range of possible policy measures for the implementation* of the rights set forth in the Covenant."<sup>353</sup>

Despite this, the wording of the OP-ICESCR, unlike the test set out in *Grootboom* "extends to optimisation in spending and policy choices". This is precisely because ICESCR's legal standard of "appropriateness" potentially:

"Opens more doors to what the Committee can assess when determining the 'range of possible policy measures' available to States, and whether the measures adopted by States are located within that range, and are therefore 'reasonable'."<sup>354</sup>

At the broadest level, this largely deferential approach has led to the reasonableness standard being described as a "double edged sword".<sup>355</sup> It is important to ensure that content is given to the standard and produces a "substantive reasonableness" which does not "allow courts to avoid giving content to ESCR and the obligations they impose"<sup>356</sup> and thereby risk "degenerating into an unprincipled and unduly deferential standard".<sup>357</sup>

#### **4. Purposive measures**

At the core of reasonableness is an understanding that ESCR are "entrenched because we value human beings and want to

---

<sup>353</sup> Article 8(4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Emphasis Added.

<sup>354</sup> Griffey, B, "The "Reasonableness" Test: Assessing Violations of State Obligations ... Covenant on Economic, Social and Cultural Rights", *Harvard Law Review*, Volume 11, 2011, p. 315

<sup>355</sup> *supra*, note 190.

<sup>356</sup> Liebenberg *supra*, note 52, p.173.

<sup>357</sup> *Id*, p. 183.

ensure that they are afforded their basic human needs”<sup>358</sup> and that people must always be treated with “care and concern”.<sup>359</sup>

According to CESC, to be reasonable, measures must be “deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights”.<sup>360</sup> This requires, at a base level, an understanding and evaluation of the ends sought to be achieved by such measures as well as the measures that will be taken to pursue such ends. Similarly, the Constitutional Court has held that the State’s duties in terms of reasonableness must also be understood “in the context of the Bill of Rights as a whole”.<sup>361</sup> This includes its objectives to create “a society based on human dignity, freedom and equality”.<sup>362</sup>

Although such purpose-driven analysis can add to the weight of substantive ESCR analysis and increase judicial protection of rights, all purposive analysis should be undertaken with the understanding that the fulfilment of ESCR is an end itself, required by international human rights law and South African constitutional law. Purposive analysis should therefore never be used to curtail or limit ESCR protection in any way.

## **5. Reasonable measures in conception and implementation**

As a matter of principle in international human rights law, reasonable “measures” refer to the full range of actions necessary to implement and give effect to ESCR. It is clear that “legislative measures alone are not sufficient to fulfil the obligations of the Covenant”<sup>363</sup> and therefore that, for example, the range of measures required for states to fulfil their obligations include “legislative, administrative, budgetary, judicial *and other measures*”.<sup>364</sup> Either acts of commission or

---

<sup>358</sup> *supra*, note 9, para 44.

<sup>359</sup> *Id.*, para 44.

<sup>360</sup> *supra*, note 316, para. 8.

<sup>361</sup> *supra*, note 9, para 44.

<sup>362</sup> *Id.*

<sup>363</sup> *supra*, note 25, para 18.

<sup>364</sup> *supra*, note 34, para 6.

acts of omission,<sup>365</sup> by any State entity, which result in the violation of ESCR, fall within the obligation to take reasonable measures. According to CESCR:

"Other measures which may also be considered 'appropriate' for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures."<sup>366</sup>

There is a very real danger that ESCR are ultimately whittled down through deferential interpretation into a right only to reasonable measures and not reasonable results. This could lead to a situation in which "nobody has a right to anything in particular, and therefore, everyone has a right to nothing at all".<sup>367</sup> CESCR has repeatedly expressed concern about this.<sup>368</sup>

---

<sup>365</sup> Id, paras 14-15.

<sup>366</sup> *supra*, note 49, para 7.

<sup>367</sup> Carol Steinberg "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence", in *The South African Law Journal*, Volume 123, 2006, p.264.

<sup>368</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4*, E/1992/23, 13 December 1991, para 4: ("there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world."); *UN General Comment 12*, para 5 ("disturbing gap still exists between the standards set in article 11 of the Covenant and the situation prevailing in many parts of the world."); *UN General Comment No.18* para 4 ("Nevertheless, for millions of human beings throughout the world, full enjoyment of the right to freely chosen or accepted work remains a remote prospect"); *UN General Comment No: 19*, para 7 ("The Committee on Economic, Social and Cultural Rights (the Committee) is concerned over the very low levels of access to social security with a large majority (about 80 per cent) of the global population currently lacking access to formal social security. Among these 80 per cent, 20 per cent live in extreme poverty"); *UN General Comment No. 15* para 1 ("The Committee has been confronted continually with the widespread denial of the right to water in developing as well as developed countries. Over 1 billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water"); *UN General Comment No.15* para 5 ("The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote".)



Although the application of the reasonableness standard to law and policy – regardless of the interpreters’ best intentions and efforts – cannot, without more, secure actual bread, actual houses and actual schools, crucially the Court has made it clear that measures “must be reasonable both in their conception *and their implementation*”.<sup>369</sup> Otherwise reasonable measures, in their conceptualization, may fall short, as examples, as a result of misinterpretations by implementing parties, corruption, maladministration or simple inaction. Implementation failures may also result from co-ordination failures between different branches and spheres of government.

Therefore, once reasonable policies have been formed and reasonable laws have been enacted, courts can evaluate the ongoing reasonableness in the implementation of policies that are reasonable on paper.

## **6. Contextually-informed measures**

The Vienna Convention on the Law of Treaties requires that treaties be interpreted “in their context and in the light of its object and purpose”.<sup>370</sup> Although States cannot “justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds”<sup>371</sup> they do “enjoy a margin of discretion in selecting the means for implementing their respective obligations”.<sup>372</sup> Indeed, “State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development” of ESCR standards.<sup>373</sup>

CESCR, for its part has noted that the obligations of States and the evaluation of the measures taken by them are deliberately crafted to allow them to reflect the “realities of the real world

---

<sup>369</sup> *supra*, note 9, para 42.

<sup>370</sup> Article 31(2) of the Vienna Law of Treaties.

<sup>371</sup> *supra*, note 34, para 8.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights".<sup>374</sup> In its statement on the OP-ICESCR, for example, CESCR indicates that contextual factors including "the country's level of development" and "the country's current economic situation" will be considered in determining whether "resource constraints" are a valid reason for failing to implement ESCR obligations.<sup>375</sup>

The African Commission too has repeatedly acknowledged that in the African context: "African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment" of ESCR rights.<sup>376</sup> It is therefore clear that the Commission will have "due regard to this depressing but real state of affairs" in determining and analysing ESCR violations.<sup>377</sup>

In the South African context, the reasonableness of measures taken by State authorities must be determined bearing in mind the "social, economic and historical context" including the present "capacity of institutions" tasked with implementing measures aimed at remedying ESCR "problems".<sup>378</sup> In *Khosa*, the Court reiterated that, "in dealing with the issue of reasonableness, context is all important."<sup>379</sup> Moreover, as context and conditions "do not remain static", measures "will require continuous review" if they are to remain *contextually reasonable*.<sup>380</sup>

Context also informs the content of an effective remedy and reparation for a violation of ESCR because "in our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be

---

<sup>374</sup> *supra*, note 49, para 9.

<sup>375</sup> *supra*, note 316, para 10.

<sup>376</sup> *supra*, note 34, para 84.

<sup>377</sup> *Id.*

<sup>378</sup> *supra*, note 9, para 43.

<sup>379</sup> *supra*, note 10, para 49.

<sup>380</sup> *Id.*, Emphasis Added.

upheld or enhanced.”<sup>381</sup> This, according to the Court, is particularly so because South Africa is “a country where so few have the means to enforce their rights through the courts” and “it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated”.<sup>382</sup>

## **7. Comprehensive and Coordinated measures**

The obligation for the discharge of human rights obligations engages all organs of State.<sup>383</sup> So for example, The Human Rights Committee has noted in respect of the ICCPR that:

“[t]he obligations of the Covenant in general ....are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party.”<sup>384</sup>

The Constitution requires the State in its entirety to “respect, protect, promote and fulfill” all rights.<sup>385</sup> The specific sections on ESCR make repeated references to “the state” without specifying which parts of the State are required to undertake particular roles and competencies. This is because the Bill of Rights “applies to all law, and binds the legislature, the executive, the judiciary and *all organs of state*”.<sup>386</sup> Ultimately, though varying from right to right, reasonable measures must be “comprehensive” and “co-ordinated” with each sphere of government fulfilling its particular obligations co-operatively “in mutual trust and good faith”.<sup>387</sup>

---

<sup>381</sup> *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786, para 69.

<sup>382</sup> *Id.*

<sup>383</sup> Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add. (2004), para 4; See also *supra*, note 25, para 18; see also, *supra*, note 26, para 6.

<sup>384</sup> Human Rights Committee, *Id.*, para 6.

<sup>385</sup> Section 7(2), Constitution of South Africa.

<sup>386</sup> Section 8(1), Constitution of South Africa.

<sup>387</sup> Chapter 3, Constitution of South Africa.

Like other human rights treaties, ICESCR does not expressly designate responsibility either to branches or organs of government, although there are particular aspects of obligations that will likely be most appropriately and effectively discharged by certain actors in line with rule of law principles and domestic authority. Obligations in ICESCR are therefore obligations of the State as a whole that must be particularized and specified in varying local contexts. The Constitution in South Africa seeks to accomplish this.

In addition to its three branches (executive, legislative and judicial), the Constitution divides the government into three spheres of government (national, provincial and local). The Constitution does assign responsibility for the discharge of obligations onto different spheres of government in its comprehensive schedules. Some are “shared competences”. For example, “housing”, “education at all levels, excluding tertiary education”, “environment”, “public transport”, “welfare services” and “health services” are shared national and provincial competences.<sup>388</sup>

On the other hand, the Constitution also sets out certain “exclusive competences”. It designates “municipal planning”, “municipal health services”, “municipal public transport”, “building regulations”, “electricity and gas reticulation”, “water and sanitation services”, “refuse removal, refuse dumps and solid waste disposal”, “street trading” and “local amenities” as local government competences.<sup>389</sup> Similarly it designates “ambulance services”, “libraries other than national libraries” and “provincial planning” as exclusive provincial competences.<sup>390</sup>

Four aspects of these arrangements should be emphasized:

- First, the boundaries of these competences are far from clear. They are often ultimately either clarified

---

<sup>388</sup> Id, Schedule 4, part A.

<sup>389</sup> Id, Schedule 4 part B; Schedule 5 part B.

<sup>390</sup> Id, Schedule 5 part A.

by legislation and policy and/or are the subject of litigation.

- Second, the competences in these schedules are not a conclusive list of all government functions.
- Third, despite these constitutional designations, legislation and policy often expand and detail the mandate of local and provincial government within the bounds of the constitution.
- Fourth and finally, no law, including the designations in these schedules, overrides the fundamental duty of all State entities to “respect, protect, promote and fulfill” all ESCR.

State obligations to realize ESCR mandate measures both “individually” *and* “through international assistance and co-operation”.<sup>391</sup> The OP-ICESCR builds on this provision of ICESCR by CESCR to, with the consent of a State Party, submit to United Nations specialized agencies, funds and programmes and other competent bodies information, observations and suggestions on the “need for technical advice or assistance” in the fulfillment of ESCR obligations by that State.<sup>392</sup>

What is clear from this brief background is that the State’s obligation to take reasonable measures to realize ESCR will vary from one ESCR to another and one sphere of government to another. The allocation of responsibilities may also vary within different functions pertaining to the same right. Much depends on the constitutional, legislative and policy framework in the particular circumstances. It also requires a “trust fund” to be created “with a view to providing expert and technical assistance” to states in implementing ESCR obligations.<sup>393</sup>

To guide these complex interactions, the Constitution requires “co-operative governance”.<sup>394</sup> Cooperation is an overall requirement regardless of the circumstances to ensure that the

---

<sup>391</sup> Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

<sup>392</sup> Article 14(1) of the Optional Protocol of the Covenant on Economic, Social and Cultural Rights.

<sup>393</sup> *Id.*, Article 14(3).

<sup>394</sup> Chapter 3, Constitution of South Africa.

three “distinctive, interdependent and interrelated”<sup>395</sup> spheres “co-operate with one another in mutual trust and good faith”.<sup>396</sup> In the specific context of reasonableness, in *Grootboom*, the Court noted the following about co-operative governance:

“What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The last of these may, as it does in this case, comprise two tiers. *The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government... A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.*

*Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution... Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state’s section 26 obligations.”*<sup>397</sup>

Finally, the Court has also indicated that especially in circumstances where the “magnitude” of a rights violation is particularly severe, a “concerted, co-ordinated and co-operative national effort” must include not only measures from

---

<sup>395</sup> Id, s 40(1).

<sup>396</sup> Id, s 41(1)(h).

<sup>397</sup> *supra*, note 9, paras 39-40. Emphasis Added.

the “government in each of its three spheres”, but also a utilization of the “panoply of resources and skills of civil society” which must be “marshalled, inspired and led” by the government.<sup>398</sup>

## **8. Coherent measures**

Measures taken, no matter how comprehensive and coordinated, may still be unreasonable if it not “capable of facilitating the realization of the right.”<sup>399</sup> In *Grootboom*, the Court therefore concluded: “section 26 [of the Constitution] does oblige the state to *devise and implement a coherent, co-ordinated programme designed to meet* its section 26 obligations”.<sup>400</sup> Reasonable measures, including “programmes” must therefore be both designed to and capable of achieving the realization of ESCR.

To be coherent, such measures, must also individually and collectively comply with the requirements of the rule of law including that they are rational and non-arbitrary. To be “rational” is a lower threshold than to be “reasonable”, but a measure can never be reasonable if it is not, in the first instance, rational. According to South African law, for a measure to be rational, there must be a sufficient connection between the means taken and purpose for which a power has been designated. This requirement stems from the fact that the state is “constrained by the principle that [it] may exercise no power and perform no function beyond that conferred . . . by law”.<sup>401</sup> Both the actual measures taken and “everything done in the process” of determining these measures “constitute means towards the attainment of the purpose for which the power was conferred”.<sup>402</sup> Both the overall rationality

---

<sup>398</sup> *supra*, note 200, para 123.

<sup>399</sup> *supra*, note 9, para 41.

<sup>400</sup> *Id.*, para 95.

<sup>401</sup> *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* [2000] ZACC 1; 2000 (2) SA 674 (CC), para 85.

<sup>402</sup> *Democratic Alliance v President of South Africa & Others* [2012] ZACC 24; 2013 (1) SA 248 (CC), para 36.

of the measures themselves and the rationality of the process (potentially including various other measures) through which the measures are determined and undertaken is therefore constitutionally required.

Furthermore rational measures may not be arbitrary. Non-arbitrary measures must also, generally, be evidenced-based.<sup>403</sup> Consistently with the requirements of South African law, CESCER also regularly refers to the need for evidence-based measures towards the realization of ESCR.<sup>404</sup>

## **9. Flexible, adapting and updating measures**

For measures to be reasonable they must be “balanced and flexible”.<sup>405</sup> One aspect of flexibility is the need for attention to be paid to “short, medium and long term needs” as well as immediate emergencies.<sup>406</sup> A reasonable plan for realization of ESCR in the long term without adequately reasonable planning for the medium and short term may therefore fall short of the standard.<sup>407</sup> Similarly, measures, which cater for the short term without considering long term needs relating to ESCR, will not be reasonable, including because they are inflexible.<sup>408</sup>

Another aspect of flexibility is that all measures require “continuous review” both in light of their effectiveness and changing circumstances to be reasonable.<sup>409</sup> More generally, CESCER has made clear that “the time frame in which the steps

---

<sup>403</sup> See, for example, the Court’s extensive reliance on scientific and social sciences evidence in concluding that the state’s policy was unreasonable in *Treatment Action Campaign*, *supra*, note 200.

<sup>404</sup> See for example: *UN General Comment No. 22* on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights); *UN General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12).

<sup>405</sup> *supra*, note 49, para 9.

<sup>406</sup> *supra*, note 9, para 44.

<sup>407</sup> In this context “short term” needs do not have the same meaning as “desperate”, urgent or compelling needs.

<sup>408</sup> *supra*, note 202, para 95. *supra*, notes 9 and 200.

<sup>409</sup> *Id.*



were taken” is an important indicator in determining the reasonableness of measures.<sup>410</sup>

The Constitutional Court has stressed the importance of flexibility, noting the executive’s willingness to engage in “considerable research” and “continually refine” its policies in the light of the findings of its research during an ongoing litigation process.<sup>411</sup> This, the Court suggested, was because “the City has not set its policy in stone”.<sup>412</sup> Indeed, it held that the revision policies even “during the course of the litigation” was laudable, describing it as illustrative of “how litigation concerning social and economic rights can ... impact beneficially on the policy-making process”:

*“This case illustrates how litigation concerning social and economic rights can exact a detailed accounting from government and, in doing so, impact beneficially on the policy-making process. The applicants, in argument, rued the fact that the City had continually amended its policies during the course of the litigation. In fact, that consequence of the litigation (if such it was) was beneficial. Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.”*<sup>413</sup>

A final element of flexibility, in keeping with the rule of law and the right to substantive equality, is that reasonable measures may need to allow for courts, the legislature and the executive to make or provide for well-defined exceptions in the implementation of measures when their application would result in grave injustices in specific contexts. In South Africa this is in line with the obligation of courts to devise context-sensitive “just and equitable” remedies.<sup>414</sup>

---

<sup>410</sup> *supra*, note 316, para. 8.

<sup>411</sup> *supra*, note 202, para 95.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.*, para 163. Emphasis Added.

<sup>414</sup> Section 172, Constitution of South Africa.

## **10.Transparent measures**

Transparency is a general principle in international human rights law, which includes, among other things, the right to receive and impart information.<sup>415</sup> This is reaffirmed by the CESCR's interpretation of specific rights as including a duty to promote as a component of the duty to fulfill.<sup>416</sup> This duty to promote includes both a duty to educate affected people about measures taken to realize their rights *and* a duty to communicate what measures have been so taken.<sup>417</sup>

In South Africa too, this approach is consistent with the Constitution's founding values of "responsiveness and openness",<sup>418</sup> the constitutional entrenchment of a right of access to public information,<sup>419</sup> and the general constitutional duty to "promote" all rights in the Bill of Rights.<sup>420</sup>

In *TAC*, the Constitutional Court described as "regrettable" the failure of the government to "publicly announce" the content of measures taken to realize the right to health. Such measures included "programmes" to prevent mother-to-child transmission of HIV including the provision of life saving medication.<sup>421</sup>

The Court thereafter explained that effective measures towards the realization of the right to health "can be achieved only if there is proper communication, especially by government"

---

<sup>415</sup> *supra*, note 26, principle I (2), Article 32(d).

<sup>416</sup> See for example Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4 (2000), para 33; Committee on Economic, Social and Cultural Rights, General Comment No.15, UN Doc E/C.12/2002/11, (2003); Committee on Social, Cultural and Economic Rights, General Comment No.19, UN Doc. E/C.12/GC/19, (2008), paras 47-49.

<sup>417</sup> *supra*, note 30, pp. 203-4.

<sup>418</sup> s 1, Constitution of South Africa.

<sup>419</sup> *Id*, s 32.

<sup>420</sup> *Id*, s 7(2) Constitution of South Africa.

<sup>421</sup> *supra*, note 200, para 123.

concluding that the programmes “must be made known effectively to all concerned, down to the district nurse and patients”.<sup>422</sup> Importantly, it concluded therefore that such public programmes “must be made known appropriately” for the constitutional requirement of reasonableness to be met.<sup>423</sup>

### **11. Measures addressing “desperate” or “compelling” need**

CESCR has noted that in considering the reasonableness of measures, it will consider “whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups” in addition to “whether they prioritized grave situations or situations of risk”.<sup>424</sup>

Similarly, in South Africa, reasonable measures must cater for emergencies and be “sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate *and* short-term requirements.”<sup>425</sup> This is even so, when as in *Grootboom* “provision for people in desperate need” could potentially “detract significantly” from other measures aimed at realizing ESCR.<sup>426</sup>

Rejecting the notion that desperate needs could be so neglected, the Court noted that in the absence of even temporary measures persons in desperate situations “will be consigned to their fate for the foreseeable future ... without any form of assistance with no end in sight”.<sup>427</sup> Observing that this would have both immediately negative impacts on their rights and inevitably cause further rights violations, the Court concluded that reasonableness requires that “a reasonable part

---

<sup>422</sup> Id.

<sup>423</sup> Id.

<sup>424</sup> *supra*, note 316, para. 8.

<sup>425</sup> *supra*, note 9, para 56. Emphasis added to highlight the distinction drawn by the court between immediate and short term needs.

<sup>426</sup> Id, para 64.

<sup>427</sup> Id, para 65.

of the national housing budget be devoted to providing “relief for those in desperate need”.<sup>428</sup>

While ultimately accepting that even reasonable measures may not result in all people requiring assistance receiving it “immediately”, the Court made clear that the State must nevertheless ensure “that a significant number of desperate people in need are afforded relief”.<sup>429</sup> Some Relevant examples of desperate need include people who are:

- Homeless or inhabiting housing immediately harmful to their health or safety (desperate need of housing assistance);
- At risk of death or serious injury/infection (desperate need of health services);
- Lacking food and, in a state of serious malnutrition, or at risk of starvation (desperate need for food); and
- Lacking any means of acquiring sufficient income and living in poverty (desperate need to secure an adequate standard of living through work opportunities and/or social protection).

The emphasis on helping those in the most desperate need is an explicit acknowledgment by the Court that reasonable “measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise”.<sup>430</sup> Reasonableness is therefore more generally – beyond the context of measures taken to assist those in desperate need – a more exacting standard when the “degree and extent” of violation is severe.

Legal practitioners and human rights defenders will note the overlap, in some respects, between the Constitutional Court’s approach to “desperate” and “compelling” need in the reasonableness evaluation with the CESC’s definition of minimum core obligations. One manner of arguing for further inclusion of minimum core standards in South African law is to persuade courts to expand this element of its reasonableness

---

<sup>428</sup> Id, para 66.

<sup>429</sup> Id, para 68.

<sup>430</sup> Id, para 44.

evaluation and supplement it with the explicit minimum core content of ESCR from international law.

## **12. Specific measures for marginalized individuals and groups**

CESCR has been consistently clear that “even in times of severe resources constraints ... vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes”.<sup>431</sup> In determining the reasonableness of steps taken to realize ESCR, CESCR has indicated that it will consider *both* “whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups *and*, whether they were non-discriminatory”.<sup>432</sup>

The obligation of States to consider disadvantaged and marginalized individuals and groups therefore includes – but extends further than – the obligation to ensure that all measures taken to realize ESCR are non-discriminatory. The obligation, for example, to take “temporary special measures” is detailed further below.<sup>433</sup>

This obligation to “prioritize the realisation of the rights of disadvantaged, marginalized and vulnerable groups” applies both to the ESCR of those within a state’s territory and outside of it.<sup>434</sup> So central is this priority that the Maastricht Guidelines indicate that even legislative and policy measures that are “manifestly incompatible with pre-existing legal obligations” may ultimately not violate States’ ESCR obligations if they are “done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups”.<sup>435</sup>

---

<sup>431</sup> *supra*, note 49, para 12; reaffirmed in note 316, para 4.

<sup>432</sup> *supra*, note 316, para 8(f).

<sup>433</sup> See section IV H(7) below.

<sup>434</sup> *supra*, note 26, para 32(a).

<sup>435</sup> [http://hrlibrary.umn.edu/instree/Maastrichtguidelines\\_.html](http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html) *supra*, note 26, para 14(d).

The African Commission describes vulnerable and disadvantaged groups as “people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights”.<sup>436</sup> It provides an extensive list of such groups which include categories that form prohibited grounds of discrimination in terms of ICESCR and the Constitution (race, gender, people with disabilities, children, the elderly);<sup>437</sup> but also includes a wider range of other categories such as “youth”, “people living with HIV”, “persons with persistent medical problems”, “victims of sexual and economic exploitation”, “slum dwellers, landless and nomadic pastoralists”, “persons living in informal settlements”, “workers in the informal sector” and , “transgendered and intersex people”.<sup>438</sup>

The Commission’s expansive interpretation of “vulnerable and disadvantaged groups”, which is somewhat mirrored in CESC and the Constitutional Court’s jurisprudence, makes clear that a wide, constantly-evolving and contextually-informed range of vulnerabilities and disadvantages should always be considered by states in determining the measures it takes to realize ESCR.

---

<sup>436</sup> *supra*, note 34, para 1(e).

<sup>437</sup> See Section H(5) of this Guide entitled “Equality and Non-Discrimination”.

<sup>438</sup> The African Commission’s full list reads as follows:

“Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children (particularly orphans, young girls, children of low-income groups, children in rural areas, children of immigrants and of migrant workers, children belonging to linguistic, racial, religious or other minorities, and children belonging to indigenous populations/communities), youth, the elderly, people living with, or affected by, HIV/AIDS, and other persons with terminal illnesses, persons with persistent medical problems, child and female-headed households and victims of natural disasters, indigenous populations/communities, persons with disabilities, victims of sexual and economic exploitation, detainees, lesbian, gay, bisexual, transgendered and intersex people, victims of natural disasters and armed conflict, refugees and asylum seekers, internally displaced populations, legal or illegal migrant workers, slum dwellers, landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture, persons living in informal settlements and workers in irregular forms of employment such as home-based workers”.

### **13. Proportionality and measures at relatively or comparatively low cost**

Although proportionality is not expressly mentioned in the ICESCR, the Committee has repeatedly affirmed the role of proportionality analysis in its assessments of States' compliance with ESCR obligations. In *Miguel Ángel López Rodríguez v Spain*, for example, CESCR indicates that a reduction of social security benefits could only be "compatible" with ICESCR if "the measure is provided for by law and is reasonable *and proportionate*."<sup>439</sup> Moreover, it has reaffirmed that "in times of severe economic and financial crisis, all budgetary changes or adjustments affecting policies must be temporary, necessary, *proportional* and nondiscriminatory".<sup>440</sup>

In *Mohamed Ben Djazia and Naouel Bellili v Spain*, CESCR decided that for evictions to be justifiable consistent with the State's obligations under ICESCR they must be conducted in accordance with "principle of human dignity contained in the preamble" and "in accordance with the general principles of *reasonableness and proportionality*".<sup>441</sup> In *Marcia Cecilia Trujillo Calero v Ecuador*, the CESCR held that Ecuador's "policy of voiding all voluntary payments received after a six consecutive month pause" was "*disproportionate to its potential policy goals, such as the protection of social security resources*".<sup>442</sup>

Another implicit acknowledgment of the proportionality requirement is CESCR's insistence that where States attempt to justify failures to comply with ESCR obligations, they must show that relatively low-cost measures were fully considered.

In the specific context of determining whether retrogressive measures can be justified, CESCR has already considered "whether the State party had sought to identify low-cost

---

<sup>439</sup>*supra*, note 189, paras 13.2, 14.8. Emphasis Added.

<sup>440</sup>*Id.*, para 17.6. Emphasis Added.

<sup>441</sup> *supra*, note 160, para 13.4. Emphasis Added.

<sup>442</sup> *Marcia Cecilia Trujillo Calero v. Ecuador*, CESCR, Communication 10/2015, UN Doc. E/C.12/63/D/10/2015 (26 March 2018) paras 13.2, 17.1. Emphasis Added.

options".<sup>443</sup> Another recent application of the obligation to consider low-cost options is evident in CESCR's decision in *Marcia Cecilia Trujillo Calero v Ecuador*. In its decision CESCR confirmed that Ecuador had failed in its ESCR obligations relating to social security because Ecuador had "not shown that there were no alternative measures that did not seriously affect the author's access to a pension".<sup>444</sup>

The inquiry into the availability of resources is part of the broader determination of whether measures taken are reasonable. CESCR has indicated that it will consider "whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards" in determining the reasonableness of measures to realize ESCR.<sup>445</sup>

This is particularly well illustrated, also, by the Constitutional Court's willingness to acknowledge the relevance of relative comparative costs of certain measures (cost effectiveness) in determining their reasonableness. For example, in evaluating the reasonableness of extending to permanent residents certain grants available to citizens, in *Khosa* the Court held that "the cost of including permanent residents in the system will be only a small proportion of the total cost" of the allocation and therefore ultimately concluded that the exclusion of permanent residents was unreasonable.<sup>446</sup>

Another example is the Court's consideration in *TAC* that in determining the reasonableness of measures in implementing the right to health it was relevant that "the drug is currently available free to government and its administration is simple".<sup>447</sup> According to the Court's reasoning, this illustrated that the relative cost of providing such treatment was

---

<sup>443</sup> Id, para 10.

<sup>444</sup> Id, para 17.1.

<sup>445</sup> *supra*, note 316, para. 8.

<sup>446</sup> *supra*, note 10, para 63.

<sup>447</sup> *supra*, note 200, para 4 . A similar proportionality analysis is included within the section 36 of the South African Constitution, which requires the determination of the reasonableness of a limitation of any right to consider whether any "less restrictive means" were available to the state.



comparatively low compared to the enormous benefit in protecting the right to health of pregnant HIV positive women. This, in turn, contributed directly to the Court's determination that the government had failed to take reasonable measures to realize their right to health.

#### **14. Measures with an (adverse) impact on other human rights**

The general obligation of States to respect, protect and fulfill human rights means that States must implement its obligation in respect of a right in a manner that will not impair the enjoyment of another right. All States have repeatedly affirmed that human rights are universal, indivisible, interdependent, and interrelated.<sup>448</sup> The Constitutional Court, from the outset of its jurisprudence, has echoed this principle.<sup>449</sup>

A logical consequence this principle is that where measures aimed at protecting one right violate another, the violating impacts of the measures on other rights will be factored into the determination of the reasonableness of those protective measures. CESCR has emphasized that "where several policy options are available" reasonableness will be assessed by, among other criteria, "whether the State party adopted the option that least restricts Covenant rights"<sup>450</sup> overall.

The Constitutional Court has seemed to adopt a similar posture in its ESCR decisions. In *Khosa*, for example, the Court held that:

"when the rights to life, dignity and equality are implicated in cases dealing with ESCR, they have to be taken into account along with the availability of human and financial resources in determining whether the

---

<sup>448</sup> See for example: World Conference on Human Rights in Vienna, *Vienna Declaration and Programme of Action*, 25 June 1993, para 5.

<sup>449</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

<sup>450</sup> *supra*, note 316, para. 8.

state has complied with the constitutional standard of reasonableness".<sup>451</sup>

The Court explained that although the State may allocate services, goods or benefits to some groups to the exclusion of others on the grounds of unaffordability, "the criteria upon which they choose to limit" the allocation of such services, goods or benefits "must be consistent with the Bill of Rights as a whole". An unreasonable limitation of "other constitutional rights" would be taken into account in the determination of the any measure's reasonableness.<sup>452</sup>

In the circumstances of *Khosa*, the decision to exclude permanent residents from certain benefits afforded to citizens therefore "directly implicated" the "equality rights entrenched in section 9" of the Constitution.<sup>453</sup> The Court held that the "denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance" amounted to unfair discrimination. It then used this finding to support its conclusion that the denial "does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution".<sup>454</sup> More generally, it concluded that a discriminatory "law or action" could violate both the right to equality and particular ESCR simultaneously.<sup>455</sup>

## **15. Meaningful engagement and consultation as reasonable measures**

The right to participate in the conduct of public affairs is protected in international human rights law.<sup>456</sup> Such participation should be from an early stage and include

---

<sup>451</sup> *supra*, note 10, para 44.

<sup>452</sup> *Id.*, para 45.

<sup>453</sup> *Id.*, para 49.

<sup>454</sup> *Id.*, paras 70-75, 82.

<sup>455</sup> *Id.*, para 53; Contrast however with *Dladla & Another v City of Johannesburg & Others* [2017] ZACC 42; 2018 (2) SA 327 (CC) paras 40-53.

<sup>456</sup> Articles 19 and 25 Articles 19, 25 of the International Covenant on Civil and Political Rights. See also the Sustainable Development Goals which consider participation to be "a vital principle for achieving sustainable development, eradicating poverty, and the realization of all human rights."

“shaping the agenda of the decision-making process”.<sup>457</sup> Before this process begins and “when all options are still open” those whose rights may be affected by a decision “should be able to participate in the decision-making process”.<sup>458</sup> The importance of participation is also highlighted repeatedly throughout the African Commissions’ guidelines on ESCR.<sup>459</sup>

In the domestic context in *Grootboom*, the Court held that for measures to be reasonable in compliance with the standard set by the Constitution: “[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing”.<sup>460</sup>

In *Olivia Road*, quoting this extract from *Grootboom*, the Court explained the duty on the State to take reasonable measures includes an obligation to take “reasonable efforts towards meaningful engagement” with affected persons. In its decision in *Olivia Road*, which was a case dealing with an eviction of a group of occupiers, the Court explained the reason for its approach as follows:

*“Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the*

---

<sup>457</sup> Human Rights Council Guidelines on the effective Implementation of the Right to Participate in Public Affairs”, 2018, para 64, available at: [https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs\\_web.pdf](https://www.ohchr.org/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf).

<sup>458</sup> Id, paras 64, 66 and 70.

<sup>459</sup> *supra*, note 34, Articles 1(b), 20(c), 26, 29, 46, 55(d).

<sup>460</sup> *supra*, note 9, para 82.

engagement process should preferably be managed by careful and sensitive people on its side.”<sup>461</sup>

While this reasoning was specific to the eviction scenario, the Court was careful to ground the obligation of meaningful engagement more generally in the duty to take reasonable measures to realize the right to have access to adequate housing. Indeed it went further, indicating that a failure to meaningfully engage affected individuals prior to an eviction is also “broadly at odds with the spirit and purpose” of the State’s constitutional obligations in terms of the Constitution’s preamble, the right to dignity and the Bill of Rights as a whole.<sup>462</sup>

This meaningful engagement obligation, grounded as it was originally in the broad “spirit and purpose” of the Constitution and the State’s obligations to take reasonable measures, has since been applied by courts to a range of rights in varied circumstances. As examples:

- The Constitutional Court has construed the right to basic education to require a meaningful engagement obligation between provincial education departments and school governing bodies;<sup>463</sup>
- The Constitutional Court has required owners of property and a municipality to “meaningfully and in good faith” engage on the payment of outstanding fees for basic services which must be paid prior to the lawful transfer of a property;<sup>464</sup>

---

<sup>461</sup>*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) paras 15, 21. Emphasis Added.

<sup>462</sup> *Id*, para 16. For an evaluation of the centrality of the meaningful engagement requirement as a component of the doctrine of separation of powers in the SA context, see: Timothy Fish Hodgson : “The mysteriously appearing and disappearing doctrine of separation of powers: toward a distinctly South Africa doctrine for a more radically transformative Constitution”, in *South African Journal on Human Rights*, Volume 34, 2018, p 27 -28.

<sup>463</sup> *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) para 119.

<sup>464</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC), para 73.

- The Constitutional Court has required an owner and an occupier on a farm to meaningfully engage about improvements the occupier intended to make to ensure her living conditions reached an adequate standard that accords with human dignity;<sup>465</sup> and
- The High Court has required meaningful engagement in a situation involving the relocation of informal traders to make way for a mall development.<sup>466</sup>

## **16. Conclusion: developing reasonableness, defining the content of rights**

In the South African context, with the benefit of significant experience with ESCR litigation, one concern that is frequently raised by legal practitioners, academics and human rights defenders is that the reasonableness standard may have led to a reluctance on the part of courts to give detailed content to ESCR. Reasonableness review, in this view, has seemingly resulted in a conflation of a “two-stage approach to constitutional analysis with its initial principled focus on the scope of the right and the beneficiary group, and thereafter a consideration of possible justifications offered by the respondent for the infringement”.<sup>467</sup>

As a result it is observed “the Court has not spent much interpretative energy in developing the substantive content of the various rights”.<sup>468</sup> The Court is also criticized for not having engaged sufficiently with the “underlying values and purposes of socio-economic rights” which may result in the “impact of the deprivation” of rights being “accorded insufficient weight” in the reasonableness evaluation.<sup>469</sup>

---

<sup>465</sup> *Daniels v Scribante & Another* [2017] ZACC 13; 2017 (4) SA 341 (CC) paras 62-65.

<sup>466</sup> Socio-Economic Rights Institute “Informal Trade in South Africa: Legislation, Case Law and Recommendations for Local Government” , 2018, available at: [http://www.seri-sa.org/images/SERI\\_SALGA\\_Informal\\_Trade\\_Jurisprudence\\_WEB.pdf](http://www.seri-sa.org/images/SERI_SALGA_Informal_Trade_Jurisprudence_WEB.pdf) p. 35-36.

<sup>467</sup> *supra*, note 52, p. 175.

<sup>468</sup> *Id.*, p. 177.

<sup>469</sup> *Id.*, p. 177.

International and comparative law are therefore indispensable to legal practitioners and human rights defenders in arguing for further content to be given to ESCR in South African law. Though courts are likely to continue to apply the reasonableness standard on a case-by-case basis, there is no reason why legal practitioners should not encourage courts to incrementally define clear content to ESCR.

The CESCR has, over decades, clarified the nature and scope of the normative content of specific ESCR. Regional and domestic courts have decided cases on a wide range of aspects of ESCR never considered by South African courts. Legal practitioners and human rights defenders should increasingly draw on this body of standards consistently emphasizing South Africa's binding international law obligations.

Ultimately, the concept of reasonableness and the rules of constitutional interpretation set out in the Constitution must remain sufficiently flexible to accommodate – and indeed prefer – interpretations of the reasonableness standard consistent with South Africa's obligations under international human rights law. Legal practitioners and human rights defenders should approach their arguments by emphasizing, where possible, the synchronicity and symbiotic relationship between international law standards on ESCR instead of presenting them as largely in conflict with or opposition to South African law.

## F. WITHIN (MAXIMUM) AVAILABLE RESOURCES

"What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources."<sup>470</sup>

– Chaskalson CJ in *Soobramoney*

"Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society."<sup>471</sup>

– Mokgoro J in *Khosa*

CESCR is clear that the availability of resources "although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction".<sup>472</sup> It has therefore indicated that even when a State's resources are "demonstrably inadequate", it must still "ensure the widest possible enjoyment" of ESCR.<sup>473</sup> This includes ensuring that the State discharge its obligations to respect and to protect ESCR, which in many aspects are less resource intensive, as well as to meet minimum core obligations.

---

<sup>470</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC), para 11.

<sup>471</sup> *supra*, note 10, para 74.

<sup>472</sup> *supra*, note 316, para 4.

<sup>473</sup> *Id.*

With this clear understanding in mind, however, the cost of fulfilling of ESCR rights, like all other rights, remains highly pertinent to the discharge of the states' obligations to ensure the realization of ESCR. Though "in many cases compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications", there are also many circumstances in which "simply taking a step may be meaningless without an accompanying resource being provided".<sup>474</sup> From its *First Certification* judgment, the Constitutional Court has affirmed that, because *all* judgments on rights – whether civil and political or social and economic – have budgetary consequences, these budgetary implications *are not* an obstacle to the discharge of any ESCR by state actors including the judiciary.<sup>475</sup>

Throughout, legal practitioners and human rights defenders should bear in mind that, both in terms of the OP-ICESCR Optional Protocol and the Constitution, "available resources" are simply a component of the analysis of whether measures taken to realize ESCR are reasonable. All resourcing measures, including budgetary measures, are "legislative and other measures" for the purpose of the evaluation of reasonableness.

In its evaluations as to whether South Africa had in fact used the "maximum available resources" to realize ESCR the CESCR has expressed serious concern over the "persistence of ... inequalities" in South Africa which it indicated "signals that the model of economic development pursued by the State party remains insufficiently inclusive". Moreover, CESCR considers the level of economic and social inequalities in South Africa to be "unacceptably high".<sup>476</sup> To the extent that budgetary measures contribute to the model of economic development in South Africa, CESCR recommended that the State reconsider whether these measures allow for sufficiently inclusive economic development and therefore meet South Africa's ESCR obligations. Indeed, CESCR further recommended that South

---

<sup>474</sup> Robert Robertson "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social, and Cultural Rights" *Human Rights Quarterly*, Volume 16, 1994, p. 695.

<sup>475</sup> *supra*, note 33, para 76.

<sup>476</sup> *supra*, note 3, para 16.



Africa “re-examine its growth model in order to move towards a more inclusive development pathway”.<sup>477</sup>

Furthermore, expressing regret over austerity measures introduced by South Africa, CESCER indicates that the State should “increase the level of funding in social security, health and education”.<sup>478</sup> The breadth of the application of the budgetary and resource related obligations should therefore not be underestimated.

The question of “available resources” is indeed contested and there remains a dearth of clear, explicit content that courts and CESCER have given to the “available resources” requirement. This ambiguity presents an opportunity for legal practitioners and human rights defenders to present arguments aimed at giving clearer content to the notion of “available resources” and the corresponding budgetary and resource related obligations of the State. Accordingly, this section draws on information emanating from international and South African experts on budgeting in an attempt to assist legal practitioners in their attempts to develop such content.

## **1. Available resources and the text of the Constitution**

The Constitution’s way of acknowledging the importance of budgeting, resource provision and resource allocation to the realization of ESCR is to repeatedly require the consideration of “available resources” as a qualifier when it requires the State to take reasonable measures to progressively realize ESCR.<sup>479</sup>

As with “progressive realization”, the phrasing of the Constitution draws directly from ICESCR, which requires states to “take steps ... to the maximum of its available resources” to

---

<sup>477</sup> Id, para 17.

<sup>478</sup> Id, para 19(a).

<sup>479</sup> See section 25(5) (in relation to land), section 26(2) (in relation to housing) and section (27(2) in relation to health care services, food, water, and social security), Constitution of South Africa..

realize ESCR.<sup>480</sup> Whether, in the abstract, “available resources” or “maximum of available resources” are substantively distinct standards is a matter of contestation. According to one view, the distinct terms are, “conceptually identical”<sup>481</sup> or simply differences in “nomenclature”.<sup>482</sup> Given the general principle that domestic law should be interpreted in line with a State’s international legal obligations, this would be preferred approached. Legal practitioners and human rights defenders are advised that, at very least, that “maximum of its available resources” in South African law and “available resources” in international law are capable of reasonable interpretation ensuring their consistency in meaning.

It is therefore a concern from the perspective of both international and domestic human rights law that “while legislation and policies have been implemented to give effect to the realization of ESCR, the generation, allocation and expenditure of budgets towards the fulfilment of ESCR remains problematic”.<sup>483</sup> This suggests, and research increasingly appears to confirm, a systemic failure to budget adequately for the realization of ESCR in South Africa.<sup>484</sup>

## **2. Is there a duty on the State to budget for the fulfilment of ESCR?**

Although courts most commonly interpret “available resources” in the context of ESCR litigation or other adjudication, the requirement places an obligation on the State at a broad level, including, but not limited to obligations related to budgeting.

---

<sup>480</sup> Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

<sup>481</sup> Daniel McLaren “‘Within its Available Resources’ Socio-Economic Rights and National Budget”, in *Studies in Poverty and Inequality Institute*, 2016, available at: <http://www.spji.org.za/wp-content/uploads/2016/02/SPII-Policy-Brief-2016-1.pdf> p 1-2.

<sup>482</sup> *supra*, note 101, para 751.

<sup>483</sup> Thandiwe Matthews and Daniel McLaren “*Budget Analysis for Advancing Socio-Economic Rights*”, 2016, available at; <https://www.sahrc.org.za/home/21/files/2016%20SPII%20SAHRC%20Guide%20to%20Budget%20Analysis%20for%20Socio-Economic%20Rights.pdf>, p. 1.

<sup>484</sup> See, for example, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160308leftinthedarkannexureC.pdf>.

Therefore, an understanding and appreciation of ESCR among National Treasury officials, Parliamentarians and the Minister of Finance critical to ensuring their realization.<sup>485</sup> Similarly, an understanding of the full extent of the obligation to take measures “within available resources”, is important for legal practitioners and human rights defenders even where they are not contemplating litigation as a way of ensuring the realization of ESCR.

CESCR has been cautious to indicate that ICESCR obligations do not necessarily require any particular administrative systems or arrangements. They do, however, effectively impose a duty on the State to budget for the realization of ESCR. For example, in its General Comment on the right to work, CESCR indicates that a national strategy on the right to work which States are obliged to develop “should impose[...] a requirement to identify the resources available ... for achieving” its goals.<sup>486</sup> Moreover, it notes “effective measures to increase the resources allocated to reducing the unemployment rate ... should be taken by States parties.”<sup>487</sup>

Ultimately, as a South African High Court judge made clear, “the state must manifestly budget for basic education *as well as for all the other resources which the state provides*”.<sup>488</sup> This general approach, which requires available resources to be considered in realizing ESCR has at least four consequences:

- First, laws, policies or practices precluding the obligation to budget for the progressive realization of ESCR in general, or a specific ESCR, or specific aspects of a particular ESCR, would be incompatible with those rights obligations;
- Second, a merely nominal budgetary allocation that is manifestly incapable of progressively realizing ESCR

---

<sup>485</sup> In South Africa the National Treasury, which is headed up by the Minister of Finance, is established in terms of section 5 of the Public Finance Management Act 1 of 1999 enacted to give effect to section 216 of the Constitution.

<sup>486</sup> *supra*, note 92, para 41.

<sup>487</sup> *Id.*

<sup>488</sup> *Basic Education for All & others v Minister of Basic Education* [2014] ZAGPPHC 251; 2014 (4) SA 274 (GP), para 43.

would also fall short of ICESCR's requirements. Budgeting must expressly seek to fulfill the States ESCR obligations at a level of performance that is legally required;

- Third, the State is compelled to "do all it can to raise more revenue to fund access to these rights".<sup>489</sup> As explained below, this may include increasing tax revenues, reallocating funds, seeking international cooperation and assistance or even accepting private donations; and
- Fourth, in specific circumstances, including ESCR litigation and adjudication, the State will be required to produce evidence that it has made reasonable use of its available resources in implementing policies and laws to give effect to ESCR. The obligation to budget therefore includes an obligation to account for and justify budgets in their ability to realize ESCR.

### **3. Budgeting and ESCR**

*What is a budget and what does budgeting involve?*

Budgeting is a complex and multifaceted task involving the executive and legislative branches of government lead by the National Treasury. A full analysis of the budgeting process is beyond the scope of this guide. Legal practitioners and human rights defenders are encourage to investigate, monitor and understand budgetary processes in order to ensure effective research, advocacy and litigation on ESCR. For the present purposes, several aspects of the State's budgetary process are relevant: revenue collection; budgetary allocation; and budgetary expenditure.<sup>490</sup>

- **Revenue collection** refers to the process whereby the State generates income. The most common form of revenue collection is taxation. Common examples of taxes include income tax, value added or sales tax, property tax and estate tax.

---

<sup>489</sup> *supra*, note 474.

<sup>490</sup> *supra*, note 483, p. 9-10.

- **Budgetary allocation** is the process through which the resources raised by **revenue collection** are directed to different agencies of the State. This involves the State, under the direction and administration of the National Treasury and Cabinet, making decisions to allocate funding to particular features of the state's activities. This will often involve trade-offs between different State priorities requiring budgetary allocations because ultimately "budget prioritisation is a balancing act of competing interests".<sup>491</sup>
- **Budgetary expenditure** describes how resources already allocated are spent, overspent, underspent or misspent by those State entities to which they are allocated through the **budgetary allocation** process.

The National Treasury is often not the only source of revenue for a State entity. In addition to private contributions and international assistance, provincial and local governments are also capable of revenue collection. For example, local governments typically collect revenue for the municipal services they provide including refuse collection, sanitation, water, electricity and rates and taxes on property.<sup>492</sup>

Moreover, local government budgets, which are regulated by the Municipal Finance Management Act,<sup>493</sup> must be "tabled" in Municipal Councils by the mayor 10 months before the beginning of a financial year.<sup>494</sup> This is where the local government declares its **budgetary allocation** for a particular financial year.<sup>495</sup> A useful guide to municipal budgetary allocation process, produced by the International Budget

---

<sup>491</sup> Id, p. 12

<sup>492</sup> Carlene van der Westhuizen et al, "A Guide to the Local Government Budget Advocacy", 2017, available at:

<https://www.internationalbudget.org/wp-content/uploads/guide-to-local-government-budget-advocacy-in-south-africa-2017-lowres.pdf>, p. 73.

<sup>493</sup> Municipal Finance Management Act 56 of 2003.

<sup>494</sup> Id, Section 21.

<sup>495</sup> For more information see: <https://www.internationalbudget.org/wp-content/uploads/guide-to-local-government-budget-advocacy-in-south-africa-2017-lowres.pdf> p. 65.

Partnership breaks the process down further into five steps, which lead up to this final tabling: <sup>496</sup>

1. Strategic planning;
2. Municipal-wide budget preparation process;
3. Tabling of the draft budget;
4. Public consultations and external assessments; and
5. Tabling of the final budget.

What this example shows is that on all levels – local, provincial and national – and in all budgeting processes, the obligation to budget within the framework “available resources” is engaged. In addition to the budgets of different spheres of government, each department – such as Human settlements (the right to housing), Health (the right to health), Basic Education (the right to basic education)) – are required to budget and thereby maximize available resources available for the realization of ESCR. Budgets are therefore not once-off documents or events to be announced by executive officials in legislatures across the country. What may be known as “the Budget Speech” is only the tip of the iceberg in a comprehensive budgetary process.

In summary, differentiating between **revenue collection**, **budgetary allocation** and **budgetary expenditure** processes is useful for the present purposes to illustrate the breadth of the meaning of the duty to budget for the realization of ESCR. This duty must be given meaning in the context of all three of these processes and any other budgetary processes or activities required of different spheres of government and government departments.

State authorities – whether local, provincial or national – should take into account these rights throughout the revenue collection, budgetary allocation and budgetary expenditure processes. This much is clear on the face of CESCR’s recommendation to South Africa in that its national and provincial legislatures “take such rights into consideration in

---

<sup>496</sup> Id, p. 67.

assessing the budgetary choices of the national and provincial governments respectively".<sup>497</sup>

*How do ESCR impact on overall budgetary processes?*

The adequacy of budgetary allocations will necessarily vary from State to State and within a particular State at different times.<sup>498</sup> The CESCR has typically recommended that States "increase the resources allocated" for the realization of specific ESCR or ESCR rights generally to ensure compliance with ICESCR's obligations<sup>499</sup> and has expressed the view that "budgetary constraints should not be invoked as *the only* justification for the lack of progress" in realizing ESCR,<sup>500</sup> particularly given that some aspects of ESCR obligation require insubstantial financial resources to execute and implement.

Although the weighing of competing demands on the public purse is undertaken as an essentially "political process",<sup>501</sup> mediating among differing and competing policy objectives, it is still a governmental process that must comply with the constraints of the State's domestic law and international legal obligations. CESCR has indicated non-compliance with ICESCR, for example, where there has been a "continuous decrease over the past decade of the resources allocated to social sectors, notably health and social protection, whereas budgetary allocations to defence and public security have increased considerably to reach 30 per cent of State expenditures."<sup>502</sup> Not all "political decisions" or "tradeoffs" will

---

<sup>497</sup> *supra*, note 2, para 19(c).

<sup>498</sup> *supra*, note 290.

<sup>499</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the fourth and fifth periodic report of Angola*, UN Doc. E/C.12/AGO/CO/4-5, (2016), para 8.

<sup>500</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights Democratic Republic of the Congo*, UN Doc. E/C.12/COD/CO/4 20 (2009), para 24. Emphasis Added.

<sup>501</sup> *supra*, notes 474, 481, 483 and 492.

<sup>502</sup> CESCR, *Concluding Observations on the Second Periodic Report of the Democratic People's Republic of Korea*, UN doc. E/C.12/1/Add.95, 12 December 2003, para 9.

therefore be considered to comply with a State's ICESCR obligations. The adequacy of a particular budget will depend on the nature and content of a particular right, its context, and the degree and extent to which it is currently being fulfilled.

In addition, there is a general requirement that pursuant to the legal framework governing the State's budgetary processes there should be a mechanism and/or planned, co-ordination action to be taken to combat corruption. Corruption decreases available revenue, decreases potential budgetary allocations and hampers budgetary expenditure.<sup>503</sup> The Constitutional Court has observed that corruption "undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights"<sup>504</sup> and threatens its ability to fulfill its obligation to "use public resources in an economic and effective manner".<sup>505</sup> The State's obligation to take "reasonable and effective measures" to combat corruption<sup>506</sup> therefore includes an obligation to ensure resources allocated to the realization of ESCR are properly spent. Unbridled or ineffectively addressed corruption may well constitute a failure to realize ESCR within a State's maximum available resources.<sup>507</sup>

Drawing this clear link between corruption and the realization of ESCR, the South African Human Rights Commission has said that it is "deeply disappointed" that "public and private corruption costs the nation billions of Rands on an annual basis" and "that these funds have been lost, rather than used in the realization of rights and services".<sup>508</sup>

Similarly, CESCR's concluding observations to South Africa acknowledge the deleterious impact corruption has on the

---

<sup>503</sup> "The Use of Maximum Available Resources", available at: <https://www.internationalbudget.org/wp-content/uploads/Maximum-Available-Resources-booklet.pdf> p. 5

<sup>504</sup> *supra*, note 14, para 57.

<sup>505</sup> *supra*, note 14, para 176.

<sup>506</sup> *supra*, note 14, para 189.

<sup>507</sup> *supra*, note 2, para 16.

<sup>508</sup> *supra*, note 4, p. 26.



realization of ESCR in South Africa, recommending that South Africa "intensify its efforts to combat illicit financial flows and tax avoidance with a view to raising national revenues and increasing reliance on domestic resources".<sup>509</sup>

*Maximizing revenue collection and the pool of available resources*

As noted above, the Constitution provides that the State, including the National Treasury, must respect, protect, promote and fulfill the rights in the Bill of Rights.<sup>510</sup> According to a Commissioner of the South African Human Rights Commission:

"The Bill of Rights calls on the State to devise sound macroeconomic, fiscal and monetary policies *so as to maximise the revenue pool* earmarked for socio-economic rights, and to manage public finances in an efficient and accountable manner..."<sup>511</sup>

In terms of the South African Constitution, then, the "allocation and expenditure of the revenue generated" must be "directed to ESCR related areas as a matter of priority".<sup>512</sup> Similarly, the obligation to make use of "maximum available resources" in international law requires that a State "do all that it can to mobilize resources within the country in order to have funds available to progressively realize ESC rights".<sup>513</sup>

In seeking to maximize its revenue, the State may have a variety of options at its disposal. When assessing the reasonableness of the measures taken, including availability of resources, it is important to recall that both the ICESCR and the Constitution do not require the "best" or the "perfect

---

<sup>509</sup> *supra*, note 2, para 16.

<sup>510</sup> s 7(2), Constitution of South Africa.

<sup>511</sup> Commissioner Ameerma of the SAHRC quoted in <https://www.sahrc.org.za/home/21/files/2016%20SPII%20SAHRC%20Guide%20to%20Budget%20Analysis%20for%20Socio-Economic%20Rights.pdf> p 2. Emphasis Added.

<sup>512</sup> *supra*, note 483, p.5

<sup>513</sup> *supra*, note 9, para 29.

option". This question is not whether objectively "whether public money could have been better spent," but rather whether budgetary and other measures are reasonable, which may derive from a potentially "wide range" of possibilities.<sup>514</sup>

This "wide, range" of possible reasonable measures to increase revenue and enhance budgets for ESCR may include:

1. **Foreign Aid:** Maximizing foreign aid received through increased solicitation of international cooperation and assistance for the fulfillment of ESCR, in line with the obligations under CESCRR;
2. **Private Contributions:** Maximizing private inputs to the pool of available resources through a variety of different public/private partnerships and private contributions;
3. **Developing the Taxation System:**
  - Ensuring Progressive Taxation: Ensuring an adequate system of taxation is in place (one possibility is a "progressive tax system" where wealthier residents and companies bear a higher proportion of the tax burden, so as not to place countervailing pressures on the enjoyment of CESCRR rights by those with lower income);
  - Broadening the Tax Base: Periodically looking to broadening the tax base (the number of persons and entities who fall within the tax paying population) to ensure stable, increasing revenues;
  - Ensuring Efficiency: Making the tax system efficient and easy-to-use to ensure that all tax that is due is collected;
  - Closing Loopholes: Closing tax "loop-holes" (often of a technical legal nature) and minimizing and penalizing unlawful tax evasion and avoidance (such as "profit shifting");<sup>515</sup>

---

<sup>514</sup> Id, para 41.

<sup>515</sup> *supra*, note 483, p 7.

- Improving Collection: Ensuring that it the state can “make every effort to collect all taxes and other revenue due it”.<sup>516</sup>

The State may well make a policy choice that is not in accordance with or even directly opposed to these measures including, for example, decreasing taxes on the extremely wealthy. However, if it does so for whatever economic or political reason, the State ultimately “must be able to show” ...“that this economic policy choice has, in fact, been more effective in realizing people’s socio-economic rights than a heavier tax regime would have been”.<sup>517</sup> States may well be obliged to justify the ability of their tax regimes to generate sufficient revenue to contribute towards the realization of ESCR. As the civil society Budget Justice Coalition told South African Parliament:

“As with all laws, the budget should take forward the constitutional imperative to build a society based on social justice and ensure the realisation of constitutional rights, especially the socio-economic rights to food, health care services, land, housing, water, education, social security and social services.”<sup>518</sup>

This echoes the observation of the Special Rapporteur on Extreme Poverty that “taxation is a key tool when tackling inequality and for generating the resources necessary for poverty reduction and the realization of human rights.”<sup>519</sup> More generally, the Special Rapporteur has observed: “tax policy is, in many respects, human rights policy.”<sup>520</sup>

---

<sup>516</sup> Id, p 5.

<sup>517</sup> Id.

<sup>518</sup> “Submission by Budget Justice Coalition with respect to the current list of zero-rated items, and mitigating the impact of the increase in the VAT rate on poor and low-income households”, 4 June 2018, available at: <http://section27.org.za/wp-content/uploads/2018/06/2018-06-05-Submission-by-Budget-Justice-Coalition-to-VAT-Expert-Panel-1.pdf> pp. 3-4.

<sup>519</sup> Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human rights*, Magdalena Sepúlveda Carmona A/HRC/26/28 (2014) p. 1.

<sup>520</sup> Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and human rights*, Philip Alston A/HRC/29/31 (2015) para 53.

Finally, it is also possible that in attempting to maximize the pool of available resources, the State may implement tax measures that inadvertently harm the realization of ESCR, including in a manner that disproportionately harms disadvantaged or marginalized persons. A recent increase in VAT in South Africa, for example, has been criticized by the South African Human Rights Commission as a measure, which “seriously threatens the human rights of the poor, and is not constitutionally justifiable.”<sup>521</sup> This VAT increase was, in part intended to “fund the R57 billion rand necessary to provide free tertiary education for the poor” thus contributing to the realization of one ESCR. Nevertheless, according to the Commission “having the poor carry” this burden “has deep impacts for the human rights of poor people and does not appear to be reasonable”.<sup>522</sup>

Acknowledging that this “recent increase in the value added tax (VAT) was not preceded by a human rights impact assessment”, CESCR recommended that South Africa “assess the impact of the VAT increase, particularly on low-income households, and take corrective actions as necessary”.<sup>523</sup>

More generally, CESCR expressed concern over South Africa’s fiscal policy “particularly relating to personal and corporate income taxes, capital gains and transaction taxes, inheritance tax, and property tax”, suggesting that they “do not enable it to mobilize the resources required to reduce such inequalities” and are therefore “not sufficiently progressive to this end”.<sup>524</sup> CESCR therefore recommended a wholesale “review” of South Africa’s fiscal policy “in order to improve its capacity to mobilize the domestic resources required to bridge existing gaps and to increase its redistributive effect”.<sup>525</sup>

### *Budgetary allocations and budgetary expenditure*

---

<sup>521</sup> *supra*, note 4, p 5.

<sup>522</sup> *supra*, note 4, p.25.

<sup>523</sup> *supra*, note 2, para 16.

<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

Beyond corruption, which clearly has a deleterious effect on how allocated resources are spent, resources must also be spent economically and effectively. Spending that is irrational, uneconomical or inefficient with short of the requirements of States in terms of ESCR obligations. This has several implications that can all be seen as part of CESCR's acknowledgment that it will consider "whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards" in determining whether that State has made adequate or reasonable use of its available resources.<sup>526</sup>

There are additional considerations in this respect, which legal practitioners and human rights defenders should fully consider in determining research, advocacy and litigation strategy:

- **Ensure Appropriate Spending:** Budgetary allocations must not be diverted to other areas inappropriately or unlawfully.<sup>527</sup> Strong evidence exists that this is currently commonplace in South Africa. For example, the Department of Basic Education has noted that of the 250 million US dollars allocated to provincial governments for inclusive education "[r]egrettably, more than 50% was in spent in other priority areas at a provincial level".<sup>528</sup> This could well amount to an ineffective and therefore unreasonable use of available resources.
- **Eliminate Underspensing:** money allocated for the realization of ESCR should not go unspent or underspent. Of the same 250 million US dollars, the Department of Basic Education acknowledges "only five of the nine provinces have used the funds available for the expansion of inclusive education" leaving much of the money that was not redirected unspent.<sup>529</sup> No

---

<sup>526</sup> *supra*, note 316, para 8(c).

<sup>527</sup> *Id.*

<sup>528</sup> Department of Basic Education, "Inclusive Education and Special Education: DBE Progress Report; with Deputy Minister", 2017, available at: <https://pmg.org.za/committee-meeting/24505/>.

<sup>529</sup> *Id.*

reasons were given for why the money was not spent on the budget line it was provided for.

- **Justification for Underspending:** Reasons should be given for why money allocated has not been spent, or spent for what it was budgeted, and how such failures are consistent with the obligation to take reasonable measures to realize ESCR.<sup>530</sup> Justifications for such underspending may vary and include incapacity, late allocation, impossibility, political reluctance, donor withdrawal.<sup>531</sup> However, CESCR has indicated that generally funds allocated must be fully spent for the purpose for which they were allocated.<sup>532</sup>
- **Ensure Rational and Non-Arbitrary Spending:** If money allocated for the realization of ESCR is spent haphazardly or arbitrarily this will not comply with the constitutional requirement of reasonableness and may result in a reduction of allocated funds thus far inhibiting realization of ESCR.<sup>533</sup>
- **Eliminate Overspending:** The government should not deliberately or negligently “overspend” by paying beyond the value of goods or services of inadequate quality to meet the standards set by ESCR. Inefficient or wasteful expenditure such as this may well amount to a failure to comply with the obligation to take reasonable measures within “available resources” to realize ESCR.<sup>534</sup>
- **Redirection of Budget Surpluses:** Existing budget surpluses should, where possible, be considered for redirection to underfunded programmes for the realization of ESCR.<sup>535</sup> Both the Supreme Court of Appeal and the Constitutional Court have indicated a

---

<sup>530</sup> Id.

<sup>531</sup> *supra*, note 483, p.7

<sup>532</sup> Id.

<sup>533</sup> Id, p.4.

<sup>534</sup> Id.

<sup>535</sup> Id, p 7.

willingness to consider predicted and actual budget surpluses as relevant in the inquiry about the State's available resources.<sup>536</sup> In *Blue Moonlight*, for example, the Constitutional Court, decried the fact that while "[t]he City provided information relating specifically to its housing budget" it failed to "provide information relating to its budget situation in general"<sup>537</sup> even though it had apparently been operating with a financial surplus for the past year.<sup>538</sup>

*Are general budgetary allocations or failures to budget justiciable?*

The fourth implication of the duty to budget is the least controversial. In South Africa, there is an established body of jurisprudence affirming the State's obligation to make reasonable use of its existing budget to give effect to and implement policies and laws relating to ESCR.<sup>539</sup> The standard of review, is, once again, reasonableness.

These considerations, at least the first three can be complex, particularly in relation to the judicial determination and enforcement. Notwithstanding these clear legal obligations, South African courts have been generally reluctant to review general budgets in the fear of interfering with policy choices in the purview of the political branches. So, while a High Court judge was willing to accept that as a matter of law "[t]he state must manifestly budget for basic education as well as for all the other resources which the state provides", the same judge

---

<sup>536</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* (2011) (4) SA 337 (SCA) para 70-3; 75 ("The Supreme Court of Appeal's finding that the City has not shown that it is incapable of meeting the needs of the Occupiers has to stand").

<sup>537</sup> *Id.*, para 74.

<sup>538</sup> *Id.*, para 71.

<sup>539</sup> See: *Basic Education for All & others v Minister of Basic Education* [2014] ZAGPPHC 251; *Government of the Republic of South Africa and Others v Grootboom & Others* [2000] ZACC 19; *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198; *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC); *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC)

said it “it is very difficult to envisage circumstances” in which “Parliament could be compelled to vote an objectively adequate amount for basic education” because courts are “notoriously ill-equipped to decide such questions”.<sup>540</sup>

This reluctance maybe attributed to a variety of factors, from political pressure on the judiciary to a sense by some that reviewing budgets is beyond the judiciary’s function and capacity. However, what is absolutely clear is that such review is not outside the judicial competence and authority.

The judiciary cannot, when called upon to evaluate whether budgetary actions comply with ESCR obligations, claim to lack the capacity to fulfill this role. Such a failure by a court would amount to shirking its own constitutional and international obligations in terms of ESCR. As a leading human rights lawyer has argued, “not having a proper budget is unlawful and unconstitutional”.<sup>541</sup> The courts themselves have affirmed, “the state *must* manifestly budget *for all ... resources*” it is obligated to provide.<sup>542</sup> This is an unavoidable consequence of the State’s duty to progressively realize ESCR “within available resources”. Courts in other countries, including, for example the Indonesian Constitutional Court, have repeatedly struck down education budgets for failing to comply with constitutional provisions.<sup>543</sup>

The South African judiciary is duty bound, for example, to declare as unreasonable (and therefore unlawful) a national budget *failing to make any allocation at all* for basic necessities such as education or health care.<sup>544</sup> A court may well be far less reluctant to take such an assertive measure in the face of such a clear violation of the State’s obligation. As illustrated

---

<sup>540</sup> *supra*, note 488, para 43.

<sup>541</sup> Adila Hassim, “Human Rights and Access to Justice in the NSP”, 2012, available at: <https://www.spotlightnsp.co.za/edition-4/page/2/> p 45-6.

<sup>542</sup> *supra*, note 494, para 43.

<sup>543</sup> See for a summary of these judgments: Stefanus Hendrianto “The Divergence of a Wandering Court: Socio-Economic Rights in the Indonesian Constitutional Court”, in *Australian Journal of Asian Law*, Volume 16, 2016, p. 1-21.

<sup>544</sup> Adila Hassim “The cost of rights: Is there a legal right to transparent and efficient budgeting?” *SECTION27 Review* 2012.



above, this approach would be consistent with the Court's general approach that an assessment of the reasonableness of any measures taken to realize ESCR "cannot leave out of account the degree and extent of the denial of the right they endeavour to realise".<sup>545</sup>

More generally, however, even if courts refuse to review budgetary measures relating to ESCR for reasonableness, legal practitioners and human rights defenders should also consider the possibility of administrative law style judicial review. The reviewability of budgetary measures is no exception to the general rule in South African law that *all* State action (whether executive, administrative or legislative) is reviewable at a minimum on *at least* the grounds of lawfulness and rationality in terms of the rule of law and the principle of legality.<sup>546</sup> As has been canvassed above, though rationality is a constituent part of reasonableness, it is a narrower standard.

The Constitutional Court has been consistently clear that "there is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."<sup>547</sup> A High Court judge recently held that though "the rule of law is not necessarily advanced by overhasty intervention", he, nevertheless, acknowledged "I am not aware of any decision of our higher courts holding that certain classes of acts performed in the exercise of public power are altogether beyond the reach of judicial scrutiny".<sup>548</sup> This is undoubtedly correct in the South African constitutional context. The case contemplated by this judge was a review of the president's decision to hire and fire members of his Cabinet. This reasoning could apply equally to the no less important and no more "political" decisions to budget for the realization of ESCR.

---

<sup>545</sup> *supra*, note 9, para 44.

<sup>546</sup> See generally Cora Hoexter "The Principle of Legality In South African Administrative Law", in *Maquarie Law Journal*, Volume 4, 2004.

<sup>547</sup> *supra*, note 9, para 44.

<sup>548</sup> *Democratic Alliance v President of the Republic of South Africa & Another* [2017] ZAWCHC 34, paras 6 and 16.

The question then is not *whether* budgetary allocations are reviewable but *when* and *what* standard is applicable to such review. There is little in the way of South African jurisprudence that addresses this question expressly. Since the “available resources” requirement exists within the evaluation of the “reasonableness” of measures taken to give effect to ESCR, legal practitioners should, in the first instance, argue that all budgetary measures must be “reasonable”.<sup>549</sup>

In the alternative legal practitioners might also argue that courts apply the generally lower “rationality” and “lawfulness” standards in terms of administrative law, which may suffice in particular cases and appeal to more deferential judges. Even if the latter path is chosen, legal practitioners should insist that a minimum the specific budgetary measures must show compliance with the law (including the Constitution and ICESCR) and be at least rationally connected to the purpose they seek to achieve (which lawfully must be the realization of ESCR).

As the discussion in this Guide of the content of the obligation to take reasonable measures within available resources indicates, in reality, the State has simply consistently failed to provide courts with sufficient (if any) evidence that its failures to realize ESCR stem from the unavailability of resources.<sup>550</sup> Legal practitioners and human rights defenders have therefore not, as yet, been forced to do too much work to prove the availability of resources because the state has consistently failed to prove their unavailability. Indeed, to date, after nearly two decades of ESCR litigation, successive governments have yet to convince any court that it is resource unavailability that has resulted in specific ESCR violations. As Liebenberg notes in reviewing the case law until 2010, all of the existing ESCR cases are illustrative of instances in which the required resources “could be accommodated within existing budgetary allocations”<sup>551</sup> and/or resources made available to the State. A

---

<sup>549</sup> Reasonableness in the context of available resources is detailed fully below.

<sup>550</sup> *supra*, note 543, paras 68-75; Minister of Basic Education v Basic Education for All [2015] ZASCA 198; 2016 (4) SA 63 (SCA), para 36.

<sup>551</sup> *supra*, note 52, p.194

contemporary review of South African ESCR judgments during the drafting of this Guide confirms that this position remains the same in 2019.

*A duty to budget and ensure budgets have an impact*

Overall, according the National Treasury, in 2016 “almost two-thirds of South Africa’s annual budget [was] allocated toward the advancement of socio-economic rights”.<sup>552</sup> Although this may appear at first glance to be a very large percentage allocation, it should be understood in the context of South Africa’s rampant poverty, widespread unemployment and levels of inequality that are close to the highest in the world. As the Constitutional Court recognized in its very first ESCR case *Soobramoney*:

“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. *For as long as these conditions continue to exist that aspiration will have a hollow ring.*”

Regardless of how much – in total or as a percentage of a total budget – any State reserves for the realization of ESCR, it may nevertheless not be sufficient to ensure the State meets its obligations under the ICESCR or required by the Constitution. The Constitution’s commitment to social and economic equality is no different to its commitment to political equality. Similarly, in a statement directly on poverty and the ICESCR, CESCR acknowledges that poverty itself amounts to and perpetuates “massive and systemic breaches” of international human

---

<sup>552</sup> *supra*, note 52, p.13.

rights.<sup>553</sup> CESCR defines poverty as “the lack of basic capabilities to live in dignity”.<sup>554</sup> The “deplorable conditions” the Constitutional Court notes that must be eliminated for a society based on human dignity clearly include poverty. The persistence and continuation of poverty itself gives the aspirations and legal commitments of the Constitution and ICESCR a “hollow ring”.

It should therefore be borne in mind by legal practitioners and human rights defenders that, as is the case with other measures, no statistical measure taken alone – including a specific percentage of the budget allocated to ESCR – will be sufficient for the state to establish whether or not reasonable measures have been taken within available resources to combat poverty.<sup>555</sup> Ultimately, one of the clearest measures of compliance with ESCR obligations is the (in)effectiveness of the resources allocated and measures implemented in altering or improving these sub-standard conditions. It should be remembered, then, that “people’s situation ‘on the ground’— not the budget itself— is the most valid indicator of whether a government is complying with its obligation of progressive achievement” of ESCR.<sup>556</sup>

Put simply, the obligation to ensure that reasonable measures are taken to realize ESCR, in conception and implementation, requires measures that could reasonably be expected to achieve *actual progress* in the enjoyment of ESCR rights of people, barring extreme external factors beyond the State’s control (such as natural disaster and global economic crisis). Legal practitioners and human rights defenders must continue to work towards ensuring that ESCR themselves (including technical phrases such as “reasonable measures”, “progressive realization” and “available resources”) are not allowed to act as

---

<sup>553</sup> Committee on Economic, Social and Cultural Rights, “Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights”, UN Doc. E/C.12/2001/10, (2001), para. 4.

<sup>554</sup> *Id.*, para 7.

<sup>555</sup> *supra*, note 9, para 44.

<sup>556</sup> Ann Blyberg & Helena Hofbauer, “Article 2 and Government Budgets”, 2014, available at: <https://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf>, p.6.

a “smokescreen to obscure the deep underlying forces which dehumanize people.”<sup>557</sup>

#### **4. Available resources in specific circumstances**

The obligation to consider “available resources” is *both* a recognition that the State cannot be asked to do the impossible *and* the clear entrenchment of a positive obligation on states to maximize access to resources and the efficiency of their use for the realization of ESCR. While States are “not obliged to go beyond available resources”,<sup>558</sup> neither can they shirk the necessary and direct implications for budgetary matters of the human rights grounded commitment to ESCR.<sup>559</sup>

The evaluation is ultimately one of whether, in specific circumstances of a particular case, an already allocated budget (assumed to be a reasonable measure) has been spent reasonably in the pursuit of the realization of ESCR. Most generally, it engages the idea that reasonable measures, including budgetary measures, must be reasonable both in conception and implementation.

This section brings together requirements in terms of the available resources qualification from South African constitutional principles and jurisprudence. The requirements detailed, are, in some ways, more exacting than the jurisprudence of the CDESCR. They are largely consistent with international human rights standards, particularly set out in the main CDESCR’s General Comments and its 2007 Statement on the “Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ under an Optional Protocol to the Covenant”.<sup>560</sup> The Statement is CDESCR’s attempt to grapple with the relevance of “maximum of available resources” for the purposes of claims in terms of the OP-ICESCR’s communications mechanism.

---

<sup>557</sup> Nelson Mandela, “Bill of Rights for a Democratic South Africa”, *ANC Bill of Rights Conference*, 1991.

<sup>558</sup> *supra*, note 9, para 94.

<sup>559</sup> *supra*, note 31, para 77.

<sup>560</sup> *supra*, note 316.

It should be borne in mind that in addition to the specific requirements detailed below, all measures taken with regard to resources must, at the very least, be reasonable. So, for example, resourcing measures must be comprehensive, coordinated, coherent, rational, and transparent and capable of achieving their stated purpose: the realization of ESCR.

### *Purposive use of available resources*

Broadly, international human rights law requires the “equitable and effective use of and access to the available resources” for the realization of ESCR.<sup>561</sup> This mirrors the purposive approach to “available resources” in South African law and “maximum of its available resources” in terms of international law.<sup>562</sup> Generally, the Constitutional Court is clear that:

“[T]he process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”<sup>563</sup>

The same applies in the context of ESCR.<sup>564</sup> CESCR’s Statement also confirms this noting that in determining compliance with a State’s obligations, it will consider whether and “the extent to which the measures taken were deliberate, concrete and *targeted towards the fulfilment of economic, social and cultural rights*”.<sup>565</sup>

---

<sup>561</sup> *supra*, note 25, para 27.

<sup>562</sup> Article 31(1) of the Vienna Convention on the Law of Treaties reads: “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

<sup>563</sup> *supra*, note 58, para 21.

<sup>564</sup> See above sections on reasonable accommodation and progressive realization.

<sup>565</sup> *supra*, note 316, Article 8(a).

Developmental targets such as those set out in the Sustainable Development Goals must remain reasonable and compliant with human rights obligations. States may therefore not excuse performance of lesser targets and measures by appealing to developmental goals and targets instead of binding ESCR obligations.

*What must resources be available for?*

A State may not simply fail to budget for a particular component or element of a right and then, in a particular circumstance, rely on that failure to illustrate that the measures it has taken are reasonable in the light of its own failure to budget.

States may not, simply put, rely on arguments that resources not budgeted are not “available resources” for the purposes of determining the reasonableness of measures taken to realize ESCR.<sup>566</sup> As the Court concluded in *Blue Moonlight*:

“This Court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. It is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations”.<sup>567</sup>

By failing to budget, the Court found that the executive authority precluded itself from claiming unavailability of resources regarding its housing rights obligations.<sup>568</sup> This, it decided, was the case even though the State entity – a local government entity – had made some reasonable efforts to

---

<sup>566</sup> *supra*, note 536, para 72.

<sup>567</sup> *Id.*, para 74.

<sup>568</sup> *Id.*, para 96.

obtain resources for this purpose by applying to provincial government for financial assistance.<sup>569</sup>

Resources must therefore be made available by particular State entities for all of their obligations in respect of all ESCR, whether defined as immediate or progressive obligations. Moreover, all legally permissible avenues of resource acquisition – include self-funding or reallocation of surpluses – must be explored by a State entity seeking to ensure the reasonableness of its measures in terms of available resources.

*Use of all forms of resources: financial, human, natural, technological and informational*

The full range of resources that are *available* must be accessed. Neither international human rights law nor the South African constitution specifically restricts “available resources” to financial resources. Given the need for a purposive approach to the interpretation of the State’s obligations in terms of both ICESCR and the Constitution, resources should be construed broadly to ensure that states comply with the obligation to take reasonable measures to realize ESCR.<sup>570</sup>

Resources include, among other types, the following: <sup>571</sup>

- Financial resources;
- Human resources;
- Natural resources;
- Informational resources; and
- Technological resources.

This understanding significantly broadens the attention that ought to be paid to “available resources” in the evaluation of compliance with ESCR obligations. In the South African context, for example, merely expending more money may prove futile in the absence of governmental officials and staff with the appropriate expertise to administer these resources consistently with ambitious and rights-compliant policies.

---

<sup>569</sup> Id, paras 48 and 96.

<sup>570</sup> *supra*, note 294, p. 749.

<sup>571</sup> *supra*, note 474, pp. 693-714.



The Department of Basic Education has, for example, reported that there are more than 231 vacant posts at district and provincial levels relating to inclusive education directorates in the six provinces for which information about staffing is available.<sup>572</sup> These vacancies – an absence of sufficient human resources – present a fundamental challenge to the ability of the State to ensure that additional financial resources provided for inclusive education can achieve the stated objectives for their allocation. The Constitutional Court itself considered the availability of human and infrastructural resources to administer treatment to HIV-positive mothers as relevant in determining whether “available resources” presented an obstacle to the protection of the right health.<sup>573</sup> The Court’s consideration makes clear that human and infrastructural resources form part of “available resources” which the state must employ reasonably.

A broader interpretation of “available resources” is also consistent with the African Charter, which provides for the right of “all peoples to freely dispose of their wealth and *natural resources*” and requires states to “enable their peoples to fully benefit from the advantages derived from their *national resources*”.<sup>574</sup> The reference to “natural” and “national” resources assist in motivating for a more holistic understanding of resources in the context of the ESCR entrenched in the Charter.<sup>575</sup>

### *The obligation of international assistance and cooperation?*

In addition to the State’s own resources, ICESCR contains an obligation that measures taken to realize ESCR include those undertaken through the obligation to seek and provide

---

<sup>572</sup> Department of Basic Education “Report on the Implementation of Education White Paper 6 on Inclusive Education: An Overview for the Period 2013-2015”, 2015, available at: <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160308overview.pdf>, p. 43.

<sup>573</sup> *supra*, note 200, para 70-73.

<sup>574</sup> Article 21 of the African Charter; Article 1(2) of the International Covenant on Economic, Social and Cultural Rights.

<sup>575</sup> See for example Articles 14-17, 21-22, and 24 of the African Charter.

"international assistance and co-operation, *especially economic and technical*".<sup>576</sup> The OP-ICESCR provides for a "trust fund" to be established "with a view to providing expert and technical assistance to States Parties ... for the enhanced implementation" of ICESCR.<sup>577</sup> The State itself "must do all it can to secure international assistance" where this is necessary.<sup>578</sup> Once it has acquired international assistance, CESCR has encouraged states to "reallocate international development aid and other resources from non-priority sectors to priority sectors and to ensure that international development aid is utilized for the progressive realization" of ESCR.<sup>579</sup>

Moreover, the OP-ICESCR specifically empowers CESCR to "transmit, as it may consider appropriate ... its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance"<sup>580</sup> to States Parties and "the advisability of international measures likely to contribute to assisting States Parties in achieving progress in implementation" of ICESCR.<sup>581</sup> Read together, the provisions of ICESCR and the OP-ICESCR clearly contemplate broad resource assistance including financial assistance to less well-resourced states to assist in the realization of ESCR.

The Limburg principles indicate similarly that available resources "refers to both the resources within a State and those available from the international community through international co-operation and assistance".<sup>582</sup> They also acknowledge "economic and technical assistance projects that

---

<sup>576</sup> Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

<sup>577</sup> Article 14(3) of the International Covenant on Economic, Social and Cultural Rights.

<sup>578</sup> *supra*, note 503, p 3.

<sup>579</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on Democratic Republic of the Congo*, UN Doc. E/C.12/COD/CO/4, (2009), para 29.

<sup>580</sup> Article 14(1) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

<sup>581</sup> Article 14(2) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

<sup>582</sup> *supra*, note 25, para 26.

could help overcome difficulties States parties have encountered in fulfilling their Covenant obligations".<sup>583</sup>

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, treat the obligations of international cooperation extensively in the principles situated under the State obligation to fulfill. They indicate that states have a collective obligation "to create an international enabling environment conducive to the universal fulfilment" of ESCR.<sup>584</sup> States must therefore ensure, for example, that in their international trade and foreign policy and "development cooperation" they endeavor to ensure the realization of ESCR.<sup>585</sup> This requires significant interstate coordination.<sup>586</sup>

Since States have widely varying access to resources and their social and economic contexts differ, a State's obligation to contribute to the fulfillment of ESCR in other states and internationally is "commensurate with, inter alia, its economic, technical and technological capacities, available resources, and influence in international decision-making processes".<sup>587</sup>

All States however, have the obligation to "cooperate to mobilize the maximum of available resources" to fulfill ESCR.<sup>588</sup> In doing so, they must prioritize realization for marginalized and vulnerable groups and core obligations to realize minimum essential levels of ESCR.<sup>589</sup> During this process, states are required to ensure non-discrimination, transparency and "avoid any retrogressive measures" relating to ESCR where there are any alternatives.<sup>590</sup>

A State that, "despite its best efforts", is "unable" to secure ESCR in its territory have an obligation to "seek international

---

<sup>583</sup> Id, para 85.

<sup>584</sup> *supra*, note 27, para 29.

<sup>585</sup> Id.

<sup>586</sup> Id, para 30.

<sup>587</sup> Id, paras 31 and 33.

<sup>588</sup> Id.

<sup>589</sup> Id, para 32.

<sup>590</sup> Id.

assistance and cooperation on mutually agreed terms". If such assistance is received, the state is obligated to ensure that the assistance provided "is used towards the realization of [ESCR]."<sup>591</sup> When a State receives a request for international assistance and is in a position to provide it, it "must consider the request in good faith, and respond in a manner consistent with their obligations to fulfil [ESCR]."<sup>592</sup> Legal practitioners and human rights defenders should therefore remain cognizant of the fact that State entities claiming unavailability of resources must also illustrate attempts to find additional resources for the realization of particular aspects of specific ESCR through international assistance.

### *Obligations relating to private resources*

Nothing in the international law framework excludes the use of private resources, where possible, in the fulfillment of ESCR. Robertson, for example, commenting on ICESCR's available resources obligation argues compellingly "in addition to allowing and encouraging voluntary use of private resources, States must also consider strategies for their appropriation."<sup>593</sup> State practice in the context of "the imposition of land reform and wealth taxes" validate this approach.<sup>594</sup>

South African courts have repeatedly accepted the importance of private contributions in interpreting what constitutes "available resources" in the evaluation of compliance with ESCR violations. Two examples illustrate this acceptance:

- In *Treatment Action Campaign* the Constitutional Court considered as fundamentally relevant to the reasonableness of the government refusal to make HIV treatment available that: "the manufacturers of Nevirapine offered to make it available to the South

---

<sup>591</sup> Id, para 34.

<sup>592</sup> Id, para 35.

<sup>593</sup> *supra*, note 474, p 700.

<sup>594</sup> Id.

African government free of charge for a period of five years".<sup>595</sup>

- In *Western Cape Forum for Intellectual Disability*, the High Court went as far as ordering that the government to take "reasonable measures" including "*providing adequate funds to organizations which provide education for severely and profoundly intellectually disabled children*".<sup>596</sup> These organizations, which had initiated the litigation that led to this order, were described by the Court as "non-governmental organisations which care for children ... with severe and profound intellectual disabilities".<sup>597</sup>

*Which organs of the State bear duties in terms of available resources?*

As described above, the discharge of international human rights obligations, and responsibility for violations, engages all organs of State, whether executive and administrative, legislative, or judicial.<sup>598</sup> Regarding South African law, in the specific context of the availability of resources for the realization of ESCR, the Court has provided some further guidance than simply referring to the general principles on co-operative governance.

In *Grootboom*, the Constitutional Court noted "the Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks".<sup>599</sup> In the context of housing, a shared national and provincial competence, the court noted that "a co-ordinated state

---

<sup>595</sup> *supra*, note 200, paras 19, 48-51.

<sup>596</sup> *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa & Another* [2010] ZAWCHC 544; 2011 (5) SA 87 (WCC) para 52.

<sup>597</sup> *Id.*, para 2.

<sup>598</sup> Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, (2004), para 4; See also *supra*, note 25, para 18; *supra*, note 26, para 6; *supra*, note 49, para 7.

<sup>599</sup> *supra*, note 9, para 39.

housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other”.<sup>600</sup>

To facilitate such coordination according to the Court, a national housing programme “must clearly allocate responsibilities and tasks to the different spheres of government *and ensure that the appropriate financial and human resources are available*”.<sup>601</sup> In *Grootboom*, the Court emphasized that national government “bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis”.<sup>602</sup> Although it places an “available resources” related duty squarely on the national government, the Court did not exclude the provincial and local governments from having concurrent duties.

Indeed, in *Blue Moonlight*, the Court confirmed that both provincial and local governments often have constitutional responsibilities relating to “available resources” including, where appropriate, budgeting for and financing the implementation of national laws and policies. In this case, which was about access to emergency housing brought pursuant to the Constitution and the National Housing Code, a local government entity denied that it had any authority or obligation to provide funds to implement the Code.

The Court rejected this argument, concluding that the local government entity had an “entitlement to approach the province for assistance” and “both the power and the duty to finance its own emergency housing scheme”. Local government was therefore required to “first consider whether it is able to address an emergency housing situation out of its own means”. Ultimately, the Court concluded “the City has a duty to plan and budget proactively for situations like that of the Occupiers”.<sup>603</sup>

---

<sup>600</sup> Id, para 40.

<sup>601</sup> Id, para 39. Emphasis Added.

<sup>602</sup> Id, para 40.

<sup>603</sup> *supra*, note 536, para 67.

What is clear from these judgments is that, depending on the specific circumstances, and legal and policy frameworks, all three branches of government (and all three spheres of government) and their subsidiary organs and entities may simultaneously have a duty to plan, budget for and expend “available resources” on the realization of ESCR. This duty may remain, as it did in *Blue Moonlight*, despite the national government bearing the primary obligation to budget and allocate resources and regardless of whether the competence (in this case “housing”) falls out of the specific areas of exclusive and/or shared competence.

*Genuine lack of available resources must be justified*

Since it would be “quite inappropriate for a court to order an organ of state to do something that is impossible”, the Court has consistently been willing to acknowledge that there will be cases in which a State entity genuinely lacks the resources to secure the realization of a particular component of a specific ESCR.<sup>604</sup>

As the High Court has noted, courts will not require the impossible of State entities because “one just cannot get blood out of a stone”.<sup>605</sup>

Nevertheless, even in such circumstances in which budgets are genuinely constrained, in *Rail Commuters*, the court was clear that “bald assertions” of unavailability of resources will not be reasonable:

“An organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. *Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided.* The standard of reasonableness so understood conforms to

---

<sup>604</sup> *supra*, note 536, para 69.

<sup>605</sup> *Id.*, para 67.

the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."<sup>606</sup>

State entities will not be permitted to merely claim resource unavailability "in the vaguest terms", as it did in *Blue Moonlight*.<sup>607</sup> The local government authority in that case disavowed its own budgetary projections describing such projections generally as "an unreliable source of information". Nevertheless, in assessing the legitimacy of the State's claim that it lacked resources, the Court noted that it failed to provide alternative "documentation to substantiate its claims of a deficit".<sup>608</sup>

Moreover, the Court concluded that it was insufficient that the "State provided information relating specifically to its housing budget" while failing to "provide information relating to its budget situation in general" because the result was that "we do not know exactly what the City's overall financial position is".<sup>609</sup>

When a State entity explains to a court, the public or on any other appropriate forum that it does not have resources available in a specific case, it must therefore provide clear evidence of its "overall financial position," as well as the resources it has available for specific programmes aimed at the realization of ESCR. Legal practitioners and human rights defenders must insist upon the full, comprehensive explanations for the state's claims of an absence of resources.

---

<sup>606</sup> *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC) para 88. Emphasis Added.

<sup>607</sup> *supra*, note 536, para 71.

<sup>608</sup> *Id*, para 73.

<sup>609</sup> *Id*, para 74.



## G. OBLIGATIONS RELATING TO PRIVATE ENTITIES

Both historically and contemporarily, in South Africa, as elsewhere in the world, many human rights abuses constituting crimes have either involved the participation of or been directed by private entities. Such historical practices include piracy, slavery and the slave trade, apartheid<sup>610</sup> and genocide and crimes against humanity<sup>611</sup>. The crime of apartheid in particular, now considered a crime against humanity,<sup>612</sup> though government enforced, was to “foster an ethic of obedience” to unjust laws which resulted in apartheid policies being implemented and enforced not only by governmental authorities, but also by “private organisations and individuals not required by law to do so”.<sup>613</sup>

Similarly, in South Africa, as everywhere in the world, the adverse effect on the enjoyment of human rights of the conduct of private actors, particularly business enterprises, is widely evident. Liebenberg observes:

“in South Africa (as is the case in other societies based on a market economy) powerful private actors such as landlords, banks, medical aid schemes, insurance companies and utility companies delivering public services such as water exercise significant control over people’s access to socio-economic rights”.<sup>614</sup>

In this context it is not surprising that the Constitution “confronts South Africa’s tragic past not only idealistically, but also realistically: *it recognises that the pervasive injustices of apartheid* not only have to be eliminated from public life, but

---

<sup>610</sup> Hennie van Vuuren, *Apartheid, Guns and Money: A Tale of Profit*, Hurst Publishers, 2018.

<sup>611</sup> Adam Hochschild, *King Leopold’s Ghost: A Story of Greed, Terror and Heroism in Colonial Africa*, Mariner Books, 1998.

<sup>612</sup> Article 7 (1)(j) of the Rome Statute of the International Criminal Court.

<sup>613</sup> Etienne Mureinik “A Bridge to where? Introducing the Interim Bill of Rights”, in *South African Journal on Human Rights*, Volume 10, 1994, p. 32.

<sup>614</sup> Sandra Liebenberg “The application of socio-economic rights to private law”, in *Tydskrif vir die Suid Afrikaanse Reg*, Volume 3, 2008, p. 464-465.

also have to be rooted out of the private sphere.”<sup>615</sup> South African domestic law, like international human rights law, is developing to incorporate protection of individuals against right abuses from non-state actors, including private entities to root out the pervasive injustices that continue to be perpetuated in the private sphere. Two major ways in which this development is occurring are relevant for the present purposes:

- A clear acceptance of the obligation of the State to protect against, including proactively preventing, human rights abuses by private entities pursuant to the “duty to protect” ESCR; and
- A growing acknowledgment of the “direct” human rights obligations of private entities in terms of ESCR.

Before proceeding to discuss these developments, it is necessary to understand the overall framework within which these developments are occurring.

### **1. State obligations to respect, protect and fulfill under international human rights law**

The obligations to respect, protect and fulfill ESCR in terms of international human rights law have been detailed in full above.<sup>616</sup> This Guide has also described the African

---

<sup>615</sup> Nick Friedman “The South African Common Law and the Constitution: Revisiting Horizontality”, in *South African Journal on Human Rights*, Volume 30, 2014, p. 67. Emphasis Added.

<sup>616</sup> For further information on the history of this conceptualisation see: *supra*, note 29, p.52; Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995, p. 109; Committee on Economic, Social and Cultural Rights, Report on the Twentieth and Twenty-first Sessions (1999), UN Doc. E/2000/22, E/C.12/1999/11, para. 53 and annex IX; Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food* (Art. 11), (Twentieth session, 1999), UN Doc. E/C.12/1999/5, paras. 14-20; Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The Right to Education* (Art. 13), (Twenty-first session, 1999), UN Doc. E/C.12/1999/10, paras. 46-48; Office of the High Commissioner for Human Rights, ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ (2005), paras. 47-48; African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Centre and the*

Commission and South African Constitution's incorporation of the duties to respect, protect and fulfill and their further articulation of a self-standing duty to promote ESCR.<sup>617</sup>

It will be recalled that the Constitutional Court has held that "implicit in section 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights *must be reasonable and effective*".<sup>618</sup> Though courts will not be "prescriptive" and a range of measures might be considered reasonable and effective, the Court has held that in determining the reasonableness of measures to comply with the duties to respect, protect, promote and fulfill the rights in the Bill of Rights that international law is of "pivotal importance".<sup>619</sup> It concluded that the "question" of what measures are reasonable "must be answered in part by considering international law" – including both binding and non-binding sources.<sup>620</sup>

## **2. The duty to protect: the State's duty to prevent human rights abuses by private entities**

As a general principle of international human rights law States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires, as is captured by the UN Guiding Principles on Business and Human Rights, states to take appropriate steps to "prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication".<sup>621</sup>

---

*Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001) A.H.R.L.R. 60 (15th Annual Activity Report), paras. 44-48. See also Olivier De Schutter, *International Human Rights Law*, Cambridge University Press, 2010, pp. 242-253; Manfred Nowak, *UN Covenant on Civil and Political Rights -- CCPR Commentary*, 2005, pp. 37-41.

<sup>617</sup> Id.

<sup>618</sup> *supra*, note 14, para 189. Emphasis Added.

<sup>619</sup> Id, para 192.

<sup>620</sup> Id, para 192.

<sup>621</sup> Principle 1 of the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, annexed to the Report of the Special Representative of the Secretary-General

The State's duty to protect individuals and groups of people from the human rights abuses perpetrated by private and non-state actors is detailed above. The duty extends beyond state protection against harms caused by business activity. However the CESCR specific articulation of the duty to protect in its recent General Comment 24 on "State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities" is similarly applicable to other non-state entities. CESCR explains that:

"The obligation to protect means that States Parties must effectively prevent the infringements of economic, social and cultural rights in the context of business activities. *This requires that States Parties adopt legislative, administrative, educational, as well as other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities; and that they provide victims of such corporate abuses with access to effective remedies.*"<sup>622</sup>

In the same General Comment CESCR proceeds to prescribe that States "should consider imposing criminal or administrative sanctions and penalties as appropriate where business activities result in abuses" of ESCR.<sup>623</sup> CESCR also recognizes that the duty to protect "at times necessitates direct regulation and intervention" by the State. By way of example, it indicates that States should "consider measures such as":<sup>624</sup>

- Restricting marketing and advertising of certain goods and services;

---

on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31 (2011), adopted by the Human Rights Council in its resolution A/HRC/RES/17/4 (2011): ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication"); See also *supra*, note 20, p. 59.

<sup>622</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 24, UN Doc. E/C.12/GC/24, (2017), para 14. Emphasis Added.

<sup>623</sup> *Id.*, para 15.

<sup>624</sup> *Id.*, para 19.

- Combating gender role stereotyping and discrimination;
- Exercising rent control in the private housing market;
- Establishing minimum wages consistent with a living wage; and
- Gradually eliminating informal or precarious forms of employment.

The Committee on the Rights of the Child has also given content to the duty to protect in the context of children's rights in its General Comment 16 on "State Obligations Regarding the Impact of the Business Sector on Children's Rights".<sup>625</sup> For a more detailed analysis of General Comment 16, legal practitioners and human rights defenders are advised to refer to the ICJ and Child Rights International Network's guide on the General Comment.<sup>626</sup>

The obligation to protect ESCR includes a duty on the State to take a number of protective measures, including but not limited to the regulation of activities of private entities that may have an impact on individuals' access to ESCR. In *New Clicks*, the Constitutional Court confirmed, for example that, consistently with the duty to protect the right of access to health care services under international law<sup>627</sup> and section 7(2) of the Constitution,<sup>628</sup> the "government is entitled to adopt, as part of its policy to provide access to health care, measures designed to make [health care services] more affordable than they presently are".<sup>629</sup> For simplicity's sake, the example of the right to health is used consistently in this section, despite the broader application of these principles to all ESCR.

---

<sup>625</sup>Committee on the Rights of the Child (CRC), General comment No. 16, UN Doc. CRC/C/GC/16, (2013).

<sup>626</sup> International Commission of Jurists, "State Obligations regarding the Impact of the Business Sector on Children's Rights: A Practical Guide for Non-Governmental Organizations on how to use the United Nations Committee on the Rights of the Child General Comment No. 16", (2016), available at: <https://www.icj.org/wp-content/uploads/2016/04/Universal-Guide-UN-Committee-on-Rights-of-the-Child-Publications-Reports-2016-ENG.pdf>

<sup>627</sup> *supra*, note 100.

<sup>628</sup> *supra*, note 102, p. 128.

<sup>629</sup> *supra*, note 101, para 32.

*New Clicks* was a decision on the provision of private health care services relating to access to medicines. Though the Constitutional Court found that the duty to protect requires the government to regulate this private sector activity to ensure that it is “affordable”, the finding is of more general application, imposing a duty to “regulate domestic health service delivery in a manner that enables equitable access to health care services and ensures the availability, accessibility, acceptability and quality of health care.”<sup>630</sup>

This broader duty to protect the right to health through the regulation of private entities emanates clearly from obligations under ICESCR as informed by the CESCR’s approach to ESCR. On the right to health, for example, the CESCR explains that the obligation to protect, “requires States to take measures that prevent third parties from interfering with” the right to health.<sup>631</sup>

Consistently with its approach to other specific ESCR, CESCR indicates that the obligation to protect includes duties to:<sup>632</sup>

- **Legislation, Policy and Programmes:** Adopt legislation, policies and programmes to ensure “equal access to health care and health-related services provided by third parties”;
- **Prevent Private Threats:** Ensure that private health sectors do “not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services”;
- **Regulate Marketing:** Control the “marketing of medical equipment and medicines by third parties”;

---

<sup>630</sup> *supra*, note 102, p. 127; SECTION 27 “SECTION 27 Submission to the Panel of the Market Inquiry into the Private Healthcare Sector”, 13 October 2014, available at: <http://section27.org.za/wp-content/uploads/2014/11/SECTION27-Submission-to-the-Panel-for-the-Health-Inquiry.pdf>, p. 14.

<sup>631</sup> *supra*, note 100, para 33.

<sup>632</sup> *Id*, para 35.

- **Set and Enforce Professional Standards:** Ensure that health professionals and practitioners “meet appropriate standards of education, skill and ethical codes of conduct”;
- **Prevent Private Harms:** Ensure that harmful social practices “do not interfere with access to reproductive health rights and family planning”; and
- **Prevent Private Limitations on Information Access:** Ensure that third parties do not “limit people’s access to health-related information and services”.

As businesses by their nature have as a primary aim maximizing profits and reducing costs, evidence suggests that, in the absence of state regulation, markets for ESCR may result in the impairment of rights. Commenting on the South African government’s initial failure to regulate the pricing of life-saving medical treatment required by HIV-positive individuals, former Chief Justice Sandile Ngcobo warned that in the absence of regulation HIV-positive people would become “victims of market failure”:

“As we know, the drugs used to treat HIV are manufactured by private companies and sold at prices far in excess of the purchasing power of those who need them most. Where the law places obligations on the state to promote treatment and prevent transmission, the law is operating to help prevent millions of people infected with HIV from becoming victims of – to use an economics term – ‘market failure’.”<sup>633</sup>

---

<sup>633</sup> Timothy Fish Hodgson, “Public interest, the Constitution and the Healthcare Inquiry preventing patients from becoming the victims of market failure, in *Competition Commission of South Africa: Eighth Annual Conference on Competition Law, Economics & Policy*, 2014, available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/Public-interest-the-Constitution-and-the-Private-Healthcare-Inquiry-preventing-patients-from-becoming-the-victims-of-market-failure.pdf>.

Building on this acknowledgement of the impact that “market failure” can have on the enjoyment of ESCR, ESCR also notes that “in order to create a favourable climate” for the protection of the right to health:

“States Parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities”.<sup>634</sup>

The obligation to protect to “create a favourable climate”<sup>635</sup> by regulating private entities extends the application of ESCR standards even to non-traditional areas of application of human rights. For example, a Health Market Inquiry Panel convened under the Competition Act grounded its investigation into competition issues in the private healthcare market in the constitutional right to health.<sup>636</sup>

Headed by former Chief Justice Sandile Ngcobo, the Inquiry noted that the starting point in considering the impact of the regulatory framework on competition is the Constitution<sup>637</sup> and then proceeded to comprehensively interpret the State’s duties in light of ICESCR and CESCR’s jurisprudence.<sup>638</sup> Overall, applying the duty to protect the right to health emanating from both international and South African law, the Panel concluded:

*“What is implicit, if not explicit in the obligation imposed by section 27(2), is the need for the regulatory framework to facilitate access to private healthcare services by promoting competition in the private sector to ensure that consumers have access to competitive services and prices from which to select.”*<sup>639</sup>

---

<sup>634</sup> *supra*, note 100, para 55.

<sup>635</sup> Sometimes also referred to in the international human rights context as a duty create “an enabling environment”. See *supra*, note 27, para 29 for example.

<sup>636</sup> Competition Commission of South Africa “*Health Market Inquiry: Provisional Findings and Recommendations Report*”, 5 July 2018, available at: <http://www.compcom.co.za/wp-content/uploads/2018/07/Health-Market-Inquiry-1.pdf>, p. 15.

<sup>637</sup> *Id.*, p. 21.

<sup>638</sup> *Id.*, p. 22-25.

<sup>639</sup> *Id.*, p. 26. Emphasis Added.



### **3. Direct human rights duties owed by private entities under domestic law**

The classic view in international human rights law is that private entities, including business enterprises, do not have “direct” human rights obligations in terms of international law. This principle is affirmed in international human rights treaties and jurisprudence of treaties bodies, including the CESCR’s, as well as the UN Guiding Principles on Business and Human Rights.<sup>640</sup>

Nevertheless, the entire object of the obligation to protect under international human rights law is that States *must themselves* impose duties on businesses and other private actors through law and regulation, and back them up through available remedies and sanction. This is the essence of the duty to protect. International law therefore not only does not prevent ascribing such duties “indirectly”, it mandates it.

Moreover, in General Comment 24, citing South African jurisprudence as an example, CESCR recognizes the validity of “direct” application of ESCR to private entities in terms of domestic human rights law:

“In certain jurisdictions individuals enjoy direct recourse against business entities for violations of economic, social and cultural rights, whether in order to impose on such private entities (negative) duties to refrain from certain courses of conduct or to impose (positive) duties to adopt certain measures or to contribute to the fulfillment of such rights”.<sup>641</sup>

The South African Constitution is explicit that “a provision of the Bill of Rights binds a natural or a juristic person if, and to

---

<sup>640</sup> Contrast: *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26 (2018), para 1199, a recent Arbitral Tribunal ruling which recognized that corporations do have direct duties not to harm fundamental rights in international law.

<sup>641</sup> *supra*, note 186, para 4.

the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".<sup>642</sup> This means that theoretically, any of the rights in the Bill of Rights could be "horizontally" applied to bind "natural" and "juristic" persons. This includes businesses of all kinds.<sup>643</sup> This approach remains perfectly consistent with the South Africa's discharge of its obligation to protect under international human rights law.<sup>644</sup>

The wording of section 8(2) is not a picture of clarity. Woolman notes that "at a minimum ... some of the substantive provisions of the Bill of Rights will apply to some disputes between private parties" despite the application of existing legal rules.<sup>645</sup> He also notes that the "gappiness" of law means that the Bill of Rights may apply directly when there are no existing rules applicable in a given situation.<sup>646</sup>

On a general level, the Court has confirmed that section 8(2) of the Constitution "was after all included to overcome the conventional assumption that human rights need only be protected in vertical relationships".<sup>647</sup>

The "nature" of ESCR rights and the "nature of the duty" imposed by them may well render them directly applicable. In *Grootboom*, the Constitutional Court held that "A society must seek to ensure that the basic necessities of life are provided to

---

<sup>642</sup> Section 8, Constitution of South Africa.

<sup>643</sup> Notably, the "Zero Draft Treaty" only applies to transnational corporations leading to the "absurd outcome" that "criminal conduct (no matter its seriousness) that occurs in more than jurisdiction may be punishable" while similarly "egregious criminal conduct (for instance crimes against humanity) may not be punishable if committed by businesses acting only within one jurisdiction". See Carlos Lopez "Towards an International Convention on Business and Human Rights (Part I)", in *Opinio Juris*, 23 July 2018, available at: <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/>.

<sup>644</sup> It is worth noting that the acceptance of "direct" obligations on private entities would introduce much more vexing issues in the international law context than it does domestically.

<sup>645</sup> Stuart Woolman et al, "Part II: The Bill of Rights" in *Constitutional Law of South Africa*, 2<sup>nd</sup> ed, 2013, pp. 31-72.

<sup>646</sup> *Id.*

<sup>647</sup> *supra*, note 465, para 41.

all if it is to be a society based on human dignity, freedom and equality".<sup>648</sup> The society referred to by the court is much broader than "the state" and it is this society that the court indicates, "must seek to ensure" the provision of basic necessities.

#### **4. Direct obligations on private entities in South African law**

The Constitutional Court has itself been somewhat hesitant to recognize the specific content of the obligations of private entities in terms of the Bill of Rights. In *Juma Musjid*, the Court held that a private trust that owned land that a school was built on "does have a negative constitutional obligation not to impair the learners' right to a basic education".<sup>649</sup> The Court indicated that this obligation required the trust to act reasonably in ensuring such impairment did not take place.<sup>650</sup> In *Juma Musjid* a private trust owned the land upon which a public school was located. The trust sought to evict the school, which in the circumstances would make the closure of the school "inevitable" thus interfering with the learners' rights to basic education.<sup>651</sup>

According to the Court in *Juma Musjid*, "the purpose of section 8(2) of the Constitution" is "to require private parties not to interfere with or diminish the enjoyment of a right" including the right to basic education.<sup>652</sup> It held, however, that "there is no *primary* positive obligation on the Trust to provide basic education to the learners" because that "*primary* positive obligation rests on the [government]".<sup>653</sup>

More recently, in *Daniels v Scribante*, the Court reinterpreted its decision in *Juma Musjid* concluding that the decision in question was "context specific" and "did not mean that under

---

<sup>648</sup> *supra*, note 9, para 44. Emphasis Added.

<sup>649</sup> See *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC), para 60.

<sup>650</sup> *Id.*

<sup>651</sup> *Id.*, paras 1-7.

<sup>652</sup> *Id.*, para 57-8.

<sup>653</sup> *Id.*, para 57. Emphasis Added.

no circumstances does the Bill of Rights impose positive obligations on private persons”.<sup>654</sup> To the contrary, the Court concluded that the right to security of tenure places both positive and negative obligations on even private individuals:

“Ultimately, the question is whether – overall – private persons should be bound by the relevant provision in the Bill of Rights. In the context of that broad formulation, this question is easy to answer insofar as the right to security of tenure is concerned. *By its very nature, the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons.* People requiring protection under ESTA more often than not live on land owned by private persons. Unsurprisingly, that is the premise from which this matter is being litigated. *And I dare say the obligation resting, in particular, on an owner is a positive one.* A private person is enjoined by section 25(6) of the Constitution through ESTA to accommodate another on her or his land. It is so that the obligation is also negative in the sense that the occupier’s right should not be “improperly invaded”.<sup>655</sup>

The Court went even further in *Daniels*, interpreting prior eviction jurisprudence as having placed a “direct, positive obligation on a private party by enjoining it to continue to house illegal occupiers who – if evicted immediately – would have been rendered homeless”.<sup>656</sup> The court was also indicated that this conclusion “placed a direct, onerous obligation on a private party”.<sup>657</sup> The conclusion in *Daniels*, according to the Court, is seemingly not an exception to *Juma Musjid* but rather reverses the position suggested by *Juma Musjid* to the extent that the Court had held that private parties bear *only* direct negative obligations in relation to human rights.

---

<sup>654</sup> *supra*, note 465, para 43-4.

<sup>655</sup> *Id.*, para 49. Emphasis Added.

<sup>656</sup> *Id.*, para 53.

<sup>657</sup> *Id.*

Moreover, it is worth noting that the private individuals described by the Court in both *Daniels* and its eviction jurisprudence may possess significantly less power – economically and institutionally – than many businesses. Both in *Daniels* and the Court’s eviction jurisprudence, the private entities are landowners who, while benefitting commercially from farming or other commercial activities, are not necessarily large commercial conglomerates. It is arguable that the nature of the duty on a private entity in terms of s 8(2) of the Constitution may “depend on the power of the private party concerned to undermine the interests and values protected by the particular right”.<sup>658</sup>

In the South African context, therefore, though market participants in the sale of food, housing, healthcare and education privately do not bear the specific duty to take “reasonable measures” to “progressively realize” ESCR “within available resources”, this does not mean that they are free of all constitutional obligations relating to ESCR. The State’s positive obligations to realize ESCR are best understood as described in *Juma*: as merely the “*primary* positive obligations”.<sup>659</sup>

The allocation of ancillary positive obligations on private entities is particularly apt when a private entity elects to trade directly in markets for goods and services that fall under the purview of ESCR obligations directly. The examples are wide-ranging and include: renting of accommodation; employment of workers; sale of private healthcare services and products; and operation of private schools and institutions of learning.

As in any commercial industry in the private market, the choice to participate in a market binds the actors to the relevant laws and regulations by their own consent.<sup>660</sup> In the relevant circumstances, this simply includes human rights duties, including ESCR. It bears repetition that, unlike the State, these market participants are not *obliged* to trade in

---

<sup>658</sup> *supra*, note 52, p. 331.

<sup>659</sup> *supra*, note 649, para 57. Emphasis Added.

<sup>660</sup> *supra*, note 645, p. 15.

goods or services that form the subject matter of ESCR. However, when they choose to do so, legal practitioners and human rights defenders may argue that these private entities freely accept constitutional responsibilities in terms the relevant ESCR.<sup>661</sup>

*Primary* positive obligations on the State, as *Daniels* clarifies, may not, then, be *exclusive* positive obligations. The degree of the positive and negative obligations on private entities will ultimately depend on the specific circumstances and perhaps even the particular actors, particular circumstances and particular contexts. Legal practitioners and human rights defenders seeking effective relief for human rights violations should therefore consider, where appropriate, to claim relief from *both* state and private entities in terms of ESCR obligations.

## **5. Future development of positive duties on private entities**

Returning to the example discussed above of the private healthcare sector, it is plausible in light of *Daniels*, that the Court may interpret the right to health as placing obligations on private actors in the burgeoning private sector in South Africa. The right to health, for example includes a right that “no one may be refused emergency medical treatment”.<sup>662</sup> It is difficult to think of an example that more clearly engages the positive and negative obligations of private entities where private health care facilities exist as they do extensively in South Africa.

Courts, following *Daniels*, may with the encouragement of legal practitioners and human rights defenders conclude, for example, that the private ambulance services, private hospitals and to a lesser extent even private medical professionals have a direct duty to take reasonable measures to ensure that no one is refused emergency medical treatment.

---

<sup>661</sup> *Id.*

<sup>662</sup> Section 27(3), Constitution of South Africa.

In this context, some experienced legal practitioners have argued that participants in the private healthcare sector in South Africa have both positive and negative duties in terms of the right to health. Similarly, in its submissions to a Competition Commission Inquiry into the private healthcare sector, a legal NGO advocating for the right to health of all South Africans argued for and implied the following direct human rights obligations of private entities:<sup>663</sup>

- **Duty to not impair rights:** A negative duty not to impair the health rights of users of the public and private health systems;
- **Duty to not obstruct state's efforts:** A negative duty not to obstruct the State's attempts to improve access to health;
- **Duty to comply with regulatory framework:** A positive duty to comply fully and proactively with existing regulations and law regulating the private healthcare sector;
- **Duty to engage meaningfully with regulators:** A positive duty to proactively, meaningfully and continuously engage the state and private regulatory authorities to improve access to the right to health;
- **Duty to engage meaningfully with the state:** A positive duty to meaningfully engage the state before taking action which implicates the rights of users of the public and private health systems; and
- **Duty to provide all relevant information:** A positive duty to proactively and in response to general requests for information provide such information to the state and regulators that is reasonably capable of being understood as necessary to ensure improved access to

---

<sup>663</sup> *supra*, note 630, pp. 21-22.

the healthcare rights of users of the public and private health systems.

Moreover, the South African Human Rights Commission recently concluded, more generally that “the private sector presently insufficiently contributes to government’s programme of radical transformation through the implementation of special measures in various contexts”.<sup>664</sup> This is a problem especially in light of the “fundamental inequalities” exist in South Africa which make it “crucial that private actors work together with the state to achieve substantive equality”.<sup>665</sup>

Given this context, there are likely to be increased opportunities for legal practitioners and human rights defenders to develop research, advocacy and litigation strategies to ensure the effective discharge of the constitutional obligations of businesses and other private entities operating in the private healthcare sector in South Africa.

## **6. Private entities performing public functions**

In most modern economies, the State often “outsources” or “delegates” some of its public functions to private actors. This includes “service delivery” processes, policies and plans necessary for the realization of ESCR.

Under international law, a private entity that performs a public function may engage the responsibility of the State. As the International Law Commission’s Articles on State Responsibility, widely considered to reflect principles of customary international law, puts it:

“the conduct of a person or entity which is not an organ of the State ...but which is empowered by the law of that State to exercise elements of the governmental

---

<sup>664</sup> *supra*, note 4, p. 5.

<sup>665</sup> *Id.*, p. 22.



authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”<sup>666</sup>

And:

“the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>667</sup>

Where the conditions in these provisions are met, the State itself will be responsible, and not just the private entity acting in its interest on its behalf. This will often have direct bearing on the strategic direction of research, advocacy and litigation of legal practitioners and human rights defenders on ESCR.

CESCR acknowledges the “increased role and impact of private actors in traditionally public sectors, such as the health or education sector” indicating that this will “pose new challenges for States parties in complying with” ESCR obligations.<sup>668</sup> It notes that “privatization is not per se prohibited by the Covenant” but it is clear that “private providers should ... be subject to strict regulations that impose on them so-called ‘public service obligations’”.<sup>669</sup>

The CESCR’s prescription in this regard extends to “concern that goods and services that are necessary for the enjoyment” of ESCR may be “less affordable” or that “quality may be sacrificed for the sake of increasing profits” as a result of privatization.<sup>670</sup> It goes as far as suggesting that if ESCR are thereby made “conditional on the ability to pay” this could “create new forms of socioeconomic segregation”.<sup>671</sup>

---

<sup>666</sup> Article 5, UN International Law Commission, ‘Responsibility of States for Internationally Wrongful Acts’, UN DOC A/56/49 (Vol. I)/Corr.4, (2001).

<sup>667</sup> Id, Article 8.

<sup>668</sup> *supra*, note 186, paras 21-2.

<sup>669</sup> Id.

<sup>670</sup> Id.

<sup>671</sup> Id.

Regarding South Africa, the Constitution defines as an “organ of state”, in addition to all actual State entities,<sup>672</sup> any other “functionary or institution” either lawfully “exercising a power or performing a function” in terms of the Constitution or any other legislation.<sup>673</sup> With reference to this definition, the Constitutional Court has made clear that the “government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.”<sup>674</sup> A private entity lawfully performing such a public function therefore “does not have to be part of government or the government itself *to be bound by the Constitution as a whole*.”<sup>675</sup>

Although the Constitutional Court has not provided a clear test or fully specified the instances in which a private entity’s functions would render it an organ of state, it has suggested that the following factors would be relevant in such a determination:<sup>676</sup>

- **Mandate:** Whether the mandate, powers and function of the entity relate to a clear legislative framework or purpose;
- **Generality:** Whether the mandate of the entity and its function apply generally to the public or a section of the public; and
- **Coerciveness:** Whether the powers of the entity are coercive in character and effect.

A clear mandate to participate in the realization of rights in the Bill of Rights, including ESCR, would strongly suggest that the function is related to a clear legislative framework or purpose. Though State control over the private entity will also suggest a

---

<sup>672</sup> s 239(a), Constitution of South Africa.

<sup>673</sup> s 239 (b), Constitution of South Africa.

<sup>674</sup> *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council & Another* [2006] ZACC 9; 2007 (1) SA 343 (CC), para 40.

<sup>675</sup> *Id*, para 41.

<sup>676</sup> *Id*, para 119.

public function is being undertaken, such control is not a prerequisite since control is ultimately “a symptom indicating, or a factor contributing to, the public nature of a power or function”.<sup>677</sup>

In the context of ESCR, the principle that private entities performing public functions can be “bound by the Constitution as a whole”, is of crucial importance. In *Allpay*, for example, the Constitutional Court handed down a series of judgments about the accountability of a private entity tasked by the State with administering the nationwide system for the distribution of social grants.

In *Allpay I*, after a tender process was completed, Cash Paymaster, a private company contracted with the South African Social Security Agency, an organ of State, to facilitate the “countrywide payment of social grants to beneficiaries”.<sup>678</sup> On review of the tender process, the award of the tender was declared unlawful and unconstitutional on the grounds that it failed to comply with administrative law requirements<sup>679</sup> such as vagueness,<sup>680</sup> irrationality,<sup>681</sup> procedural fairness,<sup>682</sup> non-compliance with a mandatory and material condition and failure to consider a relevant consideration.<sup>683</sup>

Nevertheless, in determining a just and equitable remedy, the Constitutional Court declined immediately to invalidate the contract and relieve Cash Paymaster from its contractual and constitutional obligations to ensure the payment of social grants. It reasoned as follows:

*“Any contract that flows from the constitutional and statutory procurement framework is concluded not on*

---

<sup>677</sup> Meghan Finn “Organs of state: An Anatomy”, in *South African Journal on Human Rights*, Volume 31, 2015.

<sup>678</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC), para 2.

<sup>679</sup> *Id.*, para 98.

<sup>680</sup> *Id.*, para 78.

<sup>681</sup> *Id.*, para 71.

<sup>682</sup> *Id.*, para 88-92.

<sup>683</sup> *Id.*, para 72.

*the state entity's behalf, but on the public's behalf.* The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role."<sup>684</sup>

The Court therefore suspended the declaration of invalidity of the agreement that would usually follow. In *All Pay II*,<sup>685</sup> the Court then acknowledged that the "likelihood of a disruption of payments to beneficiaries" in the case of an order of invalidity "[wa]s disputed"<sup>686</sup> and therefore it was "not in a position to determine what the effect of making a new tender award" would be on beneficiaries of social grants.<sup>687</sup>

Given the risk for beneficiaries of social grants, and, as a result of the unlawfully concluded contract, the Court concluded that Cash Paymaster, a private company "undertook constitutional obligations"<sup>688</sup> and now "plays a unique and central role as the gatekeeper of the right to social security and effectively controls beneficiaries' access to social assistance".<sup>689</sup> Valid or invalid, the contract therefore had "important constitutional consequences".<sup>690</sup> As a result, Cash Paymaster, unlike a private party to an ordinary commercial contract "cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational".<sup>691</sup>

Moreover, though finding that the unlawful contract should continue in the public interest, the Court noted that Cash Paymaster "has no right to benefit from an unlawful contract"

---

<sup>684</sup> Id, para 56. Emphasis Added.

<sup>685</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC).

<sup>686</sup> Id, para 38.

<sup>687</sup> Id, para 40.

<sup>688</sup> Id, para 56.

<sup>689</sup> Id, para 55.

<sup>690</sup> Id, para 57.

<sup>691</sup> Id, para 66.

nor should it be required to incur any losses attendant on its continued performance of its constitutional obligations.<sup>692</sup> The Court therefore required Cash Paymaster to continue performance of the contract based on a “break-even point”.<sup>693</sup>

Legal practitioners and human rights defenders should note carefully that the ultimate result of the *All Pay* litigation is the *significant expansion of the potential responsibilities and liabilities that a private entity* might incur by entering into a contractual relationship to perform the state’s obligations in relation to ESCR rights. The Court’s willingness to place the enormous responsibility of continued delivery of social grants to 17 million people, *without any profit* being achieved by the private entity, provides a strong indication of the degree to which both respect and fulfill responsibilities will be placed on private entities performing the public function of ensuring the realization of ESCR.

Legal practitioners and human rights defenders should therefore remain cognizant of the fact that private entities performing public ESCR-related functions will likely be considered by courts to effectively carry a substantial measure of the State’s constitutional and international ESCR obligations regarding those functions.

---

<sup>692</sup> Id, para 67.

<sup>693</sup> Id, para 67.

## H. EQUALITY, NON-DISCRIMINATION AND ESCR

The content of the rights to equality and equal protection of the law, both of which incorporate the principle of non-discrimination, are central to international human rights law. There is a baseline of universal standards in respect of equality and non-discrimination that are not particular to ESCR but are part of general international law and rule of law principles. In international human rights law, a succinct expression of the right to equality and equal protection is contained in article 26 of the ICCPR, which provides that:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This is reflective of article 7 of the Universal Declaration of Human Rights, which was also reinforced in the 1993 Vienna Declaration and Programme of Action agreed to by all States.<sup>694</sup> Similarly, the African Commission on Human People's Rights has affirmed that: “[t]ogether with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights”.<sup>695</sup> These standards are further developed, for example, in General Comment 28 (equality between women and men)<sup>696</sup>

---

<sup>694</sup> *supra*, note 448.

<sup>695</sup> African Commission on Human and Peoples' Rights, Decision of 15 May 2006, *Zimbabwe NGO Human Rights Forum v. Zimbabwe*, Communication No. 245/2002, para. 169. See also *Kaunda & Others v President of the Republic of South Africa* [2004] ZACC 5; 2005 (4) SA 235 (CC), paras 168-170, where the Court quoted with approval authority accepting that “today there is general agreement that norms of jus cogens reflect the most fundamental values of the international community and are therefore most deserving of international protection”.

<sup>696</sup> Article 3, Human Rights Committee, CCPR General Comment No. 28, UN Doc. CCPR/C/21/Rev.1/A, (2000).

and General Comment 18 (on non-discrimination)<sup>697</sup> of the UN Human Rights Committee.

Moreover, particularized expressions of the principles of equality and non-discrimination are common to all of the principal treaties of the international human rights system.

Treaties and other standards aimed at protecting persons from particular groups that are vulnerable to discrimination and denial of equality and equal protection. These include, as examples:

- the International Convention on the Elimination of All Forms of Racial Discrimination (providing for substantive equality on the ground of race);
- the Convention on the Elimination of all Forms of Discrimination Against Women (providing for substantive equality on the grounds of sex and gender);
- the Convention on the Rights of the Child (providing substantive equality for children regardless of their various identities and expressions);
- the Convention on the Rights of Persons with Disabilities; (providing for substantive equality for persons with disabilities);
- the United Nations Declaration on the Rights of Indigenous Peoples (providing for substantive equality for indigenous persons);
- the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (providing for substantive equality for ethnic, religious and linguistic minorities); and
- the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (providing for substantive equality relating to sexual orientation and gender identity).

---

<sup>697</sup> Human Rights Committee, CCPR General Comment No. 18, UN Doc. HRI/GEN/1/Rev.1.

In some domestic contexts what is disputed is whether the right obliges States to simply to treat like individuals alike (protect formal equality) or to ensure equal impact and results (substantive equality). However, both international human rights law and South African constitutional law provide for substantive approaches to equality.

It is important to note that equality and non-discrimination are both stand alone rights and an accessory and overarching principle of all other rights (in other words, all other rights must be protected without discrimination). In this regard, the UN Human Rights Committee is clear that equal protection of the law is an additional and separate protection from equality under the law. Equality under the law or before the law can be understood as requiring the law to apply in the same way to all individuals and groups. Equal protection of the law, requires "equality in positive terms", which includes substantively equal protection of laws as they are implemented.

The South African Constitution distinguishes between "equality before the law",<sup>698</sup> "equal protection ... from the law"<sup>699</sup> and "unfair discrimination".<sup>700</sup> Moreover, as we shall see below, it also included "equal ... benefit from the law"<sup>701</sup> and "full and equal enjoyment of all rights and freedoms"<sup>702</sup> thus reiterating the demand for substantive equality that is established in terms of international law by the requirement for "equal protection of the law".

## **1. Equality and non-discrimination and ESCR in international law**

In considering equality and non-discrimination under the ICESCR, it is important to recognize these rights must be read together with Article 26 of ICCPR and the specific non-discrimination provisions of other international instruments. Article 2(2) of the ICESCR is confined to protecting the

---

<sup>698</sup> Section 9(1)-(2), Constitution of South Africa.

<sup>699</sup> Id.

<sup>700</sup> Section 9(3)-(5), Constitution of South Africa.

<sup>701</sup> Section 9(1), Constitution of South Africa.

<sup>702</sup> Section 9(2), Constitution of South Africa.



exercise of ICESCR rights without discrimination, while Article 3 to ensuring states secure the “equal right of men and women to the enjoyment of all economic, social and cultural rights” in the Covenant.<sup>703</sup> Neither of these provisions amount to a generalized non-discrimination clause, nor an equal protection clause and must therefore be read in the broader context of equality provisions in international human rights law. CESCR itself has sought to do so.

In its General Comment 20 on non-discrimination, CESCR has stressed that, as a matter of fact, “discrimination undermines the fulfillment of economic, social and cultural rights for a significant proportion of the world’s population”.<sup>704</sup> Article 2(2) of ICESCR imposes an obligation on States to guarantee ESCR without discrimination.<sup>705</sup> CESCR has indicated that non-discrimination “is an immediate and cross-cutting obligation” under the ICESCR<sup>706</sup> as it is more generally in international human rights law.<sup>707</sup>

Moreover, when it comes to the evaluation of state performance of its ICESCR obligations, CESCR has indicated that when called upon to determine the reasonableness of measures taken by the State in communications under the OP-ICESCR, it would consider “whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner”.<sup>708</sup>

More specifically, Article 2 of ICESCR is clear that States are obliged to ensure that the protections granted by ESCR are

---

<sup>703</sup> Article 3 of the International Covenant on Economic, Social and Cultural Rights.

<sup>704</sup> *supra*, note 342, para 1.

<sup>705</sup> Article 2 of the International Covenant on Economic, Social and Cultural Rights.

<sup>706</sup> *supra*, note 342, para 20.

<sup>707</sup> See Article 26 of the International Covenant on Civil and Political Rights; Article 4 of the Convention on the Rights of Persons with Disabilities; Articles 1 and 2 of the Convention on the Elimination of All Forms of Discrimination Against Women; Articles 1 and 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and Article 1 of the Convention on the Rights of the Child.

<sup>708</sup> *supra*, note 316, para. 8.

guaranteed “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or “other status”.<sup>709</sup>

Importantly, CESCER has consistently indicated that equality should also encompass substantive equality.<sup>710</sup> Based on this understanding equality that CESCER has indicated: “non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights”.<sup>711</sup>

## **2. Equality, non-discrimination and ESCR in South African law**

The Constitution ascribes high status to the principle of equality. The “*achievement* of equality” is identified as a founding value of the Constitution.<sup>712</sup> The first right in the Bill of Rights mirrors this commitment providing for both the right to equal protection of the law, but also the right to “the full and equal enjoyment of all rights and freedoms”.<sup>713</sup>

According to the Constitutional Court, the Constitution “embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality”.<sup>714</sup> The Court notes “absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow”.<sup>715</sup> Substantive equality requires that

---

<sup>709</sup> Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

<sup>710</sup> *supra*, note 186, para 9.

<sup>711</sup> *Id.*, para 1.

<sup>712</sup> Section 1, Constitution of South Africa. Emphasis Added.

<sup>713</sup> Section 9, Constitution of South Africa.

<sup>714</sup> *Minister of Finance & Other v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC), para 31.

<sup>715</sup> *Id.*

policies and laws “should be capable of responding to real wrongs”.<sup>716</sup>

The South African Human Rights Commission concludes that formal equality is “incapable of addressing structural inequalities inherited from the apartheid era, which are currently reflected in South Africa’s huge income gap and grossly unequal distribution of wealth and land”.<sup>717</sup> Substantive equality, it stresses, aims to combat “[s]tructural or systemic inequalities” which often involve achieving “equal outcomes by treating people and groups differently”.<sup>718</sup>

The right to equality has been elevated under the Constitutional Court’s approach, such that, in the event of conflict, it will be taken to supersede other rights and interests in the constitutional quest for equality. In *National Coalition*, it held that “like justice, equality delayed is equality denied”.<sup>719</sup> Citing this finding with approval, in *Bato Star*, the Court went further acknowledging that equality and “transformation cannot be sacrificed at the altar of stability”.<sup>720</sup> It explained:

“There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. *The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution.* What is required, though, is that the

---

<sup>716</sup> Sandra Fredman, “Substantive Equality Revisited”, in *International Journal of Constitutional Law*, Volume 14, 2016, p. 14.

<sup>717</sup> *supra*, note 4, p. 22.

<sup>718</sup> *Id*

<sup>719</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs & Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 para 60.

<sup>720</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 106.

process of transformation must be carried out in accordance with the Constitution.”<sup>721</sup>

In the context of ESCR cases, the Court has placed a similar emphasis on the importance of equality. Though acknowledging, “to provide efficient and effective delivery of social services” it is often “necessary to differentiate between people and groups of people in society”, it has also indicated that the classifications upon which such differentiations are made “must satisfy the constitutional requirement of ‘reasonableness’”.<sup>722</sup>

In addition, the classification or differentiation must also meet the requirements of the right to equality and the prohibition on discrimination. They must therefore “not be arbitrary or irrational nor” may they “manifest a naked preference”. A “rational connection” between any differentiating law, policy or conduct and a “legitimate government purpose it is designed to achieve” must exist for any measure relating to ESCR to pass constitutional muster.<sup>723</sup>

Overall a “differentiating law or action which does not meet” *both of these standards* (reasonableness *and* rationality) will not accord with the right to equality.<sup>724</sup>

The Court has also connected such differentiating laws or actions to violations of specific ESCR. For example, in *Khosa*, the Court indicated that distinguishing between citizens and permanent residents for the purposes of the allocation of a social assistance grant created a “strong stigmatizing effect” which gives the “impression” that permanent residents are “inferior” to citizens.<sup>725</sup> This had a “serious impact on the dignity”<sup>726</sup> of permanent residents effectively relegating them “to the margins of society”.<sup>727</sup>

---

<sup>721</sup> Id, para 76. Emphasis Added.

<sup>722</sup> *supra*, note 10, para 53.

<sup>723</sup> Id.

<sup>724</sup> Id.

<sup>725</sup> Id, para 74.

<sup>726</sup> Id, para 76.

<sup>727</sup> Id, paras 77-81.

More generally, the Court has clearly indicated that State measures perpetuating existing stigma harm the dignity of marginalized groups.<sup>728</sup> The Court has warned that “courts and lawyers” in particular “must take care not to develop rules that will strengthen rather than diminish the stigma”.<sup>729</sup> Legal practitioners and human rights defenders are well advised to take heed of this warning.

### **3. What is discrimination?**

The CESCRC has elaborated in its jurisprudence on a well-developed definition of discrimination. Discrimination, it notes in General Comment 20:

“constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights”.<sup>730</sup>

CESCRC explains that this includes, among other acts, “incitement to discriminate and harassment”.<sup>731</sup> The most immediate prohibition that this definition alludes to is the prohibition on formal discrimination. This means, “ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds”.<sup>732</sup>

The prohibition on formal discrimination also requires the implementation of these formally non-discriminatory laws, which must also be undertaken in a non-discriminatory fashion. So, for example, where the law does not prevent girls or children with disabilities from attending schools, the decisions of officials implementing these laws should also not do so. However, according to the CESCRC “merely addressing

---

<sup>728</sup> *NM & Others v Smith & Others* [2007] ZACC 6; 2007 (5) SA 250 (CC), para 139.

<sup>729</sup> *Id*, para 141.

<sup>730</sup> *supra*, note 186, para 6.

<sup>731</sup> *Id*, para 7.

<sup>732</sup> *Id*, para 8(a).

formal discrimination will not ensure substantive equality as envisaged and defined by article 2".<sup>733</sup> This, it explains is because "the effective enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination".<sup>734</sup>

#### **4. Prohibited grounds of discrimination**

Under international human rights law, the non-exhaustive grounds of non-discrimination *include* prohibited grounds of discrimination under the ICESCR: "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*".<sup>735</sup> Since the adoption of a large range international covenants, international human rights law standards, and international human rights jurisprudence have developed such that other specific grounds can be clearly identified as falling under "other status", so that it now includes, among other grounds: sexual orientation or gender identity; age; gender; citizenship; nationality or migration status; health status; disability and socio-economic status.

In its General Comment 20, CESCR expressly affirmed that, in line with other international standards, "other status" includes at least the following additional prohibited grounds of discrimination: disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.<sup>736</sup>

There is significant overlap between the prohibited grounds under international human rights law and the prohibited grounds identified in the Constitution, which provides that:

"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds,

---

<sup>733</sup> Id, para 8(b).

<sup>734</sup> Id.

<sup>735</sup> Article 2 of the International Covenant on Economic, Social and Cultural Rights. Emphasis Added.

<sup>736</sup> *supra*, note 186, paras 27-35.

including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>737</sup>

It is critical to underscore that both under international law and the South African Constitution, the grounds enumerated are illustrative and *non-exhaustive*; the critical element is discrimination based on a status having an impact on human dignity or any other right, rather than on any thing or identity exclusively personal or of an individual character.

International human rights law provides some further assistance in identifying other prohibited grounds, much of which has been explicitly drawn on by CESC. In keeping with its substantive conception of equality requiring systemic change, CESC explains, “eliminating discrimination in practice requires paying sufficient attention to groups of individuals *which suffer historical or persistent prejudice*”.<sup>738</sup> . Similarly, the Constitutional Court has understood the listed grounds in the Constitution as an open list and has therefore, for example, acknowledged HIV status and nationality as a prohibited ground of discrimination.<sup>739</sup>

Consistently with the general approach in international human rights law, CESC, for its part, is clear that the prohibited grounds under international human rights are “not intended to be exhaustive”. In interpreting “other status”, the CESC has, for example, indicated that this includes sexual orientation and, therefore, ICESC requires that “States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights”.

Moreover, it has also noted that other status includes “gender identity” including persons who are “transgender, transsexual

---

<sup>737</sup> Section 9(3), Constitution of South Africa.

<sup>738</sup> *supra*, note 186, para 8(b). Emphases Added.

<sup>739</sup> *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC).

or intersex” who “often face serious human rights violations”.<sup>740</sup>

In this regard, CESCR’s acknowledges that many of the prohibited grounds it sets out are “identities” which are subjectively determined. It therefore notes that, “in determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned.”<sup>741</sup>

## **5. Multiple and intersectional discrimination**

The concept of “intersectionality” describes how varied identity markers or prohibited grounds of discrimination “intersect” with each other with the result that people often face multiple, forms of discrimination simultaneously and cumulatively.<sup>742</sup> This understanding is fully adopted by international human rights law, including the UN Human Rights Council.<sup>743</sup>

Discrimination based on these varied prohibited grounds – gender, race, sexual orientation, disability, poverty, rurality etc – “compound”, exacerbating their impact on individuals. International human rights law has, over time, increasingly looked to a similar conception of intersectionality in determining the nature and scope of specific manifestations of discrimination. In its 28th General Recommendation, the CEDAW Committee indicates that CEDAW requires states to “legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them” and “adopt and pursue policies and programmes designed to eliminate such occurrences”. The

---

<sup>740</sup> *supra* note 186, para 32.

<sup>741</sup> *Id.*, para 16.

<sup>742</sup> Kimberle Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, in University of Chicago Legal Forum, Volume 1989.

<sup>743</sup> See for example: Report of the United Nations High Commissioner for Human Rights, “*Impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls*”, A/HRC/35/10, 2017.



CEDAW Committee defines intersectionality, in the following manner:

“Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men.”<sup>744</sup>

The concept has also been applied by the Committee on the Elimination of Racial Discrimination in respect of the Convention on the Elimination of all Forms of Racial Discrimination,<sup>745</sup> and is more expressly identified in the Convention on the Rights of Persons with Disabilities.<sup>746</sup>

Intersectionality has been included in CESCR’s own interpretation of which categories of identity will form part of prohibited forms of discrimination based on “other status”.<sup>747</sup> Since the “nature of discrimination varies according to context and evolves over time”, a flexible approach to “other status” which includes the “intersection of two prohibited grounds of discrimination” is explicitly contemplated by CESCR.<sup>748</sup> Elsewhere it notes that “some individuals or groups of individuals face discrimination on more than one of the prohibited grounds” explaining that “such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying”.<sup>749</sup>

---

<sup>744</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28*, CEDAW/C/GC/28, 16 December 2010, para 18.

<sup>745</sup> Committee on the Elimination of Racial Discrimination (CERD) *General recommendation No. 32*, CERD/C/GC/32, 24 September 2009, para 7.

<sup>746</sup> Article 6, UN Committee on the Rights of Persons with Disabilities, *General comment No. 3*, CRPD/C/GC/3, 2 September 2016, paras 2-4.

<sup>747</sup> *supra*, note 186, para 27.

<sup>748</sup> *Id.*

<sup>749</sup> *Id.*, para 17.

Intersectionality is therefore a critical consideration in the application of anti-discrimination principles under international human rights law. The context-sensitive application of an intersectional analysis is necessary in understanding discrimination faced by individuals and groups in accessing ESCR. Legal practitioners should remain alive to the ways in which different forms of discrimination interact, intersect and compound in making arguments in courts and advocating for non-discrimination in access to ESCR.

Although South African Courts have acknowledged the importance and relevance of intersectionality in discrimination cases, its treatment has so far been limited.<sup>750</sup> The South African Human Rights Commission has taken issue with the fact that “designated groups are bluntly classified” by the executive and the legislature and generally “data is insufficiently disaggregated”. This has the result that “measures are not capable of being targeted at the most vulnerable groups in society, and can likewise not be designed to respond to new forms of discrimination, or to compounded discrimination”.<sup>751</sup>

## **6. Which entities are prohibited from discriminating?**

The State bears duties to respect, protect, fulfill and promote ESCR. This includes a duty to protect individuals and groups of people from discrimination generally – including when the discrimination itself emanates from non-state actors – and with regard to access to ESCR in particular.

The significance of the duty to protect against discrimination from private and other non-State actors is emphasized by CESCR. It explains, “discrimination is frequently encountered in families, workplaces, and other sectors of society”.<sup>752</sup> It therefore notes that States must “adopt measures, which should include legislation, to ensure that individuals and

---

<sup>750</sup> See for example *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC) paras 153–57.

<sup>751</sup> *supra*, note 4, p. 35.

<sup>752</sup> *supra*, note 186, para 11.

entities in the private sphere do not discriminate on prohibited grounds.”<sup>753</sup>

Moreover, it requires that “in addition to refraining from discriminatory actions, States p should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated.”<sup>754</sup> CESCR also calls on States “to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights” indicating that “such laws should ... attribute obligations to public and private actors”<sup>755</sup>. States should also “consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance”.<sup>756</sup>

The South African Constitution provides “no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection”.<sup>757</sup> The right to equality and the prohibition on discrimination is therefore clearly binding on private individuals, entities and institutions directly. This has been confirmed in PEPUDA and enforced by Courts who have required, for example, the provision of reasonable accommodations by private schools.<sup>758</sup>

## **7. Consequences of the prohibition of substantive discrimination**

At the broadest level, the consequences of the adopting of a substantive approach to equality and discrimination are best understood in contradistinction with a formal procedural approach to equality and discrimination.

---

<sup>753</sup> Id.

<sup>754</sup> Id, para 33.

<sup>755</sup> Id, para 37.

<sup>756</sup> Id, para 39.

<sup>757</sup> Section 9(4), Constitution of South Africa.

<sup>758</sup> *Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton Equality Court Case 1/2010* (December 2010).

Under a formal procedural approach, the obligations of States to protect the right to equality could be discharged by ensuring laws, policies and institutions that facially do not discriminate based on prohibited grounds. Similarly, under such an approach to discrimination, the mere absence of active discrimination on prohibited grounds by the State might appear to indicate compliance with human rights obligations. Another way of describing this approach would be to say that in terms of a formal approach to equality and discrimination the State might predominantly hold negative obligations “not to impair” the right to equality.

A substantive approach to equality and discrimination, on the other hand, intrinsically accepts that given a status quo of systemic and substantive inequality, “merely addressing formal discrimination will not ensure substantive equality”.<sup>759</sup> The result is that the State is under an obligation to undertake positive and proactive action to eliminate inequality.<sup>760</sup> This approach is consistent with both the Constitution and the CDESCR’s interpretation of ICESCR.

Without attempting to capture the full extent of the consequences of an approach to non-discrimination and equality that requires positive action, at least three areas marked by crucial developments in international human rights law can be identified as examples:

- **Systemic Discrimination:** The growing acknowledgment of a positive duty to act against systemic discrimination in order to achieve substantive equality;
- **Temporary Special Measures:** The existing recognition that “positive discrimination” in the form of “temporary special measures” may be necessary to ensure the achievement of substantive equality; and

---

<sup>759</sup> *supra*, note 186.

<sup>760</sup> *supra*, note 30.

- **Reasonable Accommodation:** The existing recognition of and provision for a positive duty to provide “reasonable accommodations” to those facing discrimination on prohibited grounds as a component of the right to equality.

### *Systemic discrimination*

In terms of international human rights law, it is unclear whether “systemic equality” is a distinct justiciable right or whether “systemic discrimination” alone can give rise to a standalone claim for legal protection against discrimination.

In General Comment 20 on “Non-discrimination in economic, social and cultural rights” CESCR notes the gravity of inequality and its impact on access to ESCR:

“Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world’s population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, *often because of entrenched historical and contemporary forms of discrimination.*”<sup>761</sup>

Inequality is of course a global problem. For decades, evidence suggests that throughout the world economic growth has not been equally distributed and development inconsistent. In South Africa, the situation is no different. Today “wealthy South Africans live an extraordinarily opulent lifestyle amidst a sea of poverty and deprivation”.<sup>762</sup> South Africa is consistently “one of the most consistently unequal countries in the world” with the GINI Coefficient of between 0.66 and 0.7 depending which variables are used to measure inequality.<sup>763</sup> There has been a “sharp rise” in inequality since South Africa became a

---

<sup>761</sup> *supra*, note 186, paras 1, 8. Emphasis Added.

<sup>762</sup> *supra*, note 518, p 19.

<sup>763</sup> Haroon Borat “Fact Check: is South Africa the most Unequal Society in the World?”, in *The Conversation*, 30 September 2015, available at: <https://theconversation.com/factcheck-is-south-africa-the-most-unequal-society-in-the-world-48334>.

constitutional democracy in 1994 and adopted a Constitution with justiciable ESCR in 1996.<sup>764</sup> As it is elsewhere, this inequality has disparate impact on persons based on race, gender, disability, sexual orientation, class and various other statuses and identities.

Rampant inequality is troubling particularly in the context of a growing base of evidence that more unequal societies suffer from major problems in no small part *as a result of inequality*. As examples, there is substantial evidence that more unequal countries:<sup>765</sup>

- Have higher homicide rates;
- Lower life expectancies;
- Lower average standards of health;
- Greater discrimination against women, racial minorities, and other marginalized groups; and
- Lower participation in elections.

Ultimately, research increasingly proves that “economic and social inequality” itself “adversely affects the enjoyment of human rights”.<sup>766</sup> What is clear, therefore, is that inequality is both a global and a systemic problem across the world and in South Africa. This helps explain South African law’s clear acknowledgment of a right to systemic equality. At a minimum systemic inequalities and systemic forces producing or perpetuating inequalities can and must be considered in determination whether prohibited discrimination has occurred.

In General Comment 20, CESCR, for example, notes that it “has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization”.<sup>767</sup> The nature of such discrimination is that it is often unchallenged, normalized and indirect.<sup>768</sup> However, this discrimination, which CESCR describes explicitly as “systemic discrimination” can also be observed and understood in the form of “legal rules, policies,

---

<sup>764</sup> Id.

<sup>765</sup> *supra*, note 183, p. 271.

<sup>766</sup> Id, p. 272.

<sup>767</sup> *supra*, note 186, para 12.

<sup>768</sup> Id.

practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups".<sup>769</sup>

Given these commitments ICESCR, as interpreted by CESCR, appears to "aspire[] to correct a *systemic exclusion or under-representation* of rights claims from the margins, from those suffering from poverty or destitution."<sup>770</sup> It is therefore possible for legal practitioners and human rights defenders to argue compellingly that States are required to "construe equality and nondiscrimination to require a domestic social order that supports the full realization of social rights for all".<sup>771</sup>

In South Africa, the Constitutional Court has been explicit that the Constitution's "substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege" which are both historical and still persist. This, according to the Court, has resulted in the Constitution "enjoin[ing] us to dismantle them and to prevent the creation of *new patterns of disadvantage*".<sup>772</sup>

#### *Positive measures and temporary special measures in international human rights law*

States are clearly "under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination" according to CESCR.<sup>773</sup> These "positive measures" must "represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved".<sup>774</sup>

---

<sup>769</sup> Id.

<sup>770</sup> *supra*, note 190, p. 42. Emphasis Added.

<sup>771</sup> *supra*, note 183, p. 293.

<sup>772</sup> *supra*, note 714, para 27. Emphasis Added.

<sup>773</sup> *supra*, note 186, para 9.

<sup>774</sup> Id.

States are therefore broadly required to adopt “policies, plans and strategies” which “address all groups distinguished by the prohibited grounds” and include the adoption of “temporary special measures *in order to accelerate the achievement of equality*”.<sup>775</sup>

To ensure that they respond to this purpose, the Committee on the Elimination of Racial Discrimination has suggested that:

“Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.”<sup>776</sup>

Such measures are moreover, according to the CEDAW Committee, not “an exception to the norm of non-discrimination” but instead “an emphasis that temporary special measures are part of a necessary strategy by States parties directed towards the achievement of de facto or substantive equality”.<sup>777</sup>

CESCR too has applied this rationale by noting, that differential treatment based on a prohibited ground will be presumed to be discriminatory but such treatment can be justified based on reasonable and objective evidence that the differential treatment is: “legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the

---

<sup>775</sup> *supra*, note 186, para 38. Emphasis Added.

<sup>776</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, August 2009, para 16.

<sup>777</sup> Committee on the Elimination of all forms of Discrimination Against Women, *General Recommendation No. 25: Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, 1999, para 18.



general welfare in a democratic society”.<sup>778</sup> It has also noted that eliminating systemic discrimination will “usually require” comprehensive measures “including temporary special measures”.<sup>779</sup>

The South African Constitution incorporates the need for special measures to ensure the “achievement of equality”.<sup>780</sup> “[E]quality includes *the full and equal enjoyment* of all rights and freedoms” and this end *requires* the state to take “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”.<sup>781</sup>

#### *Disadvantage: current and/or previous*

Although these individuals and groups of people certainly include those expressly identified in section 9(3) of the Constitution,<sup>782</sup> they are not limited to these individuals or groups but instead to all who are “disadvantaged by unfair discrimination”. In this regard, it is important to note that even the commonly used term “previously disadvantaged” is, as Madlanga J has warned, “a misnomer”.<sup>783</sup> The Constitution does not proscribe the need for special measures only to those *historically* disadvantaged. It clearly includes those who are presently or otherwise disadvantaged too.

#### *Temporal duration of special measures*

The Constitution, unlike the jurisprudence of the CESCR, CEDAW and CERD, does not expressly identify special measures as “temporary”. However, as has been observed by Madlanga J, all such measures are necessarily “temporary” in

---

<sup>778</sup> *supra*, note 186, para 13.

<sup>779</sup> *Id.*, para 39.

<sup>780</sup> s 1, Constitution of South Africa.

<sup>781</sup> *Id.*, s 9(2).

<sup>782</sup> *Id.*, s 9(3).

<sup>783</sup> *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association & Others* [2018] ZACC 20; 2018 (5) SA 349 (CC), para 69.

the sense that “once equality has been attained, there will no longer be a need to retain” such policies.<sup>784</sup> Their existence is therefore contingent on the persistence of inequality. Indeed, at such a time when their equality is secured, such measures would no longer be targeting “disadvantaged persons” as required by the Constitution.

*Reparation, “restitutionary or remedial measures” not positive discrimination*

In its jurisprudence on special measures, the courts have sometimes referred to them as “affirmative action”. As the South African government notes in its first country report to ICESCR: “In South Africa, affirmative action involves developing policies and legislation which aide in eradicating barriers [resulting] from injustices of our past”. These barriers have “prevent[ed] ... marginalised groups from accessing equal opportunities such as health care services, education, housing and employment ... amongst others.”<sup>785</sup>

The Government also indicates, in this regard, that “the judgments of our courts provide guidance and are continuously being factored into the policies of Government to ensure the strengthening of a human rights culture in the country”.<sup>786</sup> The judgments on temporary special measures thus far focus, disproportionately, and indeed almost exclusively on positive measures to ensure the achievement of racial equality in particular. Though this is understandable given South African history, the principles from these cases are nevertheless more broadly applicable.

Broadly, describing what is “sometimes referred to as ‘affirmative action’” as a “restitutionary measures”, the Court has indicated that such “measures must be ‘designed’ to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality”.<sup>787</sup> The Court prefers the description of “restitutionary

---

<sup>784</sup> Id, para 89.

<sup>785</sup> *supra*, note 67, para 48.

<sup>786</sup> Id, para 50.

<sup>787</sup> *supra*, note 714, para 28.

measures” because in the South African context, the terminology of affirmative action “may create more conceptual and other difficulties than it resolves”.<sup>788</sup>

Furthermore, the Court has explained that such “restitutionary measures” are a necessary component of the “remedial or restitutionary” understanding of equality entrenched by the Constitution.<sup>789</sup> They involve a “credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework”.<sup>790</sup> The measures are therefore, according to the Court, not “reverse discrimination” or “positive discrimination” but an “integral” part of “the reach of our equality protection” aimed at achieving equality and “broader social justice imperatives”.<sup>791</sup> This requires measures to redress existing inequality and “a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege”.<sup>792</sup> This position in South African law is consistent with international human rights law.

#### *When are restitutionary measures permissible?*

Because of their integral role in the achievement of equality and social justice, the Court has held that restitutionary measures “cannot be presumed to be unfairly discriminatory”.<sup>793</sup> Nevertheless, the defender of restitutionary measures, which is often the state, is obliged to prove the following:<sup>794</sup>

- **Measures target disadvantaged persons:** The restitutionary measures must “target persons or categories of persons who have been disadvantaged by unfair discrimination”. This generally requires that the “overwhelming majority of members of the favoured

---

<sup>788</sup> Id, para 29.

<sup>789</sup> Id, para 30.

<sup>790</sup> Id, para 25.

<sup>791</sup> Id, para 31.

<sup>792</sup> Id, para 32.

<sup>793</sup> Id, para 33.

<sup>794</sup> Id, para 37.

class are persons designated as disadvantaged by unfair exclusion".<sup>795</sup>

- **Measures purposed at and reasonably capable of advantaging disadvantaged persons:** The restitutionary measures must be "designed to protect or advance such persons or categories of persons". While "the future is hard to predict" the measures must nevertheless be "reasonably capable of attaining the desired outcome".<sup>796</sup> It does not require that it be shown that there is "a necessity to disfavour one class in order to uplift another" or that "there is no less onerous way in which the remedial objective may be achieved".<sup>797</sup>
- **Measures promote equality of disadvantaged persons:** The restitutionary measures must "promote the achievement of equality". Whether they do so will depend on the facts of a particular case evaluated in light of the Constitution as whole including its short, medium and long-term goals. The measures "should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened".<sup>798</sup>

### *Quotas and numerical targets*

The Court has not ruled decisively on the permissibility of "quotas" within this broad framework. It has, however, approved repeatedly of the use of "numerical targets" and indicated that "the primary distinction between numerical targets and quotas lies in the flexibility of the

---

<sup>795</sup> Id, para 40.

<sup>796</sup> Id, para 41.

<sup>797</sup> Id, para 43.

<sup>798</sup> Id, para 44.

standard”.<sup>799</sup> Some employment legislation takes a similar approach prohibiting quotas, while endorsing numerical goals “in pursuit of work place representivity and equity”.<sup>800</sup>

### *Deference, caution and restitutionary measures*

Ultimately courts should “exercise caution before knocking down measures calculated to redress the inequality of the past”.<sup>801</sup> This will require deference to measures that do not “cater for every possible eventuality” or may not guarantee equality. This is because restitutionary measures are not an exact science.<sup>802</sup>

Therefore, the Constitutional Court has held that the “duty of the courts in this regard ... does not extend to telling the functionaries how to implement transformation”. This must be left to the functionaries concerned because “transformation can take place in various ways” in every context. What courts are required to evaluate is whether restitutionary measures may represent a meaningful way to address the need to “restructure” industries or “to address historical imbalances and to achieve equity”.<sup>803</sup>

As has been indicated, in *Van Heerden*, the Court held that restitutionary measures must be aimed at the achievement of equality *and* the “broader social justice imperatives” of the

---

<sup>799</sup> *supra*, note 783, paras 42 and 54. This judgment can however reasonably be interpreted to indicate the Court more generally disproves of the conversion of numerical targets into quotas through rigid implementation.

<sup>800</sup> *Id*, para 52.

<sup>801</sup> *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* (CCT13/17) [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC), para, 90.

<sup>802</sup> *Id*, para 97:

“...unlike the launching of a rocket into space where, if you lack the necessary precision, the rocket may explode, killing the crew and those watching the launch or veer off in a wrong direction with all the hazards that this may entail. The policy is but a measure meant to address socio-legal ills which, although it must comply with constitutional prescriptions, should not be expected not to have a few shortcomings.”

<sup>803</sup> *supra*, note 720, para 104.

Constitution.<sup>804</sup> Given the limited application of restitutionary measures to ESCR cases thus far, the Constitutional Court's jurisprudence on the need for proactive restitutionary measures to ensure equality in access ESCR, contains significant untapped potential for legal practitioners and human rights defenders to consider in shaping and crafting arguments and strategies.

## **8. Reasonable accommodation: equality for persons with disabilities**

The Convention on the Rights of Persons with Disabilities, like the African Commission's Disability Protocol,<sup>805</sup> provides a similar, slightly expanded, definition of discrimination based on disability as meaning:

"Any distinction, exclusion or restriction on the basis of disability which has *the purpose or effect* of impairing or nullifying the recognition, enjoyment or exercise, *on an equal basis with others*, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, *including denial of reasonable accommodation*."<sup>806</sup>

In order to "eliminate substantive discrimination", the CESCR has recognized in some instances the need for temporary special measures. However, it also notes "such positive measures may, exceptionally, however, need to be of a permanent nature".<sup>807</sup> It gives the "*reasonable accommodation* of persons with sensory impairments in accessing health-care facilities" as an example of a permanent positive measure that may be required.

---

<sup>804</sup> *supra*, note 714, para 31; *supra*, note 4, p. 39-64.

<sup>805</sup> Articles 1(d), (i), 3(2) of the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa.

<sup>806</sup> Article 2 of the Convention on the Rights of Persons with Disabilities.

Emphasis Added.

<sup>807</sup> *supra*, note 186, para 9.

In CESCR General Comment 20, it reaffirms the definition of discrimination as including the denial of reasonable accommodation,<sup>808</sup> describing reasonable accommodation as:

“Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>809</sup>

The CRPD places significant further emphasis on reasonable accommodation throughout creating a “global reasonable accommodation” standard.<sup>810</sup> Article 5(c), provides that States must “take all appropriate steps to ensure that reasonable accommodation is provided”.<sup>811</sup> In respect of ESCR I, including education (Articles 24(2)(c) 24(5)) and work (Article 27(1)(i)), it also provides for the requirement of reasonable accommodation.<sup>812</sup> An equivalent education-specific reasonable accommodation provision is also included in the African Commission’s Disability Protocol.<sup>813</sup>

In General Comment 20, the CESCR underscores that “the denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability”.<sup>814</sup> Importantly, the CRPD Committee explicitly distinguishes between the duty of reasonable accommodation, duties to take special measures and the general duty to ensure accessibility in terms of the

---

<sup>808</sup> *supra*, note 186, para 28.

<sup>809</sup> Article 2 of the Convention on the Rights of Persons with Disabilities.

<sup>810</sup> Frederic Megret and Dianah Msipa, “Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality”, in *South African Journal on Human Rights*, Volume 30, 2014.

<sup>811</sup> Article 5(3) of the Convention on the Rights of Persons with Disabilities.

<sup>812</sup> Articles 24(2)(c), 24(5), 27(1)(i)) of the Convention on the Rights of Persons with Disabilities.

<sup>813</sup> Article 12(4)(c) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa.

<sup>814</sup> *supra*, note 186, para 28.

Covenant.<sup>815</sup> This means that the reasonable accommodation duty is consistent with and *additional to* these duties to take special measures and ensure accessibility for persons with disabilities.

In South African law, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was enacted to give effect to the constitutional right to equality.<sup>816</sup> It prohibits discrimination based on disability and requires affirmative action measures designed to promote the rights of people with disabilities.<sup>817</sup> Although the definition of “discrimination” in PEPUDA does not explicitly mention “reasonable accommodation”, its provisions pertaining to unfair discrimination on the grounds of gender,<sup>818</sup> race<sup>819</sup> and disability<sup>820</sup> clearly do.<sup>821</sup>

The reasonable accommodation standard has been applied by courts in ESCR cases including those relating to the right to education.<sup>822</sup> In the Equality Court held that the right to equality and PEPUDA’s reasonable accommodation standard required that schools – both public and private – would have to show that they took all “necessary and reasonable steps” to accommodate children with disabilities.<sup>823</sup>

Though the school in question had taken “several praiseworthy steps”, the Court found that “unfortunately not all reasonable steps were taken to remove obstacles to enable” Chelsea, a wheelchair user, “to have access to the classes, toilet and

---

<sup>815</sup> See generally: UN Committee on the Rights of Persons with Disabilities, *General Comment No. 2*, CRPD/ C/GC/2, 22 May 2014; UN Committee on the Rights of Persons with Disabilities, *General Comment No. 4*, CRPD/C/GC/4, 25 November 2016, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5*, E/1995/22, 9 December 1994.

<sup>816</sup> s 9(4), Constitution of South Africa.

<sup>817</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ss 9 and 28.

<sup>818</sup> *Id.*, s 8(h).

<sup>819</sup> *Id.* s 7(e).

<sup>820</sup> *Id.* s 9(c).

<sup>821</sup> *Id.*

<sup>822</sup> *supra*, note 758.

<sup>823</sup> *Id.*



washbasin”.<sup>824</sup> Chelsea had left the school as a result of the unaccommodating environment. The Court ruled that the school’s failure to reasonably accommodate Chelsea was unlawful and the school was therefore ordered to readmit Chelsea, provide her with further accommodations and send some of its teachers to attend a course on “how to work with disabled persons”.<sup>825</sup>

It is worth noting that, in the South African context, and some other domestic jurisdictions, the requirement of reasonable accommodation has been considered by the Constitutional Court to apply beyond the context of disability-based discrimination.<sup>826</sup>

The reasonable accommodation duty will vary from context to context; nevertheless, legal practitioners and human rights defenders will be able to discern some emerging general principles about the reasonable accommodation standard.

Although it is a “positive measure”, under both ICESCR and the CRPD, the duty to provide reasonable accommodations is “immediate” and “not a right to which the principle of progressive realisation applies”.<sup>827</sup> This is consistent with its inclusion within the definition of discrimination in ICESCR, the CRPD and the Africa Disability Protocol.

---

<sup>824</sup> Id.

<sup>825</sup> Id.

<sup>826</sup> *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC) para 72. Constitutional Court acknowledged the legislative requirements for application of the reasonable obligation standard: “when considering a matter of religion”; require “modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment”; and in accommodating needs based on “race, gender or disability”. The Court thereafter concluded that: “At its [the standard of reasonable accommodation’s] core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order *to allow all people* to participate and enjoy all their rights equally.” Emphases Added.

<sup>827</sup> Anna Lawson ‘The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn’ (2006–2007), in *Syracuse J Intl & Com*, Volume 34, pp. 598-9.

Moreover, the “reasonable accommodation” duty draws focus to the fact that “concepts such as equality or discrimination only have meaning on a highly individualised and circumstantial basis”.<sup>828</sup> According to the Committee on the Rights of Persons with Disabilities compliance with the duty will therefore be “the result of a contextual test that involves an analysis of the *relevance and the effectiveness of the accommodation*”.<sup>829</sup>

Finally, the Committee on the Rights of Persons with Disabilities has highlighted the fact that there may be a need for both material and “non-material accommodations”, for example, in the educational environment.<sup>830</sup> For example, the *Oortman* case discussed above highlights how non-material accommodations such as teachers having patience, care, respect and concern for their learners is crucial to the effective education of children with disabilities.

#### *Who is entitled to reasonable accommodations?*

In a definition substantially mirrored in the Africa Disability Protocol,<sup>831</sup> the CRPD defines disability as:

“an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>832</sup>

Consistently with this broad definition of disability, the Committee on Rights of Persons with Disabilities warns that

---

<sup>828</sup> Leticia de Campos Velho Martel ‘Reasonable accommodation: The new concept from an inclusive constitutional perspective’ (2011) 14 *SUR International Journal on Human Rights* 85, p. 264.

<sup>829</sup> *Id.* Emphasis Added.

<sup>830</sup> *Id.*

<sup>831</sup> Article 1 of the Convention on the Rights of Persons with Disabilities defines “Persons with disabilities” to: “include those who have physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others”.

<sup>832</sup> Preamble of the Convention on the Rights of Persons with Disabilities.

reasonable accommodations are not “conditional on a medical diagnosis of impairment *and should be based instead on the evaluation of social barriers*”.<sup>833</sup>

*When does the duty arise?*

The Committee on the Rights of Persons with Disabilities appears to interpret the right to reasonable accommodation as both “enforceable from the moment *it is requested*”<sup>834</sup> and as “enforceable *from the moment an individual with an impairment needs it* in a given situation”.<sup>835</sup> As the latter interpretation provides greater protection and it should therefore be preferred.

Legal practitioners and human rights defenders may argue that there is no reason, for example, to impose an obligation on learners, parents or any other entity to request an accommodation in order for the right to an accommodation to be enforceable. Since vulnerable learners and parents, in particular, are unlikely to be aware of all the possible and preferable accommodations that may occur, they may urge courts and other state entities to prefer interpretations of the CRPD consistent with the CRPD Committee’s General Comment 2.

*Undue burden, available resources and reasonable accommodation*

The CRPD, like the African Disability Protocol,<sup>836</sup> specifically allows for the limitation of the right to reasonable accommodation by creating a “defence” for a party that would otherwise be required to accommodate based on a “disproportionate or undue burden”. This is included in the definition of reasonable accommodation itself.<sup>837</sup> The CRPD Committee acknowledges this noting “availability of resources

---

<sup>833</sup> UN Committee on the Rights of Persons with Disabilities, *General Comment No. 2*, CRPD/ C/GC/2, 22 May 2014, para 15. Emphasis Added.

<sup>834</sup> *Id.*

<sup>835</sup> *Id.*, para 26. Emphasis Added.

<sup>836</sup> Article 1(d), (i) of the Protocol to the African Charter on Human and People’s Rights on the Rights of Persons with Disabilities in Africa.

<sup>837</sup> Article 2 of the Convention on the Rights of Persons with Disabilities

and financial implications is recognized when assessing disproportionate burden”.<sup>838</sup>

In the context of education, for example, the Committee indicates “availability of accommodations should be considered with respect to a larger pool of educational resources available in the education system, and not limited to resources available at the academic institution in question”.<sup>839</sup>

Secondly, reasonable accommodation should be effective at moving towards the purpose for which they are to be provided. As Campos argues, therefore, the undue burden defense can only prevail if prospective accommodation would “*excessively undermine*[] the purpose of the general measure, posing risks to safety, health and well-being” or if “in the balance of costs and benefits, the accommodation proves to be too expensive”.<sup>840</sup> In determining whether the accommodation is “too expensive” all relevant factors should be considered, including, for example, in the education context: the potential benefits of the accommodation to the claimant, other learners, the school in question and the education system as a whole.<sup>841</sup>

Finally, the CRPD Committee has remarked, in the education context that “reasonable accommodation should not entail additional costs for learners with disabilities”. This is consistent with the substance of the right “not [to be] excluded from free and compulsory primary education, or from secondary education” and wise to potential efforts to redirect costs of such reasonable accommodations onto learners.<sup>842</sup>

## **9. Equality and the content of ESCR: the example of gender**

International human rights law and standards, including under the Convention on the Rights of the Child, the Convention on

---

<sup>838</sup> UN Committee on the Rights of Persons with Disabilities, *General Comment No. 4*, CRPD/C/GC/4, 25 November 2016, para 28.

<sup>839</sup> *Id.*

<sup>840</sup> *supra*, note 828, p. 106. Emphasis Added.

<sup>841</sup> *Id.*

<sup>842</sup> *supra*, note 838, para 20.

the Elimination of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of Persons with Disabilities have specific provisions directed at addressing equality and non-discrimination.

The ICESCR under Article 3, provides that States must “undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights”.<sup>843</sup> CESCR has adopted a General Comment on The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights.<sup>844</sup> CESCR is clear that “substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are, *prima facie*, gender-neutral”.<sup>845</sup> It asserts gender-neutral laws and policies “can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women”.<sup>846</sup>

The Constitutional Court has similarly emphasized the importance of substantive equality to women indicating that discrimination against women is symptomatic of “the patriarchy which the Constitution so vehemently condemns”.<sup>847</sup> Gender-neutral laws and policies often are insufficient, because “sexism and patriarchy ... are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible”.<sup>848</sup>

---

<sup>843</sup> Article 3 of the International Covenant on Economic, Social and Cultural Rights.

<sup>844</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 16*, E/C.12/2005/4, 11 August 2005.

<sup>845</sup> *Id.*, para 8.

<sup>846</sup> *Id.*

<sup>847</sup> *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); para 80. Despite this, the Court has sometimes been criticized for reverting into the mode of formal equality analysis in gender specific cases that results in a failure to acknowledge the need for positive measures to ensure substantive equality. See for example *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) para 162.

<sup>848</sup> *Rahube v Rahube & Others* [2018] ZACC 42; 2019 (2) SA 54 (CC) para 24.

CESCR has construed discrimination based on sex to include discrimination based both on sex (biologically understood) and gender (as social constructed).<sup>849</sup> The Constitution lists *both* sex and gender as separate prohibited grounds of discrimination thereby achieving the same result.<sup>850</sup> The Constitutional Court has recently clarified that:

“The word “sex” refer to the biological characteristics that define humans as female, male or intersex. This is usually assigned at birth and differentiation between people is made on the basis of external genitalia, chromosomes, hormones and the reproductive system. References to “gender” are references to an identity that can change over time, and that differs from one culture or society to another. Gender is both a social construct and a personal identity. In social terms gender refers to the socially created roles, personality traits, attitudes, behaviours and values attributed to and acceptable for men and women as well as the relative power and influence of each. In individual terms gender refers to the specific gender group with which an individual identifies regardless of their sex.”<sup>851</sup>

The State has a general obligation to respect, protect, promote and fulfill women’s ESCR.<sup>852</sup> However, CESCR is clear that these general obligations create more “specific” obligations with regard to the full range of ESCR for women.<sup>853</sup> The process of articulating the gender-specific dimensions of ESCR for women and the particular impacts upon them has been described as “engendering ESCR”.<sup>854</sup>

The CESCR’s jurisprudence involves “engendering socio-economic rights” to ensure the effective protection of women’s

---

<sup>849</sup> *supra*, note 844, para 11.

<sup>850</sup> Section 9(3), Constitution of South Africa.

<sup>851</sup> *Rahube v Rahube and Others* [2018] ZACC 42; 2005 (5) BCLR 446 (CC).

<sup>852</sup> *Id.*, paras 16-21.

<sup>853</sup> *Id.*, paras 22-31.

<sup>854</sup> *Id.*

ESCR.<sup>855</sup> CEDAW also makes general recommendations on ESCR relating to women.<sup>856</sup> The CEDAW Committee alone has general recommendations, for example, on girls and women's education,<sup>857</sup> health,<sup>858</sup> work<sup>859</sup> and the consequences of marriage.<sup>860</sup> It has also issued general recommendations on the meaning of "temporary special measures" in terms of the CEDAW Covenant.<sup>861</sup>

This is crucial in the South African context as it is throughout the world. Many of the cases discussed in this guide have women's ESCR at their very centre. Indeed, it is notable that black women are the named applicants of a significant number of these landmark cases and black women have provided the founding affidavits of many others. As drawing from examples of judgments discussed in this Guide thus far: *Grootboom* (Mrs Grootboom); *Dladla* (Mrs Dladla); *Klaase* (Ms Klaase); *Daniels*

---

<sup>855</sup> Id.

<sup>856</sup> See Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 3*, A/42/38, 1987; UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 5*, 1988; UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 13*, 1989; UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 15*, A/45/38, 1990; UN Committee on the Elimination of Discrimination Against Women, *General Recommendations No. 16*, A/46/38, 1991; UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 25*, 2004; UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 29*, CEDAW/C/GC/29, 26 February 2013; UN Committee on the Elimination of Discrimination Against Women, *General recommendation No. 36*, CEDAW/C/GC/36, 16 November 2017.

<sup>857</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 3*, A/42/38, (1987); Committee on the Elimination of Discrimination Against Women, *General recommendation No. 36*, CEDAW/C/GC/36, (2017).

<sup>858</sup> See Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24*, A/54/38/Rev.1, (1999); UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 15*, A/45/38, (1990).

<sup>859</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 13*, (1989).

<sup>860</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 29*, CEDAW/C/GC/29, (2013).

<sup>861</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 5*, A/42/38, (1987); UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 25*, (2004).

(Mrs Daniels) and *Mazibuko* (Mrs Mazibuko). Even the world-famous *Treatment Action Campaign* case pertained specifically to women's reproductive health rights with the founding affidavit being attested to by Ms Siphokazi Mthathi with a range of supporting affidavits from other young, black, pregnant, HIV positive women.

Legal practitioners and human rights defenders are therefore well advised to consider gendered aspects of ESCR cases they are seeking to litigate and advocate around. Both CESCRR's general comments and the CEDAW's general recommendations provide a wealth of resources that can be used by practitioners to ensure the engendering of ESCR and the attaining of effective relief for women in ESCR cases.

## **10. Equality, sexual orientation, gender identity**

The UN treaty bodies have incorporated discrimination based on sexual identity and gender identity as ground for discrimination. CEDAW's general recommendations regularly refer to sexual orientation and gender identity as grounds exacerbating the vulnerability of individuals and groups in accessing rights including ESCR. The Human Rights Committee has held that discrimination based on sexual orientation violates Article 2 of the ICCPR.<sup>862</sup> The jurisprudence of UN treaty bodies including CESCRR have "consistently held that sexual orientation and gender identity are prohibited grounds of discrimination under international law"<sup>863</sup>

For further information about general international human rights protections relating to sexual orientation and gender

---

<sup>862</sup> *Irina Fedotova v. Russian Federation*, Human Rights Committee Communication No. 1932/2010, Views of 31 October 2012, UN Doc. CCPR/C/106/D/1932/2010 (2012). See also 17th session of the Human Rights Council (30 May - 17 June 2011), available at: <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session17/Pages/ResDecStat.aspx> and <https://www.icj.org/sogi-un-database/>.

<sup>863</sup> United Nations Human Rights Office of the High Commissioner "Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law" (2012), available at: <https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> p. 41.



identity (SOGI), legal practitioners should refer to the ICJ's Practitioners Guide on SOGI<sup>864</sup>; the ICJ's comparative law casebook on SOGI,<sup>865</sup> and the ICJ's SOGI UN Database.<sup>866</sup>

In General Comment 20 CESCR deals definitively with discrimination based on "sexual orientation and gender identity". It notes "other status" in Article 2 of the Convention "includes sexual orientation". It therefore concludes in full:

*"States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace."*<sup>867</sup>

Furthermore, CESCR cites directly from the "Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity".<sup>868</sup> These principles define the State's obligations in the realization of the ESCR of persons irrespective of their gender identity and sexual orientation.<sup>869</sup> The principles have recently been updated to include "additional principles" and "additional state

---

<sup>864</sup> International Commission of Jurists "Practitioners Guide 4: Sexual Orientation, Gender Identity and International Human Rights Law" (2009), available at: <https://www.icj.org/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf>.

<sup>865</sup> International Commission of Jurists "Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook" (2012), available at: <https://www.icj.org/wp-content/uploads/2012/05/Sexual-orientation-gender-identity-and-Justice-report-2011.pdf>.

<sup>866</sup> International Commission of Jurists "Sexual Orientation and Gender Identity Database" available at: <https://www.icj.org/sogi-un-database/>.

<sup>867</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 20, E/C.12/GC/20, (2009), para 32; See also UN High Commissioner for Refugees, Guidelines on International Protection No. 9, UN Doc HCR/GIP/12/01 (2012), para 24. Emphasis Added.

<sup>868</sup> The Yogyakarta Principles, "Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" (2007), available at: <https://www.refworld.org/pdfid/48244e602.pdf>.

<sup>869</sup> Id, pp. 11-18.

obligations” some referring to ESCR such as: the right to protection from poverty, the right to sanitation and rights relating to information and communication technology.<sup>870</sup>

The CESCR has also addressed these requirements in its specific General Comments on the rights water, work, social security and the highest attainable standard of health.<sup>871</sup> Problems in accessing ESCR for LGBTI individuals are well documented. They include bullying and harassment at schools, workplace discrimination, heightened vulnerability to violence, abuse and sexual assault and generally restricted access to public services that form the core of ESCR.<sup>872</sup> These barriers have been confirmed in the South African context.<sup>873</sup>

CESCR has taken the same approach to the gender identity of individuals indicating, for example, “persons who are transgender,

---

<sup>870</sup> The Yogyakarta Principles Plus 10, “Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles” (2017), available at: [https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5\\_yogyakartaWEB-2.pdf](https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf).

<sup>871</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 15, E/C.12/2002/11, (2003); Committee on Economic, Social and Cultural Rights, General Comment No. 18, E/C.12/GC/18, (2006); Committee on Economic, Social and Cultural Rights, General Comment No. 19, E/C.12/GC/19, (2008); Committee on Economic, Social and Cultural Rights, General Comment No. 14, E/C.12/2000/4, (2000); Committee on Economic, Social and Cultural Rights, General Comment No. 19, E/C.12/GC/19, 4 February 2008. *supra*, note 96, para 12(b); *supra*, note 127, para 13; *supra*, note 85, para. 18.

<sup>872</sup> See UNSECO “Out in the open: education sector responses to violence based on sexual orientation and gender identity/expression”, 2016, <https://www.gale.info/https://www.unicef.org/rosa/sites/unicef.org/rosa/files/2018-03/VACineducation.pdf>; <http://unesdoc.unesco.org/images/0024/002447/244756e.pdf>; United Nations Development Programme, “Lost in Transition: Transgender People, Rights and HIV Vulnerability, in the Asia –Pacific Programme”, 2012, available at: [http://www.undp.org/content/dam/undp/library/hiv/UNDP\\_HIV\\_Transgender\\_report\\_Lost\\_in\\_Transition\\_May\\_2012.pdf](http://www.undp.org/content/dam/undp/library/hiv/UNDP_HIV_Transgender_report_Lost_in_Transition_May_2012.pdf).

<sup>873</sup> Alex Muller, “Scrambling for access: availability, accessibility, acceptability and quality of healthcare for lesbian, gay, bisexual and transgender people in South Africa”, *The Open Access Publisher*, 2017, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5450393/>.

transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”<sup>874</sup>

The South African Constitution explicitly prohibits discrimination against persons based on “sexual orientation”.<sup>875</sup> The Constitutional Court has repeatedly reaffirmed this right.<sup>876</sup> More recently South African courts have also been engaged in ensuring human rights protections for transgender persons.<sup>877</sup> Despite this, with the notable exception of family and marriage-related cases, cases directly on ESCR *and* including sexual orientation and gender-identity related dimensions remain sparse.

Legal practitioners and human rights defenders should be alert to the intersections between discrimination based on sexual orientation and gender in the context of ESCR. As the Constitutional Court has noted “references to ‘gender’ are references to an identity that can change over time, and that differs from one culture or society to another. Gender is both a social construct and a personal identity”.<sup>878</sup> Legal practitioners will therefore need to guide courts in understanding the wide spectrum of gender identities protected against gender discrimination and remain conscious, that, in determining whether discrimination based on sexual orientation has taken place, an individual’s own self-identified gender will be directly relevant.

---

<sup>874</sup> *supra*, note 186, para 32.

<sup>875</sup> Section 9(3)-9(5) Constitution of South Africa.

<sup>876</sup> *Minister of Home Affairs & Another v Fourie & Another* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC)

<sup>877</sup> *KOS & Others v Minister of Home Affairs & Others* [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC); Mandivavarira Mudarikwa et al “Recognition of Economic, Social and Cultural Rights: A continued struggle for persons with diverse gender identities, gender expressions and sex characteristics in South Africa” *Recommendations submitted to the Working Group on South Africa Committee on Economic, Social and Cultural Rights*, 61<sup>st</sup> Session, 2018, available at: [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fZAF%2f32541&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fZAF%2f32541&Lang=en).

## V. REMEDIES AND AVENUES FOR REDRESS FOR ESCR VIOLATIONS

It is a general principle of law that there are no rights without remedies, and a firmly established standard in international law that those subjected individually or collectively to human rights violations have the right to an effective remedy for such violations.<sup>879</sup> Indeed, all States clearly endorsed these general principles and many elements of what the right to an effective remedy incorporates when they adopted by consensus resolution of the UN General Assembly the UN Basic Principles on Remedy and Reparation.<sup>880</sup>

While these Principles address *gross* human rights violations and serious violations of international humanitarian law in particular, Articles 1-3 express the general obligations that pertains to all human rights violations, more generally. Article 3 sets out the general position in international law, and reads as follows:

"3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

---

<sup>879</sup> *supra*, note 20, p. 20 ("It is a general principle of law that every right must be accompanied by the availability of an effective remedy in case of its violation. For a remedy to be effective, those seeking it must have prompt access to an independent authority, which has the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress harm.").

<sup>880</sup> *supra*, note 321.

- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below."

The right to an effective remedy is provided expressly or recognized through jurisprudence of supervisory authorities and treaty bodies tasked with interpreting all UN human rights treaties, including ICESCR, as well as regional human rights treaties, like the African Charter.

Accordingly, these general principles apply with equal force to violations of ESCR as any other rights protecting in international human rights law. The Maastricht Guidelines also affirm, specifically in the context of ESCR, that "any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels".<sup>881</sup> CESCR has repeatedly confirmed that the internationally recognized right to a remedy applies to ESCR pursuant to their obligations under the ICESCR.<sup>882</sup>

For a more detailed and comprehensive analysis of the right to remedy in international law, legal practitioners are advised to refer to the ICJ's Practitioners Guide on the Right to Remedy and Reparation.<sup>883</sup> Briefly, according to the UN Principles on Remedy and Reparation, effective reparation for a violation or abuse of human rights must include, singly or in combination

---

<sup>881</sup> *supra*, note 26.

<sup>882</sup> See, for example, Committee on Economic, Social and Cultural Rights: General Comment No. 7 on Forced Evictions and the Rights to Adequate Housing, UN Doc HRI/GEN/1/Rev.6 at 45 (1997); General Comment No. 15 on the Right to Water, UN Doc HRI/GEN/1/Rev.6 at 105 (2003). See also CESCR General Comment 24.

<sup>883</sup> The Right to a Remedy and Reparation for Gross Human Rights Violations Practitioners Guide No. 2 (Revised Edition) 2018 available <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>.

as necessary: restitution; compensation, rehabilitation; satisfaction and guarantees of non-repetition.<sup>884</sup>

While domestic courts and mechanisms will generally be the place of first resort for victims of violations to obtain effective remedy and redress, legal practitioners are advised that:

“victims of violations of ESC rights and their counsel may have to consider bringing their case to the scrutiny of international or regional human rights protection mechanisms, when they have been unable to obtain justice at domestic level, either because the laws or legal mechanisms are unavailable or ineffective in practice.”<sup>885</sup>

## **1. International Redress**

At the international level there are a range of mostly quasi-judicial mechanisms and procedures through which legal practitioners and human rights defenders can escalate their complaints and grievances in the terms detailed throughout this Guide.

To begin with, South Africa is obliged to report periodically on the performance of its obligations under the full complement of human rights treaties to which it is party, it has ratified, most of which contain at least some ESCR obligations. Civil society organizations, groups and individuals are given the opportunity to participate in these reporting processes by making submissions to United Nations Treaty Bodies who are considering state reports. Relevant United Nations Treaty Bodies that South Africa must report to include:

- the Committee on the Elimination of Racial Discrimination (for reporting on the International

---

<sup>884</sup> Basic Principles on the right to a remedy and reparation for victims of gross violations of human rights law and serious violations of humanitarian law, adopted by General Assembly Resolution 60/147, UN Doc A/RES/60/147 (2005) (cited as UN Principles on Remedy and Reparation), Principles 18 to 23. See *supra*, note 883, pp. 156 – 157 for a fuller explanation of extent to which these forms of remedy apply to all human rights violations.

<sup>885</sup> *supra*, note 20.

Convention on the Elimination of all Forms of Racial Discrimination),

- the Committee against Torture (for reporting on the Convention against Torture),
- the Human Rights Committee (for reporting on the International Covenant on Civil and Political Rights);
- the Committee on the Elimination on all Forms of Discrimination Against Women (for reporting on the Convention on the Elimination on all Forms of Discrimination Against Women);
- the Committee on the Rights of the Child (for reporting on the Convention on the Rights of the Child);
- the Committee on the Rights of Persons With Disabilities (for reporting on the Convention on the Rights of Persons With Disabilities) and
- the Committee on the Economic, Social and Cultural Rights (for reporting on International Covenant on Economic, Social and Cultural Rights).

Submissions to these UN treaty bodies on the extent which South Africa is adequately implementing its ESCR observations, including reporting on violations, can help to inform the Concluding Observations and Recommendations made to the South African State and thereby influence both specific and institutional reforms, redress and remedies for the violation of ESCR.

While this aspect of the mandate of treaty bodies does not directly constitute a remedy, it can lead to more effective remedies in the home States. The ICJ's experience shows that South African legal practitioners and human rights defenders inputs to UN treaty bodies have had major impacts on the recommendations of these bodies, which have often incorporated such inputs in full or in part.

Almost all of the treaties discussed in this Guide have complaints or "communications procedures" which allow for the treaty bodies corresponding "Optional Protocols", which are separate instruments ratified by states acknowledge through which aggrieved individuals and groups of individuals may in

principle bring complaints of alleged human rights violations directly to the attention of UN treaty bodies for adjudication.

For some treaties (such as the Convention Against Torture and Convention on the Elimination of Racial Discrimination) in order to enable such complaints being brought, the state will first have to make a declaration under the relevant treaty provisions recognizing the competency of the treaty body to consider individual communications of violations. For others (including ICESCR and the Convention on all forms the Elimination of Discrimination Against Women) there separate Optional Protocols specifically concerning communications procedures.

South Africa has made just such declarations recognizing the competency of the Committee on the Elimination of Racial Discrimination and the Committee against Torture to hear individual complaints, and have become to party to the Optional Protocols relating the communications procedures of the Convention on the Elimination on all Forms of Discrimination Against Women, Convention on the Rights of Persons With Disabilities and the International Covenant on Civil and Political Rights.<sup>886</sup> In its first report to CESCR South Africa indicated that though it had not yet acceded to the Optional Protocol to the Covenant on Economic, Social and Cultural Rights that this matter was "is receiving attention".<sup>887</sup>

Each of these complaints procedures have their own admissibility requirements, which include the requirement of the "exhaustion of local remedies" prior to the initiation of a complaint to a UN treaty body.

In addition to the requirements of the treaties themselves, each Committee has adopted rules of procedures governing in detail how the procedures are to be accessed and the detailed procedures for adjudication of the communications. Legal

---

<sup>886</sup> UN Treaty Body Database, See the list headed "Acceptance of individual complaints procedures for South Africa", available at: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN).

<sup>887</sup> *supra*, note 2, para 1.



practitioners and human rights defenders seeking to access these mechanisms should familiarize themselves with these rules.<sup>888</sup>

Finally, there are a variety of UN “special procedures”, which are mandates given by the UN Human Rights to independent experts on individual themes addressing important issues in their thematic reports that can be helpful to legal practitioners and human rights defenders searching for documentary and expert evidence of violations or in forming legal arguments of ESCR related claims.

Some special procedures also consider communications on individual cases and, while, with one exception (the Working Group on Arbitrary Detention) these special procedures do not adjudicate or pass judgment on the merits of individual claims, they may raise the cases with governments and in some instance publicize them in their public reports. These special procedures, which may take the form of Special Rapporteurs, Independent Experts, or Working Groups presently include, among others those focused on:

- the right to development;
- the right to education;
- the right to food;

---

<sup>888</sup> See United Nations Treaty Body Database: ‘United Nations Convention Against Torture’, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=65](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=1&DocTypeID=65); ‘International Convention on the Elimination of All Forms of Racial Discrimination’, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=65](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=6&DocTypeID=65); ‘Convention on the Elimination of all Forms of Discrimination Against Women’, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=65](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=65); ‘Committee on Economic, Social and Cultural Rights’, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/62/3&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/62/3&Lang=en); ‘International Covenant on Civil and Political Rights’, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=65](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=65); ‘Convention on the Rights of Persons with Disabilities’, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/1/Rev.1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/1/Rev.1&Lang=en).

- the right to health;
- the right to housing;
- the rights to water and sanitation;
- the situation of human rights defenders; and
- extreme poverty and human rights.<sup>889</sup>

As the ICJ's Practitioner's Guide on Adjudicating Economic, Social and Cultural Rights at National Level notes:

"many of these procedures, including those addressing ESC rights, communicate directly with States and other actors involved in violations in the context of their country missions and allegation letters, as well as through urgent appeals procedures requesting immediate action to avoid irreparable harm."<sup>890</sup>

Legal practitioners and human rights defenders can assist the work of Special Procedures mandate holders by providing them information on the laws, policies and practices in a particular country related to the relevant theme, as well as information on individual cases. Mandate holders may seek to visit specific countries where they have been made aware of particularly substantial problems such as widespread or systematic violations of rights that are not being effectively addressed and remedied. After such visits, mandate holders typically produce reports, which may be helpful to legal practitioners and human rights defenders in making persuasive arguments on adjudicate platforms as well in domestic and international advocacy efforts. Moreover, there is some precedent in the South African context for the direct intervention of special rapporteur's in litigation as *amicus curiae*.<sup>891</sup>

---

<sup>889</sup> For a full list of mandate holders see:

<https://www.ohchr.org/EN/HRBodies/SP/Pages/Currentmandateholders.aspx>.

<sup>890</sup> *supra*, note 20, p 163.

<sup>891</sup> For more information see: Socio-Economic Rights Institute, "SERI represents UN Special Rapporteur on the right to freedom of assembly in challenge of Gathering Act", (2018), available at: <https://www.seri-sa.org/index.php/latest-news/828-litigation-update-seri-represents-un-special-rapporteur-on-the-rights-to-freedom-of-assembly-and-association-in-challenge-of-protest-law-22-august-2018> ; *Mlungwana and Others v S and Another* ZACC 45; 2019 (1) BCLR 88 (CC).

## **2. Regional Redress**

The ICJ's Handbook on "Engaging Africa-based Human Rights Mechanisms" summarizes the various ways in which legal practitioners and human rights defenders may make use of African regional human rights mechanisms to ensure the protection of human rights, including ESCR.<sup>892</sup>

As in the international sphere, in Africa two main forms of recourse exist for human rights violations: 1) Regional human rights mechanisms established by treaties;<sup>893</sup> and 2) Regional quasi-judicial and judicial mechanisms with appropriate jurisdiction.<sup>894</sup> Both categories of mechanisms fall under the mandate of the African Commission on Human and People's Rights.

The most prominent regional quasi-judicial mechanism in Africa is the African Commission on Human and People's Rights. Staffed by mandate holders ("commissioners") and a professional secretariat, the African Commission is empowered under the African Charter to receive "communications" from aggrieved individuals and States about violations of the Charter rights.<sup>895</sup> After receiving communications and determining their admissibility in terms of the Commission's rules of the procedure,<sup>896</sup> the Commission will adjudicate complaints and provide remedies for violations of human rights it has determined to have occurred.

As is the case in regard to the communications made to UN treaty bodies the Commission's decisions develop a body of jurisprudence that can be called on by legal practitioners and human rights defenders in future complaints in domestic,

---

<sup>892</sup> International Commission of Jurists, "Engaging Africa based Human Rights Mechanisms: A Handbook for NGOs and CSOs", (2018), available at: <https://www.acdhrs.org/wp-content/uploads/2018/11/Africa-Engaging-Africa-based-HRM-Publications-Reports-Thematic-reports.pdf>.

<sup>893</sup> For a full list of special supervisory mechanisms see: <http://www.achpr.org/mechanisms/>.

<sup>894</sup> *supra*, note 892, p 51.

<sup>895</sup> *Id*, pp. 54-55.

<sup>896</sup> African Commission on Human and People's Rights, 'Communications Procedure', available at: <http://www.achpr.org/communications/>

regional and international fora. The process of assessment of complaint and adjudication itself also provides a platform for complainants to elevate and draw regional and international attention to their struggles in the absence of effective domestic redress.

The special mechanisms mandated by the African Commission are in some ways similar to those in terms the United Nations human rights system. The African Commission similarly appoints Special Rapporteurs, Committees or Working Groups on particular thematic rights issues, as well as country rapporteurs tasked with investigating and reporting on human rights issues in particular countries.<sup>897</sup> “Working Groups” consisting of several or more commissioners “assigned responsibility for deeper work in a thematic area”.<sup>898</sup>

Since 2004 the Commission has had a working group on Economic, Social and Cultural Rights, which has, for example, passed resolutions on topics such as on “Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services”<sup>899</sup> and undertaken country visits.<sup>900</sup> In addition, the mandate of the Commission’s working group on “Extractive Industries, Environment and Human Rights Violations” is clearly directly relevant to widespread ESCR violations on the African continent.<sup>901</sup>

The Commission typically tasks one out of the eleven appointed commissioners tasked with taking a lead on its working in the thematic area of Economic, Social and Cultural Rights.

---

<sup>897</sup> Id, pp. 56-57.

<sup>898</sup> Id.

<sup>899</sup> African Commission on Human and Peoples' Rights, “420: Resolution on States’ Obligation to Regulate Private Actors Involved in the Provision of Health and Education Services - ACHPR / Res. 420 (LXIV)”, 2019, available at: [http://www.achpr.org/sessions/64th\\_os/resolutions/420/](http://www.achpr.org/sessions/64th_os/resolutions/420/).

<sup>900</sup> African Commission on Human and Peoples' Rights, Angola: Promotion Mission 2010, available at: <http://www.achpr.org/states/angola/missions/promo-2010/>

<sup>901</sup> Working Group on Extractive Industries, Environment and Human Rights Violations, available at: <http://www.achpr.org/mechanisms/extractive-industries/>

### **NGO and CSO participation in proceedings of the African Commission on Human and People's Rights<sup>902</sup>**

While any CSO working in the field of human rights in Africa may apply for accreditation to engage directly with the African Commission, legal practitioners and human rights defenders are advised that that periodic collective engagement with the Commission typically gives civil society a more effective voice that neither the African Commission nor State Parties can ignore. Thus, over the years, CSOs and NGOs have established an "NGO forum" hosted by the African Centre for Democracy and Human Rights Studies for the purpose of networking and collective engagement with the Commission.

The NGO Forum, which is usually convened a few days before the official commencement of Ordinary Sessions of the Commission, provides opportunity for organizations to discuss and develop strategies for pressing human rights issues across thematic lines, receive and consider reports on the human situations from countries and regions in Africa and present a joint statement to the African Commission on the state of human rights in Africa and implementation of the African Charter. It also gives smaller and new organizations, especially those without observer status with the Commission, a voice to air pressing matters of human rights concern. Some of the resolutions eventually adopted by the Commission originate from the Forum as matters of concern raised and exhaustively discussed by civil society.

Finally, the NGO Forum also provides opportunity for interaction and direct contact with Commissioners, as it is common for some of them to attend sessions of the NGO Forum upon invitation. Legal practitioners and human rights defenders may therefore make strategic use of the NGO Forum to leverage further attention for their claims for protection of ESCR rights in terms of the African Charter.

---

<sup>902</sup> *supra*, note 892, p. 65-66. This table is reproduced from the ICJ Handbook with only minor revisions.

In recent years some organizations have either struggled to receive accreditation to participate effectively in interactions with the African Commission or had their accreditation revoked. A clear example is the revocation by the Africa Commission of the observer status of the Coalition of African Lesbians, after sustained pressure and direction by the African Union.<sup>903</sup> This revocation appears to have occurred for discriminatory reasons and is a cause of concern for the future independence and effectiveness of the African Commission.

While the African Commission has been successful in providing for effective remedies for some complainants, there are inherent limitations in its status as a non-judicial mechanism and compliance rates by States may not be satisfactory. The African Court of Human and Peoples' Rights, more recently established under the Protocol to the African Charter on Human and Peoples' Rights Establishing the African Court on Human and Peoples' Rights, is a judicial body which is empowered to issue binding judgments.<sup>904</sup> Though the Court's Protocol has been in force since 2004, it only has jurisdiction over States that are parties to the Protocol,<sup>905</sup> including South Africa.<sup>906</sup>

---

<sup>903</sup> Frans Viljoen, 'Op-Ed: Africa's Rights Commission can – and should – do more for Sexual Minorities', 09 May 2019, available at: <https://www.chr.up.ac.za/opinion-pieces/1511-op-ed-africa-s-rights-commission-can-and-should-do-more-for-sexual-minorities>; See also *supra*, note 892, pp. 66 and 65 – 67, on the criterion for granting of observer status which includes that the organizations' objectives activities must be "in consonance with the principles and objectives in the AU Constitutive Act; African Charter and the Protocol to the African Charter on the Rights of Women in Africa".

<sup>904</sup> African Commission on Human and Peoples' Rights, "Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights", available at: [http://www.achpr.org/files/instruments/court-establishment/achpr\\_instr\\_proto COURT eng.pdf](http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto COURT eng.pdf).

<sup>905</sup> *supra*, note 892, p. 68.

<sup>906</sup> Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, available at: <http://www.achpr.org/instruments/court-establishment/ratification/>.

In Africa, there several sub-regional organizations, including in Southern Africa, the Southern African Development Community Treaty (SADC). For dispute resolution, SADC established the Southern African Development Community Tribunal (SADC Tribunal). The SADC Tribunal is, at the time of writing, no longer functional after some SADC States effectively obliterated its jurisdictions competencies after unfavorable decisions of the Tribunal. It is no longer empowered to receive complaints from non-State actors. However, in the aftermath of decisions of the Tanzanian High Court and the South African Constitutional Court declaring the conduct of the Tanzanian and South African governments in disempowering the SADC Tribunal unlawful, the pressure is increasing for its full reinstatement though its future remains in the balance.<sup>907</sup> Legal practitioners and human rights defenders are encouraged to participate in advocacy, research and litigation geared towards ensuring the SADC Tribunal can once become an effective avenue for the remedy and redress from ESCR violations.

Several binding protocols to the SADC Treaty, directly relevant to the protection and promotion of ESCR, have been adopted by SADC States, some of which engage ESCR obligations in the sub-region. These include SADC Treaty Protocol on Employment and Labour;<sup>908</sup> SADC Treaty Protocol on Health;<sup>909</sup> SADC Treaty Protocol on Education and Training;<sup>910</sup> and the SADC Treaty Protocol on Gender and Development.<sup>911</sup>

---

<sup>907</sup> International Commission of Jurists, *Tanzanian High Court condemns unlawful stripping of SADC Tribunal's powers rendering the rule of law a "pipe dream"*, 15 June 2019, available at: <https://www.icj.org/tanzanian-high-court-condemns-unlawful-stripping-of-sadc-tribunals-powers-rendering-the-rule-of-law-a-pipe-dream/>; See also *Law Society of South Africa and Others v President of the Republic of South Africa and Others* [2018] ZACC 51; 2019 (3) SA 30 (CC).

<sup>908</sup> Southern African Development Community, *Protocol on Employment and Labour*, 1999, available at: [https://www.sadc.int/files/5714/6193/6406/Protocol\\_on\\_Employment\\_and\\_Labour\\_-\\_English\\_-\\_2014.pdf](https://www.sadc.int/files/5714/6193/6406/Protocol_on_Employment_and_Labour_-_English_-_2014.pdf).

<sup>909</sup> Southern African Development Community, *Protocol on Health*, 1999, available at: [https://www.sadc.int/files/7413/5292/8365/Protocol\\_on\\_Health1999.pdf](https://www.sadc.int/files/7413/5292/8365/Protocol_on_Health1999.pdf).

<sup>910</sup> Southern African Development Community, *Protocol on Education Training*, 1997, available at:

Legal practitioners and human rights defenders are advised to make use of these regional and sub-regional mechanisms for the protection of ESCR. Depending on the political and social context within which violations occur, pressure emanating from recommendations and resolutions of regional and sub-regional African mechanisms complement, may in some instances, be strategically more effective in producing the desired outcomes than those deriving from other international sources.

However, legal practitioners and human rights defenders should bear in mind that these mechanisms – international, regional and sub-regional – are complementary, and not mutually exclusive. In choosing between UN and regional or sub-regional mechanisms for redress, one factor to keep in mind is the general rule in most UN treaty bodies regarding duplication of procedures. Although it is not necessary to exhaust regional remedies before attempting to access a UN treaty body, if a matter is contemporaneously under consideration by a regional mechanism, the UN treaty body may reject it as inadmissible.<sup>912</sup> However, if the regional mechanism resolves the matter in a manner that is not satisfactory to the complainant(s), he/she/they may then pursue the remedy with a UN treaty body.

### **3. Domestic Redress**

Various avenues for redress of ESCR violations are available in the domestic context in South Africa.

---

[https://www.sadc.int/files/3813/5292/8362/Protocol\\_on\\_Education\\_Training1997.pdf](https://www.sadc.int/files/3813/5292/8362/Protocol_on_Education_Training1997.pdf).

<sup>911</sup> Southern African Development Community, Protocol on Gender and Development, 2008, available at:

[https://www.sadc.int/files/8713/5292/8364/Protocol\\_on\\_Gender\\_and\\_Development\\_2008.pdf](https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf).

<sup>912</sup> For information see: International Justice Resource Center, 'Exhaustion of Domestic Remedies in the United Nations System', 2018, available at:

<https://ijrcenter.org/wp-content/uploads/2018/04/8.-Exhaustion-of-Domestic-Remedies-UN-Treaty-Bodies.pdf>, p. 16-17.



First, legal practitioners are advised to make use of administrative and judicial remedies established by law and relating to specific rights and even specific subsets of issues pertaining to particular rights. As examples, within the purview of the right to housing, the Rental Housing Act creates a Rental Housing Tribunal ideally placed deal with complaints of violations of housing rights relating to rental arrangements. Similarly, the Labour Relations Act sets up the Commission for Conciliation, Mediation and Arbitration (CCMA), a mechanism designed to resolve labour disputes without the need to resort to expensive and costly litigation. In addition to these and similar fora provided for in South African law, specialist courts exist to protect, as examples, children's rights (Children's Courts); workers rights (Labour Courts) and land rights (Land Claims Courts).

Second, another layer of protection is created by the South African Constitution in the form of so-called "Chapter 9 Institutions" or "State Institutions Supporting Constitutional Democracy". These institutions are established in terms of enabling legislation that is required by the Constitution and include: the South African Human Rights Commission (SAHRC), which is South Africa's accredited National Human Rights Institution;<sup>913</sup> the Commission for Gender Equality; the Public Protector; the Auditor General and Independent Electoral Commission.<sup>914</sup> Though the mandate of all such institutions has relevance to the protection of ESCR, given the particular relevance of the SAHRC and Public Protector and the breadth of their mandates and powers, they are selected as illustrative examples for the present purposes.

In additional to its general promotional mandate, the SAHRC may investigate individual complaints about human rights violations including ESCR. In addition, the SAHRC is competent to initiate inquiries or public hearings into specific human rights violations and produce reports making

---

<sup>913</sup> For more information on the international accreditation procedures for NHRI's see:

<https://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart%20%289%20May%202019%29.pdf>.

<sup>914</sup> s 184, Constitution of South Africa.

recommendations to the government in accordance with its findings. It has run inquiries relevant to ESCR including, as examples, socio-economic challenges of mining-affected communities,<sup>915</sup> mental healthcare,<sup>916</sup> emergency healthcare services<sup>917</sup> and water and sanitation.<sup>918</sup> The SAHRC is also empowered to “bring proceedings in a competent court or tribunal in its own name, or on behalf of a person or a group or class of persons”.<sup>919</sup> The SAHRC has, from time to time, intervened in litigation relating to ESCR.

The Public Protector’s mandate involves ensuring the accountability of governmental officials for the administration of State resources and institutions.<sup>920</sup> The Public Protector is broadly empowered to “investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice”, report on it, and take “appropriate remedial action”.<sup>921</sup>

---

<sup>915</sup> South African Human Rights Commission, National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa, available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf>.

<sup>916</sup> South African Human Rights Commission, “Report of the National Investigative Hearing into the Status of Mental Healthcare in South Africa”, 2017, available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Mental%20Health%20Report%20Final%2025032019.pdf>.

<sup>917</sup> South African Human Rights Commission, “Access to Emergency Medical Services in the Eastern Cape Hearing Report”, 2015, available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Report%20on%20Access%20to%20Emergency%20Medical%20Services%20in%20the%20Eastern%20Cape....pdf>.

<sup>918</sup> South African Human Rights Commission, “Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014”, available at: [https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf).

<sup>919</sup> Section 13 (3)(b), South African Human Rights Commission Act 40 of 2013.

<sup>920</sup> Public Protector Act 14 of 1994, as amended and ss 181 & 183 of the Constitution of South Africa.

<sup>921</sup> Constitution, s 182, Constitution of South Africa.

The Constitutional Court has indicated that, in the appropriate circumstances, the remedial action prescribed by the Public Protector is binding, specifically noting the connection between corruption and maladministration and ESCR violations. Because the “the tentacles of poverty run far, wide and deep” in South Africa and “litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen” the Constitutional Court has recognized that Public Protector has a crucial role to play in protecting human rights including ESCR.<sup>922</sup>

Finally, the judiciary, as the “ultimate guardians” of the Constitution in South Africa bear significant responsibility for the protection of ESCR.<sup>923</sup> Many ESCR claims are patently justiciable in terms of the South African Constitution and have frequently been successfully vindicated by the courts as the examples littered throughout this Guide illustrate. Legal practitioners and human rights defenders are advised that experience suggests that litigation strategies in South Africa relating to ESCR have often been most successful when undertaken in coordination with other forms of advocacy including: human rights education; protest and other forms of public advocacy including media advocacy; and advocacy on regional and international levels.<sup>924</sup>

When adjudicating ESCR cases, courts are directed in the exercise of their remedial powers by the Constitution which provides wide discretionary powers to courts in particular

---

<sup>922</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC), para 52.

<sup>923</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC)(SARFU II), para 72.

<sup>924</sup> Mark Heywood, South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health, in *Journal of Human Rights Practice*, Volume 1, 2009; Steven Budlender et al, “Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons”, 2015, available at: <https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>.

and requires them to ensure “just and equitable” remedies for violations of human rights.<sup>925</sup> Although context necessarily informs the content of an effective remedy and reparation for a violation of ESCR, South African courts have stressed that:

“in our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.”<sup>926</sup>

This, according to the Court, is particularly so because South Africa is “a country where so few have the means to enforce their rights through the courts” and “it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated”.<sup>927</sup>

Courts have therefore contemplated and ordered a wide range of “creative remedies” aimed at giving full effect to ESCR.<sup>928</sup> Such remedies may include, as examples, declarations of invalidity; interim and final interdicts;<sup>929</sup> meaningful engagement and mediation;<sup>930</sup> awards of compensation including those for “constitutional damages”;<sup>931</sup> supervisory and structural orders requiring those in violation of their obligations to report back to courts

---

<sup>925</sup> s 172(1)(b), Constitution of South Africa.

<sup>926</sup> *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786, para 69.

<sup>927</sup> *Id.*

<sup>928</sup> *Id.*

<sup>929</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC).

<sup>930</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

<sup>931</sup> See for example, *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* [2019] ZASCA 57; [2019] 3 All SA 69 (SCA) paras 23-26; See also Michael Bishop in “Remedies” in Constitutional Law of South (Woolman et al eds) 9-151- 9-157.

periodically;<sup>932</sup> and punitive costs orders made against intransigent state officials.<sup>933</sup>

Overall, legal practitioners and human rights are advised to think beyond traditional remedies available in civil cases towards requesting courts granting effective remedies that vindicate the rights of those whose ESCR have been violated. This is particularly necessary because:

"Since deprivations of socio-economic rights tend to be systemic and take place on a large scale, they cannot be remedied by a once-and-for-all court order sounding in money. Thus, the Court has emphasised the broader importance of developing effective and innovative remedies to redress any infringement of constitutional rights. This is particularly relevant in socio-economic rights cases, where impoverished communities often lack access to legal services, and cannot afford to engage in ongoing litigation to secure an effective remedy."<sup>934</sup>

---

<sup>932</sup> Id, Bishop pp. 9-179 – 9-189.

<sup>933</sup> See for example *Black Sash Trust v Minister of Social Development and Others* [2018] ZACC 36; 2018 (12) BCLR 1472 (CC).

<sup>934</sup> Khulekani Moyo, "The Jurisprudence of the South African Constitutional Court on Socio-economic Rights" available at: <https://www.fhr.org.za/files/7215/1247/1872/Jurisprudence.pdf> p. 15.

## VI. ANNEXURES

The following table is not comprehensive. It provides information relating to the status of international, regional and sub-regional treaties and protocols signed and/or ratified/acceded to by South Africa that are either referenced in this Guide or related directly to treaties and protocols so referenced.

<b>ANNEXURE A: SOUTH AFRICA – TREATY STATUS</b>			
<b>Treaty</b>	<b>Ratification or Accession Status</b>	<b>State Report</b>	<b>Concluding Observations</b>
<b>INTERNATIONAL HUMAN RIGHTS TREATIES</b>			
<b>Convention against Torture (CAT)</b>	Signed: Jan 1993 Ratified: Dec 1998	Nov 2017 Aug 2006	Dec 2006
<b>International Covenant on Civil and Political Rights (CCPR)</b>	Signed: Oct 1994 Ratified: Dec 1998	Nov 2014	April 2016
<b>Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</b>	Signed: Jan 1993 Ratified: Dec 1995	Mar 2010 Feb 1998	April 2011 July 1998
<b>International Convention on the Elimination of All Forms of Racial Discrimination (CERD)</b>	Signed: Oct 1994 Ratified: Dec 1998	Nov 2014 May 2005	Oct 2006
<b>International Covenant on</b>	Signed: Oct 1994	Jun 2017	Oct 2018

<b>Economic, Social and Cultural Rights (CESCR)</b>	Ratified: Jan 2015		
<b>Convention on the Rights of the Child (CRC)</b>	Signed: Jan 1993 Ratified: June 1995	Nov 2014 May 1998	Oct 2016 Feb 2000
<b>Convention on the Rights of Persons with Disabilities (CRPD)</b>	Signed: Mar 2007 Ratified: Nov 2007	Nov 2015	Oct 2018
<b>OPTIONAL PROTOCOLS TO INTERNATIONAL HUMAN RIGHTS TREATIES</b>			
<b>Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women</b>	Acceded: Oct 2005		
<b>Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b>	Signed: Sep 2006  Acceded: June 2019		
<b>Optional Protocol to the International Covenant on Civil and Political Rights</b>	Acceded: Aug 2002		

<b>Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty</b>	Acceded: Aug 2002		
<b>Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict</b>	Signed: Feb 2002 Ratified: Sep 2009		
<b>Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography</b>	Acceded: June 2003		
<b>Optional Protocol to the Convention on the Rights of Persons with Disabilities</b>	Signed: March 2007 Ratified: Nov 2007		



<b>AFRICAN REGIONAL HUMAN RIGHTS TREATIES</b>			
<b>African Charter on Human and People's Rights</b>	Signed: 9 July 1996 Ratified: 9 July 1996	May 2005 Aug 2015	Dec 2005 June 2016
<b>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa</b>	Signed: March 2004 Ratified: Dec 2004	May 2005 Aug 2015	Dec 2005 June 2016
<b>African Charter on the Rights and Welfare of the Child</b>	Signed: Oct 1997 Ratified: Jan 2000		
<b>African Charter on Democracy, Elections and Governance</b>	Signed: Feb 2010 Ratified: Dec 2010		
<b>AU Convention Governing Specific Aspects of Refugee Problems in Africa</b>	Signed: Dec 1995 Ratified: Dec 1995		
<b>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights</b>	Signed: June 1999 Ratified: March 2002		
<b>Protocol to the</b>	Signed: 29		

<b>African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities</b>	April 2019		
<b>Southern African Development Community Sub-Regional Human Rights Treaties</b>			
<b>Treaty of the Southern African Development Community</b>	Acceded: Aug 1994		
<b>SADC Treaty Protocol on Employment and Labour</b>	Signed: Aug 2014		
<b>SADC Treaty Protocol on Health</b>	Signed: Aug 1999		
<b>SADC Treaty Protocol on Education and Training</b>	Signed: Sep 1997		
<b>SADC Treaty Protocol on Gender and Development</b>	Signed: Aug 2008		

## Commission Members

March 2019 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

### President:

Prof. Robert Goldman, United States

### Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

### Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

### Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirkubanza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



International  
Commission  
of Jurists

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

t +41 22 979 38 00  
f +41 22 979 38 01  
[www.icj.org](http://www.icj.org)