

International Law in the Interpretation of Sections 25 and 26 of the Constitution

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

The protection of human rights is one of the main aims of international law. Since the Second World War, the United Nations and various other international organs have recognised the protection of human rights in various treaties. These treaties protect citizen's rights against possible infringement on the side of the state. South Africa was isolated from the development that occurred in international human rights law due to the system of apartheid. When South Africa became a democracy in 1994, international law had to be made part of South African law so that South Africa could once again take its place in the international community. Therefore, the Constitution of 1996 contains various sections that deal with international law and its place within the South African legal system. In particular, section 39(1)(b) of the Constitution places an obligation on courts, tribunals and forums to consider international law in interpreting the bill of rights.

With regard to section 39(1)(b), this thesis questions whether the Constitutional Court fulfils its obligation when interpreting the right to property and housing in sections 25 and 26 of the Constitution respectively. Through a discussion of Constitutional Court cases on the right to property, it is discovered that the Court does not optimally use the international law sources that are available. The Court does not reflect on the status of international law sources and confuses international law with foreign law. Therefore, the sources relating to the right to property in international and regional international law are outlined. On the basis of the available sources in international law that relate to the right to property, it is argued that there is no justification for the Court not considering the relevant international law sources.

With regard to the right of access to adequate housing in section 26 of the Constitution and the case law relating to the right, the Constitutional Court is more willing to consult international law to aid its interpretation of the right. This is partly attributable to fact that the right to adequate housing is a well developed right in international law. As a result, the Court refers to a wide range of international law sources when interpreting the right of access to adequate housing. However, the Court does not indicate the status of the various international law sources it uses to interpret the right to adequate housing.

Therefore, it is argued that in the instances where there are relevant international law sources available to aid the interpretation of the rights to property and adequate housing, they should be considered. In the event that the Constitutional Court uses international law sources, their status within South African law and their relevance to the rights in question should be made clear. As a result, a method for the use of international law as a guide to interpretation is proposed.

Opsomming

Die beskerming van menseregte is van groot belang in internasionale reg. Na afloop van die Tweede Wêreldoorlog het verskeie internasionale agente, met die Verenigde Nasies in die voorgrond, menseregte begin erken in verskeie internasionale konvensies. Omdat Suid-Afrika die apartheidstelsel toegepas het, was die Suid-Afrikaanse reg geïsoleerd van die ontwikkeling rakende die beskerming van menseregte in internasionale reg. Met die koms van demokrasie was Suid-Afrika genoodsaak om internasionale reg deel te maak van Suid-Afrikaanse reg om te verseker dat Suid-Afrika weer die internasionale gemeenskap kon betree. Gevolglik bevat die Grondwet van 1996 verskeie artikels wat met internasionale reg handel. In besonder plaas artikel 39(1)(b) 'n verpligting op howe, tribunale en ander forums om internasionale reg te gebruik wanneer enige reg in die handves van menseregte geïnterpreteer moet word.

In hierdie tesis word daar besin oor die vraag of die Grondwetlike Hof die verpligting in terme van artikel 39(1)(b) nakom wanneer die regte tot eiendom en toegang tot geskikte behuisung in artikels 25 en 26 onderskeidelik geïnterpreteer word. Na 'n bespreking van die grondwetlike sake wat verband hou met die reg tot eiendom, word die gevolgtrekking gemaak dat die Grondwetlike Hof nie die verpligting in terme van artikel 39(1)(b) konsekwent nakom nie. Die Hof verwys nie na relevante internasionale of streeks-internasionale reg nie. Verder verwar die Hof internasionale reg met buitelandse reg. In die gevalle waar die Hof wel gebruik maak van internasionale reg, word die status van dié reg in die Suid-Afrikaanse regstelsel nie duidelik uiteengesit nie.

Na aanleiding van die grondwetlike sake wat verband hou met die reg van toegang tot geskikte behuisung, is dit duidelik dat die Grondwetlike Hof meer gewillig is om internasionale reg in ag te neem. 'n Moontlike rede hiervoor is die feit dat die reg tot behuisung goed ontwikkel is in internasionale reg. Gevolglik maak die Grondwetlike Hof geredelik van internasionale reg gebruik om artikel 26 van die Grondwet te interpreteer. Nietemin, die status van die internasionale reg bronne wat die Hof wel gebruik word nie uiteengesit nie.

Daarom word daar aangevoer dat indien daar internasionale reg beskikbaar is wat relevant is tot die geskil, behoort die Grondwetlike Hof sulke reg in ag te neem. Indien die Hof wel internasionale reg gebruik om die regte tot eiendom en toegang tot geskikte behuising te interpreteer, moet die status van die bronne uiteengesit word. Daarom word daar ook in die tesis 'n voorstel voorgelê hoe howe te werk moet gaan indien internasionale reg bronne geraadpleeg word.

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Introduction

1 1 Background to the Research Problem

Before South Africa became a democracy in 1994, the apartheid government was notorious for violating human rights. Without a bill of rights the courts were unable and unwilling to protect citizens' rights. Furthermore, the courts could not test legislation passed by Parliament. After the United Nations Charter¹ came into force in 1945, the international community actively started promoting the protection of human rights by means of numerous treaties recognising human rights and implementing mechanisms to effectively protect human rights. As a result of the apartheid system, South Africa was isolated from this development in international human rights law.

Since the United Nations' inception in 1945, the South African government was singled out as a violator of human rights.² When South Africa became a democracy in 1994, South Africa wanted to enter the international community and 'take its rightful place as a sovereign state in the family of nations'.³ In order to succeed at this aim, the bill of rights was included in the 1993 Constitution as well as in the Constitution of 1996 to protect the fundamental human rights of all people within the Republic. The Constitution recognises the fact that international law has an important role to play in South African law. This is evident through the various sections in the Constitution that deal with international law.

Section 231 of the Constitution makes international agreements binding on South African law when it has been approved by the National Assembly and the National Council of Provinces. However, in terms of section 231(3) an international agreement of a technical, administrative or executive nature becomes binding on South African law without the approval of the National Assembly and National Council of Provinces.⁴ Section 232 of the

¹ Charter of the United Nations, signed on 26 June, entered into force on 24 October 1945, 1 UNTS XVI.

² See Dugard J 'Racism and Repression in South Africa: The Two Faces of Apartheid' (1989) 2 *HVHRJ* 97-99 at 97.

³ Preamble of the Constitution of 1996.

⁴ Botha N 'Treaty-making in South Africa: A Reassessment' (2000) 25 *SAYIL* 71-96 at 77 states that an agreement of a technical, administrative or executive nature is an agreement that flows from the day to day activities of the government departments.

Constitution makes customary international law part of South African law if it is not in conflict with the Constitution or an act of Parliament. With regard to customary international law, South Africa follows a monistic approach in which domestic law and international law are regarded as one system of law.⁵ According to Dugard, section 232 gives constitutional standing to the common law position regarding customary international law and gives it additional weight.⁶ Section 233 of the Constitution requires courts to favour an interpretation of legislation that is consistent with international law rather than inconsistent, if such an interpretation is reasonably possible. Therefore, international law is deemed to play an important role in South African law.

The Constitution of 1993 also made international law applicable in the interpretation of the bill of rights.⁷ This approach was carried forward to the Final Constitution of 1996. Section 39(1)(b) of the Constitution of 1996 obliges courts to consider international law in interpreting the bill of rights.⁸ According to Liebenberg, section 39(1)(b) of the Constitution 'signals the Constitution's openness and receptiveness to the norms and values of the international community'.⁹ In addition, section 39(1)(c) makes it possible for courts to consider foreign law when interpreting the bill of rights.

To fulfil the obligation in terms of section 39(1)(b), courts must consider international law when a right in the bill of rights is interpreted. Therefore, when a right in the bill of rights needs to be interpreted, courts must take due cognisance of the relevant sources of international law to guide their interpretation. In *S v Makwanyane* (hereafter '*Makwanyane*'),¹⁰ the Constitutional Court stated that binding and non-binding international law, together with customary international law, create the framework within which the bill of rights must be understood. In *Makwanyane*, the Court specifically included the regional

⁵ See Dugard J *International Law: A South African Perspective* (3rd ed 2005) 55.

⁶ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 55.

⁷ S 35(1) of the 1993 Constitution.

⁸ The obligation in terms of s 39(1) of the Constitution applies to courts, tribunals and forums.

⁹ Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 101.

¹⁰ 1995 (3) SA 391 (CC) para 35.

international law of the European Council and the Organisation of American States as international law that can be used as a guide to interpret the bill of rights.¹¹

The obligation in terms of section 39(1)(b) should be distinguished from the obligation to apply international law that is binding on South African law.¹² The obligation in section 39(1)(b) of the Constitution is an obligation placed on courts, tribunals and forums to consider international law as a guide to the interpretation of the rights in the bill of rights. In the event that South Africa ratified a treaty, it becomes directly binding on South African law in terms of section 231 of the Constitution.

The right to property in section 25 of the Constitution forms part of the bill of rights. Therefore, section 25 should also be interpreted with the aid of relevant international law. However, with regard to the case law on the right to property, the Constitutional Court has not consistently adhered to this obligation. As an example, the Constitutional Court attempted to use international law in the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (hereafter 'FNB').¹³ In the *FNB* decision, the Constitutional Court had to decide whether the detention and sale of goods in terms of section 112 of the Customs and Excise Act¹⁴ constituted a deprivation for purposes of section 25(1) of the Constitution and should therefore have been declared unconstitutional.

During the course of the judgment the Constitutional Court acknowledged the obligation placed on it in terms of section 39(1)(b) of the Constitution. Furthermore, the Court noted the discretion it has in considering foreign law as made possible through section 39(1)(c). However, the Constitutional Court did not have proper regard to international law. The Court presented a lengthy discussion of the laws of the United States, Australia, Germany and the United Kingdom on the subject of deprivation.¹⁵ The Court also considered the

¹¹ *S v Makwanyane* 1993 (3) SA 391 (CC) para 35. The Court also stated that reports made by specialised agencies such as the International Labour Organisation can be used by the South African courts as interpretive guides.

¹² See Liebenberg *S Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 103.

¹³ 2002 (4) SA 768 (CC).

¹⁴ Act 91 of 1964.

¹⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2001 (4) SA 768 (CC) paras 71-97.

laws of these jurisdictions, together with the law of the Council of Europe as developed by the European Court on Human Rights under the European Convention on Human Rights and Fundamental Freedoms.¹⁶ Therefore, not only did the Constitutional Court confuse international law with foreign law, it also did not have proper regard to the status of regional international law. In subsequent property law cases, such as *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*¹⁷ and *Du Toit v Minister of Transport*,¹⁸ the Constitutional Court made no reference to international law that might have been available.

The right of access to adequate housing also forms part of the bill of rights and courts must consider international law when this right needs to be interpreted. With regard to the right of access to adequate housing in section 26 of the Constitution, the Constitutional Court has been more willing to consult international law sources. In *Government of the Republic of South Africa v Grootboom*,¹⁹ the Constitutional Court relied on the International Covenant on Economic, Social and Cultural Rights (the 'ICESCR')²⁰ as well as the General Comments of the Committee on Economic, Social and Cultural Rights. Similarly, in *Jaftha v Schoeman*; *Van Rooyen v Stoltz*²¹ the Constitutional Court relied on the ICESCR and the General Comments of the Committee. However, the Court did not consider or discuss the status of these sources. The ICESCR is not binding on South African law, and although courts are able to consult non-binding international law,²² its status within South African law was not made clear.

Therefore, the main research problem addressed in this thesis concerns the role that international law should play and has played in the interpretation of the property rights in sections 25 and 26 of the Constitution. To illustrate the discussion the thesis will analyse the various cases before the Constitutional Court where the obligation in terms of section 39(1)(b) was either completely ignored or, in the event that it was recognised, applied

¹⁶ Signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 222, ETS 5.

¹⁷ 2005 (1) SA 530 (CC).

¹⁸ 2006 (1) 297 (CC).

¹⁹ 2001 (1) SA 46 (CC).

²⁰ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1973, 993 UNTS 3.

²¹ 2005 (2) SA 140 (CC).

²² *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

incorrectly. The Court tends to confuse international law with foreign law, and as a result does not give proper effect to international law when interpreting the bill of rights. The status of international law sources and their relevance in South African law is also not made clear at all times.

1 2 Research Question, Hypothesis and Methodology

The research question guiding the research is to determine how international human rights law can be used effectively by South African courts in interpreting and expanding human rights entrenched in the bill of rights. This question is addressed with specific reference to the protection of property and the right of access to adequate housing in sections 25 and 26 of the Constitution.

South Africa is party to numerous conventions, both international and regional.²³ Parts of the Constitution were drafted with these and other conventions in mind²⁴ and in some instances the Constitution was drawn up to adhere to the principles set out in these conventions. Therefore, in addition to the constitutional obligations in terms of section 39(1)(b) it can be argued that courts must consider these conventions because the Constitution and many of the international human rights conventions which the Constitution emulates have the same objective. As was stated by the Constitutional Court in *Kaunda v President of the Republic of South Africa*, ‘these international instruments enshrine the fundamental human rights that are generally to be found in our Constitution’.²⁵ It is also argued that international law can prove to be an effective guide on the interpretation of certain rights.

²³ Such as the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171; the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990, 1557 UNTS 3, 28 ILM 1456; the Convention on the Elimination of All Forms of Discrimination Against Women, adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 December 1981, 1249 UNTS 13, 19 ILM 33 and the African (Banjul) Charter on Human and Peoples’ Rights, adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58 (1982).

²⁴ See in this regard a discussion of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child with regard to the drafting of the Interim and Final Constitutions in Heyns C and Viljoen F ‘The Impact of Six Major UN Human Rights Treaties in South Africa’ (2001) 16 *SAPL* 28.

²⁵ 2005 (4) SA 235 (CC) para 158.

As a point of departure it is assumed, in view of the case law presented above, that South African courts do not consistently adhere to the obligation to consider international law to interpret the bill of rights. The courts fail to take international and regional international law into consideration as they are obliged to do in terms of section 39(1)(b). Furthermore, the courts tend to confuse international law with foreign law, and judges are sometimes under the impression that when they have considered foreign law or made a comparative case law study, they have fulfilled their obligation in terms of section 39(1)(b) of the Constitution.²⁶

With regard to sections 25 and 26 of the Constitution the hypothesis guiding the present research is that the courts can only fulfil their obligation in terms of section 39(1)(b) if they consider the international law sources that could be applicable in the matter in order to assist the interpretation of the bill of rights. As a result, the aim of the thesis is two-fold. The first aim is to set out the relevant international law sources available to the courts to interpret sections 25 and 26 of the Constitution. The second aim of this thesis is to propose a possible method for the application of these sources, as briefly addressed in chapter 4 and further outlined in the concluding chapter.

The relevant international law sources discussed in the present research consists of international conventions open for signature to all states, as well as general comments and communications produced by various international supervisory organs. The regional international law of the African Union, the European Union and the Organization of American States is further discussed, since regional international law falls under the broad term of international law.²⁷ In addition, regional international law is relevant because it is an effective guide of interpretation. The law of the African Union, as developed under the African Charter on Human and Peoples' Rights²⁸ by the African Commission on Human

²⁶ For instance, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 71-97.

²⁷ Shaw MN *International Law* (5th ed 2003) 2. Shaw states that international law may also be regional, 'whereby a group of states linked geographically or ideologically may recognise special rules applicable only unto them'.

²⁸ Adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58 (1982).

and Peoples' Rights, is an important international law source, because it is directly binding on South African law. The jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, as well as the communications of the Inter-American Commission on Human Rights are also discussed because they complement and strengthen the international human rights conventions, even though they are not directly binding on South Africa.²⁹

The international law sources available to the courts to help interpret the right to property and the right of access to adequate housing in terms of sections 25 and 26 of the Constitution respectively are outlined and analyzed in the chapters that follow. The hierarchy of these sources is discussed, as well as whether these sources are binding on South Africa or not. As a result of the *Makwanyane*³⁰ decision, courts are allowed to consider non-binding international law. However, the Constitutional Court has in the past referred to non-binding instruments without proper justification as to why the particular non-binding instrument finds application in a particular case.³¹

To determine the use of international law prior to the constitutional era, the place of international law within the South African legal system is considered. This serves as an illustration of South Africa's isolation from the international community. Through a discussion of South African case law and constitutions before the Interim Constitution of 1993, the change which both the 1993 and 1996 Constitution brought about with regard to international law becomes apparent.

The constitutional provisions dealing with international law in the 1993 Constitution are discussed to indicate the effect that the 1993 Constitution had on the status of international law within South African law. Thereafter the international law provisions in the 1996 Constitution are considered to compare the effect this Constitution had on the use of international law under the 1993 Constitution. Early constitutional case law is discussed to

²⁹ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 330.

³⁰ *S v Makwanyane* 1995 (3) SA 391 (CC).

³¹ See for instance *Jafftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), in which the Constitutional Court relied on the ICESCR, an instrument that is not binding on South African law as well as the General Comments of the Committee on Economic, Social and Cultural Rights without making the status of these sources clear.

present an overview of the utilization of international law in order to derive general principles on the applicability of international law in South African law. Although the early Constitutional Court cases indicate a willingness to consider a wide range of international law sources to interpret the bill of rights,³² further case law suggests that the Court did not adhere to this approach consistently.³³ Recent constitutional case law is further discussed to illustrate this point.

Furthermore, an overview of international treaties and regional conventions dealing with the right to property and housing is presented. International treaties and regional conventions dealing with specific groups of persons, for instance children, refugees and women, are also outlined. The jurisprudence of regional international courts as well as communications by regional commissions are discussed, since these supervisory organs have interpreted the right to property and housing to some extent. The general comments made by international committees that have interpreted the right to property and housing, or the property and housing rights of specific persons, are discussed. Furthermore, the writings of academic authors on the topic of international law, both in relation to the general principles of international law and the right to property and the right to adequate housing are analyzed.³⁴

1 3 Overview of Chapters

Chapter 2 discusses South Africa's isolation from the development that took place in international law during the period of apartheid. It is indicated that the principle of parliamentary sovereignty and the fact that courts could not protect the rights of citizens against the powers of the supreme government resulted in many human rights violations. While the international community began to actively protect human rights through international treaties, starting with the Universal Declaration of Human Rights of 1948 (the

³² In *S v Makwanyane* 1995 (3) SA 391 (CC) para 35 the Constitutional Court noted a wide range of international law sources that might be used to aid the interpretation of the right to life.

³³ In *Azanian Peoples' Organisation v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 26, discussed in chap 2 at 2 4 3, the Constitutional Court rejected international law from the outset without further investigating the principles relevant to the case that have crystallised in international law.

³⁴ According to art 38(d) of the Statute of the International Court of Justice, the 'teachings of the most highly qualified publicists of the various nations' may be recognized as a subsidiary source of international law that courts may consult: Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 193-194.

'UDHR')³⁵ and the International Covenants of 1966,³⁶ South Africa implemented the system of apartheid and violated various human rights protected in international law. The use of international law prior to the 1993 Constitution is discussed to illustrate the effect that both the 1993 and 1996 Constitution had on the use of international law in South African jurisprudence.

In chapter 3 the use of international law in interpreting the right to property in section 25(1)-(3) of the Constitution of 1996 is discussed. The international and regional international law sources available to courts are outlined according to their hierarchy, to indicate the sources available to courts in interpreting the right to property. It is argued that the Constitutional Court does not effectively use the available international law sources when interpreting the right to property. Furthermore, it is shown that the Court confuses international law with foreign law and as a result conflates the obligation to consider international law in terms of 39(1)(b) with the discretion to consider foreign law in terms of section 39(1)(c) of the Constitution. Furthermore, the property rights of refugees and women in international and regional international law are discussed, because these vulnerable groups' right to property has received additional attention in international and regional international law.

In chapter 4 the Constitutional Court's use of international law in interpreting section 26 of the Constitution, the right of access to adequate housing, is discussed. Through the discussion on the sources of international law it becomes apparent that the right to adequate housing is a well developed area of international law, even though an independent right to adequate housing is not found in international law. The Constitutional Court is prepared to consider international law when interpreting the right to adequate housing to a greater extent than in the case of interpreting section 25. Although the regional international law systems discussed do not contain a right to adequate housing, the relevant supervisory organs of the African Union, the European Union and the

³⁵ Adopted by the General Assembly of the United Nations, Resolution 217 (III) of 10 December 1948, UN doc A/810.

³⁶ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3 and the International Covenant on Civil and Political Rights (the 'ICCPR'), adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

Organisation of American States have attempted to protect the right to adequate housing, and the development in this regard is discussed.

The tension that exists between the right to property and the right to housing is also discussed in this chapter. Protecting a property right of one person may lead to a violation of the right to adequate housing of another person and the balancing of these competing interests is discussed briefly. Chapter 4 continues with a discussion on eviction. The protection against arbitrary eviction is found in section 26(3) of the Constitution. The Committee on Economic, Social and Cultural Rights, under the auspices of the ICESCR³⁷ has indicated that protection against arbitrary eviction is an important component of the right to adequate housing. Therefore, the prohibition against arbitrary eviction in international law is compared with section 26(3) and additional legislation that deals with eviction.

1 4 Definitions and Limitations

Certain limitations are placed on the research in order to effectively answer the research question that was presented. In addition, since international law uses terms that might differ from the terms used in South African law, those terms are briefly explained here.

Although the obligation in terms of section 39(1)(b) applies to courts, tribunals and forums, attention is given to the use of international law by courts only. Furthermore, only judgments handed down by the Constitutional Court will be considered for reasons of space. The international law discussed mainly includes international human rights law, as developed under the UDHR,³⁸ the ICESCR³⁹ and the ICCPR.⁴⁰ Although humanitarian law

³⁷ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

³⁸ Adopted by the General Assembly of the United Nations, Resolution 217 (III) of 10 December 1948, UN doc A/810.

³⁹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

⁴⁰ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

also protects property and housing rights, it was omitted from the present research because it only finds application during times of war or civil unrest.

With regard to the right to property in section 25 of the Constitution, international law that concerns deprivation and expropriation in terms of section 25(1)-(3) is discussed. Section 25(4)-(9), which deals with land reform, including restitution, has been excluded to limit the scope of the discussion, since land reform deserves so much attention that it will shift the core question of the present research.

The property rights of indigenous and tribal peoples are protected in international law by, amongst others, article 27 of the ICCPR. Article 27 protects minority group rights and has been interpreted by the Human Rights Committee to include the land occupied by indigenous peoples.⁴¹ Although the ICCPR is binding on South African law, the property rights of indigenous and tribal peoples are not discussed here because these rights relate closely to land restitution and a discussion of their protection would incorporate a discussion of section 25(7) which, as was indicated above, has been excluded from this project.

With regard to the right to housing, section 26 of the Constitution provides for a right of access to adequate housing. In international law, it is merely a right to adequate housing. Although the Committee on Economic, Social and Cultural Rights has stated that the right to adequate housing should be accessible,⁴² the difference between the right of access to adequate housing in South African law and the right to adequate housing in international law is addressed in chapter 4. It is argued that the accessibility factor laid by the Committee, which is aimed at specific groups of people, cannot limit the right in section 26, which is a right of access to adequate housing available to everyone.

⁴¹ See *Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, Communication Nr 167/1984 of the Human Rights Committee, 26 March 1990, UN doc CCPR/C/38/D/167/1984; *Kitok v Sweden*, Communication Nr 197/1985 of the Human Rights Committee, 27 July 1988, UN doc CCPR/C/33/D/197/1985; *Länsman v Finland*, Communication Nr 511/1992 of the Human Rights Committee, 8 November 1994, UN doc CCPR/C/52/D/511/1992.

⁴² Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8(e).

In international law, forced eviction is spelt out in broad terms. Furthermore, international law provides guidelines to states regarding problem areas concerning eviction. In South African law, eviction is more defined and developed than in international law. However, international law still provides over-arching principles regarding evictions that could be useful to the further development of eviction law in South Africa. Therefore, the position regarding forced eviction in international law is compared to the position regarding eviction in South African law.

2

The Constitutional Obligation and International Law

2 1 Introduction

The Interim Constitution of 1993¹ changed the constitutional system that prevailed in South Africa since the early 1900s. Before the 1993 Constitution was agreed to, Parliament was supreme in the sense that it could pass legislation without fear that the substance of legislation would be tested by a court of law.² According to Mureinik, the dawning of the new constitutional era in South Africa, with a supreme Constitution and an entrenched bill of rights, represents a bridge from a culture of authority towards a culture of justification.³ The authority that Parliament once had to promulgate laws and change parliamentary institutions at will had to make way for a system where Parliament's actions need to be justified and where its decisions may be reviewed judicially.

Before 1994, various human rights were violated by numerous laws that were promulgated by Parliament. There was no bill of rights or other legislation available to either citizens or courts to protect the citizens' human rights against the power of the state. As the Appellate Division stated in 1934:

'Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and ... it is the function of courts of law to enforce its will.'⁴

The protection of human rights is one of the main aims of international law.⁵ International law can be described as the rules and principles that bind states in their relations with each other and, in relation to human rights law, place obligations on the state towards its citizens.⁶ Since the Second World War it has become clear that international law also

¹ Act 200 of 1993.

² According to Carpenter G *Introduction to South African Constitutional Law* (1987) 77, '[p]arliamentary sovereignty means, in brief, that Parliament, consisting of the elected representatives of the people, is the supreme authority in the country. Despite the powerful position occupied by the executive, the Cabinet remains accountable to Parliament, and the judiciary has no power to invalidate parliamentary legislation which has been duly passed'. See 2 2 below regarding the reception of this principle into South African law.

³ Mureinik E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1993) 10 *SAJHR* 31-48 at 32.

⁴ *Sachs v Minister of Justice* 1934 AD 11 at 37.

⁵ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 308.

⁶ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 1.

extends to individuals. This is evident from the acceptance of the Universal Declaration of Human Rights in 1948 (the 'UDHR').⁷ This declaration was followed by the International Covenant on Economic, Social and Cultural Rights (the 'ICESCR')⁸ and the International Covenant on Civil and Political Rights (the 'ICCPR').⁹ These three instruments form the international bill of rights, which strives to protect the individual's human rights if a state fails to protect such rights. Before the 1993 Constitution was enacted the protection of individual human rights in South Africa had not received the attention it generally enjoyed in the international community. A possible reason for this was the fact that South Africa followed the principle of parliamentary sovereignty, in which Parliament could pass legislation that was contrary to international human rights standards and that violated human rights. The courts could not protect citizens against the encroachments of their rights as the courts had no right to test the substance of legislation and there was no justiciable bill of rights to prevent the violation of human rights. With the enactment of the 1993 Constitution and the justiciable bill of rights, international law came to play an important role in the interpretation of human rights for two reasons: Firstly, international law principles contain provisions similar to those found in the bill of rights and as a result of the numerous debates concerning the interpretation of these rights in the international community there is vast literature on the interpretation of these rights¹⁰ and, secondly; courts are obligated by the Constitution to consider international law when interpreting the bill of rights.¹¹

Below, the principle of the sovereignty of Parliament together with the inability of the courts to test the substance of legislation will be discussed in order to demonstrate the lack of protection of human rights and the change that the 1993 Constitution brought about in protecting human rights. The violation of human rights during the apartheid regime came

⁷ Adopted by the General Assembly of the United Nations, Resolution 217(III) of 10 December 1948, UN doc A/810.

⁸ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

⁹ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

¹⁰ For instance, the right to life features in numerous international debates concerning abortion, capital punishment, euthanasia and war.

¹¹ S 39(1)(b) of the 1996 Constitution obliges courts, tribunals and forums to consider international when interpreting any right in the bill of rights. The possible reason for the inclusion of s 39 is the fact that lawyers and politicians had to consult comparative (international and foreign) law in order to draft the bill of rights: Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 1-2.

at a stage when the protection of human rights came to the forefront on the international arena. In entering a democratic society based on human dignity, equality and freedom,¹² human rights, already protected through international law instruments, were afforded protection in the 1993 Constitution and the 1996 Constitution. The place of international law, especially when the interpretation of a specific right is at issue, will be discussed with reference to the influence that the 1993 Constitution and the 1996 Constitution respectively had on the application of different areas of international law in South African law.

2 2 Constitutional History

In the late 19th century, Chief Justice Kotzé of the High Court of the *Zuid-Afrikaansche Republiek* (hereafter 'ZAR') tried to establish the courts' power of judicial review in the case of *Brown v Leyds*.¹³ Kotzé CJ and Ameshoff J found that legislation in conflict with the Constitution of the *Republiek* was invalid.¹⁴ President Kruger, the president of the ZAR at the time, did not accept the principle of judicial review and passed a bill through the House of Assembly denying the competence of the judiciary to test legislation. The bill also made it possible for the President to dismiss any judge who failed to assure the President that he would not exercise the right to test legislation.¹⁵ When Chief Justice Kotzé refused to assure the President that he would not exercise the courts' testing right in subsequent cases, the President dismissed Kotzé as Chief Justice. Kotzé ultimately left the bench after he gave a warning of the possible dangers of the supremacy of the House of Assembly.¹⁶ With the swearing in of the new Chief Justice, Gregorowski, President Kruger declared the testing right to be a principle of the devil himself, advising judges not to go the devil's way by exercising the testing right.

In 1910, the Union of South Africa came into being through the acceptance of the South Africa Act of 1909 by the British Imperial Parliament. The 1909 act was 'the logical product of the prevailing legal and political climate'¹⁷ at the time. JC Smuts, educated at

¹² S 7(1) of the 1996 Constitution.

¹³ (1897) 4 OR 17.

¹⁴ Carpenter G *Introduction to South African Constitutional Law* (1987) 139.

¹⁵ See Dugard J *Human Rights and the South African Legal Order* (1977) 22.

¹⁶ See Dugard J *Human Rights and the South African Legal Order* (1977) 22.

¹⁷ Dugard J *Human Rights and the South African Legal Order* (1977) 25.

Cambridge University, and JX Merriman, who held the British constitution in high esteem,¹⁸ were responsible for drafting the 1909 Constitution. As a result, the 1909 Constitution was based on the Westminster parliamentary system, a system which held as a fundamental doctrine the sovereignty of Parliament.¹⁹ The principle of parliamentary supremacy entailed that courts were unable to set aside an act of the legislature, even if such legislation was morally repugnant.²⁰ In line with the Westminster model, this constitution did not afford individual rights, nor did it contain a bill of rights.²¹

However, in 1910 the functions of the Union's legislative and executive branches of government were still subordinate to the will of the British Parliament. The British Parliament ended this subordination by adopting the Statute of Westminster in 1931. The Union government 'accepted' the Statute of Westminster in the Status of the Union Act²² in 1934.²³ As a result of this Act, the Union Parliament held sole legislative power in the Union. Therefore, the restraints that previously prevented the Union Parliament from passing legislation that would be void if the British Parliament found it to be repugnant, ceased to exist. With the adoption of the Statute of Westminster the Union Parliament became sovereign in its own right.

The National Party came to power in 1948. At that time, the coloured community in the Cape was still included on the voters' roll in the Cape. Their right to vote was at that time still protected by section 35 of the 1909 Constitution. Section 35, together with section 137,²⁴ were entrenched clauses which required a two-thirds majority of both the House of Assembly and the Senate before it could be amended.²⁵ The National Party government promulgated the Separate Representation of Voters Act²⁶ to remove the coloured community from the common voters' roll in order to create an all-white voters' roll. When

¹⁸ Thompson LM *The Unification of South Africa 1902-1910* (1960) 95.

¹⁹ See Dugard J *Human Rights and the South African Legal Order* (1977) 25-26.

²⁰ Motale Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) 2.

²¹ Seafeld L 'South Africa: The Interdependence of all Human Rights' in An-Na'im AA (ed) *Human Rights under African Constitutions* (2003) 295-341 at 297. This constitution included entrenched clauses that could only be changed by a two-thirds majority in a joint sitting of the House of Assembly and the Senate.

²² Act 69 of 1934.

²³ See Rautenbach IM and Malherbe EFJ *Constitutional Law* (4th ed 2004) 15.

²⁴ S 137 guaranteed the equal status of both English and Afrikaans.

²⁵ Carpenter G *Introduction to South African Constitutional Law* (1987) 140.

²⁶ Act 46 of 1951.

the validity of the Separate Representation of Voters Act²⁷ was challenged in *Harris v Minister of the Interior*,²⁸ the Appellate Division found that the act was invalid. The Government in turn passed the High Court of Parliament Act.²⁹ The function of this court was to review cases in which the Appellate Division invalidated an act of Parliament. The High Court of Parliament reversed the decision of the Appellate Division in *Harris v Minister of the Interior*.³⁰ The High Court of Parliament stated that the 1909 Constitution must be interpreted against the backdrop of English constitutional law and the powers of the British Parliament, whose actions could not be tested by the courts.³¹ Therefore, the South African courts were also unable to test the powers of the Union Parliament. In the subsequent case of *Minister of the Interior v Harris*,³² the Appellate Division invalidated the High Court of Parliament Act,³³ deciding that the High Court of Parliament was not a court as such and that the entrenched provisions of the 1909 constitution were protected only by the proper courts of law.³⁴

However, as a result of parliamentary supremacy, Parliament was able to override judgments given by the courts by various means if such judgments were in conflict with decisions made by Parliament. After the judgment was given in *Minister of the Interior v Harris*,³⁵ Parliament restructured both the Appellate Division and the Senate.³⁶ Consequently, the House of Assembly and the Senate passed the South African Act Amendment Act of 1956³⁷ which, in section 35, made it impossible for the courts to pronounce upon the validity of any law that was passed by Parliament. This was the final blow to the courts' right to test the validity of legislation passed by Parliament. Therefore, as Dugard explains, 'the dispute over the entrenched clauses convincingly established the principle of parliamentary supremacy'.³⁸

²⁷ Act 46 of 1951.

²⁸ 1952 (2) SA 428 (A).

²⁹ Act 35 of 1952.

³⁰ 1952 (2) SA 428 (A).

³¹ Carpenter G *Introduction to South African Constitutional Law* (1987) 146.

³² 1952 (4) SA 769 (A).

³³ Act 35 of 1952.

³⁴ See Carpenter G *Introduction to South African Constitutional Law* (1987) 143-147; Dugard J *Human Rights and the South African Legal Order* (1977) 31.

³⁵ 1952 (4) SA 769 (A).

³⁶ Dugard J *Human Rights and the South African Legal Order* (1977) 31.

³⁷ Act 9 of 1956.

³⁸ Dugard J 'The South African Constitution 1910-1980' in Mellett HF, Scott S and Van Warmelo P (eds) *Our Legal Heritage* (1982) 105-116 at 109.

In 1961, the ruling National Party changed the Union of South Africa into a Republic. This was done through the Republic of South Africa Constitution, Act 32 of 1961. This constitution did not effect any change to the constitutional principles that prevailed at the time. It could by now be established that the 'National Party Government had identified itself completely with the Westminster model and the principle of Parliamentary sovereignty'.³⁹ Although the courts' power to judicially review Parliament's actions had already been curtailed, section 59(2) of the 1961 Constitution provided that '[n]o court of law shall be competent to enquire into or pronounce upon the validity of any act passed by parliament', thereby constitutionally entrenching the principle that the courts had no testing right.

In 1983 a new constitution was accepted by the House of Assembly; the Constitution of South Africa of 1983.⁴⁰ This constitution did not change the supremacy of Parliament, nor did it afford courts the right to test Parliament's actions. The 1983 Constitution did, however, create a State President who could freely declare a state of emergency, during which time he could consolidate power in the executive even further.⁴¹ The major change this constitution introduced was to create the three houses of Parliament: one for whites; another for coloureds; and a third for Indians. This so-called tricameral Parliament was established in order to give each group equal footing in political life, but since the black population was excluded from this process and the white house of Parliament could override decisions made collectively by the coloured and Indian houses, this tricameral structure did not change the constitutional composition of the state since it still prevented the majority of South Africans from participating in the highest level of government.

It has been argued that the South Africa Act of 1909 and the Republic of South Africa Act of 1961⁴² were flexible constitutions, because they were based on the flexible Westminster system.⁴³ The 1983 Constitution contained more entrenched provisions than the previous constitutions did, but because none of the constitutions could be regarded as the highest

³⁹ Dugard J 'The South African Constitution 1910-1980' in Mellett HF, Scott S and Van Warmelo P (eds) *Our Legal Heritage* (1982) 105-116 at 110.

⁴⁰ Act 110 of 1983. This act came into operation on 3 September 1984.

⁴¹ Woolman S and Swanepoel J 'Constitutional History' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2008) 21:1-49 at 23.

⁴² Act 32 of 1961.

⁴³ See Carpenter G *Introduction to South African Constitutional Law* (1987) 283; Booysen H and Van Wyk DH *Die '83-Grondwet* (1984) 40.

law it meant that general legislation could not be declared invalid because of conflict with the spirit and values of any of the constitutions.⁴⁴ Entrenched provisions only meant that these provisions could only be changed by a special procedure.⁴⁵

As a result of the implementation of the policy of apartheid by the National Party Government, South Africa had been singled out by the United Nations since the organisation's inception as a 'principal violator of human right norms contained in the Universal Declaration of Human Rights and the United Nations Charter'.⁴⁶ From 1985 onwards, South Africa experienced numerous states of emergencies in order to deal with the uprising of black people against the apartheid policy. The National Party government retaliated, with the aid of emergency regulations, by adopting dictatorial methods to oppress black people, which involved 'a notorious assault on human rights'.⁴⁷

When the system of apartheid was abolished by President FW de Klerk in February 1991, it was clear that a justiciable bill of rights was needed to protect all South Africans against the power of the government. Therefore, a constitution with an entrenched bill of rights was needed that would afford individuals the necessary protection against the encroachment of their rights by the legislature or executive.⁴⁸ As a result, parliamentary sovereignty was abandoned and the bill of rights was inserted into the Interim Constitution of 1993,⁴⁹ which was declared the highest law.⁵⁰ Unlike the previous dispensation, the now independent judiciary was entrusted with the power to safeguard the entrenched bill of rights and the will of the legislature and executive was no longer absolute.

Before the Constitution of 1993⁵¹ South Africa never had an entrenched bill of rights. Therefore, the question regarding the interpretation of these entrenched rights arose. Section 39 of the Constitution of 1996 indicates to the courts how to interpret the bill of

⁴⁴ Carpenter G *Introduction to South African Constitutional Law* (1987) 283.

⁴⁵ Carpenter G *Introduction to South African Constitutional Law* (1987) 283.

⁴⁶ Dugard J 'Racism and Repression in South Africa: The Two Faces of Apartheid' (1989) 2 *HVHRJ* 97-99 at 97.

⁴⁷ Devenish G 'South Africa from Pre-colonial Times to Democracy: A Constitutional and Jurisprudential Odyssey' 2005 *TSAR* 547-571 at 565.

⁴⁸ Carpenter G *Introduction to South African Constitutional Law* (1987) 283.

⁴⁹ Act 200 of 1993.

⁵⁰ See s 4 of the 1993 Constitution and s 2 of the Constitution of 1996.

⁵¹ Act 200 of 1993.

rights. In particular, section 39(1)(b) requires the courts to consider international law when interpreting the bill of rights.

2 3 The Role of International Law

2 3 1 Introduction

For the reasons set out above, international law has not played an influential role in South African law during the apartheid era. Before the 1993 Constitution South Africa has not been party to any human rights convention, except for those concerning the suppression of slavery.⁵² While the South African government violated various fundamental human rights, the protection of human rights in the international community gained momentum.⁵³ Some of the laws that were promulgated in South Africa that contravened human rights included the Prohibition of Mixed Marriages Act,⁵⁴ the Population Registration Act⁵⁵ and the Group Areas Act.⁵⁶ The democratically elected government had to rectify this situation by ensuring that the protection of human rights received the consideration it had not received previously under South African law.

Before the coming into force of the Constitution of 1993, international law was generally viewed as law existing between recognized states and not enforceable by individuals. Therefore, it proved to be difficult to effectively enforce international human rights law in the South African domestic legal system before the 1993 Constitution was adopted.⁵⁷ South Africa had to devise a mechanism through which international human rights could be protected and enforced. In response to this problem, the justiciable bill of rights was included in the constitution so that an individual could lay claim to rights similar to the ones ordinarily found in international human rights law. As a result of this it is important to consider international human rights law and the application of these laws in international law in order to understand how these laws could be applied in the South African context.

⁵² Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 189.

⁵³ This is evident from the adoption of the Universal Declaration of Human Rights in 1948, which was followed by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of 1966.

⁵⁴ Act 55 of 1949.

⁵⁵ Act 30 of 1950.

⁵⁶ Act 41 of 1950.

⁵⁷ Maluwa T 'International Human Rights Norms and the South African Interim Constitution 1993' (1993) 19 *SAYIL* 14-42 at 20.

This will be illustrated later with reference to cases such as *Government of the Republic of South Africa v Grootboom*,⁵⁸ in which the Constitutional Court considered findings of the United Nations Committee on Economic, Social and Cultural Rights to ascertain what the right to adequate housing, entrenched in section 26 of the Constitution of 1996, entails. In that case, international law was considered partly because there have been many debates in the international community on this specific subject resulting in numerous literature on the topic.

During the apartheid era, before the text of the 1993 Constitution and the constitutional principles were agreed to, international law was approached differently. Before the 1993 Constitution was enacted, international law played a secondary role in South African jurisprudence, since South African courts failed, as Dugard explains it, 'to use the limited opportunities available to them to apply international human right norms'.⁵⁹ With the enactment of the 1993 Constitution, the exclusion of any reference to international law in any previous constitutions was rectified by including provisions that call for an inclusive approach towards international law.⁶⁰

The different approaches to international law during these three periods will be discussed below. General principles will be drawn from case law and other sources with regard to the interpretation and application of international law in constitutional adjudication. This will be done by examining the principles regarding the application of international law in South African law, mainly made evident through case law; and considering the new constitutional approach to international law.

⁵⁸ 2001 (1) SA 46 (CC).

⁵⁹ Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 191.

⁶⁰ This approach was maintained in the 1996 Constitution. See Dugard J *International Law: A South African Perspective* (3rd ed 2005) 55; Prevost D 'South Africa as an Illustration of the Development in International Human Rights Law' (1999) 24 *SAYIL* 211-231 at 219. In the 1910, 1961 and 1983 constitutions no reference is made to the place of international law in South African law.

2 3 2 *International Law before the Interim Constitution of 1993*

The Constitution of 1993⁶¹ was enacted by the Multi-National Negotiations Forum of December 1993. In the preceding period, international law had not played a prominent role in South African courts. There are various reasons for the courts' behaviour in this regard. Dugard maintains that South African courts were unfamiliar with international law; they were unaware of the importance of international legal norms; and they were antipathetic towards international law as a result of South Africa's isolation from the international community.⁶² This meant that South African law was isolated from the developments that took place with regard to international human rights. Consequently, international law was seldom raised in court cases, and limited attention was paid to it in the event that it was raised.⁶³

Before the enactment of the 1993 Constitution customary international law was always deemed part of South African common law.⁶⁴ Customary international law can be described as the common law of the international community.⁶⁵ South Africa followed a monistic approach with regard to customary international law; regarding international law and national law as one system of law. Courts could take judicial notice of customary international law if it was found that the requirements for the creation of a customary rule of international law were met.⁶⁶ For an international law principle to be regarded as customary international law, there needed to be a settled practice (*usus*) in the state of adhering to such principle and the state had to accept the obligation to be bound by such rule (*opinio juris*).⁶⁷ If the court decided that these criteria were fulfilled it would apply

⁶¹ Act 200 of 1993.

⁶² Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 191.

⁶³ Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 171.

⁶⁴ *Ex Parte Schumann* 1940 NPD 251 at 254; *Parkin v Government of the République Démocratique du Congo* 1971 (1) SA 259 (W); *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C). In *Nduli v Minister of Justice* 1978 (1) SA 893 (C) 906B it was said that 'it is obvious that international law is part of our law'.

⁶⁵ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 29.

⁶⁶ In *De Howarth v The SS India* 1921 CPD 451 and *Ex Parte Sulman* 1942 CPD 407, the Cape Provincial Division took judicial notice of principles of international law. These cases are discussed in Dugard CJR 'Consular Immunity' (1966) 83 SALJ 126-132. In *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) the court refused to accept an affidavit from an expert on international law, stating that international law cannot be proved by means of an affidavit as in the case of foreign law.

⁶⁷ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 29.

customary international law, except where such principles were in conflict with legislation.⁶⁸

It is clear from judgements handed down before the 1993 Constitution that the courts were hesitant to regard principles such as those contained in the UDHR,⁶⁹ the ICCPR,⁷⁰ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'European Convention')⁷¹ as customary international law.⁷² In *S v Rudman*, the Eastern Cape Local Division of the High Court stated: 'However laudable the ideals which have inspired the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European and American conventions they do not form part of customary international law'.⁷³ In *S v Petane*,⁷⁴ the court denied that Protocol 1 to the Geneva Conventions⁷⁵ forms part of international customary law and consequently the defendants were unable to prove that they should be treated as prisoners of war and that the court had no jurisdiction to try their matter. Dugard argues that certain rights contained in these declarations and conventions are part of customary international law, such as the right to non-discrimination, the right to a fair trial and the prohibition of cruel, inhumane and degrading treatment.⁷⁶ Therefore, courts need to apply such conventions since, as customary international law, they form part of South African law.

Leaving aside the fact that South African courts were reluctant to accept certain principles as customary international law, customary international law was also subject to certain qualifications during this period. If a specific matter was governed by an act of Parliament where the meaning was clear, or the meaning of the act could easily be determined, the South African courts had to apply the act even if it contravened customary international

⁶⁸ Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 190.

⁶⁹ Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, Resolution 217 (III) of 10 December 1948, UN doc A/810.

⁷⁰ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

⁷¹ Signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 222, ETS 5.

⁷² See *S v Petane* 1988 (3) SA 51 (C) 59; *S v Rudman* 1989 (3) SA 368 (E) 376-378.

⁷³ 1989 (3) SA 368 (E) 377.

⁷⁴ 1988 (3) SA 51 (C).

⁷⁵ Protocol (I) Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, entered into force on 7 December 1977, 1125 UNTS 17512.

⁷⁶ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 315.

law.⁷⁷ This qualification was softened by the presumption that the legislature did not intend to violate customary international law.⁷⁸ Where customary international law had undergone a change, the South African courts were not bound to follow precedent set down by earlier decisions.⁷⁹ This was settled in the cases of *Inter-Science Research Development Services (Pty) Ltd v Republica Popular de Mocambique*⁸⁰ and *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia*,⁸¹ both instances in which the courts relied on an English case, *Trendex Trading Corporation v Central Bank of Nigeria*.⁸²

Treaties, charters and conventions could previously be used by the courts only if they had been incorporated into South African national law by means of legislation.⁸³ Treaties were the responsibility of the national executive, who had to negotiate, sign, ratify and accede to such treaties. Although the courts were reluctant to make use of international law principles as stated above, 'international human rights conventions and declarations not binding on South Africa either as custom or treaty might be invoked by courts as a guide to judicial policy in the formulation of a rule of law'.⁸⁴ Before the 1993 Constitution three possibilities have crystallised as to how treaties could be made part of South African law: Treaties could be embodied in the text of an act of Parliament; included as a schedule to an act passed by Parliament; or brought into operation by means of proclamation in the Government Gazette if an act of Parliament granted the executive the power to bring the treaty into operation in this manner.⁸⁵

⁷⁷ Maluwa T 'International Human Rights Norms and the South African Interim Constitution 1993' (1993) 19 *SAYIL* 14-42 at 29.

⁷⁸ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 52-53.

⁷⁹ Dugard J *International Law: A South African Perspective* (1994) 47-49. Maluwa T 'International Human Rights Norms and the South African Interim Constitution 1993' (1993) 19 *SAYIL* 14-42 at 32 seems to be incorrect when he states that: 'Second, in keeping with the doctrine of stare decisis, the courts would follow their own precedents even if such precedents did not reflect the true state of customary international law (where, for example, customary international law had undergone a change)'.

⁸⁰ 1980 (2) SA 111 (T).

⁸¹ 1980 (2) SA 709 (E).

⁸² 1997 QB 529 (CA).

⁸³ *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) 161; Collier JG 'Is International Law Really Part of the Law of England?' (1989) 38 *ICLQ* 924-935 at 925; Maluwa T 'International Human Rights Norms and the South African Interim Constitution 1993' (1993) 19 *SAYIL* 14-42 at 29.

⁸⁴ Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 191.

⁸⁵ Dugard J *International Law: A South African Perspective* (1994) 52-53; Maluwa T 'International Human Rights Norms and the South African Interim Constitution 1993' (1993) 19 *SAYIL* 14-42 at 32.

2 3 3 *International Law in the Interim Constitution of 1993*

The bill of rights in both the 1993 Constitution and the 1996 Constitution was drawn up with specific international human rights instruments in mind. In drafting the bill of rights, the African National Congress relied strongly on the UDHR, the ICESCR, the ICCPR, the European Convention and the African Charter on Human and Peoples' Rights.⁸⁶ Therefore, international law and its interpretation will have to play a prominent role in the development of South Africa's human rights jurisprudence.⁸⁷ This might be one of the reasons why reference to international law is made in the 1993 Constitution and retained in the 1996 Constitution. A further reason for the inclusion of these provisions in the constitutions is the idea of achieving harmony between international law and South African law.⁸⁸ The inclusion of certain clauses in both the 1993 and 1996 Constitutions and the change it brought about in relation to the pre-1994 position is further discussed and analysed below.

With the coming into force of the 1993 Constitution, international law was set to play a more prominent role in South Africa's jurisprudence, especially with regard to human rights law and humanitarian law.⁸⁹ In the 1993 Constitution, international law was dealt with in sections 35(1) and 231; the former concerning international law in the interpretation of the bill of rights, while the latter concerned international agreements (treaties), conventions and customary international law. In addition, sections 116(2) and 227(2)(d) were concerned with international law in relation to the Human Rights Commission and the national defence force respectively. This chapter focuses on the different approaches with regard to the use of international law in interpreting the bill of rights, customary international law and treaties in each of the periods under discussion. Therefore, sections 116(2) and 227(2)(d) will not be discussed.

⁸⁶ Adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58, (1982). See Prevost D 'South Africa as an Illustration of the Development in International Human Rights Law' (1999) 24 *SAYIL* 211-231 at 223.

⁸⁷ Keightley R 'Public International Law and the Final Constitution' (1996) 12 *SAJHR* 405-418 at 415.

⁸⁸ Dugard J and Currie I 'Public International Law' 1996 *ASSAL* 145-173 at 153.

⁸⁹ Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 191.

Concerning customary international law, section 232 gives the common law position regarding customary international law constitutional standing. Customary international law is binding in the Republic unless it is inconsistent with the constitution itself or another act of Parliament.⁹⁰ This provision changes the position regarding the application of customary international law. Before the 1993 Constitution, at a time when the Parliament was sovereign, customary international law could be applied if it was not in conflict with an act of Parliament. With the new constitutional dispensation and the constitution being the highest law in the Republic,⁹¹ any law inconsistent with it is invalid. Therefore, customary international law is still applicable, under the condition that it is not in conflict with the constitution or an act of Parliament.

As a result of section 232, common law and case law are subordinate to customary international law because customary international law is applicable in as far as it is not in conflict with the constitution or an act of Parliament. Therefore, if customary international law changes, case law recognizing an earlier rule cannot prevent the new rule of customary international law from being applied. This means that the principle of *stare decisis* does not apply in the case of customary international law, as was stated in *Kafraria Property Co (Pty) Ltd v Government of the Republic of Zambia*.⁹²

Various authors, including Dugard⁹³ and Mulawa,⁹⁴ submit that as a result of this provision it is no longer necessary for the courts to state the reasons why they apply a certain rule of customary international law and that only those rules of customary international law that are inconsistent with the constitution or an act of Parliament do not form part of South African law. However, the courts will still determine whether the rule is in fact a rule of customary international law. If customary international law is inconsistent with an act of state, precedent or a Roman-Dutch common law rule,⁹⁵ it will not hamper the applicability

⁹⁰ See Dugard J 'International Human Rights' in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 171-195 at 192; Dugard J 'The Role of International Law in Interpreting the Bill of Rights' (1994) 10 *SAJHR* 208-215 at 210, in which Dugard argues that the inclusion of s 231(4) in the Constitution of 1993 gives customary law a more elevated status.

⁹¹ S 4 of the Constitution of 1993 and s 2 of the 1996 Constitution.

⁹² 1980 (2) SA 709 (E) 714.

⁹³ Dugard J *International Law: A South African Perspective* (1994) 339-340.

⁹⁴ Maluwa T 'International Human Rights Norms and the South African Interim Constitution 1993' (1993) 19 *SAYIL* 14-42 at 33.

⁹⁵ Devine DJ 'The Relationship Between International Law and Municipal Law in the Light of the Interim South African Constitution 1993' (1995) 44 *ICLQ* 1-18 at 7.

of customary international law, thereby leaving wide scope for customary international law to be applied by the courts.

Treaties are referred to as international agreements in the new constitutional text. The approach to international agreements before 1994 was altered by the 1993 Constitution in section 231(1)-(3). Section 231(1) did not negate international agreements, but kept such agreements in force. In terms of section 82(1)(i) of the 1993 Constitution, the negotiation and signing of international agreements remains the responsibility of the President, but Parliament has to agree to the ratification of or accession to such international agreements in terms of section 231(2). Furthermore, where Parliament agrees to ratification and accession, such agreement will be binding on the Republic if Parliament expressly so agrees and if such agreement was not inconsistent with the 1993 Constitution.⁹⁶

The effect of section 231(2) was that the President does not have the sole discretion to bring an international agreement into operation. Parliament could also ratify and accede to international agreements if such agreement was not in conflict with the 1993 Constitution. The purpose of the inclusions of these sections was to incorporate international agreements into South African law. However, as a result of these provisions only a few treaties were ratified by Parliament to be incorporated into South African law.⁹⁷ As it was never the intention that only a few treaties should be incorporated into South African law, the position regarding international agreements changed slightly in the Constitution of 1996.

From the inclusion of provisions dealing with international law in the 1993 Constitution, and later in the 1996 Constitution, it is evident that international law has to play a greater role in relation to the interpretation and application of South African law in the new constitutional dispensation. The 1996 Constitution builds on the position of international law that the Constitution of 1993 established, albeit with a few changes and adaptations, which are discussed below.

⁹⁶ S 231(3) of the Constitution of 1993.

⁹⁷ It has been said that government departments take too long to bring international agreements before Parliament: Dugard J *International Law: A South African Perspective* (3rd ed 2005) 59.

2 3 4 *The 1996 Constitution and the Position of International Law*

The Constitution of 1996 was enacted into law on 4 February 1997. It contains the bill of rights in chapter 2. The Constitution is the highest law in the Republic and any conduct that is inconsistent with the Constitution is invalid.⁹⁸ It aims at greater reference to international law in South African law, and it is this relationship that will be discussed below.

Section 39(1)(b) of the 1996 Constitution has the effect that international law is applicable in all matters concerning the interpretation of the bill of rights in chapter 2 of the Constitution. In chapter 14, where general provisions are found, the manner in which international law should be applied is set out in sections 231, 232 and 233. Section 231 deals with matters concerning international agreements, section 232 with customary international law and section 233 with the application of international law in the interpretation of legislation.

Section 232 of the 1996 Constitution makes customary international law part of South African law, except if it is inconsistent with the Constitution or an act of Parliament. Section 232 of the Constitution supersedes section 231(4) of the 1993 Constitution and is in its essence the same. In the 1996 Constitution, the word 'binding' was omitted from the phrase 'customary international law *binding* in the Republic'. Keightley argues that customary international law to which South Africa objects will still be deemed part of South African law.⁹⁹ In contrast, Botha¹⁰⁰ argues that the omission of the word 'binding' is of no real consequence, and Dugard and Currie agree with this viewpoint as 'the omission of the word "binding" ... paves the way for a more generous approach to the question whether a customary rule has sufficient *usus* and *opinio juris* to support it'.¹⁰¹

⁹⁸ S 2 of the Constitution of South Africa of 1996.

⁹⁹ Keightley R 'Public International Law and the Final Constitution' (1996) 12 *SAJHR* 404-418 at 408.

¹⁰⁰ Botha N 'International Law and the South African Interim Constitution' (1994) 9 *SAPL* 245-256.

¹⁰¹ Dugard J and Currie I 'Public International Law' 1996 *ASSAL* 145-173 at 149-150.

In *Kaunda v President of the Republic of South Africa*,¹⁰² the Constitutional Court had to decide whether or not the applicants, South African nationals who were apprehended in Zimbabwe on charges that they planned a coup against the President of Equatorial Guinea, qualified for diplomatic protection. The Court first considered whether a state has an obligation to protect its nationals under the rules of customary international law, by seeking diplomatic protection for them while they are in another country.

After the Constitutional Court decided that there was no principle in customary international law that could force a state to seek diplomatic protection for its citizens, the Court turned its attention to whether or not South African law could compel the South African government to seek diplomatic protection for its citizens. This led to the conclusion that, in certain cases, customary international law needed to be considered first before an answer is sought in national law. A possible explanation for this may be that the issue of diplomatic protection has been a controversial topic in international law. Therefore, there is more literature, including case law, academic writings and published research, in international law on the specific topic of diplomatic protection that can aid the Court in delivering judgment on a matter that is not so familiar to South African law.

The provision governing international agreements in South African law is found in section 231 of the 1996 Constitution. The negotiation of international agreements remains the responsibility of the national executive. Furthermore, in terms of section 231(2) of the Constitution, international agreements only become binding in the Republic if both the National Assembly and the National Council of Provinces agree thereto. However, in terms of section 231(3), international agreements become binding in the Republic through mere signature by the national executive when it is 'an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession'.¹⁰³ According to Botha, agreements of a technical, administrative or executive nature are agreements that flow from the day to day activities of the government departments.¹⁰⁴ Furthermore, such agreements do not have major political

¹⁰² 2005 (4) SA 235 (CC).

¹⁰³ S 231(3) of the 1996 Constitution.

¹⁰⁴ Botha N 'Treaty-making in South Africa: A Reassessment' (2000) 25 *SAYIL* 71-96 at 77. For a full discussion on the requirements in terms of s 231(3), see also Schneeberger J 'A Labyrinth of Tautology: The

significance, have no financial consequences and do not affect national law.¹⁰⁵ The approval of the National Assembly and the National Council of Provinces is not required in this instance, but the agreement must still be tabled in the National Assembly and the Council of Provinces within a reasonable time. This provision was inserted in the 1996 Constitution in order to increase the number of treaties being incorporated into South African law. From this it can be concluded that the 1996 Constitution seeks greater inclusion of international law in South African jurisprudence than the 1993 Constitution.

2 4 The ‘New’ Constitutional Obligation of Interpretation

2 4 1 Introduction

A bill of rights as found in chapter 2 of the 1996 Constitution, which expanded and built on chapter 3 of the 1993 Constitution, is a novelty in South African law. None of the previous constitutions fully entrenched fundamental human rights in South African law in an instrument that is the highest law in the Republic.¹⁰⁶ The interpretation of the bill of rights and legislation with reference to international law has not yet been given sufficient attention during the pre-1994 period. Therefore, the Constitution of 1996 contains various provisions that attempt to effect the implementation of international law into domestic law.

Section 233 of the Constitution requires the courts, when interpreting legislation, to prefer an interpretation that is consistent with international law rather than inconsistent. This obligation is mandatory on the courts if such an interpretation is reasonably possible. This section also gives constitutional standing to the interpretive presumption that legislation intends to comply with international law.¹⁰⁷ In *Kaunda v President of the Republic of South Africa*,¹⁰⁸ the court found that all legislation, including the bill of rights and the Constitution as a whole, needs to be interpreted according to this provision. Therefore, international law is not only relevant when interpreting the bill of rights as mandated by section 39(1)(b), but it is also relevant when interpreting legislation.¹⁰⁹

Meaning of the Term “International Agreement” and its Significance for South African Law and Treaty Making Practice’ (2001) 26 *SAYIL* 1-40 at 5-8.

¹⁰⁵ Botha N ‘Treaty-making in South Africa: A Reassessment’ (2000) 25 *SAYIL* 71-96 at 76.

¹⁰⁶ S 2 of the 1996 Constitution.

¹⁰⁷ Keightley R ‘Public International Law and the Final Constitution’ (1996) 12 *SAJHR* 405-418 at 415.

¹⁰⁸ 2005 (4) SA 235 (CC) para 33.

¹⁰⁹ See Keightley R ‘Public International Law and the Final Constitution’ (1996) 12 *SAJHR* 405-418 at 415.

The interpretation clauses in sections 35 and 39 of the 1993 and 1996 Constitutions respectively are not comparable with any legislation passed before 1994. The interpretation clause and its application in constitutional adjudication are discussed below with reference to landmark Constitutional Court cases where international law played, or could have played, an important role.

Section 35(1) in chapter 3 of the 1993 Constitution provides:

‘In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.’

Dugard states that section 35(1) could be hailed as a ‘jewel in the Constitution’¹¹⁰ as it placed public international law firmly within the South African legal context. Public international law should come to the foreground every time a dispute regarding the interpretation of the rights contained in chapter 3, fundamental human rights, comes before a court of law. Previously, the courts had not been under an obligation to consider international law when handing down judgment, but through the operation of section 35(1), courts are under a new obligation to consider international law when interpreting the bill of rights.

Section 35 of the 1993 Constitution was succeeded by section 39 of the Constitution of 1996. With regard to international law, section 39(1) of the 1996 Constitution differs from section 35(1) of the 1993 Constitution. Section 39(1) of the Constitution provides:

‘When interpreting the Bill of Rights, a court, tribunal or forum-

- a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- b) *must* consider international law; and

¹¹⁰ Dugard J ‘International Law and the “Final” Constitution’ (1995) 11 *SAJHR* 241-251 at 242.

c) *may* consider foreign law.¹¹¹

The obligation imposed on the courts under section 35(1) of the 1993 Constitution was that the courts *shall* have regard to public international law only when applicable, while under section 39(1) of the 1996 Constitution the courts *must* consider international law when interpreting the bill of rights. The courts, as well as any tribunal or forum, are under a strict obligation to consider international law in every case that deals with the interpretation of the rights contained in the bill of rights.¹¹² The 1993 Constitution placed this obligation on courts only and not on tribunals and forums as the 1996 Constitution does. The question is whether or not the courts have fulfilled this obligation imposed on them and also how they interpreted this interpretation clause in proceedings before them. The following judgments handed down by the Constitutional Court are examined to analyse the courts' approach to the use of international law: *S v Makwanyane*;¹¹³ *Azanian Peoples Organisation v President of the Republic of South Africa*;¹¹⁴ and *Government of the Republic of South Africa v Grootboom*.¹¹⁵

2 4 2 *S v Makwanyane*

In *S v Makwanyane* (hereafter '*Makwanyane*'),¹¹⁶ a case concerning the constitutionality of the death penalty and heard under the 1993 Constitution, the Constitutional Court was presented with both international and foreign law with regard to the admissibility of the death penalty. The case was brought before the Court on the assumption that administering the death penalty contravenes section 11(2) of the 1993 Constitution, the right not to be subjected to cruel, inhumane and degrading punishment.

¹¹¹ Own emphasis.

¹¹² In Keightley R 'Public International Law and the Final Constitution' (1996) 12 *SAJHR* 404-418 at 415, the author makes the point that s 39(1) of the 1996 Constitution extends the interpretational role of international law further than was the position in the 1993 Constitution. Under the 1996 Constitution not only courts, but also any tribunal and forum are obligated to take international law into account.

¹¹³ 1995 (3) SA 391 (CC).

¹¹⁴ 1996 (4) SA 671 (CC).

¹¹⁵ 2001 (1) SA 46 (CC).

¹¹⁶ 1995 (3) SA 391 (CC).

In terms of section 35(1) of the 1993 Constitution, the Court concluded that the term 'international law' includes both binding and non-binding international law.¹¹⁷ The Court noted that comparable decisions by international tribunals such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights, have dealt with the admissibility of the death penalty.¹¹⁸ Although the comparable instruments the Court referred to are not binding in South African law, they aided the Court in reaching its ultimate decision. This illustrates the importance of considering international law to receive guidance on certain matters, because the issue has already been dealt with and debated in international law.¹¹⁹

The following principles can be established from the *Makwanyane* decision with regard to the application of international law concerning constitutional interpretation.¹²⁰ Firstly, it is competent for a court to consider both international (and foreign) law because such laws are of value in their own right.¹²¹ Secondly, binding and non-binding international law creates the framework for constitutional interpretation.¹²² This framework in which the bill of rights 'can be evaluated and understood' consisted in the *Makwanyane* case of international agreements and customary international law.¹²³ Guidance could therefore be found in international law, but courts should be mindful of the fact that the constitution is the highest law in the Republic and that any law, including international law, that is inconsistent with it is invalid.¹²⁴

Thirdly, the context of the constitution needs to be kept in mind. The administering of the death penalty is not prohibited by international law, and there is no universal rule as to the

¹¹⁷ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹¹⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹¹⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 34.

¹²⁰ Du Plessis LM 'Interpretation' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2008) 32:1-193 at 172-173.

¹²¹ Du Plessis LM 'Interpretation' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2008) 32:1-193 at 172. In *S v Makwanyane* 1995 (2) SA 391 (CC) para 39 the Court noted that although it can derive assistance from public international law (as well as foreign case law), the Court is in no way bound to follow it.

¹²² *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹²³ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹²⁴ S 2 of the 1996 Constitution; *S v Makwanyane* 1995 (3) SA (CC) paras 36-39.

admissibility of the death penalty. In article 6 of the ICCPR,¹²⁵ which is binding on South African law, it is stated that no one may be *arbitrarily* deprived of their life and that the death penalty may only be imposed on those who have committed the most serious of offences. Amongst these and other international law authorities, the position of the death penalty in the United States of America and India was discussed. The Court returned to the crucial question whether the punishment of the death penalty is permissible under the South African Constitution of 1993. Therefore, the Court had regard to the international law (as well as comparable foreign law), but found it of utmost importance to abide by the position of the 1993 Constitution, and found that administering the death penalty contravenes section 11(2) of the 1993 Constitution, the section that prohibits cruel, inhumane and degrading treatment or punishment.

2 4 3 Azanian Peoples Organisation v President of the RSA

In *Azanian Peoples Organisation v President of the Republic of South Africa* (hereafter 'Azapo')¹²⁶ the constitutionality of the Promotion of National Unity and Reconciliation Act (the 'Amnesty Act'),¹²⁷ which granted amnesty to perpetrators of political crimes that took place during the apartheid era, was brought to the Constitutional Court in terms of section 22 of the 1993 Constitution. Section 22 protects the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum. During the course of argument, the applicants relied on international law to invalidate the Amnesty Act,¹²⁸ because support could not be found in South African law.¹²⁹ The applicants argued that the state is under an obligation under international law to prosecute those guilty of gross human rights violations.

The issue before the Constitutional Court was whether an interpretation of the 1993 Constitution that renders an act of Parliament invalid should be preferred by relying on international law. Various international law conventions were cited in the heads of

¹²⁵ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

¹²⁶ 1996 (4) SA 671 (CC).

¹²⁷ Act 34 of 1995.

¹²⁸ Act 34 of 1995.

¹²⁹ See Dugard J 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 *SAJHR* 258-268 at 260.

argument and in the case,¹³⁰ but were dismissed by the Court. Mohammed DP stated that if the Amnesty Act¹³¹ is inconsistent with the 1993 Constitution, the reliance on international law becomes irrelevant.¹³² Although the constitution is the highest law in the Republic and any conduct in conflict with it is invalid, the Court should have conducted a thorough investigation into international law because the 1993 Constitution requires it in section 35(1) and the arguments brought by the applicants were based on international law.

Dugard and Currie, although agreeing with the constitutional interpretation, states that this judgment is disappointing from an international law perspective as it disregards international law from the outset.¹³³ The Court failed to make a proper inquiry into international law and as a result failed to recognise that persons are generally prosecuted for crimes against humanity and therefore excluded from an amnesty provision, but that this is not an absolute rule in international law as state practice is too unclear to support such an argument.¹³⁴ Unfortunately, the Court never got to this stage, as it first ruled that international law was irrelevant, or inconsistent with the constitution, before attempting to reconcile the constitution with international law.¹³⁵

The position taken by the Court in the *Azapo* case was a regression from the position with regard to international law that the same Court took in *Makwanyane*.¹³⁶ In *Makwanyane*, the Constitutional Court made it clear that both binding and non-binding international law creates the framework for interpretation. The position taken in the *Azapo*¹³⁷ decision, that international law is irrelevant if the constitution renders it invalid, makes section 39(1)(b), in

¹³⁰ Art 49 of Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, entered into force 21 October 1950, 75 UNTS 31; Art 50 of Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, entered into force 21 October 1950, 75 UNTS 85; Art 129 of Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, entered into force 21 October 1950, 75 UNTS 135; art 146 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, entered into force 21 October 1950, 75 UNTS 287.

¹³¹ Act 34 of 1995.

¹³² *Azanian Peoples Organisation v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 26.

¹³³ Dugard J and Currie I 'Public International Law' 1996 ASSAL 145-173 at 163.

¹³⁴ Dugard J 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 SAJHR 258-268 at 267; Motala Z 'The Constitutional Court's Approach and its Method of Interpretation in the "Amnesty Decision": Intellectual Honesty or Political Expediency?' (1996) 21 SAYIL 29-59 at 31.

¹³⁵ Dugard J and Currie I 'Public International Law' 1996 ASSAL 145-173 at 165.

¹³⁶ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹³⁷ *Azanian Peoples Organisation v President of the Republic of South Africa* 1996 (4) SA 671 (CC).

this case section 35(1) of the 1993 Constitution, unnecessary because courts are in any event bound to follow international law that is binding on the Republic.¹³⁸ The position taken in the *Azapo* case deviated from the position in the *Makwanyane*¹³⁹ case and turned out to be an *ad hoc* instance, and 'openness to and generous reliance on international law has most recently been the default (judicial) disposition in constitutional interpretation in South Africa'.¹⁴⁰

2 4 4 *Government of the RSA v Grootboom*

Government of the Republic of South Africa v Grootboom (hereafter '*Grootboom*')¹⁴¹ was heard by the Constitutional Court concerning, amongst others, the proper approach to section 26 of the 1996 Constitution. Section 26 concerns the right of all to have access to adequate housing, the state's responsibility to realise this right and the right of all persons not to be evicted from their homes or have their homes demolished without an order of court. During the course of argument the Court referred to international law in interpreting section 26 of the Constitution. The Constitutional Court accepted the position in *Makwanyane*¹⁴² that international law for the purposes of section 39(1)(b) of the 1996 Constitution (section 35(1) of the 1993 Constitution) includes both binding and non-binding international law to create the framework for interpretation. However, Yacoob J, placed a proviso on this, stating that while international law might be a guide to interpretation 'the weight to be attached to any particular principle or rule of international law will vary'.¹⁴³

The Constitutional Court in *Grootboom*¹⁴⁴ relied on the ICESCR¹⁴⁵ to determine whether or not the Court could formulate a minimum core obligation in respect of the right to have access to adequate housing and, more specifically, shelter. The United Nations Committee on Economic, Social and Cultural Rights monitors state parties' obligations with regard to

¹³⁸ Du Plessis LM 'Interpretation' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2008) 32:1-193 at 179.

¹³⁹ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁴⁰ Du Plessis LM 'Interpretation' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2008) 32:1-193 at 176.

¹⁴¹ 2001 (1) SA 46 (CC).

¹⁴² *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁴³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 26.

¹⁴⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁴⁵ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

the Covenant. The Court relied heavily on the General Comments of the Committee, who formulated the minimum core obligation with regard to this right after many years of examining the reports it received from member states. Therefore, the comments of the Committee on Economic, Social and Cultural Rights contain substantive information that it received over a long period of time from which to determine what the minimum core obligation is in respect of the right to adequate housing. The Constitutional Court ruled that it did not have sufficient information to determine what the minimum core with regard to access to adequate housing is in the South African context.

The Constitutional Court emphasised that the state's obligation to provide access to adequate housing depends on the relevant context and will sometimes differ from city to city and person to person.¹⁴⁶ The same is also true for international law. International law also needs to be understood in the context in which it has been developed or formulated.¹⁴⁷ This leads to the conclusion that international law can in no circumstances just be applied blindly, but that the context and its relevance to the dispute need to be highlighted in order to make a proper inquiry into international law.¹⁴⁸

2 5 Conclusion

With the formation of the Union of South Africa in 1910 the principle of the sovereignty of Parliament was incorporated into South African law. This principle, together with the courts' inability to test the substance of legislation, made the implementation of the apartheid system possible. The apartheid system led to the isolation of South Africa from the international community and the developments that took place in international law. During the apartheid era the government regarded international law as an inferior area of the law and the apartheid policy itself violated principles of international law.¹⁴⁹ Therefore, international law and the protection of human rights were neglected during this period.

¹⁴⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 37.

¹⁴⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 31.

¹⁴⁸ This case is discussed in detail in chap 4 at 4 3.

¹⁴⁹ Scholtz W 'A Few Thoughts on Section 231 of the South African Constitution, Act 108 of 1996' (2004) 29 *SAYIL* 202-216 at 1.

In the beginning of the 1990s South Africa moved away from this culture of authority towards a culture of justification,¹⁵⁰ with the acceptance of a supreme constitution and a justiciable bill of rights. Any law or conduct in conflict with the Constitution is now invalid.¹⁵¹ The bill of rights grants fundamental individual human rights, such as the right to human dignity,¹⁵² life,¹⁵³ property¹⁵⁴ and adequate housing.¹⁵⁵ The courts are further entrusted to safeguard the human rights of all citizens.¹⁵⁶ With regard to international law, the 1996 Constitution emphasises the position regarding international agreements,¹⁵⁷ thereby seeking to include South Africa once again in the international community by making it possible, and somewhat easier, for international agreements to be incorporated into South African law. The Constitution also makes reference to areas of international law, such as customary international law and gives such law constitutional standing in South African law.¹⁵⁸ When courts interpret legislation, they are under an obligation to interpret legislation in favour of international law if such an interpretation is reasonably possible.¹⁵⁹ It can therefore be concluded that international law is deemed to be important in the new constitutional era.

The manner in which the courts must interpret the bill of rights is set out in section 39(1) of the 1996 Constitution. In section 39(1)(b), the courts are placed under an obligation to consider international law when interpreting the bill of rights. Since 1995, the courts have developed its approach to this interpretation. In *Makwanyane*,¹⁶⁰ it was established that international law for purposes of this section includes binding and non-binding international law. In *Grootboom*,¹⁶¹ the principle laid down in *Makwanyane*¹⁶² was accepted, but the Court stated that the weight to be attached to each principle of international law will vary, thereby seeking an interpretation that is context sensitive.

¹⁵⁰ Mureinik E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1993) 10 *SAJHR* 31-48 at 32.

¹⁵¹ S 2 of the 1996 Constitution.

¹⁵² S 10 of the 1996 Constitution.

¹⁵³ S 11 of the 1996 Constitution.

¹⁵⁴ S 25 of the 1996 Constitution.

¹⁵⁵ S 26 of the 1996 Constitution.

¹⁵⁶ See chap 8 of the 1996 Constitution, in particular ss 165 and 172.

¹⁵⁷ S 231 of the 1996 Constitution.

¹⁵⁸ S 232 of the 1996 Constitution.

¹⁵⁹ S 233 of the 1996 Constitution.

¹⁶⁰ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹⁶¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 26.

¹⁶² *S v Makwanyane* 1995 (3) SA 391 (CC).

The obligation imposed on the courts to consider international law in the interpretation of the bill of rights has not been adhered to in all cases before the court. It might be that courts are not aware of all the international law sources available to them in interpreting the various rights contained in the bill of rights. For example, in a case that was heard in terms of section 25 of the 1996 Constitution, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,¹⁶³ which will be discussed in chapter 3, the Constitutional Court accepted its obligation to consider international law as well as the discretion that the court has concerning the use of foreign law. Although the court did extensive research into foreign law, it failed to do a study of international law. Subsequent case law regarding the interpretation of the rights in relation to section 25 has not dealt with international law instruments and principles or regional international law instruments and principles either.¹⁶⁴

In contrast, courts have proven to be more willing to consult international law when interpreting the right of access to adequate housing in section 26 of the Constitution. Therefore, the right to adequate housing and the right of access to adequate housing in domestic law will be discussed in chapter 4 to indicate the extent to which international law was useful in interpreting the right. The right referred to includes the right of access to adequate housing as well as the right protecting an existing right to housing.

Therefore, the aim of the following chapters is to identify the sources of international law that courts must consider when interpreting the relevant rights in the bill of rights as there is a vast number of sources that can aid the courts in the interpretation process. The following chapters will identify those international law instruments and principles that the courts may and should consult when interpreting the right to property, guaranteed in section 25 of the 1996 Constitution, and the right of access to adequate housing in section 26.

¹⁶³ 2002 (4) SA 768 (CC).

¹⁶⁴ See for example *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC) and *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

3

Property Rights in International Law

3 1 Introduction

Chapter 2 illustrated that South Africa was isolated from the developments that took place in the area of the protection and advancement of human rights in international law, mainly due to the implementation of the system of apartheid. Various human rights were disregarded by the South African apartheid Government at a time when the protection of human rights in international law became increasingly important. It became clear that the protection of human rights is emphasised in the new democratic South Africa. This becomes evident from the extensive protection of human rights in the Constitution of 1996, which is the highest law in the Republic.

As indicated in chapter 2, all the rights in the bill of rights need to be interpreted with international law in mind as mandated by section 39(1)(b) of the Constitution. This chapter will focus on the utilisation of international law in interpreting the right to property as found in section 25 of the Constitution. The property clause in section 25 of the Constitution has a twofold purpose. It has a protective purpose (section 25(1)-(3)) and a reform purpose (section 25(5)-(9)). The protective purpose entails that existing property rights and interest are protected against deprivation and expropriation, while the reform purpose legitimizes land reform and 'related land reforms in property holdings and property law'.¹ Section 25(4) is an interpretation provision relating to both the protective and reform purpose.² The courts have indicated that they would interpret these seemingly contradictory rights purposively so that both the objectives of section 25; the protection of existing property interest and the guarantee of state action to promote land and other related reforms, are respected, protected, promoted and fulfilled.³ Therefore, Van der Walt submits that section 25 requires an (internal) interpretation that seeks to balance these two competing

¹ Van der Walt AJ *Constitutional Property Law* (2005) 13.

² Van der Walt AJ *Constitutional Property Law* (2005) 12.

³ Van der Walt AJ *Constitutional Property Law* (2005) 11. S 7(2) of the Constitution of 1996 requires the state to respect, protect, promote and fulfil all the rights in the bill of rights. The state's duty, especially in relation to socio-economic rights is further discussed in chap 4 at 4 2 4.

purposes in seeing them as part of 'one integrated guarantee'⁴ instead of viewing them as two distinct and separate duties.⁵

The purpose of this chapter is to indicate that the Constitutional Court is not fulfilling its obligation to apply international law when interpreting the right to property as mandated by section 39(1)(b) of the Constitution. In addition, it will be explained that the Court confuses international law with foreign law when interpreting the right to property. This confusion is in conflict with section 39 of the Constitution, because section 39(1)(b) obliges courts to consult international law in interpreting the bill of rights, while section 39(1)(c) of the Constitution makes it possible for the courts to consider foreign law when interpreting any right in the bill of rights. To illustrate that the Constitutional Court does not consider international law when interpreting the bill of rights and that they confuse international law with foreign law, the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,⁶ in which the Constitutional Court had to hand down judgment in terms of the protective purpose of section 25, will be discussed. Later cases by the Constitutional Court, also concerning the protective purpose of section 25, such as *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*⁷ and *Du Toit v Minister of Transport*,⁸ will serve as further illustration of the Constitutional Court's reluctance to discuss international law.

Therefore, the international law sources protecting property rights will be spelt out in order to enable a discussion on the use of these sources in interpreting the right to property in the South African context. In that discussion it will become clear that the right to property is controversial in international law, which may lead to the conclusion that international law may not add much value to the interpretation of the right to property. Furthermore, the right to property in regional international law will be discussed. It will be suggested that the right to property in regional international law is more developed and more easily enforceable

⁴ Van der Walt AJ *Constitutional Property Law* (2005) 288.

⁵ Van der Walt AJ *Constitutional Property Law* (2005) 288.

⁶ 2002 (2) SA 768 (CC).

⁷ 2005 (1) SA 530 (CC).

⁸ 2006 (1) 297 (CC).

than in international law. Therefore, the available regional international law that might be able to aid the interpretation of the right to property in the South African context will be discussed.

The Universal Declaration of Human Rights (the 'UDHR')⁹ will be considered as it contains a property provision in article 17. Since the right to property is a controversial issue in international law, the right to property was excluded from the International Covenant on Economic, Social and Cultural Rights¹⁰ and the International Covenant on Civil and Political Rights,¹¹ the covenants that give binding effect to the rights contained in the UDHR. However, it has been possible to include the right to property in binding regional international law instruments, as the legal and social customs of geographical areas are similar.¹² Therefore, the regional international law that will be discussed include the African Charter on Human and Peoples' Rights,¹³ the European Convention on Human Rights and Fundamental Freedoms¹⁴ and the American Convention on Human Rights,¹⁵ as all these regional law instruments contain a right to property. The right to property in these systems has been the source of case law or communications by the various regional international human rights courts and commissions. These cases and communications give further clarity to the interpretation of the rights contained in the respective conventions.

In international law, the property rights of specific groups of peoples, for instance refugees and women are more developed than the general protection of property rights. Therefore, the property rights of these specific groups of people will be discussed since these sources can aid the courts in interpreting these specific groups' property rights.

⁹ Adopted by the General Assembly of the United Nations, Resolution 217 (III) of 10 December 1948, UN doc A/810.

¹⁰ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

¹¹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

¹² Krause C 'The Right to Property' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 191-209 at 194.

¹³ Adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58 (1982).

¹⁴ Signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 222, ETS 5.

¹⁵ Signed at San Jose, Costa Rica on 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123, OASTS 36.

3 2 Property Rights in International Law

In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996*,¹⁶ the Constitutional Court stated with regard to the right to property:

'If one looks to international conventions [and foreign constitutions] one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as the fact that significant conventions and constitutions contain no protection of property at all. Although art 17 of the UHDR provides that '(e)veryone has the right to own property' and that '(n)o-one shall be arbitrarily deprived' of property, neither the ICESCR nor the ICCPR contains any general protection of property.'¹⁷

This dictum illustrates the various formulations with regard to the right to property accepted in international law and foreign jurisdictions as well as the difficulty in formulating a general right to property in international law. The tension between the protection of property rights on the one hand and social rights on the other explains this difficulty. Generally, property rights guarantee the institution of private property and protect acquired rights from arbitrary interferences, while social rights' purpose is the distribution of wealth and resources.¹⁸ According to Krause and Alfredsson, the constitutions and general laws of most democracies have long protected the right to property.¹⁹ The right Krause and Alfredsson refers to is generally a specific right protecting 'the institution of private property and acquired rights'.²⁰ However, this right is not absolute, as limitations can be placed on the right. Due to the different views of states with regard to the concept of property as well as the limitations that can be placed on the right to property, the adoption of an international property standard is difficult.²¹ As a result, the drafting of article 17 of the UDHR,²² which

¹⁶ 1996 (4) SA 744 (CC).

¹⁷ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa 1996*, 1996 (4) SA 744 (CC) para 71.

¹⁸ Krause C 'The Right to Property' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 191-209 at 201. This tension also exists in s 25, where the protection of existing property rights in s 25(1)-(3) conflicts with s 25(5)-(9), which enables land reform. See Van der Walt AJ *Constitutional Property Law* (2005) 12-18 and 287-289.

¹⁹ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 359.

²⁰ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 359.

²¹ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 360.

²² Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, Resolution 217 (III) of 10 December 1948, UN doc A/810.

contains the right to property, was rife with debates concerning the content and limitations of the right. It was also considered to omit the right to property from the UDHR altogether. Therefore, property rights in international law are controversial when compared to the other internationally protected human rights.²³ This is evident from the examples below of the different views states expressed during the drafting of article 17 of the UDHR.

During the drafting of the property provision in the UDHR, various formulations and ideas were introduced in the debates that took place in the Drafting Committee of the Commission on Human Rights. The Drafting Committee consisted of representatives from the Human Rights Commission.²⁴ In the preparatory work, the representatives from the United Kingdom and Australia felt that a clause protecting property rights should be omitted altogether.²⁵ Western countries, with the United States at the forefront, sought strong protection of the right to property, while the third world and socialist countries sought stronger recognition of the social function of property, arguing for easier interference with property rights in the public interest.²⁶

Three proposals were presented by the Drafting Committee of the Commission on Human Rights during the first, second and third sessions. The first proposal, which guaranteed everyone the right to own personal property, was criticized by the United States in that the term 'personal property' is used to distinguish goods from real property in Anglo-American law.²⁷ Both the United Kingdom and China were critical of the inclusion of the right to property in the UDHR; both states opted for a more general protection of the right to property, which they proposed should read 'everyone is entitled to protection from

²³ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 359.

²⁴ Representatives from the following countries were part of the Drafting Committee; Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom and the United States of America: Möller JT 'The Universal Declaration of Human Rights: How the Process Started' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 23-25 at 24.

²⁵ Rosas A 'Property Rights' in Rosas A and Helgensen J (eds) *The Strength of Diversity: Human Rights and Pluralist Democracy* (1992) 133-157 at 137; UN doc E/CN.4/AC.1.SR.8, 20 June 1947 (First Session of the Drafting Committee of the Commission on Human Rights, Summary Record of the Eight Meeting) 10.

²⁶ Krause C 'The Right to Property' in Eide A, Krause C and Rosas C (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 191-210 at 192.

²⁷ UN doc E/CN.4/AC.1.SR.8, 20 June 1947 (First Session of the Drafting Committee of the Commission on Human Rights, Summary Record of the Eight Meeting) 9-11; Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 362.

reasonable interference with his property'.²⁸ On this point the Soviet Union criticised the vagueness of the words such as 'unreasonable interferences'.²⁹

During the third session of the Commission of Human Rights, article 17 as it stands today was formulated. Krause and Alfredsson note that although the draft was still the subject of further debates, the 'end result was article 17 as we know it'.³⁰ The fact that article 17 was included in a declaration (a non-binding document) with great difficulty foreshadowed the debates that took place when the drafting of the international covenant took place.

During the drafting of the international covenant that was to follow the UDHR, ideological differences that prevailed between the Eastern and Western countries made it impossible to produce a single covenant to give effect to the Declaration. As a result two covenants, namely the International Covenant on Economic, Social and Cultural Rights (the 'ICESCR')³¹ and the International Covenant on Civil and Political Rights (the 'ICCPR')³² were adopted by the General Assembly.³³ When it came to the drafting of the right to property in order to give effect to article 17 of the UDHR, consensus could not be reached as to which Covenant this right should be included under.³⁴ According to Rosas, the drafters of the international covenants opted to include the right of property in the ICESCR; although some felt that it should be included in the ICCPR since property 'also had the character of civil freedoms'.³⁵ According to Krause it was possible to agree on the formulation of article 17 of the UDHR because it is a 'legally non-binding declaration,' but impossible to include a right to property in the universal conventions that require more

²⁸ UN doc E/CN.4/99, 24 May 1948 (Third Session of the Commission on Human Rights, India and the United Kingdom: Proposed Amendments to the Draft Declaration on Human Rights) 4.

²⁹ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 363.

³⁰ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 363.

³¹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

³² Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

³³ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 316.

³⁴ UN doc A/2929, United Nations General Assembly, Tenth Session Agenda Item 28 (Part II) 1 July 1955, (Annotations on the text to the draft International Covenants on Human Rights) 65.

³⁵ Rosas A 'Property Rights' in Rosas A and Helgesen J (eds) *The Strength of Diversity: Human Rights and Pluralist Democracy* (1992) 133-157 at 138.

precise formulations, especially with regard to the permissible limitations.³⁶ The debates that took place concerning the inclusion of the right to property in the international covenants can be categorised into four groups, namely those concerned with inclusion of the right in a Covenant, the formulation of the right, the limitations of the right, and the restriction on state action respectively.³⁷

Arguments against the inclusion of the right to property related to the problems of non-consensus on the concept of the right to property and the limitations that the right to property should be subject to. On the contrary, it was argued by some states that the exclusion of the right to property might create the impression that it is not a fundamental human right. With regard to the inclusion or exclusion of the right to property in the draft covenants, the differences regarding the concept of the right to property and the restrictions to which the right should be subject became evident. Regarding the formulation of the right to property, the same arguments were brought forward as during the drafting procedure of article 17 of the UDHR. Some states wanted the right to property to be broad and in general terms, resembling article 17 of the UDHR, while others sought an article which is drafted in precise legal terms and spells out the specific limitations and qualifications pertaining to the right.³⁸

While it was agreed that the right to property is not absolute, it was emphasised that the limitations placed on rights differ 'from time to time and from country to country'.³⁹ Some states wanted to include the text of paragraph 2 of article 17 of the UDHR in the covenant, which states that no one shall be deprived of property arbitrarily. However, it was argued that the text of the UDHR lacked legal precision and that the term 'arbitrarily' carried different meanings in different jurisdictions.⁴⁰ As the limitations that could be placed on the

³⁶ Krause C 'The Right to Property' in Eide A, Krause C and Rosas A(eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 191-210 at 194.

³⁷ UN doc A/2929, United Nations General Assembly, Tenth Session Agenda Item 28 (Part II) 1 July 1955, (Annotations on the text of the draft International Covenants on Human Rights) 65-67.

³⁸ UN doc A/2929, United Nations General Assembly, Tenth Session Agenda Item 28 (Part II) 1 July 1955, (Annotations on the text of the draft International Covenants on Human Rights) 66.

³⁹ UN doc A/2929, United Nations General Assembly, Tenth Session Agenda Item 28 (Part II) 1 July 1955, (Annotations on the text of the draft International Covenants on Human Rights) 66.

⁴⁰ UN doc A/2929, United Nations General Assembly, Tenth Session Agenda Item 28 (Part II) 1 July 1955, (Annotations on the text of the draft International Covenants on Human Rights) 66.

right to property were the most debatable,⁴¹ especially with regard to the wording of the right, it was decided that the right to property should be left out of the covenants.⁴²

Therefore, the only reference to a general right to property in international law is found in the UDHR. While the rights contained in the International Covenants are binding on state parties to the extent that they were ratified, the UDHR can have no binding force. The UDHR is not a treaty that is open for ratification by states. Dugard states that the UDHR is a 'recommendatory resolution of the United Nations' General Assembly and is therefore not legally binding on states'.⁴³ However, because the UDHR can be regarded as 'an authoritative statement of the international community',⁴⁴ some of the provisions in the UDHR have acquired the status of customary international law. Nevertheless, it seems to be debatable whether the right to property has acquired the status of customary international law. Tladi does not argue against accepting that the right to property forms part of customary international law, but is of the opinion that it should not be a fact that is assumed lightly.⁴⁵ Tladi further states that the right to property (as forming part of customary international law) 'is a right which, if relied upon, needs to be substantiated by providing the elements of customary international law, namely *usus* and *opinio iuris*'.⁴⁶ If it can be proven that the right to property, as contained in article 17 of the UDHR, forms part of customary international law, it can be applicable in terms of section 232 of the Constitution of 1996. Section 232 makes customary international law applicable in South African law unless it is inconsistent with the Constitution or an act of Parliament. Article 17 of the UDHR cannot be so construed that it is inconsistent with the Constitution or with an act of Parliament. Therefore, article 17 should, as a starting point, be used in interpreting the right to property.

⁴¹ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 360; Rosas A 'Property Rights' in Rosas A and Helgesen J (eds) *The Strength of Diversity: Human Rights and Pluralist Democracy* (1992) 133-157 at 138.

⁴² UN doc A/2929, United Nations General Assembly, Tenth Session Agenda Item 28 (Part II) 1 July 1955, (Annotations on the text of the draft International Covenants on Human Rights) 65.

⁴³ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 314.

⁴⁴ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 316.

⁴⁵ Tladi D 'The Right to Diplomatic Protection, the Van Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (2009) 20 *Stell LR* 14-30 at 24. At 23, Tladi states that expropriation without compensation is in breach of the principles of international law, but that this does not mean that the right to property can be regarded as a *human* right under customary international law.

⁴⁶ Tladi D 'The Right to Diplomatic Protection, the Van Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (2009) 20 *Stell LR* 14-30 at 24.

In considering article 17, which states that, 'everyone has the right to own property alone as well as in association with others [and] no one shall be arbitrarily deprived of property', Krause and Alfredsson are of the opinion that this article does not recognise the right to property as an absolute right; persons may, in certain instances, be deprived of their property.⁴⁷ However, the deprivation of property may not be arbitrary. According to Krause, there are diverging opinions whether compensation is a requirement in the event of a deprivation, and if so, how compensation should be calculated.⁴⁸ The issue of compensation can be regarded as the most contested aspect of the right to property and was the main reason for the exclusion of the right to property in the International Covenants of 1966.⁴⁹ However, the term 'arbitrary' gives an indication that a state may not take property without paying compensation.⁵⁰ In addition, Cotula argues that the arbitrariness requirement can be 'interpreted as requiring public purpose, non-discrimination, and adherence to due process of law'.⁵¹ Therefore, the right to property under the UDHR prohibits the arbitrary deprivation of property and the 'arbitrariness requirement' may mean that the deprivation must be accompanied by compensation, must be for a public purpose, may not be discriminatory and must be done in accordance with due process of the law.

3 3 Property Rights in Regional International Law

3 3 1 Introduction

If the definition of international law can be described as 'a body of rules and principles which are binding upon states in their relations with one another'⁵² or 'those rules and norms that regulate that conduct of States and other entities which at any time are

⁴⁷ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 364.

⁴⁸ Krause C 'The Right to Property' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 191-209 at 200.

⁴⁹ Krause C 'The Right to Property' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 191-209 at 200-201.

⁵⁰ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 364; Krause C 'The Right to Property' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 191-209 at 201; Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 66-67.

⁵¹ Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 67.

⁵² Dugard J *International Law: A South African Perspective* (3rd ed 2005) 1.

recognised as being endowed with international personality',⁵³ then regional instruments can also be applicable under the broad term of international law. These regional law instruments are the result of the geographic and ideological similarities that tend to exist between neighbouring states. This fact makes it easier for states to agree to the formulation of certain rights. Therefore, Shaw states that international law may also be regional, 'whereby a group of states linked geographically or ideologically may recognise special rules applicable only unto them'.⁵⁴ These instruments need to be approached with caution as terms and methods of interpretation might differ from region to region. As a result, using these regional international instruments in domestic jurisdictions should still remain context sensitive. As an example, in the preamble to the European Convention on Human Rights and Fundamental Freedoms, (the 'European Convention')⁵⁵ it is stated that the governments of European countries 'are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law'.

This part of the chapter will describe regional international law instruments regarding the right to property. The right to property in regional international law compensates for the lack of any real protection of property in international law.⁵⁶ Since the ICCPR⁵⁷ and the ICESCR⁵⁸ do not contain a property provision, the regional international law systems are the only human rights systems available to persons whose property rights were violated in the event that domestic remedies have been exhausted.⁵⁹ As indicated, there are three prominent regional bodies that have drawn up documents to bind the different regions and contain provisions protecting property. Of particular relevance to the South African context is the African Charter on Human and Peoples' Rights (the 'Banjul Charter'),⁶⁰ which is

⁵³ Wallace RMM and Martin-Ortega O *International Law* (6th ed 2009) 2.

⁵⁴ Shaw MN *International Law* (5th ed 2003) 2.

⁵⁵ Signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 222, ETS 5.

⁵⁶ Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 67.

⁵⁷ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

⁵⁸ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

⁵⁹ Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 72.

⁶⁰ Adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58 (1982).

binding on South African law in terms of section 231 of the Constitution.⁶¹ Property is protected in article 14 of the Banjul Charter. In addition, article 1 of Protocol 1 to the European Convention and article 21 of the American Convention on Human Rights (the 'American Convention')⁶² protect property. The protection afforded the right to property differs from region to region and the effectiveness of the implementation of remedies adds significantly to this difference.

3 3 2 *The African Charter on Human and Peoples' Rights*

The Banjul Charter was adopted in July 1981 by the Organization of African Unity in Nairobi. The Organization of African Unity was replaced by the African Union in 2002 as a result of the Organization of African Unity's failure to 'satisfy the needs and aspirations of the Continent'.⁶³ Currently there are 52 African states that form part of the African Union,⁶⁴ South Africa being one of them. The Organization of African Unity had as its mandate issues including the struggle against colonialism; preserving territorial integrity; and the non-interference by foreign states in the internal affairs of another state. Human rights and the protection thereof was never a central concern for the Organization of African Unity.⁶⁵ With the development of African countries and the decolonization that took place, it was necessary to change these objectives. Therefore, the African Union has the protection and advancement of human rights as its central theme.⁶⁶

⁶¹ S 231 of the Constitution of 1996 makes international agreements, such as the Banjul Charter, directly applicable through ratification.

⁶² Signed at San Jose, Costa Rica on 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123, OASTS 36.

⁶³ Naldi GJ 'The African Union and the Regional Human Rights System' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed 2008) 20-48 at 20.

⁶⁴ Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Western Sahara, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe; while Guinea, Madagascar and Eritrea are suspended.

⁶⁵ Naldi GJ 'The African Union and the Regional Human Rights System' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed 2008) 20-48 at 45.

⁶⁶ Preamble to the Banjul Charter, adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58 (1982).

The monitoring of the rights contained in the Banjul Charter is entrusted to the 11 independent African personalities who together form the African Commission on Human and Peoples' Rights (the 'African Commission').⁶⁷ In terms of article 45 of the Banjul Charter, the purpose or function of the African Commission is to promote and protect human and peoples' rights; to interpret the provisions of the Charter; and to perform any task assigned to it by the Assembly of the Organization of African Unity. The African Commission is often criticised because its decisions have no binding legal force and state parties often neglect to implement its recommendations.⁶⁸ Therefore, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which sets up the African Court on Human and Peoples' Rights, was adopted by the Organization of African Unity in Burkina Faso on the 10th of June 1998. This Protocol was adopted to solve the problem that the non-binding nature of the Commission's recommendations posed. The Protocol has not been ratified and the African Court on Human and Peoples' Rights is not yet operative.⁶⁹

The Banjul Charter is unique in the sense that it contains civil and political rights;⁷⁰ economic, social and cultural rights;⁷¹ and group rights,⁷² all in one charter. Article 14 of the Charter, which forms part of the collection of civil and political rights, reads as follows:

'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provision of appropriate laws.'

⁶⁷ S 30 of the Banjul Charter; Naldi GJ 'The African Union and the Regional Human Rights System' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed 2008) 20-48 at 34.

⁶⁸ Motala A 'The African Court on Human and Peoples' Rights: Origins and Prospects' in Akokpari J, Ndinga-Muvumba A and Murithi T (eds) *The African Union and its Institutions* (2008) 271-290 at 273; Naldi GJ 'The African Union and the Regional Human Rights System' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed 2008) 20-48 at 36. Naldi argues that the African Commission have persuasive and moral authority.

⁶⁹ The African Union decided to merge the African Court on Human and Peoples' Rights and the African Court of Justice into a single court. However, the Protocol on the Statute of the African Court of Justice and Human Rights, which was opened for signature and ratification on 1 July 2008, is not yet in force: Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 111.

⁷⁰ For instance; freedom from discrimination (arts 2 and 18(3)), the right to life and personal integrity (art 4), freedom from cruel, inhuman and degrading punishment (art 5) and the right to a fair trial (arts 7 and 25).

⁷¹ For instance the right to work (art 15), the right to health (art 16) and the right to education (art 17).

⁷² For instance the right to self-determination (art 20), the right to development (art 22) and the right to peace and security (art 23).

In terms of article 14, state parties should refrain from arbitrarily interfering in one's possession of property and should prevent third parties from the doing the same.⁷³ However, article 14 does not clarify who the holder of the right to property is and does not make provision for the payment of compensation. According to Cotula,⁷⁴ the lack of compensation requirements weakens the protection of the right to property if it is compared to the protection afforded in European and American regional international law. Olaniyan is of the opinion that if article 14 of the Banjul Charter is read with article 21, the problem resulting from the omission of any compensation requirement is solved.⁷⁵ Article 21 of the Banjul Charter guarantees the right of people to freely dispose of their natural resources and in the event of spoliation the dispossessed people shall have the right to the lawful recovery of their property as well as to adequate compensation.⁷⁶

Article 14 of the Banjul Charter protects existing access to one's property as well as the right not to have property removed without due process. This was stated in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*.⁷⁷ The central matter in these three related communications concerns the government's actions to prohibit the publishing and circulation of several newspapers. The government's agents sealed off the newspapers' buildings and they were occupied by the armed security personnel and policemen in defiance of court orders. In addition, it was alleged that the government violated the proprietary rights of the owners of the newspaper companies. The African Commission found that the actions of the military government constituted a violation of article 14 of the Banjul Charter. The Commission held that the right to property includes a right to have access to one's property and not to have the property encroached upon. It was also emphasised that if it cannot be shown that the seizure was in the public interest or for a public purpose, such seizure violates the right to property.

⁷³ Olaniyan K 'Civil and Political Rights in the African Charter: Articles 8-14' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed 2008) 213-243 at 238.

⁷⁴ Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 70.

⁷⁵ Olaniyan K 'Civil and Political Rights: Articles 8-14' in Evans M and Murray R (eds) *The African Charter on Human Rights: The System in Practice 1986-2006* (2nd ed 2008) 213-243 at 238.

⁷⁶ Olaniyan K 'Civil and Political Rights: Articles 8-14' in Evans M and Murray R (eds) *The African Charter on Human Rights: The System in Practice 1986-2006* (2nd ed 2008) 213-243 at 239. In reading arts 14 and 21 of the Banjul Charter together, Olaniyan raises the question whether or not the right to property is an individual right only or both an individual and collective right. Olaniyan is of the opinion that the right to property should be interpreted in the broadest sense; that it can be enjoyed individually and collectively.

⁷⁷ African Commission, Communications 140/94, 141/94 and 145/94, 15 November 1999.

Huri-Laws, a non-governmental organisation registered in Nigeria, alleged certain violations on the part of the Nigerian government against the Civil Liberties Organisation in the communication of *Huri-Laws v Nigeria*.⁷⁸ Huri-Laws contended that the agents of the military government of Nigeria, the State Security Services (the 'SSS'), searched the premises of the Civil Liberties Organisation in search of incriminating materials without a search warrant. The SSS confiscated 13 computers, official files and diskettes without any warrants. All computers barring one were released to the Civil Liberties Organisation. As a result, the complainant alleged that the search and seizure of the Civil Liberties Organisation's property without a warrant was in breach of article 14 of the Banjul Charter. On the basis of article 14, the plaintiffs argued that 'owners have the right to undisturbed possession, use and control of their property, however they deem fit'.⁷⁹ In addition, the complainant alleged that there was no evidence that the search and seizure was for a public need or in the public interest. The commission found that there was a violation of article 14. The African Commission agreed with the complainant that the right to property in article 14 includes the rights of owners to undisturbed possession and to use and control their property however they may deem fit.

Due to the limited communications on the right to property, the right to property in the African regional system has not been clarified to the same extent as in the European and Inter-American systems.⁸⁰ In the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,⁸¹ the plaintiffs alleged that the Nigerian government violated article 14 of the Banjul Charter by destroying the Ogoni peoples' homes. However, the failure on the Commission's part to find a violation of the right to property may signal reluctance on the part of the African Commission to give this right normative content.⁸² Nevertheless, the African Commission has interpreted the right to property to include a right of access to one's existing property, the right to undisturbed possession as well as the right to control and use one's property. In addition, Olaniyan

⁷⁸ *Huri-Laws v Nigeria*, African Commission, Communication 225/98 (2000) AHRLR 273 (ACHPR 2000).

⁷⁹ *Huri-Laws v Nigeria*, African Commission, Communication 225/98 (2000) AHRLR 273 (ACHPR 2000) para 52.

⁸⁰ Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 71

⁸¹ African Commission, Communication 155/96 (2001) AHRLR 51 (ACHPR 2001).

⁸² Since the African Commission read in a right to housing in the Banjul Charter in this communication, it is discussed in detail in chap 4 at 4 6 2.

states that the '[c]ommission's jurisprudence has shown, somewhat, a willingness to strike a fair balance between the demands of the 'general interest of the community' and the requirements of the protection offered in Article 14'.⁸³ Although the African Commission's communications have no binding force, they can still be used to interpret the right to property in the South African context.

3 3 3 *The European Convention on Human Rights and Fundamental Freedoms*

In 1949, the Council of Europe⁸⁴ was founded to facilitate intergovernmental co-operation, to achieve greater unity between the member states⁸⁵ and to counter the communist threat posed by the Soviet Union.⁸⁶ The European Convention was signed in Rome on the 4th of November 1950 and entered into force 3 September 1953. As of 2006, the European Convention has 14 protocols⁸⁷ which either alter rights or procedures in the Convention itself or are the subjects of new rights and obligations not initially contained therein. Of these protocols, Protocol 1⁸⁸ concerns the right to property; the right to education; and the right to regular and fair elections.

The drafting of the right to property to be included in the European Convention was just as controversial as was the case in drafting article 17 of the UDHR as discussed above.⁸⁹ State parties to the European Council could not agree on the formulation that a right to property should take in the European Convention. Therefore, it was decided by the Committee of Ministers of the European Union that the right to property, together with the right to education and political rights, was to be omitted from the European Convention

⁸³ Olaniyan K 'Civil and Political Rights: Articles 8-14' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed 2008) 213-243 at 238-239.

⁸⁴ The founding members of the Council of Europe are Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. Other members that have joined since 1949 are Greece, Turkey, Iceland, Germany, Austria, Cyprus, Switzerland, Portugal, Spain, Liechtenstein, San Marino, Finland, Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania, Andorra, Latvia, Albania, Moldova, Macedonia, Ukraine, Russia, Croatia, Georgia, Armenia, Azerbaijan, Bosnia, Herzegovina, Serbia, Monaco and Montenegro.

⁸⁵ Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 222, ETS 5; Shaw MN *International Law* (5th ed 2003) 319.

⁸⁶ Allen T *Human Rights in Perspective: Property and the Human Rights Act 1998* (2005) 17.

⁸⁷ In 2009 a provisional protocol, Protocol 14bis was opened for signature.

⁸⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, entered into force on 3 September 1953. First Protocol to the Convention signed in Paris on 20 March 1952 (213 UNTS 222, ETS 5).

⁸⁹ For a full discussion on the drafting of the right to property as a clause in the European Convention, see Allan T *Human Rights in Perspective: Property and the Human Rights Act 1998* (2005) 17-28.

and included later in a separate protocol to the Convention when consensus could be reached.

When consensus was reached concerning the right to property, article 1 of the First Protocol to the European Convention on Human Rights was accepted and it reads as follow:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.’

The European Court of Human Rights has indicated that the right to the ‘peaceful enjoyment of possession’ in substance guarantees a right to property.⁹⁰ The European Court has also given a broad definition to ‘possession’ to include a wide range of legal interests.⁹¹ Allen is of the opinion that article 1 of Protocol 1 applies to all rights in property and also includes the rights to acquire and dispose of property.⁹² According to Cotula the term ‘possession’ not only includes disputed ownership over land, ‘but also rights based on licences, welfare benefits, and legal claims based on arbitration awards or tort compensation.’⁹³

In *Sporrong & Lönnroth v Sweden*⁹⁴ three rules in article 1 of Protocol 1 were identified and distinguished. The first rule encapsulates the principle of peaceful enjoyment of possessions; the second concerns the deprivation of property; while the third deals with

⁹⁰ *Marckx v Belgium* (1979) ECHR Series A vol 31 para 63.

⁹¹ Cotula L ‘International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa’ (2008) 33 *SAYIL* 62-112 at 68; Allen T *Human Rights Perspective: Property and the Human Rights Act 1998* (2005) 40-41. Allen states that a strict interpretation of the term ‘possession’ would probably have meant that it only includes property in terms of the common law of a particular state.

⁹² Allen T *Human Rights in Perspective: Property and the Human Rights Act 1998* (2005) 40-41.

⁹³ Cotula L ‘International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa’ (2008) 33 *SAYIL* 62-112 at 68.

⁹⁴ (1982) 5 EHRR 35.

the state's power to control the use of property.⁹⁵ According to Van der Walt, this means that the first rule can be regarded as a 'separate, independent guarantee of property' as well as a 'guarantee for the existence of institutions that enable people to have peaceful enjoyment of their possessions'.⁹⁶ In terms of the second and third rule, the European Court of Human Rights has developed a proportionality rule. There has to be a fair balance between an individual's right to property and the public interest.⁹⁷

Although the European Convention and the jurisprudence of the European Court of Human Rights can never be directly binding on South African law, it can still be considered by the South African courts to interpret the right to property. In *S v Makwanyane*,⁹⁸ as discussed in chapter 2, the Constitutional Court stated that the decisions of the European Court of Human Rights 'may provide guidance as to the correct interpretation of particular provisions'⁹⁹ in the bill of rights. In addition, the abundant jurisprudence of the European Court of Human Rights has influenced jurisdictions outside Europe which would indicate that the law developed around the European Convention by the European Court is worth considering in the interpretation of the right to property in the South African context.¹⁰⁰ Therefore, article 1 of Protocol 1 to the European Convention should be considered by any South African court in interpreting the right to property as regional international law.

3 3 4 *The American Convention on Human Rights*

The Charter of the Organization of American States¹⁰¹ and the American Convention on Human Rights,¹⁰² also known as the Pact of San José, are the two sources protecting human rights in the inter-American system.¹⁰³ The American Convention on Human Rights was adopted in San José, Costa Rica, in 1969 by an inter-governmental conference

⁹⁵ *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 para 61.

⁹⁶ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 100.

⁹⁷ Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 68.

⁹⁸ 1995 (3) SA 391 (CC).

⁹⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹⁰⁰ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 96.

¹⁰¹ Signed in Bogotá on 30 April 1948, entered into force on 13 December 1951, 119 UNTS 48.

¹⁰² Signed at San Jose, Costa Rica on 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123, OASTS 36.

¹⁰³ Buergenthal T 'The Inter-American System for the Protection of Human Rights' in Meron T (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 439-493 at 439; Dugard J *International Law: A South African Perspective* (3rd ed 2005) 333.

convened by the Organization of American States.¹⁰⁴ This Convention came into force on the 18th of July 1978 when it was ratified.¹⁰⁵

As with the European Convention on Human Rights, the American Convention cannot be directly binding on South African law. However, the Constitutional Court also included the jurisprudence of the Inter-American Commission on Human Rights and Inter-American Court of Human Rights under the sources to provide guidance as to the correct interpretation of a right in the bill of rights.¹⁰⁶ Therefore, South African courts are able to consult the jurisprudence of these institutions to find the best possible interpretation of the right to property.

The right to property is contained in article 21 of the American Convention, which reads as follows:

‘Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. Usury and other forms of exploitation of man by man shall be prohibited by law.’

Most cases concerning article 21 of the American Convention which have been referred to the Inter-American Court of Human Rights by the Inter-American Commission on Human Rights deal with indigenous peoples’ right to their ancestral land.¹⁰⁷ For instance, in *Mayagna (Sumo) Awas Tingi Community v Nicaragua*,¹⁰⁸ the state did not demarcate the communal lands of the Community, nor did they adopt effective measures to ensure the property rights of the community to its ancestral lands and natural resources. The state granted a concession on community lands without the permission of the community and

¹⁰⁴ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 334.

¹⁰⁵ To date the following countries have ratified the Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. To date neither the United States of America nor Canada has ratified this Convention.

¹⁰⁶ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

¹⁰⁷ See Cotula L ‘International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa’ (2008) 33 *SAYIL* 62-112 at 69.

¹⁰⁸ Judgment of 31 August 2001, Inter-American Court of Human Rights (Ser C) Nr 79.

did not give effective relief when the community lodged a complaint against the state's actions. The Inter-American Court of Human Rights ordered the Nicaraguan state to 'carry out the delimitation, demarcation and titling of the territory belonging to the Community'.¹⁰⁹ In addition, the Nicaraguan state was ordered to refrain from doing anything that might negatively affect the 'existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities'.¹¹⁰ Therefore, states also have a duty to improve the security of property from interference from third parties through registration systems.¹¹¹

Similarly, the case of *Saramaka People v Suriname*¹¹² dealt with the concession of the indigenous peoples' ancestral land without their prior consent. With regard to the claim made on behalf of the indigenous people that their property rights were infringed, the Inter-American Court of Human Rights reiterated that the state may restrict the use and enjoyment of property in terms of article 21 of the American Convention. However, such restrictions may only take place if four conditions are met. The restriction should have been previously established by law, must be necessary, proportional and have the aim of achieving a legitimate objective in a democratic society.¹¹³ In the case of *Ivcher-Bronstein v Peru*,¹¹⁴ which dealt with the deprivation of the plaintiffs' nationality resulting in his loss of control over a Peruvian television network, the court stated that

[p]roperty may be defined as those material objects that may be appropriated, and also any right that may form part of a person's patrimony; this concept includes all movable and immovable property, corporeal and incorporeal elements, and any other intangible object of any value'.¹¹⁵

¹⁰⁹ *Mayagna (Sumo) Awas Tingi Community v Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (Ser C) Nr 79, paras 153 and 173.4.

¹¹⁰ *Mayagna (Sumo) Awas Tingi Community v Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (Ser C) Nr 79, paras 15 and 173.4. Compare *Yakye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2005, Inter-American Court of Human Rights (Ser C) Nr 125, where the Inter-American Court recognized the independent right of ownership and possession and ordered the demarcation and title of the community's ancestral land.

¹¹¹ Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 70.

¹¹² Judgment of 28 November 2007, Inter-American Court of Human Rights (Ser C) Nr 172.

¹¹³ *Saramaka People v Suriname*, Judgment of 28 November 2007, Inter-American Court on Human Rights (Ser C) Nr 172 para 127. In the case where indigenous people are involved a fifth requirement is added, namely that the restriction imposed cannot 'amount to a denial of their survival as a tribal people'.

¹¹⁴ Judgment of 6 February 2001, Inter-American Court of Human Rights, para 122.

¹¹⁵ This definition was subsequently quoted with approval in *Mayagna (Sumo) Awas Tingi Community v Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (Ser. C) Nr 79 para 144.

In terms of this brief discussion concerning the right to property in the Inter-American regional international law system it can be concluded that property in terms of the American Convention is interpreted widely.¹¹⁶ In addition, although the use and enjoyment of property may be restricted, it may only be restricted when certain requirements are fulfilled.

3 3 5 Conclusion

In this part of the chapter it was shown that the right to property in regional international law is more developed than in international law. The supervisory organs of the different regional systems have come a long way in interpreting and giving effect to the right to property as contained in their respective instruments. It was also indicated that the Banjul Charter's formulation of the right to property in article 14 is much broader and weaker, due to the absence of compensation requirements, when compared with the property provisions found in article 1 of Protocol 1 to the European Convention and article 21 of the American Convention. However, the Banjul Charter is binding on South African law, and as a result, the Banjul Charter has to be considered whenever the right to property needs to be interpreted. Similarly, through the judgment of *S v Makwanyane*¹¹⁷ and by operation of section 39(1)(b), the regional international law of the European Council and the Organisation of American States, as developed by their respective supervisory organs, could also be consulted.

Although the right to property is found in the three regional systems as discussed, protecting and enforcing the right to property in the African region is less developed and as a result weaker than in the European and Inter-American systems. Although the African system does not pose the same strict requirements for admissibility of a claim based on the Banjul Charter as the European and Inter-American systems, the African Commission is less effective than the supervisory organs of the European and Inter-American regions

¹¹⁶ See Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights under Human Rights and Investment Law in Africa' (2008) 33 *SAYIL* 62-112 at 69 where the author states that the scope of the right to property is not limited to property recognised in domestic law, but also includes entitlements based on customary international law.

¹¹⁷ 1995 (3) SA 391 (CC).

in monitoring compliance with the Banjul Charter.¹¹⁸ This is in part attributable to the fact that the African Court on Human and Peoples' Rights is not yet operative and the African Commission on Human Rights does not give binding decisions. Furthermore, the African Commission's communications do not have strong persuasive powers. Nevertheless, as these regional international law conventions and jurisprudence have interpretational value, it is still necessary for courts, tribunals and forums to consult these instruments and the interpretation, however limited, given them.

3 4 Cases Relating to Section 25 of the Constitution

Several cases that have been heard by the Constitutional Court concern section 25 of the Constitution. Amongst these, the Court attempted to use international law in just one case, namely *First National Bank of SA LTD t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (hereafter 'FNB').¹¹⁹ In this case the South African Revenue Service (the 'SARS') detained and established a statutory lien in terms of section 114 of the Customs and Excise Act¹²⁰ on vehicles on the premises of Lauray Manufacturers (CC). SARS also detained and established a lien over two additional vehicles; the first leased and the second sold under an instalment sale agreement by FNB to Airpark Halaal Cold Storage (CC). In all three instances FNB retained ownership of the three vehicles.

The vehicles that were detained on the premises of Lauray and Airpark in securing the payment by them for outstanding customs and/or excise debt belonged to a third party, namely Wesbank, a subsidiary of FNB. FNB questioned the constitutionality of section 114 of the Customs and Excise Act,¹²¹ stating that this particular section allowed for the execution and sale of goods without an order of the court. It further alleged that the detention and ultimate sale of the goods amounted to an expropriation without making provision for compensation to be paid as required by section 25 of the Constitution of 1996, and therefore argued that it should be declared invalid.

¹¹⁸ For a more detailed discussion, see Cotula L 'International Law and Negotiating Power in Foreign Investment Projects: Comparing Property Rights Protection under Human Rights and Investment Law in Africa' (2008) 22 *SAYIL* 62-112 at 72-76.

¹¹⁹ 2002 (4) SA 768 (CC).

¹²⁰ Act 91 of 1964.

¹²¹ Act 91 of 1964.

In the Cape High Court,¹²² the application was denied and FNB appealed directly to the Constitutional Court. In the Constitutional Court it was submitted that the provisions of section 114 of the Customs and Excise Act¹²³ were inconsistent with section 25(1) of the Constitution, and therefore invalid. Relying on a list of factors, the Court ruled that there is insufficient reason for the deprivation and accordingly found that the deprivation of property was arbitrary.¹²⁴ As a result, the Court concluded that section 114 of the Act is invalid in as far as it subjects the property of a person other than the person who is liable to a lien, detention and sale.

In the judgment, written by Ackermann J, it was acknowledged that the Court has an obligation in terms of section 39(1)(b) of the Constitution to consider international law when interpreting the bill of rights. The Court further mentioned the discretion that the Court has in terms of section 39(1)(c) of the Constitution in applying or using foreign law in interpreting the bill of rights.¹²⁵ Although international and foreign law can be an interpretive tool that can aid the Court in interpreting rights in the bill of rights, the Court stated that it should not lose sight of the context in which the property clause came into existence.¹²⁶ Therefore, with reference to the obligation in terms of section 39(1) of the Constitution, it could have been reasonably expected that the Court would discuss international and regional international law that could aid the interpretation of section 25 of the Constitution, before turning to a discussion on foreign law.

However, from paragraphs 71 to 97 of the judgment the Court considered foreign law under the heading; 'Comparative law on deprivation of property'. The Court noted that in dealing with the deprivation of property many jurisdictions use some concept of proportionality, although the context and analytical methodology differs from the South African Constitution. Therefore, the Court investigated the approaches concerning the

¹²² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2001 (3) SA 310 (C).

¹²³ Act 91 of 1964.

¹²⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹²⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 64.

¹²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 64.

proportionality question in other democratic jurisdictions before attempting to conclude what 'arbitrary' deprivation means in terms of section 25 of the Constitution. The foreign law discussed by the Court will be highlighted below to indicate the extensive use or reliance on foreign law, while the reference to international law is almost non-existent.

The Court considered the Fifth and Fourteenth Amendment of the United States of America's federal Constitution.¹²⁷ The Fifth Amendment read with the Fourteenth Amendment, constitutes the property clause.¹²⁸ This property clause consists of two parts, the 'due process clause' and the 'takings clause'. In terms of the due process clause, a person may not be deprived of his/her property without due process of law. In terms of the takings clause, private property may not be taken for a public use without just compensation.¹²⁹

The Court also discussed section 51(xxxi) of the Australian Constitution.¹³⁰ This section, although not a typical property guarantee, is 'recognized and treated as a constitutional property guarantee by the courts, and it has generated extensive and influential case law on the constitutional provision and of the relevant cases'.¹³¹ Section 51(xxxi) reads as follows:

'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: the acquisition of property on just terms for any State or person for any purpose in respect of which the Parliament has the power to make laws.'¹³²

¹²⁷ Constitution of the United States of America of 1787.

¹²⁸ See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398.

¹²⁹ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 399. The Court also quoted from *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 425: 'The general rule at least is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognised as a taking'. The Court also considered *Dolan v City of Tigard* 114 S Ct 2309 (1994), in which the Supreme Court of the United States of America laid down a rough proportionality test in determining whether or not the regulation goes too far.

¹³⁰ Commonwealth of Australia Constitution Act 1900 (UK).

¹³¹ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 39.

¹³² S 51(xxxi) also empowers the Government to expropriate, but requires compensation to be paid in such an event. However, no mention is made of the regulation of property. It should be noted that this section does not form part of a traditional bill of rights. The Australian courts have developed a doctrine around the regulation of property where the regulation, although not falling within the ambit of s 51 is nevertheless considered lawful despite the fact that no 'just terms' are provided for. In *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, the Australian court took a strict position regarding the circumvention of s 51(xxxi) by doing indirectly what the state may not do directly. For purposes of s 51(xxxi) the Australian

Furthermore, the Court discussed article 1 of the First Protocol to the European Convention¹³³ of the Council of Europe. Article 1 protects the peaceful enjoyment of possessions, requires deprivation to be for a public purpose and in accordance with the relevant laws and entitles the state 'to control the use of property in accordance with the general interest'.¹³⁴

The property clause of the Federal Republic of Germany, contained in article 14 of *Grundgesetz* is also discussed by the Court.¹³⁵ Article 14(1) guarantees property and the right of inheritance and provides that its substance and limits shall be determined by the law. Article 14(2) states that property also entails obligations and that its use should serve the public interest. Article 14(3) makes provision for expropriation. However, such expropriation should be in the public interest and if expropriation does occur, the compensation that is paid must represent a fair balance between the public interest and the interest of those affected.

The South African Constitutional Court admitted that the law of the United Kingdom is not entirely relevant to the question at hand. Nevertheless, the Court discussed the applicable administrative principles of the United Kingdom.¹³⁶

courts require that there should be an acquisition for the purposes of s 51(xxxi). In *Mutual Pools and Staff (Pty) Ltd v The Commonwealth of Australia* (1994) 179 CLR 155 the court stated that legislation needs to be characterised to see if it falls inside the ambit of s 51(xxxi). In other cases, the Australian Court found that the forfeiture of property in a case where the owners were unaware of the unlawful use of their fishing vessel (*Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270) and the creation of a statutory lien and sale of goods of property of a owner who had not incurred the fees (*Airservices Australia v Canadian Airlines International Ltd* (1999) 167 ALR 392) does not contravene s 51(xxxi) but is part of a regulatory provision. In order to determine whether an acquisition of property falls within the ambit of s 51(xxxi), the Australian High Court has developed a principle of proportionality and McHugh J in *Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270 at 292-2923 illustrates this point.

¹³³ European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, entered into force on 3 September 1953; First Protocol to the European Convention on Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952 (213 UNTS 222, ETS 5).

¹³⁴ *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35 at 61. *James v United Kingdom* (1986) EHRR 123 is also discussed.

¹³⁵ German courts distinguish provisions that define the contents and limits of property from dispossessions which could, in terms of art 14(3), classify as expropriations. This distinction is based on the aim or purpose of the dispossession and not with the extent of interference with property rights. Therefore, for an acquisition to qualify as an expropriation, the purpose of the dispossession must be to confiscate the right as such. See Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 142.

¹³⁶ The Constitutional Court considered the limits for substantive judicial review of an administrative authority on the 'Wednesbury rule', which entails that the decision of the authority is unreasonable if it is one that no

The lengthy discussion on comparative law concerning the deprivation of property in the *FNB*¹³⁷ decision is problematic for two reasons. Firstly, the Court did not investigate property rights in international law at all; making no reference to property rights in international law. Although the Court stated that foreign law ‘cannot, by simplistic transference,’¹³⁸ provide for a proper interpretation of the South African property clause, the Court nevertheless consulted foreign law to a large extent while simply ignoring international law principles that are available. Although the foreign law that was discussed is helpful and courts are at liberty to consult foreign law in the interpretation of the bill of rights, reliance on international law in the interpretation of the right to property would have been more appropriate as section 39(1) of the Constitution renders international law a more appropriate tool for interpretation. This is made evident through the wording and structure of section 39(1): courts are obliged to use international law in the interpretation of the bill of rights, but have discretion to use foreign law in the interpretation of the bill of rights. Before entering into a discussion on foreign law, a thorough investigation and discussion should have been undertaken of property rights and the deprivation of property in international law. Since all courts, tribunals and forums must consider international law, the Court should have mentioned article 17 of the UDHR,¹³⁹ the difficulties with formulating an international standard on the right to property and the subsequent exclusion of the right to property in the international covenants. Thereafter, the Court should have turned to regional international law, before turning to foreign law.

Secondly, insufficient reference was made to regional international law. There is no reference to the article 14 of the Banjul Charter,¹⁴⁰ which is binding on South African law. As a result, the communications of the African Commission concerning the right were not discussed or even mentioned. In the communications discussed above at 3 3 2 it was

reasonable tribunal could have reached. In *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223 and in *R v Secretary of State for the Home Departments, Ex Parte Hindley* (2000) 1 QB 152 (CA) 177 G the court used a proportionality test for reviewing executive action.

¹³⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

¹³⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 97.

¹³⁹ Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, Resolution 217 (III) of 10 December 1948, UN doc A/810.

¹⁴⁰ African Charter on Human and Peoples’ Rights, adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58 (1982).

established that the right to property includes a right of access to one's property. Furthermore, if property is seized, it needs to be justifiable in the public interest or for a public purpose. In addition, if the Constitutional Court considered the African Commission's interpretation of article 14 of the Banjul Charter, the Court would have noted the African Commission's willingness to balance the demands of the community with the protection of property.¹⁴¹

The Constitutional Court discussed article 1 of the First Protocol to the European Convention, but confused it with foreign law by discussing it with the laws of the United States of America, Australia, Germany and the laws of the United Kingdom. Regarding the law of the Council of Europe as foreign law makes it applicable to the interpretation process under section 39(1)(c); courts may consult foreign law. However, as explained above, the law of the Council of Europe is regional international law, is higher in status than foreign law and has to be considered in interpreting the rights in the bill of rights in terms of section 39(1)(b). Although the Court reached sensible conclusions based on the European Convention and the jurisprudence of the European Court of Human Rights that was considered, the Court confused regional international law with foreign law and miscalculated its importance as international law.

The Constitutional Court identified the three rules as laid out in *Sporrong and Lönnroth v Sweden*¹⁴² which were confirmed in *James v United Kingdom*.¹⁴³ Furthermore, it stated that under the third rule it has been held that dispossession without compensation is lawful in cases where heavy property taxes have been imposed,¹⁴⁴ exchange control impositions have been levied,¹⁴⁵ compulsory contribution to a state pension scheme levied,¹⁴⁶ fines imposed for a criminal offence and smuggled goods forfeited¹⁴⁷ and property involved in a criminal act forfeited.¹⁴⁸ This is in line with the principle that the Court in the *FNB*¹⁴⁹ case

¹⁴¹ Olaniyan K 'Civil and Political Rights: Articles 8-14' in Evans M and Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd ed 2008) 213-243 at 238-239.

¹⁴² (1982) 5 EHRR 35.

¹⁴³ (1986) 5 EHRR 123.

¹⁴⁴ *Gudmunder Gudmundson v Iceland* (1960) YB 3 394.

¹⁴⁵ *X and Y v United Kingdom* (1973) 44 CD 29.

¹⁴⁶ *X v The Netherlands* (1971) YB 14 224.

¹⁴⁷ *X v Austria* (1979) 13 DR 27.

¹⁴⁸ *Allgemeine Gold-und Silberscheideanstalt AG v The United Kingdom* (1987) ECHR Series A vol 108.

¹⁴⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

formulated with reference to the comparative foreign law discussion, namely that it is permissible in certain circumstances to deprive persons of their property without paying compensation if it is in the public interest. Furthermore, from the discussion concerning Protocol 1, the Court derived that a proportionality analysis has been developed to determine whether a deprivation of property is lawful or not. Furthermore, the deprivation (or regulatory measure) must be lawful, in the public interest as well as establish a fair balance between the public interest and the property interest affected.¹⁵⁰

Article 21 of the American Convention¹⁵¹ was not discussed either. As illustrated above, article 21 of the American Convention is usually used to assert indigenous peoples' right to their ancestral land. However, the Inter-American Court of Human Rights has indicated that the use of enjoyment of property may be restricted, but only if certain requirements are met. In addition, article 21 requires the payment of compensation if deprivation takes place.

In the almost 30 paragraphs in which the Constitutional Court discussed foreign law in the *FNB*¹⁵² judgment, two principles are derived. The first is that it is permissible under certain circumstances to deprive persons of property in the public interest without paying compensation. The second principle is that there has to be an 'appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve'.¹⁵³

Relying on article 1 of the First Protocol, the Court could have justified its finding that a person may be deprived of his/her property without being paid compensation. Article 14 of the Banjul Charter, article 1 of the First Protocol to the European Convention and article 21 of American Convention require such deprivation to be in the public interest or for a public purpose. In addition, these regional international law instruments dealing with the right to property require that a balance has to be struck between the sacrifice of the individuals

¹⁵⁰ Relying on *X v Austria* (1979) 13 DR 27 and *Fredin v Sweden* (1991) ECHR Series A vol 192.

¹⁵¹ American Convention on Human Rights, signed at San Jose, Costa Rica on 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123, OASTS 36.

¹⁵² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

¹⁵³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 98.

and the public purpose being served. Therefore, the principle derived from the study on comparative law on the issue of deprivation of property, could also have been reached by considering regional international law.

It is regrettable that in subsequent cases heard by the Constitutional Court, no reference was made to international law in interpreting section 25 of the Constitution at all. For instance, in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*,¹⁵⁴ the constitutionality of section 118(1) of the Local Government: Municipal Systems Act¹⁵⁵ and section 50(1)(a) of the Gauteng Local Government Ordinance¹⁵⁶ was challenged. These sections require that a certificate be issued in order for the landowners to transfer their immovable property. This certificate states that consumption charges for services relating to the immovable property in the preceding two years were paid. Without this certificate, transfer of the property cannot take place, which placed a restriction on the landowners' power to transfer their immovable property. In these cases, the landowners rented their immovable property to third parties. These third parties failed to pay the consumption charges which meant that the required certificate could not be issued when the landowners wanted to dispose of the property. Therefore, sections 118(1) and 50(1) were being challenged on the basis that they give rise to a deprivation of property contrary to section 25(1) of the Constitution.

In answering the question whether or not these provisions amount to an arbitrary deprivation of property, the Constitutional Court relied on its previous judgment, namely the *FNB*¹⁵⁷ decision. The Court applied the test as it was laid down in the *FNB* judgment, although the Court applied it incorrectly.¹⁵⁸ However, no mention is made of the discussion of international and foreign law in the *FNB* case. The Court did not elaborate on it, nor did it approve or disapprove of the *FNB* Court's reasoning with regard to the use of international and foreign law. It is disappointing that in determining whether the legislation

¹⁵⁴ 2005 (1) SA 530 (CC).

¹⁵⁵ Act 32 of 2000.

¹⁵⁶ Ordinance 17 of 1939.

¹⁵⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

¹⁵⁸ In this regard, see Van der Walt AJ 'Retreating from the FNB Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*' (2005) 122 *SALJ* 75-89.

in place arbitrarily deprives the affected landowners of their property, no reference was made to section 39(1)(b) and international law.

In *Du Toit v Minister of Transport*,¹⁵⁹ the issue before the Court was whether the compensation paid to the plaintiff was in line with section 25 of the Constitution. In this case, the South African Roads Board extracted 80 000 cubic metres of gravel from the plaintiff's land in order to build a public road. When compensation was calculated, a dispute occurred. The plaintiff insisted that what was expropriated was the gravel, while the Roads Board stated that it was only the right to use the 3.03 hectares for a temporary period that was expropriated. The applicant sought compensation in accordance with article 12(1)(a) of the Expropriation Act,¹⁶⁰ that is, market value. In the alternative, the applicant sought compensation that is just and equitable in line with section 25(3) of the Constitution.

Writing for the majority, Mokgoro J made no reference to international law or regional international law regarding the duty of states to pay just and equitable compensation in the event of an expropriation. Langa CJ, who wrote a minority judgment, made no reference to the principles of international law regarding the payment of just and equitable compensation either. On the point of expropriation and compensation, the Banjul Charter is an important source as it deals with the issue of compensation in the event of spoliation.¹⁶¹

There are various reasons that can explain why the courts and especially the Constitutional Court do not consider international law when the right to property is adjudicated. As indicated above, the protection of property rights in international law is controversial. Property seems to lie at the heart of what states regard as that which makes them sovereign.¹⁶² Therefore, states hesitate to agree to conventions regulating the right

¹⁵⁹ 2006 (1) 297 (CC).

¹⁶⁰ Act 63 of 1975.

¹⁶¹ See 3 3 2 for further discussion.

¹⁶² Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 359.

to property. By comparison, conventions regarding the rights pertaining to women,¹⁶³ children,¹⁶⁴ refugees¹⁶⁵ and the like have been agreed to by various states, making it evident that states will agree to these rights more easily. Therefore, when cases relating to women,¹⁶⁶ children,¹⁶⁷ refugees¹⁶⁸ and the environment¹⁶⁹ are at issue, South African courts are more readily prepared to consult international law, because it is on a subject that states could agree to with relative ease.

The second reason is related to the first. When investigating property rights in international law, the labyrinth of laws and regulations that are found as a result of a lack of consensus regarding the content and limitation on the right to property is staggering. As a result of this labyrinth that would be encountered if a judge wanted to consult property rights in

¹⁶³ Convention on the Political Rights of Women, adopted for signature, ratification and accession by Resolution 640 (VII) on the United Nations General Assembly on 20 December 1952, entered into force on 7 July 1954, 193 UNTS 135; Convention on the Nationality of Married Women, adopted and opened for signature, ratification and accession by Resolution 1040 (XI) of the United Nations General Assembly on 29 January 1957, entered into force on 11 August 1958, 309 UNTS 65; Declaration on the Elimination of Discrimination against Women, proclaimed by the United Nations General Assembly by Resolution 2263 (XXII) on 7 November 1967, UN doc A/RES/2263; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981, 1249 UNTS 13, 19 ILM 33.

¹⁶⁴ Declaration of the Rights of the Child, proclaimed by the United Nations General Assembly by Resolution 1386 (XIV) on 20 November 1959, UN doc A/4354; Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990, 1557 UNTS 3, 28 ILM 1456; Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, proclaimed by Resolution 2037 (XX) of the United Nations General Assembly on 7 December 1965, UN doc A/RES/20/2037(XX).

¹⁶⁵ Convention Relating to the Status of Refugees, General Assembly Resolution 429(V) of 12 December 1950, adopted on 28 July 1951 at Geneva, entered into force on 22 April 1950, 189 UNTS 150; Protocol Relating to the Status of Refugees, General Assembly Resolution 2198 (XXI) of 16 December 1966, entered into force on 4 October 1967, 606 UNTS 267; Convention Relating to the Status of Stateless Persons, adopted by the Conference of Plenipotentiaries on 28 September 1954 at New York, entered into force on 6 June 1960, 360 UNTS 117; Convention on the Reduction of Statelessness, adopted by the Conference of Plenipotentiaries on 30 August 1961 at New York, entered into force on 13 December 1975, 989 UNTS 175.

¹⁶⁶ In *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) the Supreme Court of Appeal stated that the South African Government has a duty under international law imposed on it by s 39(1)(b) to protect women against violent crime and gender discrimination.

¹⁶⁷ In *De Gree v Webb* 2007 (5) SA 185 (SCA), a case involving the inter-state adoption of a South African child, the Supreme Court of Appeal stated that what should be taken into account is the best interest of the child, a well established principle in international law; an obligation imposed on them in terms of s 39(1)(b).

¹⁶⁸ In *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) the court accepted the obligation in terms of s 39(1)(b) to make use of international law. The court made use of the Convention Relating to the Status of Refugees of 1950, 189 UNTS 150, in order to determine when refugee status or asylum can be granted.

¹⁶⁹ For instance, in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 158 the court stated that 'when interpreting the constitutional right to a safe and healthy environment entrenched in section 24, it is permissible to take cognisance of international law as provided for in section 39(1)(b)'.

international law, it seems as though judges are reluctant to do so. And if the venture into international law is not done properly, it can easily be done incorrectly.

Although property rights in various jurisdictions vary considerably and the 'concept of property and the permissible limitations differ significantly ... [making] it difficult to adopt international property rights standards,'¹⁷⁰ regional human rights instruments do contain a right to property. Therefore, the regional international law and the continuous development that takes place should be taken into account when the right to property is interpreted.

3 5 Property Rights of Specific Persons in International Law

3 5 1 Introduction

As illustrated in the previous sections, due to the diverging opinions of different states on the protection of property rights, the right to property is not effectively protected in international law. In regional international law, property rights are protected to a larger degree and have been developed by the relevant supervisory organs. In international law, the property rights with regard to specific groups of persons are in most instances the subject of further development. These groups of persons, for instance refugees and women, are seen as vulnerable and therefore in need of special protection.¹⁷¹ The sources relating to the property rights of these peoples that are binding on South African law through ratification should be able to assist the courts when interpreting the property rights of these specific groups of people. Therefore, the sources that are binding on South African law, pertaining to the property rights of refugees and women will be discussed.

3 5 2 Refugees

As a consequence of the Second World War many people in Europe were displaced and in order to deal with this problem the United Nations established the United Nations High Commissioner for Refugees.¹⁷² Consequently, the Convention Relating to the Status of

¹⁷⁰ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 360.

¹⁷¹ Krause C and Alfredsson G 'Article 17' in Alfredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 359-378 at 373.

¹⁷² Katz A 'Refugees' in Dugard J (ed) *International Law: A South African Perspective* (3rd ed 2005) 341-353 at 342.

Refugees (the 'Refugee Convention')¹⁷³ and the Protocol Relating to the Status of Refugees¹⁷⁴ were adopted. The Organization of African Unity (the 'OAU') Convention Governing the Specific Aspects of Refugee Problems in Africa¹⁷⁵ was concluded in 1969 in order to regionally implement the Refugee Convention in Africa.¹⁷⁶ South Africa has ratified the Refugee Convention, the Protocol Relating to the States of Refugees and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, making these instruments binding on South African law. In South Africa, aspects regarding refugees and asylum seekers are governed by the South African Refugee Act 130 of 1998, as amended by the Refugee Amendment Act 33 of 2008.¹⁷⁷ The purpose of the Refugee Act¹⁷⁸ is to give effect to the international law instruments mentioned above. In the Preamble to the Act, the accession to these international law instruments regarding refugees is acknowledged and in doing so, the South African government has 'assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law'.¹⁷⁹ In article 8(1) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, member states are encouraged to co-operate with the United Nations' High Commissioner for Refugees. Therefore, these international and regional international laws should be consulted as they provide additional protection for refugees' property rights.

¹⁷³ General Assembly Resolution 429(V) of 14 December 1950, adopted on 28 July 1951 at Geneva, entered into force on 22 April 1950, 189 UNTS 150.

¹⁷⁴ General Assembly Resolution 2198 (XXI) of 16 December 1966, entered into force on 4 October 1967, 606 UNTS 267.

¹⁷⁵ Addis Ababa, 10 September 1969, entered into force 2 September 1974, 1001 UNTS 45.

¹⁷⁶ Art 6 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, states that '[t]he present Convention shall be the effective regional complement in Africa of the 1951 Convention on the Status of Refugees'.

¹⁷⁷ Before the enactment of the Refugee Act 130 of 1998 on 1 April 2000, the Aliens Control Act 96 of 1991 (repealed by the Immigration Act 13 of 2002) governed aspects concerning person seeking asylum and refugee status.

¹⁷⁸ Act 130 of 1998. For a discussion on the procedures to be followed when persons apply for refugee status or asylum in terms of the Refugee Act 130 of 1998 see Katz A 'Refugees' in Dugard J (ed) *International Law: A South African Perspective* (3rd ed 2005) 341-353 at 348-353.

¹⁷⁹ Therefore, in s 6 of the Refugee Act 130 of 1998, which was retained in form but moved to s 1A of the Refugee Amendment Act 33 of 2008, it is stated that the Refugee Act 130 of 1998 'must be interpreted and applied with due regard to (a) the 1951 Convention Relating to the Status of Refugees; (b) the 1967 United Nations Protocol Relating to the Status of Refugees; (c) the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; (d) the 1948 Universal Declaration of Human Rights; and (e) any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party'.

When a person is granted refugee status, he is given certain rights in terms of international, regional international and South African law. The Refugee Act¹⁸⁰ does not explicitly grant refugees (or asylum seekers) a right to property. However, section 27(b) of the Refugee Act,¹⁸¹ as amended by the Refugees Amendment Act,¹⁸² states that refugees are entitled to full legal protection, which includes all the rights set out in the bill of rights of the Constitution of 1996, except those rights which only apply to citizens.¹⁸³ Therefore, it is possible to protect refugees' property rights in terms of the Constitution and the Refugee Convention of 1951.

Therefore, property of a refugee is protected from deprivation and expropriation by section 25(1)-(3) of the Constitution.¹⁸⁴ However, refugees will not be able to claim any right in terms of access to land and restitution programmes in terms of section 25(5)-(9).¹⁸⁵ In terms of section 25(1) of the Constitution, refugees may only be deprived of their property in terms of law of general application and only if the deprivation is not arbitrary.¹⁸⁶ Law of general application includes original and delegated legislation as well as rules of common and customary law.¹⁸⁷ In addition, these laws of general application should be specific, accessible and should not target certain individuals in an unfair manner.¹⁸⁸ Section 25(1)

¹⁸⁰ Act 130 of 1998.

¹⁸¹ Act 130 of 1998.

¹⁸² Act 33 of 2008.

¹⁸³ In terms of s 27A of the Refugees Amendment Act 33 of 2008, asylum seekers are also entitled to the rights contained in the bill of rights, but only in as far as those rights apply to asylum seekers. Examples of rights that will not be available to refugees include rights that are only available to citizens, such as political rights contained in section 19 and the right to freedom of trade, occupation and profession in s 22 of the Constitution.

¹⁸⁴ Van der Walt AJ *Constitutional Property Law* (2005) 48-49; Currie I and De Waal J *The Bill of Rights Handbook* (5th ed 2005) 35-36. According to Van der Walt '[n]atural persons qualify for the protection of most of rights in the Bill of Rights in principle, although some rights are specifically reserved for citizens'. According to Currie and De Waal rights phrased negatively, such as s 25(1), 'are accorded to all natural persons within the territory of the Republic' and this will include persons legally or illegally, temporarily or permanently within the Republic. S 27(b) of the Refugees Act 130 of 1998, as amended by the Refugees Amendment Act 33 of 2008, states that refugees are entitled to all the rights in the bill of rights in as far as they do not apply exclusively to citizens.

¹⁸⁵ Van Wyk J 'The Relationship (or Not) Between Rights of Access to Land and Housing: De-linking Land from its Components' (2005) 16 *Stell LR* 466-487 at 474 points out that refugees are 'excluded from land redistribution or access programmes' because section 25(5), which requires of the state to take reasonable and legislative measures within its available resources to promote access to land on an equitable basis, applies only to citizens.

¹⁸⁶ See Van der Walt AJ *Constitutional Property Law* (2005) 121-178; Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* (5th ed 2006) 544-557.

¹⁸⁷ Van der Walt AJ *Constitutional Property Law* (2005) 143. At 144 Van der Walt also argues that the rules of common and customary law that authorize deprivation are also susceptible to the requirement that they should not be arbitrary.

¹⁸⁸ Van der Walt AJ *Constitutional Property Law* (2005) 143-144.

also prohibits the arbitrary deprivation of property. In *FNB*¹⁸⁹ the Constitutional Court adopted a 'substantive interpretation of the non-arbitrariness requirement'.¹⁹⁰ The Court firstly considered whether there is sufficient reason for the deprivation. If not, the deprivation will be arbitrary. In determining whether there is sufficient reason for the deprivation, the Court considered a list of factors.¹⁹¹

In terms of section 25(2) and (3) of the Constitution, refugees' property may only be expropriated in terms of a law of general application. The expropriation should be for a public purpose or in the public interest and must be accompanied by the payment of compensation.¹⁹² Since the decision in *FNB*, an enquiry in terms of section 25(1)-(3) will have to start with section 25(1). Therefore, to answer the question whether an expropriation took place in terms of section 25(2), deprivation in terms of section 25(1) as described above has to be considered first.¹⁹³ The law of general application as described in terms of section 25(1) above is also applicable to an enquiry in terms of section 25(2). Therefore, if refugees have property, their property will be protected from deprivation and expropriation in terms of the Constitution. As has been stated before, refugees will not be able to claim any rights in terms of land redistribution or access to land programmes.

To support and supplement the property protection of refugees in terms of the Constitution, the Refugee Convention could be considered, since it is binding on South African law. Article 13 of the Refugee Convention protects the movable and immovable property of refugees.¹⁹⁴ It reads as follow:

¹⁸⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) 768 (CC).

¹⁹⁰ Van der Walt AJ *Constitutional Property Law* (2005) 153.

¹⁹¹ *First National Bank of SA Ltd t/a Wesbank v South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (2) 768 (CC) para 100.

¹⁹² See Van der Walt AJ *Constitutional Property Law* (2005) 179-283.

¹⁹³ *First National Bank of SA Ltd t/a Wesbank v South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (2) 768 (CC) paras 58 and 60. This was a departure from the Constitutional Court's finding in *Harksen v Lane NO* 1998 (1) SA 300 (CC), where deprivation and expropriation were regarded as two exclusive categories, while in the *FNB* decision the Constitutional Court found that deprivation will always be considered first, irrespective of whether the case was brought in terms of s 25(2). See Van der Walt AJ *Constitutional Property Law* (2005) 148-151 and Van der Walt AJ and Botha H 'Coming to Grips with the New Constitutional Order: Critical Comments on *Harksen v Lane NO*' (1998) 13 *SAPL* 17-41 at 19-21.

¹⁹⁴ Art 14 of the Convention Relating to the Status of Refugees of 1951, 189 UNTS 150, also protects the intellectual property of refugees.

'The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.'

As indicated above, refugees would be able to rely on section 25(1)-(3) if they were deprived or expropriated from their property, but will not be able to claim any right in terms of land access and restitution programmes. However, article 13 of the Refugee Convention seems to indicate that the South African government needs to treat refugees at least as favourably as aliens generally in the same circumstances, with regard to the acquisition of both movable and immovable property. This means that there should be no undue limitations placed on refugees, due to their status as refugees, in acquiring property as this might result in discrimination based on race, religion and country of origin, which is prohibited by article 3 of the Refugee Convention¹⁹⁵ and section 9 of the Constitution of 1996. This would supplement refugees' property rights in terms of section 25 of the Constitution. Article 13 of the Refugee Convention supports the rights available to refugees in section 25(1)-(3), by recognising the rights pertaining to property, which in the South African context will be protection from deprivation and expropriation.

3 5 3 Women

In international law, women's property rights have also received specialized attention. The Convention on the Elimination of All Forms of Discrimination against Women (the 'CEDAW')¹⁹⁶ is binding on South African law¹⁹⁷ and has the purpose to eliminate discrimination based on sex. It also contains certain articles pertaining to equality with regard to property. Article 14 of the CEDAW concerns the role of rural women in the economic survival of their families and article 14(g) affords women equal rights to those

¹⁹⁵ Convention Relating to the Status of Refugees of 1951, 189 UNTS 150. Art 4 of the OAU Convention Regarding the Specific Aspects of Refugee Problems in Africa of 1969, 1001 UNTS 45, denounces discriminations based on 'race, religion, nationality, membership of a particular social group or political opinions'.

¹⁹⁶ Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 December 1981, 1249 UNTS 13, 19 ILM 33.

¹⁹⁷ South Africa signed the CEDAW on 29 January 1993 and it entered into force in South Africa on 14 January 1996. See Henys C and Viljoen F 'The Impact of Six Major UN Human Rights Treaties in South Africa' (2001) 16 *SAPL* 28- 67 at 29.

granted to men in relation to land reform. Furthermore, article 15, which pertains to equality in legal and civil matters, provides in article 15(2) that women should receive equal treatment to that which men receive to conclude contracts and administer property. The aim of this article is to give women the right, which in some countries is not enjoyed by women, to enter into contracts without their husbands' consent with regard to their own property and earnings.¹⁹⁸

Equality in family law is governed by article 16 of the CEDAW. Article 16(1)(h) states that state parties must ensure '[t]he same right for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'. These articles are drawn up to eradicate discrimination against women. Property regimes throughout the world had at some stage discriminated against women by using property rules. For instance, in certain jurisdictions property law made it impossible for females to inherit the family land while in other jurisdictions husbands automatically acquired the wife's property upon entering into marriage.¹⁹⁹

In the case of *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*,²⁰⁰ the discrimination that South African women face in the event of intestate succession in African customary law was brought to light. In this case, the constitutional validity of male primogeniture was challenged, as well as section 23 of the Black Administration Act²⁰¹ and section 1(4)(b) of the Intestate Succession Act.²⁰² The principle of male primogeniture entails that only a male related to the deceased qualifies to be an intestate heir.²⁰³ When the deceased has

¹⁹⁸ Office of the United Nations Commission for Human Rights *Discrimination against Women: The Convention and the Committee Fact Sheet 22* (1993). This document is neither paginated nor paragraphed.

¹⁹⁹ Office of the United Nations Commission for Human Rights *Discrimination against Women: The Convention and the Committee Fact Sheet 22* (1993). This document is neither paginated nor paragraphed.

²⁰⁰ 2005 (1) SA 580 (CC).

²⁰¹ Act 38 of 1927.

²⁰² Act 81 of 1987. Through s 1(4)(b) of the Intestate Succession Act 81 of 1987 it was possible to exclude s 23 (of the Black Administration Act 38 of 1927) estates from the operation of the Intestate Succession Act.

²⁰³ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) par 77. See Bennet TW *Customary Law in South Africa* (2004, reprinted 2007) 335.

no male descendants, his father is regarded as the intestate heir.²⁰⁴ If the deceased father does not survive the deceased, 'an heir is sought among the father's male descendants related to him through the male line'.²⁰⁵

In the *Bhe* case, the two minor daughters of the deceased were barred from inheriting from his estate. In the *Shibi* case, the deceased had no surviving wife, descendants, parents or grandparents. The nearest male relatives were the deceased's cousins. Therefore, the sister of the deceased (Ms Shibi) was not eligible to be an heir in terms of the rules of intestate succession under African customary law.²⁰⁶

The Constitutional Court ruled that the principle of male primogeniture, as it has come to be applied with regard to the inheritance of property, is unconstitutional, because it unfairly discriminates against women. The Court also found that section 23 of the Black Administration Act is invalid, because it violates the right to equality and dignity found respectively in section 9 and 10 of the Constitution. Furthermore, the Court ruled that section 1(4)(b) of the Intestate Succession Act²⁰⁷ is invalid in as far as it excludes estates in terms of section 23 of the Black Administration Act.²⁰⁸

Therefore, South African courts have effectively tried to eradicate discrimination based on sex, especially in relation to women's property rights. As a result of the *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*²⁰⁹ case, the discrimination women faced in inheriting property has been eradicated. This is in line with the established international law principles on the matter as well the CEDAW which is binding on South African law.

²⁰⁴ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) par 77. See Bennet TW *Customary Law in South Africa* (2004, reprinted 2007) 337.

²⁰⁵ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) par 77. See Bennet TW *Customary Law in South Africa* (2004, reprinted 2007) 337. Therefore, if the deceased has no male descendants and his father does not survive him, the deceased's eldest brothers, in order of seniority, are next in order of intestate succession.

²⁰⁶ Ms Shibi also contested the manner in which the estate of her late brother was wound up: *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) para 24.

²⁰⁷ Act 81 of 1987.

²⁰⁸ Act 38 of 1927.

²⁰⁹ 2005 (1) SA 580 (CC).

3 6 Conclusion

It became clear in this chapter that the Constitutional Court does not adhere to the obligation placed on it by section 39(1)(b) of the Constitution to consider international law when interpreting the right to property. In the *FNB*²¹⁰ decision it became evident that the Constitutional Court, although accepting that it has an obligation to consider international law, failed to make proper reference to international law in interpreting the right to property. In the subsequent Constitutional Court cases concerning the right to property that were discussed, namely *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*,²¹¹ and *Du Toit v Minister of Transport*,²¹² no reference was made to international law either. Furthermore, in the *FNB*²¹³ case it became clear that the Constitutional Court confuses international law with foreign law. This is evident through the discussion of article 1 of Protocol 1 to the European Convention which is merged with the discussion of the legal principles of other countries such as Australia, Germany and the United States of America. This collapses the distinction made by the Constitution in section 39(1)(b) and 39(1)(c). In terms of section 39(1)(b) courts *must* consider international law when interpreting any right in the bill of rights, and in terms of section 39(1)(c) courts *may* consider foreign law when interpreting any right in the bill of rights

As discussed above, property rights are controversial in international law. Due to diverging views on the part of states; a right to property, although included in the UDHR, was excluded from the international covenants. Therefore, the right to property remains underdeveloped in international law. However, since there are provisions in international law that attempt to regulate the general protection of property, such as article 17 of the UDHR, it could be worth considering when the right to property needs to be interpreted.

²¹⁰ *First National Bank of SA Ltd t/a Wesbank v South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (2) 768 (CC).

²¹¹ 2005 (1) SA 530 (CC).

²¹² 2006 (1) 297 (CC).

²¹³ *First National Bank of SA Ltd t/a Wesbank v South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (2) 768 (CC).

It also became clear in this chapter that the right to property is more developed in regional international law. The relevant supervisory organs of the relevant regional systems have given interpretation, although in some instances limited, as to what the right to property consists of. It was made clear that the protection afforded property in the Banjul Charter is weaker when compared to the European and American Conventions because of the lack of effective monitoring of adherence to the Banjul Charter as well as the lack of enforceable remedies. However, the communications by the African Commission should still be able to guide the courts towards an interpretation of the right to property that is both in line with international law and the Constitution. The decisions and communications given by the supervisory organs in terms of the European and American Conventions should also be used by the court in interpreting the right to property since they can be regarded as international law and are part of the 'framework in which the bill of rights can be evaluated and understood'.²¹⁴

Furthermore, the property rights of refugees and women have been subject to further developments. In cases where refugees and women's rights stand to be adjudicated, South African courts can take cognisance of the international law sources, which as was seen in this instance, are binding on South African law.

This leads to the conclusion that courts, tribunals and forums are not justified in not fulfilling their obligation in terms of section 39(1)(b). Since there are international law sources that might be able to guide courts in attaining the best possible interpretation of the right to property in the new South African context, these international law sources should be considered.

In the following chapter, it will be considered whether or not the Constitutional Court is more prepared to consult international law when the right to adequate housing in terms of section 26 of the Constitution needs to be adjudicated. In contrast with the right to property, it will become clear that courts are more prepared to consult international law when interpreting the right to housing. Furthermore, it will become clear that with regard to the right to housing, international law is more developed than regional international law.

²¹⁴ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

4

Housing Rights in International Law

4 1 Introduction

In the previous chapter, the right to property in international law was discussed. It became clear that the Constitutional Court does not utilise international and regional international law effectively in interpreting the right to property as mandated by section 39(1)(b) of the Constitution. This chapter will focus on section 26 of the Constitution. The aim is to enquire whether the Court is more willing to consult international law when interpreting the right to housing in comparison with the right to property. Section 26 of the Constitution of 1996 contains the right of access to adequate housing, the state's duty to realise the right and to protect it from arbitrary interferences once the right is obtained. In terms of section 39(1)(b), courts must consider international law when they interpret the right to housing. Since the right of access to adequate housing is a well developed area of international law, it is possible to identify international law that concerns the right to adequate housing that might be useful in guiding the courts to interpret the right of access to adequate housing.

Therefore, this chapter will analyse the sources of international law with regard to the right to adequate housing. To fulfil the obligation imposed on courts, tribunals and forums to consider international law, the starting point will be the international bill of rights; the Universal Declaration of Human Rights (the 'UDHR')¹ followed by the International Covenant on Economic, Social and Cultural Rights (the 'ICESCR'),² since the ICESCR contains a right to housing similar to the UDHR. In addition, reports of the United Nations' Committee on Economic, Social and Cultural Rights will be discussed. These reports, regarded as soft international law, may serve as helpful tools to interpret the right and to provide guidance as to which direction the development of the right should follow. Furthermore, the use of these international law sources by the South African courts in interpreting and giving effect to the right of access to adequate housing in terms of section

¹ Adopted by the General Assembly of the United Nations, Resolution 217(III) of 10 December 1948, UN doc A/810.

² Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

26(1) and (2), especially in *Government of the Republic of South Africa v Grootboom*³ and in *Jafta v Schoeman and Others; Van Rooyen v Stoltz*⁴ will be discussed in order to illustrate to what extent, if any, the Constitutional Court has considered international law in fulfilling their obligation in terms of section 39(1)(b) of the Constitution.

Once a right of access to housing is obtained, protection against evictions becomes important. This protection is included in section 26(3) of the Constitution. As indicated by the Office of the United Nations High Commissioner for Human Rights, there is a strong connection between the protection against forced evictions and security of tenure, which is an integral part of the right to housing under international law.⁵ Without the specific protection against forced evictions the right to housing, both under international and domestic law, has no real meaning. The protection against forced evictions under international law is further explored in this chapter to enable a discussion about the possible influence international law may have on the domestic law of evictions. Cases such as *Port Elizabeth Municipality v Various Occupiers*⁶ and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*⁷ are of special interest in ascertaining the possible impact of binding, non-binding and soft international law in eviction cases. The aim is to explore whether international law has, in its quest to protect the right to adequate housing, shed further light on the interrelationship between housing rights and the protection against forced evictions; and whether such explanations of the possible interdependence of these two concepts could have further application within domestic case law.

The regional international law that might further aid the court in interpreting the right to adequate housing will also be discussed. While it is clear that the African Charter on Human and Peoples Rights (the 'Banjul Charter'),⁸ the European Convention for the

³ 2001(1) SA 46 (CC).

⁴ 2005 (2) SA 140 (CC).

⁵ Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing Fact Sheet 21* (Rev 1 2009).

⁶ 2005 (1) SA 217 (CC).

⁷ 2008 (3) SA 208 (CC).

⁸ Adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58, (1982).

Protection of Human Rights and Fundamental Freedoms (the 'European Convention')⁹ and the American Convention on Human Rights (the 'American Convention')¹⁰ do not contain any right to housing or shelter, reference to these regional international law conventions is still deemed important. The courts and commissions responsible for monitoring and enforcing these conventions have strived to protect a right to housing in some form or another. Of particular relevance to South Africa is the Banjul Charter, which is binding on South African law and therefore directly applicable. In the case of *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*,¹¹ the African Commission on Human and Peoples' Rights has found that the right to housing can be derived with reference to other rights in the Banjul Charter. Similarly, the jurisprudence of the European Court of Human Rights that has considered protecting the home in terms of articles 6 and 8 of the European Convention will briefly be discussed. Furthermore, the right against arbitrary evictions in light of the American Convention, as given effect to by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, will be analysed.

The specific housing rights of certain vulnerable persons, such as children, refugees and women have received ample attention in international law. The protection afforded to these vulnerable groups in international law will be explored in order to indicate that there are arguments in international law that could in some instances shed greater light on the issues that are relevant when the housing rights of these groups are infringed. These sources that are available in international law and specifically relate to the housing right of these vulnerable groups can support arguments for the protection of similar rights in South Africa.

4 2 International Law and the Right to Adequate Housing

4 2 1 Introduction

As already indicated, the right to adequate housing is a highly developed area of international law. This is evident in the numerous international law sources that contain a

⁹ Signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 222, ETS 5.

¹⁰ Signed at San Jose, Costa Rica on 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123, OASTS 36.

¹¹ African Commission, Communication 155/96 (2001) AHRLR 51 (ACHPR 2001).

right to adequate housing. A general right to adequate housing, as a subset or requirement for an adequate standard of living, is found in article 25 of the UDHR,¹² which was later adopted in article 11(1) of ICESCR.¹³ Housing rights of specific groups of people are also found in article 27 of the Convention of the Right of the Child,¹⁴ article 14(1) of the Convention of the Elimination of All Forms of Discrimination against Women¹⁵ and article 43(1)(d) of the Convention on the Protection of the Rights of All Migrant Workers and their Families.¹⁶ In relation to these rights, article 5(e)(iii) of the Convention on the Elimination of All Forms of Racial Discrimination¹⁷ further seeks to eradicate all forms of discrimination based on various grounds in respect of housing rights.

Article 25 of the UDHR gives everyone the right to an adequate standard of living, 'adequate for the health and well-being of himself and his family, including food, clothing, *housing* and medical care'.¹⁸ Explaining the subordinate position of the right to adequate housing, which is not an independent right, Craven maintains that the drafters of the UDHR were of the view that the fulfilment of economic and social rights, such as the right to housing, was dependent upon the social or economic development of the particular state.¹⁹ Craven also states that the right to adequate housing was not afforded independent protection in the UDHR, possibly because the drafters of the UDHR were of the opinion that the rights to privacy and property were able to protect the right to

¹² Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, Resolution 217(III) of 10 December 1948, UN doc A/810.

¹³ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

¹⁴ General Assembly Resolution 44/25 of 20 November 1989, entered into force on 2 September 1990, 1577 UNTS 3, 28 ILM 1456 (Text is reproduced as amended by General Assembly Resolution 50/155 of 21 December 1995 and as amended on 19 November 2002).

¹⁵ General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981, 1249 UNTS 13, 19 ILM 33

¹⁶ General Assembly Resolution 45/158 of 18 December 1990, entered into force on 1 July 2003, 2220 UNTS 93.

¹⁷ General Assembly Resolution 2106A (XX) of 21 December 1965, entered into force on 4 January 1969, 660 UNTS 195.

¹⁸ Own emphasis.

¹⁹ Craven M 'History, Pre-history and the Right to Housing in International Law' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 43-61 at 51.

housing.²⁰ In addition, the drafters viewed homelessness as a widespread occurrence of social ill, which could not be legislated away.²¹

4.2.2 Article 11(1) of the ICESCR

The ICESCR and the International Covenant on Civil and Political Rights (the 'ICCPR')²² were drafted and promulgated to give effect to the rights declared in the UDHR. According to McLean, the essential international law instruments for interpreting the right to housing are the ICESCR and the Committee for Economic, Social and Cultural Rights' General Comments 3, 4 and 7.²³ Article 11(1) of the ICESCR provides that all state parties (to the Covenant) are to 'recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions'.²⁴ Although it was argued by some states that the right to housing should be an independent right, separate from the right to an adequate standard of living, the United Nations' General Assembly's Third Committee decided that these two aspects (the right to housing and the right to an adequate standard of living) needed to be discussed together. As a result, the right to adequate housing is included under the broad right, namely the right to an adequate standard of living.²⁵ According to Eide and Eide, '[f]ood, housing and care are the three most important elements for an adequate standard of living'.²⁶ Consequently, the right to housing plays a central role in determining what would constitute an adequate standard of living. As will be discussed, housing has an impact on various other fundamental human rights, such as the right to human dignity.

²⁰ Craven M 'History, Pre-history and the Right to Housing in International Law' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 43-61 at 51.

²¹ Craven M 'History, Pre-history and the Right to Housing in International Law' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 43-61 at 51.

²² Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

²³ McLean K 'Housing' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2006) 55:1-57 at 32.

²⁴ Eide A and Eide WB 'Article 25' in Afredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 523-550 at 539. According to Eide and Eide, 'article 25 of the UDHR is wider in scope than article 11 of the CESC; the elaboration of the right to medical care is addressed in article 12 of the latter. Issues relating to motherhood are also addressed in article 10 (protection of the family) of the CESC, and, above all, in the Convention on the Elimination of All Forms of Discrimination against Women'.

²⁵ See Craven M 'History, Pre-history and the Right to Housing in International Law' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 43-61.

²⁶ Eide A and Eide WB 'Article 25' in Afredsson G and Eide A (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 523-550 at 541.

In relation to the right to adequate housing, it is important to consider article 2(1) of the ICESCR. Unlike civil and political rights, which are negative in nature, socio-economic rights place both positive and negative obligations on states. Therefore, states that have ratified the ICESCR are required to realise socio-economic rights

‘to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.²⁷

The state parties are also required to take steps in order to realise the right contained in the Covenant.²⁸ Although it is understood that the rights in the Covenant cannot be realised immediately, state parties should take steps to realise these rights. With this in mind, the ICESCR devised certain mechanisms to ascertain the level of state co-operation with regard to the state parties’ obligations in the Covenant.

The Committee on Economic, Social and Cultural Rights is responsible for monitoring the ICESCR.²⁹ The Committee receives national reports from state parties to the Covenant.³⁰ On the basis of this accumulated information it then presents General Comments. In its 4th General Comment,³¹ the Committee has given extensive interpretive information concerning the right to adequate housing. This Comment can also be regarded as the most authoritative comment with regard to the right to housing in international law.³² In this Comment, the Committee states that ‘article 11(1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions’³³ with regard to the right to adequate housing in international law.

²⁷ ICESCR art 2(1). S 26 of the South African Constitution of 1996 contains similar provisions.

²⁸ In the French translation the undertaking is ‘to act’ (*s’engage à agir*) and in the Spanish translation ‘to adopt measures’ (*a adoptar medidas*).

²⁹ Dugard J *International Law: A South African Perspective* (3rd ed 2005) 321.

³⁰ This is done in terms of arts 16 and 17 of the ICESCR.

³¹ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23.

³² See Leckie S ‘Where it Matters Most: Making International Housing Rights Meaningful at the National Level’ in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 3-41 at 9.

³³ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 3.

In the 4th General Comment, the Committee acknowledges the gap between reality and the standard set by the Covenant with regard to the right to adequate housing,³⁴ since it is estimated that over one billion people in the world are inadequately housed.³⁵ The Committee is of the view that the right to housing, interpreted broadly, should be seen as a right to live somewhere in security, peace and dignity.³⁶ Therefore, the right to housing is interwoven with other human rights, such as the rights to dignity, work, health and education.³⁷ Violations of these and other human rights often lead to the violation of the right to adequate housing. According to the United Nations, the right to housing, although sometimes regarded as a right to property, is in fact broader than a right to property as a focus on property rights may lead to violations of the right to (adequate) housing, an example being forcible eviction of slum-dwellers that reside on private property.³⁸ Therefore, the right of access to housing and security of tenure once housing is acquired should be kept in mind when the landowner, with a property right, wants to institute eviction proceedings. The balancing of the right to housing and the right of property (the protection of existing property interest) creates tension in the adjudication of these respective rights.

In protecting human rights, the right of access to housing in both international and domestic law is of critical importance. In order to minimize the gap between housing standards internationally and domestically and in view of the current housing situation in South Africa, regard should be given to the principles of international law pertaining to the right to housing. These international law instruments are helpful in guiding national policy and more importantly, the courts. Due to globalization and the fact that many foreigners, especially from the rest of Africa, come to South Africa in search for work, housing rights in

³⁴ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 4.

³⁵ Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing Fact Sheet 21* (Rev 1 2009) 1.

³⁶ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 7. The fact that human dignity plays a role in the right to have access to adequate housing has been accepted by the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 23 and *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 21.

³⁷ Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing Fact Sheet 21* (Rev 1 2009) 9. The Preamble of both the ICCPR and the ICESCR states that the rights contained therein flow from the inherent dignity of the human person.

³⁸ Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing Fact Sheet 21* (Rev 1 2009) 8.

international law is worth considering in giving effect to the right of access to adequate housing as well as security of tenure to those who already have access.

4 2 3 Applicability of the ICESCR on South African Law

South Africa signed the ICESCR in 1994. Although it was expected that South Africa would ratify it soon afterwards,³⁹ it has not been ratified yet. Therefore, the ICESCR is not directly binding on South African law.⁴⁰ However, it can be argued that the ICESCR, together with the United Nations' Committee on Economic, Social and Cultural Rights' General Comments, can be used as an interpretive guide by the South African courts for the reasons that follow. Firstly, the drafters of the Constitution relied heavily on the ICESCR in formulating the bill of rights, thereby making the Committee's interpretation and General Comments valuable sources of interpretation for the South African courts.⁴¹ This view is also adopted when arguments are made before the courts.⁴² Secondly, the Constitutional Court stated in *S v Makwanyane*⁴³ that binding and *non-binding* international law principles for the purposes of section 39(1)(b) create the framework within which the bill of rights can be interpreted.⁴⁴ Thirdly, comparative study as provided for by section 39(1)(c) of the Constitution⁴⁵ would be less effective, since South Africa is one of a few

³⁹ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359-378 at 359.

⁴⁰ S 231(2) of the Constitution states that an international agreement, for instance the ICESCR, can only bind the Republic after it has been approved by the National Assembly and the National Council of Provinces. The ICESCR can also not be regarded as an international agreement of a technical, administrative or executive nature in terms of s 231(3) which would make it binding in South Africa without the approval of the National Assembly or National Council of Provinces.

⁴¹ Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 107; Currie I and De Waal J *The Bill of Rights Handbook* (5th ed 2005) 575; Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *International Perspectives on Housing Rights* (2003) 207-219 at 217. Liebenberg states that '[t]he ICESCR is of particular relevance to the interpretation of ss 26, 27 and 29 because the Covenant was a major source of reference for the drafting of these provisions'. Budlender states as follows: 'These General Comments were helpful [to the *Grootboom* court] because of their standing in international law, and because they are authoritative interpretations of an instrument [the Covenant] which clearly had a major influence in the drafting of the South African Constitution.' In similar vein, Currie and De Waal write that the Committee's Comments on State Reports are a 'valuable source of guidance to South African courts'.

⁴² In the Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) in the case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC), the amici stated that '[t]he International Covenant on Economic, Social and Cultural Rights (ICESCR) is of particular relevance in the interpretation of section 26 of the Constitution because the Covenant was a major source of reference for the drafting of this provision'.

⁴³ 1995 (3) SA 391 (CC).

⁴⁴ This was accepted by the same Court again in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 26.

⁴⁵ S 39(1)(c) makes it possible for courts, tribunals and forums to consider foreign law when interpreting the bill of rights.

countries which has entrenched socio-economic rights.⁴⁶ Fourthly, on signature of the Convention, South Africa 'incurred an international obligation'⁴⁷ in terms of the Vienna Convention on the Law of Treaties.⁴⁸ According to article 18 of the Vienna Convention, a country that has signed a treaty but not yet ratified it must resist 'acts which would defeat the object and purpose of the treaty.'⁴⁹

Both section 26 of the Constitution of South Africa and article 11(1) of the ICESCR require housing to be adequate. The Committee laid down certain factors in General Comment 4⁵⁰ that could be used to determine what 'adequate housing' means. From the courts' perspective, this should be an important indication as to what would constitute adequate housing, since there are no other indicators in South African jurisprudence to indicate to the courts what the concept would entail. An important difference between these two provisions is the fact that the Constitution states that the right of access to adequate housing is available to everyone, while the ICESCR simply states that it is a right to adequate housing.

The first factor to be considered is security of tenure. The state should provide protection against forced eviction, irrespective of whether occupation occurs in private or rental accommodation, lease, emergency housing or informal settlements. An adequate house should further have certain facilities essential for the well-being and security of the inhabitants. Therefore, the availability of materials, facilities and infrastructure is a pre-requisite for adequate housing. Costs associated with housing should be at a level that does not compromise or threaten the right. This will include establishing housing subsidy schemes for those in need of financial assistance.

⁴⁶ Currie I and De Waal J *The Bill of Rights Handbook* (5th ed 2005) 575 state that South Africa, together with Sri Lanka, Hungary, Lithuania and Portugal are the only countries that have 'an extensive list of directly-entrenched socio-economic rights', making comparative study difficult.

⁴⁷ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359-378 at 371.

⁴⁸ Concluded at Vienna on 23 May 1969, entered into force on 27 January 1980, 8 ILM 679, Cmd 7964.

⁴⁹ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *SAJHR* 359-378 at 371 states that South Africa should review all legislation and policies to ensure that when the Covenant is ratified, national law would not be in conflict with international law. See further Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 106; McLean K 'Housing' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2006) 55:1-57 at 32.

⁵⁰ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8.

Furthermore, for housing to be regarded as adequate it needs to be habitable. It has to provide the occupants adequate space and protect them from cold, damp, heat, rain, wind, structural hazards and diseases. Adequate housing should also be accessible. Vulnerable groups such as the elderly, children and those living with diseases and disabilities should be given special recognition in housing laws and policies. Adequate housing should also be in a location that is in close proximity to employment opportunities, schools, hospitals and other facilities to allow for easy access. Finally, adequate housing should be culturally adequate. Cultural identity and diversity of housing should be possible.⁵¹

4 2 4 The State's Duty to Respect, Protect, Promote and Fulfil

In addition to the concept of adequacy explained above, states also incur obligations in relation to the right to housing.⁵² In international law, these obligations are found in General Comment 14, where the Committee states that '[t]he right to health, like all human rights, imposes three forms of state obligations on State parties: the obligation to respect, protect and fulfil'.⁵³ It is accepted by the United Nations⁵⁴ and various authors⁵⁵ that these obligations are at least also applicable with regard to the right to adequate housing.

Section 7(2) of the Constitution, which applies to all rights in the bill of rights, requires the state to respect, protect, promote and fulfil the rights in the bill of rights. This section

⁵¹ According to the Committee, this means that '[t]he way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing': Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8(g). Recognising the development and modernization that is taking place in the housing sphere, the Committee is of the view that cultural dimensions to housing should not be sacrificed as a result thereof.

⁵² The obligations placed on the state are the inverse of peoples' rights (to housing) that they have against the state. As an example: people have a right of access to adequate housing in terms of s 26 and the state's obligation is to respect, protect, promote and fulfil the right.

⁵³ Committee on Economic, Social and Cultural Rights *General Comment 14: The Right to the Highest Attainable Standard of Health Article 12 of the ICESCR*, 11 August 2000, UN doc E/C.12/2000/4 para 33.

⁵⁴ Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing Fact Sheet 21* (Rev 1 2009) 33-34.

⁵⁵ For instance, Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220; De Vos P 'The Right to Housing' in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (2002) 85-106 and Leckie S 'The Human Right to Housing' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 149-168 all discuss the right to adequate housing in the Constitution with reference to the obligation to respect, protect and fulfil.

relates these obligations as also found in international law to South African domestic law. However, section 7(2) goes even further in that it contains an additional obligation, namely the obligation to promote. These obligations can be classified as either negative or positive obligations. The negative obligation that relates to this section is the state's duty to respect the right to housing. In General Comment 14⁵⁶ the Committee interpreted this to mean that the state should not interfere, either directly or indirectly, with the enjoyment of the right. The duty to respect the right to housing is given more vigour in section 26(3) of the Constitution, which states that

'no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstance [and] no legislation may permit arbitrary evictions'.

Therefore, it is submitted that the negative obligation to respect the right to housing would be breached if the state were to allow arbitrary evictions, either on state or private parties' insistence.⁵⁷ The positive obligations of the right to housing, which can also be found in international law, concern the objective to protect and fulfil the right. Under the obligation to protect the right to housing, the state must adopt measures to ensure that third parties do not interfere with other individuals' housing rights.⁵⁸ This is also applicable in cases where third parties are 'landlords, property developers, land owners or any third party capable of abusing these rights'.⁵⁹ The Committee has stated that under the obligation to fulfil the right to adequate housing, states must aim through legislative, administrative, budgetary and judicial measures to fully realize the right.⁶⁰

⁵⁶ Committee on Economic, Social and Cultural Rights *General Comment 14: The Right to the Highest Attainable Standard of Health Article 12 of the ICESCR*, 11 August 2000, UN doc E/C.12/2000/4 para 33.

⁵⁷ Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220 at 208; Leckie S 'The Human Right to Housing' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 149-168 at 156.

⁵⁸ Committee on Economic, Social and Cultural Rights *General Comment 14: The Right to the Highest Attainable Standard of Health Article 12 of the ICESCR*, 11 August 2000, UN doc E/C.12/2000/4. para 33. Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220 at 210 states that the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 are examples of legislation enacted to give effect to the duty to protect.

⁵⁹ Leckie S 'The Human Right to Housing' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 149-156 at 157.

⁶⁰ Committee on Economic, Social and Cultural Rights *General Comment 14: The Right to the Highest Attainable Standard of Health Article 12 of the ICESCR*, 11 August 2000, UN doc E/C.12/2000/4 para 33. The Committee also proposes that the state should adopt promotional measures to fully realise the right, but as South Africa's Constitution list 'promote' as an additional element, it is discussed separately.

Another positive requirement set by section 7(2) of the Constitution is the state's duty to promote the right to housing.⁶¹ However, in *Government of the Republic of South Africa v Grootboom*,⁶² the Court stated that legislation and government policies should make it possible for individuals to provide housing. Leckie argues that the state must revise all legislation that erodes the right to adequate housing and implement housing policies as a means to place sufficient emphasis on the right in order to achieve the full realisation of the right.⁶³ In addition, Budlender argues that administrative bodies should bear the promotion of the right to adequate housing in mind when making administrative decisions that might have an effect on the right to housing.⁶⁴ This was the case in *Minister of Public Works v Kyalami Ridge Environmental Association*,⁶⁵ where it was made clear that the right to housing has to be kept in mind in all administrative decisions that have an influence on the right.⁶⁶

In order to highlight the use of these international law instruments and principles in South African law in relation to the right of access to adequate housing and the state's duty to implement reasonable measures to realise this right, two Constitutional Court cases are discussed below. They are *Government of the Republic of South Africa v Grootboom*⁶⁷ and *Jaftha v Schoeman; Van Rooyen v Stoltz*.⁶⁸ The purpose of this discussion is to indicate the effectiveness of the use of the international law sources in interpreting the right of access to adequate housing as mandated by section 39(1)(b) of the Constitution. The prohibition against the arbitrary eviction of a home in terms of section 26(3) is discussed later at 4 5.

⁶¹ Leckie S 'The Human Right to Adequate Housing' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 149-168 at 157; Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220 at 212.

⁶² 2001 (SA) 46 (CC) para 35. Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220 at 213-214. Although it was argued by some that the obligation to fulfil the right to housing is merely an aspiration, this viewpoint was proved wrong by the Constitutional Court in *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 78.

⁶³ Leckie S 'The Human Right to Adequate Housing' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 149-168 at 156.

⁶⁴ Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220 at 212.

⁶⁵ 2001 (3) SA 1151 (CC).

⁶⁶ Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220 at 213.

⁶⁷ 2001 (1) SA 46 (CC).

⁶⁸ 2005 (2) SA 140 (CC).

4 3 Government of the RSA v Grootboom

In *Government of the Republic of South Africa v Grootboom* (hereafter '*Grootboom*'),⁶⁹ Mrs Irene Grootboom and the other respondents lived under intolerable conditions in an informal squatter camp in Wallacedene. She and her sister's family lived in a shack about 20 square metres in size. Half of the population in Wallacedene were children, while a quarter of the inhabitants of Wallacedene had no income at all. Adding to the fact that the people were living in shacks, there were no sewage or refuse removal services available. In addition, only 5% of the shacks had electricity and there was no water available. When the respondents realised that they would have to continue living in such conditions until their application for a low-cost housing subsidy would be approved, they moved onto vacant private land. The private land owner succeeded in evicting the respondents from the land and the respondents were forced to resettle on a nearby sports field, since their previous site in Wallacedene was already occupied by other occupiers. Shortly after the eviction order was executed, during which event the respondents lost most of their building materials and personal belongings due to the inhumane fashion of the eviction, the winter season started. The structures that the respondents erected on the sports field offered meagre protection against the elements.

The respondents asked the municipality to fulfil its constitutional obligation and provide them with temporary accommodation. When the municipality could not give a satisfactory response, the respondents brought proceedings against the Oostenberg Municipality in the then High Court of the Cape of Good Hope.⁷⁰ They wanted the government to provide them with basic shelter or housing until they received permanent housing.⁷¹ The High Court ordered that the government had to provide the applicants who were children, together with their parents, with adequate housing in terms of section 28(1)(c) of the Constitution. The government contested the correctness of the High Court order. After further deliberations, the government made an offer to the respondents that would immediately improve their crisis situation, which the applicants accepted. However, the

⁶⁹ 2001 (1) SA 46 (CC).

⁷⁰ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR (C).

⁷¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 4.

government failed to fulfil their undertaking in terms of the agreement. As a result, the respondents approached the Constitutional Court.

The case before the Constitutional Court was mainly based on section 26 of the Constitution.⁷² This section reads as follows:

- '(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

As indicated, section 26 imposes both positive and negative obligations on the state. The positive obligations on the state are to protect, promote and fulfil, while the negative obligation is the one of respect. According to Budlender, section 26(1) specifies the general scope of the right, while section 26(2) and 26(3) 'are simply manifestations of the general right set out in Section 26(1)'.⁷³ However, section 26(1) and 26(2) are related and must therefore be understood together.⁷⁴

Section 26(2) places a positive obligation on the state to provide adequate housing by implementing legislation and other measures (such as housing policies), taking into account the available resources the state has at its disposal, in order to progressively realise the right. In other words, to determine whether or not the state has met the requirements set by sections 26(1) and (2), three factors need to be considered.⁷⁵ Firstly, the state must take reasonable legislative or other steps. Although the state has the discretion to determine the detail of such legislation or policies, such instruments must be reasonable and the courts have laid down certain criteria in order to determine whether the state's action is reasonable. The policy has to be flexible and balanced, should not exclude

⁷² The Court also considered s 28(1)(c), the rights of children to shelter. See 4 7 1 below.

⁷³ Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-220 at 207-208.

⁷⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 34.

⁷⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 38, explained in paras 39-46.

a significant segment of society and the policy should be clear and efficient in assigning the relevant functions to the three spheres of government.⁷⁶ Furthermore, legislation on its own is not enough: the implementation of the policy formulated has to be effective in order to realise the right.⁷⁷

Secondly, the steps implemented must have the ability to achieve the progressive realisation of the right. It is acknowledged that the right has to be realised over time, since immediate realisation will in most instances not be possible. Therefore, the Court in *Grootboom* stated that 'legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time' in order to facilitate the progressive realisation of the right'.⁷⁸ Furthermore, the Court drew reference from the ICESCR,⁷⁹ stating that

'there is no reason not to accept that it bears the same meaning in the Constitution as in the document [the ICESCR] from which it was so clearly derived'.⁸⁰

The Committee accepts that the realisation of the right takes place over time, but that this does not deprive the right of all meaningful content. Furthermore, the Committee states that any retrogressive measures would need careful consideration and will have to be justified.⁸¹ This was also accepted in the *Grootboom*⁸² case, which would indicate to the state that careful consideration must be given to all relevant factors before acting in a way that may directly or indirectly cause a regression in the standard of housing currently in place.

⁷⁶ McLean K 'Housing' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2006) 55:1-57 at 14; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 39-44.

⁷⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 42. This is reiterated by the Committee on Economic, Social and Cultural Rights in *General Comment 3: The Nature of State Parties Obligations Article 2(1) of the ICESCR*, 14 December 1990, UN doc E/1991/23 para 4, in which the Committee states that legislative measures does not in itself mean that the obligation in terms of the Covenant is fulfilled; the legislation adopted has to be the most appropriate in the circumstances.

⁷⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 45.

⁷⁹ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

⁸⁰ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 45.

⁸¹ Committee on Economic, Social and Cultural Rights *General Comment 3: The Nature of State Parties Obligations Article 2(1) of the ICESCR*, 14 December 1990, UN doc E/1991/23 para 10.

⁸² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 45.

Thirdly, the progressive realisation of the right has to be undertaken within the state's available resources. Although the steps taken by government should be implemented immediately, the progressive realisation of the right may take place over a longer period of time. This is due to the fact that the obligation to take steps does not necessarily have big budgetary implications. Therefore, the state is not obliged to do more than what its resources permit. However, the Committee has indicated that states should seek international support if their policies go beyond their available resources.⁸³

Although article 11(1) of the ICESCR does not, like the South African Constitution, state that it is a right of access to adequate housing, the Committee is of the view that 'adequate housing must be accessible to those entitled to it'.⁸⁴ Particular attention should be paid to those forming part of disadvantaged groups, such as children, victims of natural disasters and people living in disaster-prone areas. According to the Committee, people who fall into these groups should be given preference. This view of the Committee, that adequate housing should be accessible, is not the same as what is mandated by the Constitution in section 26(1). In relation to this difference, Yacoob J stated:

'The right delineated in s26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.'⁸⁵

The accessibility factor laid down by the Committee is aimed at specific groups of people, while the section 26 reference to access applies to all citizens, as section 26(1) of the Constitution states that *everyone* has the right to have access to adequate housing. Therefore, the provision of the Constitution is open to all who are in need of housing and cannot be interpreted in the narrower sense as is seen in international law.

⁸³ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 10.

⁸⁴ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8(e).

⁸⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 35.

Section 26(3) of the Constitution spells out the negative obligations with regard to the right to adequate housing. This section denounces arbitrary evictions. It can be argued that one of the factors of adequate housing as given by the Committee in their 4th General Comment, namely security of tenure, is linked to section 26(3). A more detailed discussion on evictions in South African and international law as well as security of tenure will follow at 45.

In addition, section 26 cannot be seen in isolation.⁸⁶ Section 26, together with the right to health care, food, water and social security;⁸⁷ the rights of children;⁸⁸ the right to education;⁸⁹ the rights of detained persons (including sentenced prisoners);⁹⁰ the right of property (specifically the right of equitable access to land, land restitution and tenure security);⁹¹ labour rights;⁹² environmental rights⁹³ and the right to language and culture,⁹⁴ forms part of the socio-economic rights contained in the bill of rights.⁹⁵ The Committee has stated that the right to housing should not be interpreted narrowly, but that it should be seen as a right to live somewhere in security, peace and dignity.⁹⁶ Furthermore, the Committee reiterated that, apart from human dignity and non-discrimination,

‘the full enjoyment of other rights – such as the right to freedom of expression, the right to freedom of association ..., the right to freedom of residence and the right to participate in public decision-making – is indispensable if the right to adequate housing is to be realized and maintained by all groups in society’.⁹⁷

⁸⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 24.

⁸⁷ S 27 of the South African Constitution of 1996.

⁸⁸ S 28 of the Constitution.

⁸⁹ S 29 of the Constitution.

⁹⁰ S 35 of the Constitution. S 35(2)(e) provides that all detained, including sentenced, persons have the right to adequate accommodation when in detention.

⁹¹ S 25(5)-(9) of the Constitution.

⁹² S 23 of the Constitution.

⁹³ S 24 of the Constitution.

⁹⁴ S 31 of the Constitution.

⁹⁵ Liebenberg S ‘South Africa: Adjudicating Social Rights under a Transformative Constitution’ in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 75-101 at 78. See also Brand D ‘Introduction to Socio-Economic Rights in the South African Constitution’ in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (2005) 1-57 at 1.

⁹⁶ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 7.

⁹⁷ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 9.

This makes it necessary to keep all these rights in mind when the right of access to adequate housing is interpreted or implemented. As a result, Yacoob J made the following observation in the *Grootboom* decision:

‘All the rights in the Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.’⁹⁸

Consequently, the right of access to adequate housing requires an interpretation that is contextual; one that is understood in the textual setting of the Constitution and one that must be understood in the social and historical context.⁹⁹ Therefore, the socio-economic rights must ‘be read together in the setting of the Constitution as a whole’.¹⁰⁰ However, the obligation in terms of section 39(1)(b) should be considered. Where international law is able to shed greater light, as an interpretive tool, on the development of a specific right, such international law should be considered.

Therefore, the Court considered what the relevant international law would be in this instance, as well as what its impact might be. The Court admitted that it had an obligation in terms of section 39 to consider international law in interpreting the bill of rights and that non-binding international law, according to the previous judgment in *S v Makwanyane*,¹⁰¹ may also be used.¹⁰² However, the Court noted that although international law may be used as a valuable source of interpretation, the weight attached to each principle of international law may vary.¹⁰³

The *amici* in the *Grootboom* case presented the Court with article 11(1) of the ICESCR, arguing that it may help the Court understand the positive obligation imposed on the state by socio-economic rights.¹⁰⁴ The differences between the right to adequate housing in the

⁹⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 24.

⁹⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 23; De Vos P ‘The Right to Housing’ in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (2005) 85-106 at 88.

¹⁰⁰ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 para 24.

¹⁰¹ 1995 (3) SA 391 (CC).

¹⁰² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 26.

¹⁰³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 26.

¹⁰⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 27.

Constitution and article 11(1) of the ICESCR were duly noted by the Court.¹⁰⁵ The Constitution provides for a right of access to adequate housing, while the ICESCR merely provides for a right to adequate housing. The Constitution requires the government to take reasonable steps to realise the right, while the ICESCR requires member states to take appropriate steps in order to realise the right.¹⁰⁶ Furthermore, the *amici* urged the Court to accept the international law concept of the minimum core obligation into South African law. Even though the court rejected this argument, it is important to highlight this discussion because it brings important considerations to light on what might constitute adequate housing in the South African legal context.

In the *Grootboom* case, the *amici* requested the Court to adopt the minimum core obligation as formulated by the Committee in its 3rd General Comment.¹⁰⁷ In this Comment the Committee stated that a minimum core obligation should be placed on the state to see to it that 'at the very least, minimum essential levels of each of the rights'¹⁰⁸ are met. Therefore, the minimum core obligation aims to serve as a threshold beneath which a state party may not regress. The Court emphasised that the Committee did not clearly define what the minimum core is.¹⁰⁹ However, in General Comment 3, with reference to housing, the Committee stated that if a significant segment of society is deprived of adequate housing, it will be assumed *prima facie* that the state is not fulfilling its obligation in terms of the Covenant.¹¹⁰ States in breach of their Covenant duties are, therefore, forced to justify their breach. In this regard article 2(1) of the ICESCR, as discussed above, should be kept in mind, as the state is required to achieve the progressive realisation of the right within its available resources.

The Constitutional Court refused to accept the minimum core in South African law because the Committee itself did not precisely indicate what the minimum core would be in a specific case. The Court was of the opinion that it is beyond its reach to decide what the

¹⁰⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 28.

¹⁰⁶ See Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 108.

¹⁰⁷ Committee on Economic, Social and Cultural Rights *General Comment 3: The Nature of State Parties Obligations Article 2(1) of the ICESCR*, 14 December 1990, UN doc E/1991/23.

¹⁰⁸ Committee on Economic, Social and Cultural Rights *General Comment 3: The Nature of State Parties Obligations Article 2(1) of the ICESCR*, 14 December 1990, UN doc E/1991/23 para 10.

¹⁰⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 30.

¹¹⁰ Committee on Economic, Social and Cultural Rights *General Comment 3: The Nature of State Parties Obligations Article 2(1) of the ICESCR*, 14 December 1990, UN doc E/1991/23 para 10.

minimum core should be, since the Court did not have sufficient evidence to determine this issue. As the minimum core would constitute a threshold beneath which a state may not regress, different factors need to be taken into account in different scenarios. The Court indicated that before a minimum core could be established, it had to identify the need and opportunities for the enjoyment of the right. In relation to this the Court stated:

‘These [needs and opportunities] will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country.’¹¹¹

The Court further found it difficult to determine the minimum core because it has to be determined in a specific context. This difficulty arises since the need to adequate housing differs from the perspective of defining it in general terms or in light of specific groups of people. For some, the right to have access to adequate housing might mean access to land, to others land and housing and yet to others it might mean financial assistance.¹¹² The argument was also put forward that it would be incompatible with the ‘institutional roles and competencies of the courts’¹¹³ if the Court were to define the minimum core.¹¹⁴ The Court concluded that it did not have sufficient information before it to decide what the minimum core would be, therefore rejecting the minimum core obligation argument presented by the *amici*. With the rejection of the minimum core obligation argument, the Court only had to consider whether the state’s action in realising the right to adequate housing was reasonable.

Bilchitz has written extensively on the minimum core obligation and advocates the acceptance of such an obligation in South African law.¹¹⁵ He argues that the minimum core

¹¹¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 32.

¹¹² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 33.

¹¹³ Liebenberg S ‘Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate’ in Woolman S and Bishop M (eds) *Constitutional Conversations* (2008) 305-331 at 306.

¹¹⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 33; *Minister of Health v Treatment Action Campaign* 2002 (5) 721 (CC) paras 36-39.

¹¹⁵ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 178-215; Bilchitz D ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence’ (2003) 19 *SAJHR* 1-26; Bilchitz D ‘Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance’ (2002) 119 *SALJ* 484-501. Objections have also been raised against the acceptance of the minimum core obligation in South African law. For a discussion of these

should be understood in light of two thresholds, interests or components which can specifically be explained in relation to housing in section 26(1). The first interest, being the first threshold interest or the minimum core, would mean that a person is entitled to at least having or obtaining minimal shelter to protect him from natural elements such as rain, which could negatively impact on a person's health, in order to survive.¹¹⁶ The first threshold interest would be available to all persons, immediately. In other words, all should have access to adequate housing, which in the first threshold sense would mean shelter from the elements. However, this minimal interest is not all that is protected by the Constitution. The second interest, put forward by Bilchitz, is one that would allow for human flourishing.¹¹⁷ It is on the first interest, that of the minimum core, that this part of the chapter will focus on.

With regard to the right to adequate housing, the minimum core

'can be made more concrete so as to require that individuals can at all time have access to accommodation that offers protection from the elements, sanitary conditions, and access to basic services such as sanitation and running water'.¹¹⁸

Therefore, if all have access to accommodation that offers protection from the elements and such accommodation also provides for access to the relevant services, the minimum interest of the right of access to adequate housing is met.

As a result, Bilchitz criticizes the Courts reasons in the *Grootboom*¹¹⁹ case for denying the minimum core obligation as presented in international law. Bilchitz argues that the arguments of the Court

objections and Bilchitz's reply see Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 197-207 and Bilchitz D 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Implications' (2002) 119 SALJ 484-501 at 486-489.

¹¹⁶ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 187-188.

¹¹⁷ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 188. The author highlights the Preamble of the Constitution, where it is stated that the quality of life for all persons needs to be enhanced and the potential of all peoples needs to be freed. The author also cites an Indian Supreme Court Case, *Shantisar Builders v Narayan Khimalal Totame* AIR 1990 630 at 9, where the court found that persons require 'suitable accommodation which would allow [them] to grow in every aspect-physical, moral and intellectual'. See also Bilchitz D 'Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance' (2002) 119 SALJ 484-501 at 490.

¹¹⁸ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 188.

¹¹⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

'exhibit confusion as to the nature of a minimum core obligation, which arises from failing to draw a crucial distinction . . . between the invariant, universal standard that must be met in order for an obligation to be fulfilled, and the numerous particular methods that can be adopted in order to meet this standard and thus comply with a constitutional obligation'.¹²⁰

Bilchitz advocates a general standard that would constitute a minimum core. This standard would, in the case of housing, comprise of access to housing that provides protection from the elements, at the very least, in sanitary conditions, as well as access to basic services, such as toilets and running water.¹²¹ This general standard relates to the realising of the minimal interest, while the legislature and executive still retain their discretion as how best to achieve this general standard.

Bilchitz further argues that it is not necessary for the Court to have been presented with a lot of information to understand what the minimum interest of people is.¹²² The minimum core of the right (to housing) need only be laid down as it applies to all people and not with reference to specific groups of people, which would admittedly make the formulation of the minimum core difficult. Bilchitz further contends that the fact that some need land, while others need land and housing and yet others need financial assistance is irrelevant in considering what would constitute a minimum core. If it can be assumed that the minimum core means that all need shelter from the elements, those who have shelter have no basis to claim, but those who have land can, for instance, claim building materials. The general obligation does not vary; the position of each person in relation to the minimum core will influence the relief that will be granted.¹²³

Brand, in turn, argues that understanding the minimum core as a general standard is suitable for the international enforcement of socio-economic rights, but is not useful for the

¹²⁰ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 197.

¹²¹ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 198.

¹²² Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 199.

¹²³ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 199-200.

domestic context.¹²⁴ This is understandable, according to Brand, if one considers the difference between the institutions and manner in which socio-economic rights are enforced in the national and international spheres.¹²⁵ Furthermore, Brand argues that it is necessary to be more specific in laying down a minimum core entitlement, but that it should, in addition, also be 'particular, concrete, context-sensitive and flexible'.¹²⁶ Therefore, Brand argues that the minimum core obligation would necessarily be a shifting concept.¹²⁷ Bilchitz, in response to this argument, maintains that the general standard should still be set, but that it should allow for latitude and flexibility in determining what the survival interest of specific people is in a specific context.¹²⁸

Another relevant question in relation to the acceptance of the minimum core obligation is whether or not the minimum core can be enforced as an individual right. It is argued that courts may grant relief to individuals, which would mean that individuals may claim particular goods from the state. The problems with this approach are that it prioritises some individuals above others and, if courts hand down numerous orders granting individual relief, it may hamper the government's efforts to implement a coherent plan.¹²⁹ This reasoning is in line with Yacoob's reasoning in *Grootboom* where he stated that neither section 26 nor section 28 entitles an individual to claim shelter on demand. Rather, it obliges the government to devise and implement a coherent plan designed to meet the section 26 obligation.¹³⁰

¹²⁴ Brand D 'The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künnean' in Brand D and Russel S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2001) 99-108 at 101.

¹²⁵ Brand D 'The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künnean' in Brand D and Russel S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2001) 99-108 at 101.

¹²⁶ Brand D 'The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künnean' in Brand D and Russel S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2001) 99-108 at 101.

¹²⁷ Brand D 'The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künnean' in Brand D and Russel S (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2001) 99-108 at 106.

¹²⁸ Bilchitz D *Poverty and Fundamental Human Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 198. See also Liebenberg S 'Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate' in Woolman S and Bishop M (eds) *Constitutional Conversations* (2008) 305-331 at 317-318.

¹²⁹ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 203.

¹³⁰ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 95.

There are also arguments in favour of the granting of individual relief. Traditionally, courts have been concerned with the plight of individuals, making individual relief a natural consequence of adjudication. Furthermore, if courts refused to grant individual relief it might scare future litigants from bringing cases before courts. If individual relief is not granted, it may negatively affect the individual if such individual's minimal interests are not met.¹³¹

The solution, as put forward by Bilchitz,¹³² entails that there should be no rigid policy when it comes to individual relief. Individual relief should be granted if government policy fails to treat the individual equally, treats the individual without insufficient respect or fails to address a particular individual's individual need.¹³³ This does not preclude individuals from seeking appropriate (individual) relief from the courts, given the courts' discretionary powers.

The Constitutional Court also raised an objection to the acceptance of the minimum-core in *Minister of Health v Treatment Action Campaign* (hereafter 'TAC').¹³⁴ In elaborating on their previous discussion in *Grootboom*,¹³⁵ the Court in the TAC¹³⁶ case stated that the minimum core can possibly be relevant to the question of reasonableness under section 26(2); it cannot be seen as a self-standing right in terms of section 26(1). In addition, the Court in the TAC case reasoned that the acceptance of the minimum core would mean that all are entitled to the minimum core immediately. The Court stated that it would be impossible to give all who require it access to the minimum core services immediately, but that the state would do well to reasonably provide access to the rights in question on a progressive basis.¹³⁷

¹³¹ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 204.

¹³² Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 204-206.

¹³³ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 205.

¹³⁴ 2002 (5) SA 721 (CC).

¹³⁵ 2001 (1) SA 46 (CC).

¹³⁶ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

¹³⁷ See Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 206-207 for Bilchitz's arguments against the Court's reasoning.

Using the two-tier interest approach, Bilchitz explains the relationship between section 26(1) and 26(2) and the 'progressive realisation of the right' in section 26(2). Simply put, Bilchitz is of the opinion that progressive realisation would apply in the case of moving from the minimal interest (the minimum core obligation) to the realisation of the maximum interest (the human flourishing interest).¹³⁸ Bilchitz is also of the opinion that the Committee's interpretation on progressive realisation and their finding that there is a minimum core obligation in relation to the right to housing cannot be separated.¹³⁹ Therefore, in accepting the Committee's interpretation regarding the progressive realisation of the right to housing, the Constitutional Court should also have accepted the minimum core argument.¹⁴⁰

Although the Court in *Grootboom*¹⁴¹ admitted that there exists a minimum core obligation in international law as developed by the Committee, it refused to accept the minimum core obligation in South African law. In subsequent Constitutional Court cases concerning the right of access to adequate housing, such as *Port Elizabeth Municipality v Various Occupiers*¹⁴² and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*,¹⁴³ no mention was made of the minimum core obligation.

Given the arguments presented against the acceptance of the minimum core obligation in South African law, it is difficult to predict whether or not the Constitutional Court would have accepted the minimum core obligation in South African law had the ICESCR and the additional literature that relates to the Covenant been binding on South African law. The Court was very determined not to accept the minimum core obligation in the *Grootboom*¹⁴⁴ case, a decision that was repeated in *TAC*.¹⁴⁵ However, this does not mean that the minimum core cannot be used at all. In the *Grootboom* case, as in most socio-economic

¹³⁸ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 193.

¹³⁹ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 194.

¹⁴⁰ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 194.

¹⁴¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁴² 2005 (1) 217 (CC).

¹⁴³ 2008 (3) SA 208 (CC).

¹⁴⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁴⁵ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

rights cases, the Court preferred the reasonableness test; asking whether the actions of the executive are reasonable in realising the rights in question. The minimum core may still support arguments that the measures adopted by the government were unreasonable. In relation to this, Liebenberg states as follows:

‘The furthest the Court was prepared to go was to hold that, where the evidence in a particular case revealed that it was appropriate, regard could be had to the content of a minimum core obligation in evaluating the reasonableness of the state’s measures.’¹⁴⁶

However, the question may be raised as to what ruling the Court would have made if the ICESCR was a binding instrument. It would have been interesting to know whether or not the Court would have accepted the minimum core obligation and formulated the core obligation in the South African context, irrespective of the insufficient information before the Court. It can be argued that a flexible approach where various principles are identified as to what would constitute adequate housing would have been the better option. It is to this question that the next part of the chapter will turn.

In relation to both domestic and international law, the *Grootboom*¹⁴⁷ Court could further have discussed the concept of adequacy in greater detail, since both the South African Constitution and international law require housing to be adequate. In determining the extent to which the Covenant may be used as a guide to interpret section 26, the difference between this constitutional provision and article 11(1) of the ICESCR was highlighted by the Court.¹⁴⁸ In *Grootboom*, Yacoob did not give real meaning to the term adequate; he simply stated that in order to realise the right in section 26(1) there must be land, services and a dwelling.¹⁴⁹

Therefore, what is lacking in the discussion of international law and its impact in the *Grootboom* decision is the Committee’s viewpoint on what can be regarded as adequate.

¹⁴⁶ Liebenberg S ‘Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate’ in Woolman S and Bishop M (eds) *Constitutional Conversations* (2008) 305-331 at 306.

¹⁴⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁴⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 28.

¹⁴⁹ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 191 is of the opinion that the Court should have been more precise in, for instance, defining the size of the land and the dwelling.

As was seen above, the Committee laid down certain factors in General Comment 4¹⁵⁰ as to what would constitute *adequate* housing. According to the Committee, adequacy of housing is determined by ‘social, economic, cultural, climatic, ecological and other factors’.¹⁵¹ Although these factors differ according to time and place, the Committee saw it fit to identify certain factors that must be taken cognisance of. Furthermore, the National Department of Housing accepted the Committee’s interpretation of ‘adequacy’ in the National Housing Code, which indicates that the interpretation given in international law can be adopted in South African law.¹⁵² The Court missed a valuable opportunity to give meaning to the concept of adequacy, since this concept has not been given any meaningful content in South African law through proper interpretation.

In giving content to the concept of adequacy, the Committee stated that legal security of tenure should be afforded to all people. Tenure for this purpose includes emergency housing and informal settlements, as tenure takes on a variety of forms.¹⁵³ Furthermore, immediate measures should be taken to confer legal tenure security upon those who lack such protection. Therefore, the lack of security of tenure of the respondents in *Grootboom*¹⁵⁴ should have been noted. On this basis the respondents might have been protected against eviction from the private land until such time as alternative accommodation could have been made available to them. The respondents were forced to move onto the private land due to the intolerable conditions in which they lived in Wallacedene. In that event, the balance between the private property owner’s rights and the respondents’ need for housing should have been considered.¹⁵⁵ On the basis of legal

¹⁵⁰ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23.

¹⁵¹ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8.

¹⁵² In National Department of Housing *National Housing Code Part 1* (2000) it is stated as follows: ‘What does “adequate” mean? The wording of the housing right provision corresponds with the International Covenant on Economic, Social and Cultural Rights (1966). In that context, “adequate housing” is measured by certain core factors: legal security of tenure; the availability of services; materials, facilities, and infrastructure; affordability; habitability; accessibility; location and cultural adequacy. South Africa’s housing policy concurs with this concept of housing.’

¹⁵³ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8(a).

¹⁵⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁵⁵ In this regard, see Van der Walt AJ ‘Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law’ (2002) 18 *SAJHR* 372-420, where the author discusses the tension that exists between the common law that favours the granting of eviction orders to land owners speedily and effectively, and the land reform laws which in turn set substantive and procedural safeguards against such evictions.

security of tenure, it is evident that even the respondents in *Grootboom* were entitled to be protected against the initial eviction.

Adequate housing as defined in international law also entails the availability of services, materials, facilities and infrastructure; affordability; habitability and location, as described above. South Africa's housing policy also contains these factors. In section 1 of the Housing Act,¹⁵⁶ 'housing development' is defined as follows:

'The establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents in the Republic will, on a progressive basis, have access to-

(a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and

(b) potable water, adequate sanitary facilities and domestic energy supply.'

The factors included in this definition mirror the factors mentioned above as required by the Committee and as accepted by the National Department of Housing. For that reason, the factors identified by the Committee, accepted by the National Department of Housing and further expanded in legislation¹⁵⁷ could have been of value to the Court's ruling in *Grootboom* to determine what would constitute adequate housing. When courts consider these factors, they could also have given further content to these factors and explained what they may mean in the South African context.

Cultural adequacy is also a factor in determining what would constitute adequate housing as it is understood by the Committee. According to the Committee, the cultural identity and diversity of housing should be expressed.¹⁵⁸ In an attempt to evaluate the standard at which housing should be regarded as adequate, Bilchitz states that adequate housing will

¹⁵⁶ Act 107 of 1997.

¹⁵⁷ For instance, s 3(5)(a) of the Housing Act 107 of 1997 sets up a housing scheme which provides for subsidies to low income households in line with the statement made by the Committee that financial assistance should be given those in need of it.

¹⁵⁸ Committee on Economic, Social and Cultural Rights *General Comment 3: The Nature of State Parties Obligations Article 2(1) of the ICESCR*, 14 December 1990, Doc E/1991/23 para 8.

be such that it is adequate according to the level of economic development of a particular country. This is also in accord with the reasoning in *Grootboom* that the right should be interpreted in the specific context. This links with the third standard put forward by Bilchitz¹⁵⁹ in relation to which adequacy can be judged. This third standard asks the question whether or not the people 'have access to the general conditions in their particular society to realize a wide range of purposes'.¹⁶⁰

The *Grootboom*¹⁶¹ Court ruled that those in need of socio-economic rights have the right to enforce such right. Neither section 26 nor section 28 of the Constitution entitles any of the parties to claim shelter on demand. The Constitutional Court overturned the ruling of the High Court which held that the government, in terms of section 28(1)(c), has a duty to provide those respondents who are children, and their parents, with shelter. Section 26 of the Constitution obliges the state to devise a plan to meet the obligation placed on it. Although legislation exists that enable the national, provincial and local spheres of government to meet the obligation in terms of section 26, in as far as the legislation does not provide assistance for those in need of immediate relief, the obligation was not met.

In *Grootboom* the Constitutional Court gave a declaratory order, stating that the state needs to take action to meet the obligation that section 26(2) of the Constitution places on them. The obligation the state has in this regard is to devise, fund, implement and supervise certain measures that can aid those in desperate need.¹⁶² It was shown that there are numerous sources in international law concerning the right to adequate housing. As was indicated the Court referred to these sources, in so doing fulfilling its obligation to consider international law as mandated by section 39(1)(b) of the Constitution. However, it is regrettable that the Court did not attach greater weight to international principles in reaching its conclusion. The concept of adequacy in section 26 of the Constitution as

¹⁵⁹ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 192 lays down three standards in relation to which adequacy can be judged. The first is whether or not the individual meets his survival interest with the housing provided and the second standard relates to whether the individual has access 'to the general conditions necessary in all societies to realize a wide range of purposes'.

¹⁶⁰ Bilchitz D *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 192.

¹⁶¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁶² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 96.

found in international law could have been an indication that the Court needed to give further clarity to the concept of 'adequacy' in domestic law.

4 4 Jaftha v Schoeman; Van Rooyen v Stoltz

Another case decided by the Constitutional Court that dealt with the right to adequate housing in which arguments based on international law were presented is the case of *Jaftha v Schoeman; Van Rooyen v Stoltz* (hereafter '*Jaftha*').¹⁶³ Mrs Jaftha received a state housing subsidy in 1997 with which she obtained her home where she and her two children resided. Due to ill health Mrs Jaftha was unable to work and, according to the Court, Mrs Jaftha could be described as 'poor'. As a result of her surrounding circumstances she borrowed R200. Mrs Jaftha was unable to repay the amount owed and the creditor handed the matter over to his attorney. In 2001, Mrs Jaftha discovered that the amount owed had escalated to R7000 and when she was unable to pay, her house was sold in execution for R5000.

Similarly, Mrs Van Rooyen, a poor widow who inherited a state house from her late husband, who in turn acquired it from the state subsidy scheme, was unable to repay a grocery debt of R190. On the same day that Mrs Jaftha's house was sold in execution, Mrs van Rooyen's house was sold in execution for a mere R1000 as a result of her inability to repay the debt. Due to the fact that the houses in both instances were acquired from the state housing scheme, both applicants were disqualified from receiving housing subsidies in future.

In the Constitutional Court, the applicants challenged the constitutionality of sections 66(1)(a) and 67 of the Magistrates' Court Act.¹⁶⁴ Sections 66(1)(a) of the Act allows for the sale and execution of immovable property for judgment debt if the movable property of the debtor is insufficient to satisfy the debt. In turn, section 67 of the Act excludes certain movables from sale and execution. The applicants contended that the right in section 26 of the Constitution was violated, since these provisions made it possible for the state and private parties to interfere unjustifiably with their right to adequate housing. Furthermore,

¹⁶³ 2005 (2) SA 140 (CC).

¹⁶⁴ Act 32 of 1944.

they argued that section 66(1)(a) was unconstitutional 'to the extent of its over-breadth in that it allows a person's right to have access to adequate housing to be removed even in circumstances where it is unjustifiable'.¹⁶⁵

As in the *Grootboom*¹⁶⁶ case, Mokgoro J considered the right to adequate housing in international law.¹⁶⁷ The Court recognised the obligation to consider international law as mandated by section 39(1)(b) of the Constitution. In addition, it was stated that guidance might be sought from international law instruments that have considered the meaning of adequate housing. Mokgoro J stated that the concept of adequate housing was briefly discussed in *Grootboom*,¹⁶⁸ but admitted that the Court had not yet considered it in any detail. As in *Grootboom*, the Court in the *Jaftha*¹⁶⁹ case considered article 11(1) of the ICESCR¹⁷⁰ as well as General Comment 4¹⁷¹ of the Committee, which gave further content to the right to adequate housing.

For purposes of the *Jaftha*¹⁷² case, the Court regarded the concept of adequacy as central to the right to housing, which mirrors the view of the Committee's 4th General Comment.¹⁷³ This is a different approach to the one followed in *Grootboom*,¹⁷⁴ where the Court drew no inference from the concept of adequacy as developed by the Committee.

In *Jaftha*,¹⁷⁵ the Constitutional Court acknowledged that the concept of adequacy is determined by social, economic, cultural, climatic and ecological factors. Nevertheless, the Court accepted the Committee's viewpoint that one of the factors that must be taken into account when determining what would constitute adequate housing is legal security of

¹⁶⁵ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 17.

¹⁶⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁶⁷ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 23 and 24.

¹⁶⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁶⁹ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

¹⁷⁰ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

¹⁷¹ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23.

¹⁷² *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

¹⁷³ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8(e).

¹⁷⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁷⁵ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

tenure, 'which guarantees legal protection against forced evictions, harassment and other threats'.¹⁷⁶ The Court considered the historical context of forced removals and racist eviction and found that the international law concept of adequacy and security of tenure is central to an understanding of section 26. Therefore, the aim of section 26 is to break with apartheid-style evictions in order to prevent the removal of people in a manner that is contrary to their human dignity and that would render them homeless. It was at this stage that international law proved to be useful in guiding the Court. By considering international law on the right to adequate housing, the Court was prompted by the Committee's interpretation of the right to also consider security of tenure.

As a result, the Court evaluated the negative aspect of the right of access to adequate housing in terms of section 26(1)-(2).¹⁷⁷ This entails that the state or individuals should not frustrate existing access to adequate housing. In the High Court, the argument based on this negative formulation of the right was dismissed. However, the Constitutional Court re-affirmed that a negative obligation can be placed on the state and individuals. Therefore, in the *Jaftha*¹⁷⁸ case the negative obligation of section 26 was placed beyond doubt. Owing to the concept of adequacy and security of tenure, the Court concluded that 'any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)'.¹⁷⁹

However, the Court still conducted a further inquiry into whether or not the deprivation of existing access to adequate housing can be justified in terms of section 36 of the Constitution. The Court ruled that the sale in execution of Jaftha and Van Rooyen's immovable property cannot be justified in terms of section 36 of the Constitution due to the fact that section 66(1)(a) of the Magistrate's Courts Act¹⁸⁰ places a severe limitation on the right to housing. In addition, the result of the limitation, that of permanently depriving the applicants of their homes, is too severe for the small amounts of debt incurred.

¹⁷⁶ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 8, and quoted in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 24.

¹⁷⁷ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 31-34.

¹⁷⁸ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

¹⁷⁹ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 34.

¹⁸⁰ Act 32 of 1944.

The Constitutional Court ruled that section 66(1)(a) of the Magistrates' Court Act¹⁸¹ was unconstitutional to the extent that it allowed for the execution of the homes of indigent debtors, where they lost their security of tenure. The remedy the Court gave was one of reading in. The Court read into the Act that execution of someone's home cannot take place without an order of the court after having considered all the circumstances.

Therefore, in the *Jaftha*¹⁸² case, the Constitutional Court acknowledged the Committee's work on the concept of adequate housing and one of the factors – that of security of tenure – encouraged the Court to analyse the negative obligation imposed in section 26(1)-(2). Security of tenure also bears relation to forced evictions, which will be discussed at 4 5 below. However, the Court merely used the factors found in international law regarding the concept of adequacy. The Court did not give it meaningful content in South African law. Nevertheless, the Constitutional Court showed a willingness to consider the international law available to them in interpreting the right of access to adequate housing, in doing so fulfilling the obligation in terms of section 39(1)(b). As a result, it can be accepted that security of tenure is an element of adequate housing. Therefore, security of tenure needs to be considered in all cases where the right of access to adequate housing is an issue. This will be in line with both international law and the Court's ruling in the *Jaftha* case.

In both the *Grootboom*¹⁸³ and *Jaftha*¹⁸⁴ cases, the Constitutional Court used the ICESCR and the General Comments of the Committee on Economic, Social and Cultural Rights to interpret the right of access to adequate housing in section 26 of the Constitution. In *Grootboom*, the Court considered the minimum core obligation as developed in international law. However, as was discovered, the Court did not adopt the minimum core obligation because the Court did not have sufficient information to determine the minimum core in respect of the right to adequate housing.¹⁸⁵ However, the Court did not clearly stipulate the status of the ICESCR in South African law, not did it make the hierarchy of the ICESCR in relation to the General Comments clear. In *Jaftha*,¹⁸⁶ where the Constitutional Court also considered the ICESCR and the General Comments of the

¹⁸¹ Act 32 of 1944.

¹⁸² *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

¹⁸³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁸⁴ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

¹⁸⁵ *Government of the Republic of South African v Grootboom* 2001 (1) SA 46 (CC) para 33. See 4 3 above.

¹⁸⁶ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) paras 23-24.

Committee on Economic, Social and Cultural Rights, especially in relation to security of tenure, the status of these sources were not stipulated. Although courts are able to consider non-binding international law when interpreting a right in the bill of rights, setting out the status of the international law sources used would be helpful for future cases considering international law.

4 5 Protection Against Forced Evictions

According to the Committee on Economic, Social and Cultural Rights, there are basically two ways in which the right to adequate housing can be violated. The first is in the event that the living and housing conditions in a particular country decline, while the second is when forced eviction occurs.¹⁸⁷ The international community has for a long time concerned itself with the eviction of people who already enjoy a right to housing.¹⁸⁸ Given that evictions may violate a range of fundamental human rights, because it is generally accompanied by violence or is discriminatory against women or certain groups of people, the regulation of eviction is an important consideration in international law. Therefore, eviction may take place,¹⁸⁹ but the Committee has indicated that states must procedurally and substantively regulate the practice of forced eviction.

Since there is no independent right to adequate housing in the ICESCR,¹⁹⁰ the Committee has emphasised that the right to adequate housing (as a subset of a right to an adequate standard of living) includes protection against forced evictions. Closely related to this concept is security of tenure.¹⁹¹ Therefore, in its 7th General Comment,¹⁹² the Committee

¹⁸⁷ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 paras 11 and 18.

¹⁸⁸ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 2.

¹⁸⁹ According to the Committee on Economic, Social and Cultural Rights in *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV par 11, evictions may be justifiable, an example being in the case where rent is not paid. However, the evictions should still take place in a manner that does not contravene any right in the ICESCR and all involved persons should have access to all legal recourses and remedies.

¹⁹⁰ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

¹⁹¹ Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing Fact Sheet 21* (Rev 1 2009).

¹⁹² Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV.

considered the right to adequate housing with specific emphasis on evictions.¹⁹³ In international law, forced evictions are regarded as being a *prima facie* violation of the right to adequate housing.¹⁹⁴ The Committee defines forced eviction as follows:

‘The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’¹⁹⁵

Mindful of the fact that state parties are to use legislative means to protect the rights in the ICESCR, the Committee has indicated that it is essential for state parties to adopt legislation specifically designed to eradicate forced evictions.¹⁹⁶ According to the Committee, legislation with this purpose should provide security of tenure to occupiers of land and housing, conform to the Covenant and set procedures in place that have to be followed in the event that eviction is allowed.¹⁹⁷

The Committee has also indicated that women, children and other minorities are vulnerable groups that suffer disproportionately from forced evictions.¹⁹⁸ Therefore, these groups need special protection and special consideration in the case of forced eviction. The Committee has further laid down procedural safeguards which should apply in all cases where forced evictions take place.¹⁹⁹ These include consultation with the affected parties, adequate notice of the eviction date, information on proposed eviction, information on government officials that will be present during eviction proceedings, as well as those carrying out the eviction and the provision of legal remedies. Furthermore, eviction should

¹⁹³ The practice of forced evictions is of major concern to the United Nations as it is estimated that at least 2 million people around the globe are forcibly evicted every year; UN-Habitat *Global Report on Human Settlements 2007: Enhancing Urban Safety and Security* (Nairobi 2007).

¹⁹⁴ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 18 and later repeated in Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 1. Although this refers to the right in the Covenant, it is still applicable due to the reasons mentioned above at 4 2 3.

¹⁹⁵ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR: (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 3.

¹⁹⁶ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 9.

¹⁹⁷ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 9.

¹⁹⁸ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 10.

¹⁹⁹ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 15.

not take place during the night or during bad weather. According to Chenwi, '[p]arliament and government should take these international standards into account in drafting legislation and policies relevant to evictions'.²⁰⁰

The concept of forced eviction in international law as briefly set out directly above provides guidelines to the state parties as to how to domestically try to prevent evictions from taking place in contravention of human rights. These guidelines are spelt out in broad terms with certain pointers as to where the problem areas regarding forced eviction lie, for instance the atrocities women suffer once evicted. Eviction law in terms of South African law is, however, more developed and more defined than in international law. Section 26(1)-(2) protects the right of access to adequate housing while section 26(3) prohibits arbitrary evictions once the right in section 26(1)-(2) is enjoyed. In relation to section 26(3), further substantive safeguards are also found in legislation.²⁰¹ Before entering a new democratic era, forced removals and evictions were rife in South African law. To consider the impact of international law in the development of security of tenure in realising that evictions may have negative impact on human rights, the history of evictions in the South African context will be considered to enable a discussion on the possible effect that international law had on the development of eviction law.

In the apartheid years in South Africa, millions of black people were forcibly removed and evicted due to the apartheid land law.²⁰² The history of forced removals and evictions in South Africa and the weak tenure security black people had during apartheid is a major cause of the housing crisis that currently prevails.²⁰³ Therefore, apartheid land law was eliminated and black people's weak tenure security had to be strengthened in order to prevent future eviction of people without due process resulting in further homelessness.

²⁰⁰ Chenwi L *Evictions in South Africa: Relevant International and National Standards* (2008) 6.

²⁰¹ For example, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

²⁰² Van der Walt AJ 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land Reform Legislation' 2002 *TSAR* 254-289 at 259 states that apartheid land law was entrenched in more than a hundred laws, the most important being the Prevention of Illegal Squatting Act 52 of 1951 and the Group Areas Act 63 of 1966.

²⁰³ See Van der Walt AJ 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land Reform Legislation' 2002 *TSAR* 254-289 at 263.

As a result, when apartheid ended and the emphasis was placed on the protection of human rights, protecting occupiers against arbitrary evictions had to be safeguarded. In order to solve the problem of the disparity between the weak protection black people had in common law in relation to their homes (and land) against the strong protection of the property rights protected in common law and legislation, reform was needed.²⁰⁴ Therefore, section 26(3) of the Constitution prohibits arbitrary evictions. In addition,

‘the government has enacted legislation and policies which give effect to the housing and tenure rights enshrined in the Constitution and provide procedural and substantive protection to people faced with evictions’.²⁰⁵

Consequently, it is necessary to briefly evaluate the view on evictions in domestic law before 1994 in order to understand how international law had an impact on domestic law concerning the protection against evictions.

Before the enactment of the Constitution of 1996, a landowner could evict people occupying his land in terms of the common law by using the *rei vindicatio*. The principles that applied to the *rei vindicatio* were laid down in *Chetty v Naidoo*.²⁰⁶ In order to succeed with the *rei vindicatio*, the plaintiff (landowner) only had to show that he was the owner of the land and that the defendant (occupier) was in occupation. The burden then shifted to the defendant to show that he had a right, in contract or statute, which prohibited the eviction.²⁰⁷ Although eviction by way of the *rei vindicatio* could not take place without legal process, the right afforded to the landowner was much stronger than that of the occupier, leading to an imbalance in standing. In other words, landowners’ rights to exclusive possession more often than not trumped other rights the occupiers might have enjoyed. The Interim Constitution of 1993²⁰⁸ did not alter the common law position applicable in

²⁰⁴ Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 269.

²⁰⁵ Chenwi L *Evictions in South Africa: Relevant International and National Standards* (2008) 2.

²⁰⁶ 1974 (3) SA 13 (A) 20A-E.

²⁰⁷ Only in the case where the plaintiff agreed that the defendant had a right to occupy, he, the plaintiff, had to prove that the permission had ended. See Van der Van der Walt AJ ‘Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land Reform Legislation’ 2002 *TSAR* 254-289 at 257.

²⁰⁸ Act 200 of 1993.

eviction cases. The position was altered with the enactment of section 26(3) of the 1996 Constitution.²⁰⁹

The constitutional framework with regard to security of tenure and protection against eviction includes sections 25(5) and (6), 26(3) and 28(1).²¹⁰ Section 25(5) requires the state to implement legislative and other measures which would enable citizens to gain access on an equitable basis to land within its available resources, while section 25(6) requires the state to strengthen legally insecure tenure of land. Section 26(3) requires a court to consider all the relevant circumstances before granting an eviction order and prohibits arbitrary evictions. According to Budlender there are mainly two ways in which the negative obligation to respect the right to housing can be violated.²¹¹ A statute may permit evictions that are procedurally or substantively unfair and private parties or the state may bring eviction proceedings against occupiers which will have the effect of rendering them homeless. Finally, section 28(1) gives children the right to shelter.

It has been submitted that the Extension of Security of Tenure Act (hereafter 'ESTA')²¹² and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (hereafter 'PIE')²¹³ have been promulgated to reform the common law of eviction and to improve security of tenure in South Africa.²¹⁴ There are also other acts that deal with improving security of tenure.²¹⁵ This is in accordance with international law that requires legislation to be enacted in order to provide greater security of tenure. PIE is the most important of the legislation enacted to protect unlawful occupiers against eviction.²¹⁶ To understand the

²⁰⁹ See McLean K 'Housing' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2006) 55:1-57 at 43.

²¹⁰ Chenwi L *Evictions in South Africa: Relevant International and National Standards* (2008) 16.

²¹¹ Budlender G 'Justiciability of the Right to Housing: The South African Experience' in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-219 at 209.

²¹² Act 62 of 1997.

²¹³ Act 19 of 1998.

²¹⁴ Van der Walt AJ 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation' 2002 *TSAR* 254-289; De Vos P 'The Right to Housing' in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (2005) 85-106 at 93; McLean K 'Housing' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2006) 55:1-57 at 45.

²¹⁵ Van der Walt AJ 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation' 2002 *TSAR* 254-289 at 265; De Vos P 'The Right to Housing' in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (2005) 85-106 at 93. Van der Walt, with De Vos agreeing, further mentions the Rental Housing Act 50 of 1999, the Land Reform (Labour Tenants) Act 3 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996 and the Restitution of Land Rights Act 22 of 1994 as legislation aimed at improving security of tenure.

²¹⁶ Van der Walt AJ *Property in the Margins* (2009) 147.

relationship between these acts set out to improve tenure security, as part of the concept of adequate housing as discussed above, it is of interest to explore the correlation between these acts and various principles of international law. The application of the PIE Act has further been analysed by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*,²¹⁷ and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*,²¹⁸ which will be discussed below.

PIE replaced the Prevention of Illegal Squatting Act²¹⁹ as well as its subsequent amendments.²²⁰ The Prevention of Illegal Squatting Act allowed for the eviction of unlawful occupiers, who were usually black and poor. The PIE Act, drafted to preclude such discriminatory practices, provides for procedural protection to persons who unlawfully occupy land.²²¹ An unlawful occupier is defined as someone 'who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'.²²² However, this excludes an occupier in terms of ESTA²²³ and a person whose informal right to land, but for the provisions in PIE, is protected by the Interim Protection of Informal Land Rights Act.²²⁴ The PIE Act does not only protect occupiers who never had consent to occupy the land, but also those who previously had consent (being lawful occupiers), but whose consent ended (making them unlawful occupiers), so called 'holders-over'.²²⁵

The PIE Act distinguishes between persons who have been in unlawful occupation for less than 6 months and those that have been in unlawful occupation in excess of 6 months.²²⁶ In the case of occupation for less than 6 months, section 4(6) applies. It provides that the

²¹⁷ 2005 (1) SA 217 (CC) para 39.

²¹⁸ 2008 (3) SA 208 (CC).

²¹⁹ Act 52 of 1951.

²²⁰ Sch 1 of PIE.

²²¹ This Act is excluded where property is used for business or commercial purposes.

²²² S 1 of PIE.

²²³ Act 62 of 1997.

²²⁴ Act 31 of 1996.

²²⁵ *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA). See McLean K 'Housing' in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2nd ed 2006) 55:1-57 at 43-44 and De Vos P 'The Right to Housing' in Brand D and Heyns C (eds) *Socio-Economic Rights in South Africa* (2005) 85-106 at 95-96 for a brief discussion on the relevant debate evident through case law regarding the legal position of 'holding-over'. See also Van der Walt AJ 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law' (2002) 18 *SAJHR* 372-420 at 404 for criticism against the manner in which the Supreme Court of Appeal decided the *Ndlovu* case.

²²⁶ S 4(6) and 4(7) respectively.

court may grant an eviction order if it is just and equitable to do so and only after the relevant circumstances have been considered, which includes the rights and needs of the elderly, children, disabled persons and female-headed households. In the event that occupation has exceeded 6 months, section 4(7) applies. In this instance, the rights and needs of the elderly, children, disabled persons and women-headed households also need consideration. Additionally, the courts must also consider whether alternative land was made available or whether alternative land can reasonably be made available.

Section 6 of the PIE Act allows for an organ of state to institute eviction proceedings. In such an event the court, upon determining whether it is just and equitable to grant such an order, must have regard to the availability of alternative accommodation or land.²²⁷ In cases where the state sought eviction orders and have been able to show that they have a rational plan to re-accommodate the occupiers, such eviction orders were usually granted. In cases where no plans of re-accommodation were presented, the eviction orders were usually denied.²²⁸

The purpose of the PIE Act is in accordance with international law. This Act provides security of tenure for people with weak tenure security rights who have already have housing and stand the risk of being rendered homeless as a result of the eviction. In General Comment 7,²²⁹ the Committee voices the opinion that the state should take measures to provide alternative adequate housing in the event that an eviction order will render people homeless. This is in accordance with section 6 of PIE and case law on the matter.

Furthermore, the Committee states that vulnerable groups such as women and children suffer disproportionately from forced evictions.²³⁰ Therefore, it is fitting that PIE makes special reference to the plight of women, children, the elderly and disabled groups, as a consideration before an eviction order is granted.

²²⁷ S 6(3)(c).

²²⁸ Report by the Centre on Housing Rights and Eviction (COHRE) *Any Room for the Poor? Forced Eviction in the City of Johannesburg, South Africa* (2005) 37.

²²⁹ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 16.

²³⁰ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 10.

In their 7th General Comment, the Committee has laid down certain procedural protection measures, which include that an opportunity for consultation with those affected by eviction has to take place.²³¹ The PIE Act does not make mention of the requirement set by international law that consultation with the affected parties should take place before an eviction order is granted. However, the practice of consulting with affected parties before eviction takes place was established in *Port Elizabeth Municipality v Various Occupiers*.²³² In this case unlawful occupiers, including children, occupied undeveloped private land. The occupiers were willing to move from the land if they were given alternative accommodation. However, the municipality sought an eviction order and an order confirming that they are not constitutionally bound to provide the occupiers with alternative accommodation once evicted. The Constitutional Court stated that the parties concerned should have engaged with each other amicably in order to arrive at workable solutions.²³³ The presence or absence of mediation will be an important factor in reaching a decision whether it is just and equitable to grant an eviction order.²³⁴

Furthermore, the Court stated that in relation to section 26(3) of the Constitution, an eviction order may be granted, even if it results in the loss of the occupiers' homes.²³⁵ However, if the occupiers that stand to be evicted are well-settled in the place they occupy, courts should be hesitant in granting an eviction order if no alternative accommodation is available.²³⁶ The Court refused to grant the eviction order since the municipality did not make an effort to enter into negotiations with the occupiers.

²³¹ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 15.

²³² 2005 (1) SA 217 (CC).

²³³ In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 87, a case in which PIE was not considered, the Court also stated that it would have been expected of the responsible municipality to engage with the respondents when it became clear to them that the number of people occupying the land in New Rust continued to grow.

²³⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 47.

²³⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 21.

²³⁶ In this case, the interconnectedness of the right to property (s 25) and the right to housing (s 26) was acknowledged. The framework within which evictions, in terms of PIE, should take place consists of respecting the property rights of the private landowner while also respecting the human dignity of the vulnerable of society. The balancing between these two conflicting interests will determine the outcome of each specific case since the context of each situation needs to be considered. See Van der Walt AJ 'The State's Duty to Protect Property Owners v the State's Duty to Provide Housing: Thoughts on the *Modderklip* case' (2005) 21 *SAJHR* 144-161 and Van der Walt AJ 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-reform Legislation' 2002 *TSAR* 254-289.

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*²³⁷ some 400 occupiers stood to be evicted from the buildings they occupied due to the fact that these buildings were unsafe and unhealthy. The eviction proceedings were brought in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act,²³⁸ which allows for the eviction of persons due to health and safety concerns. The Supreme Court of Appeal granted the eviction order and the occupiers appealed to the Constitutional Court. The Court gave an engagement order; an interim order that forced the City and the occupiers to engage with each other meaningfully on all pressing issues. The fact that the eviction would render the occupiers homeless was a grave concern to the Court and weighed heavily in the favour of the occupiers.

In addition, the Court found that section 12(6) of National Building Regulations and Building Standards Act²³⁹ was unconstitutional. The Court stated that section 12(6) violated section 26(3) of the Constitution in that it made it possible for the state organ, without first obtaining a court order, to levy a fine on occupiers that do not vacate the premises after they have received notice to vacate the premises.

South African eviction law has come a long way in protecting the vulnerable from arbitrary evictions by strengthening tenure rights and including substantive protection in the event that eviction is allowed. Legislation enacted to give greater security of tenure should be central in any case concerning the eviction of people, because it prevents the injustices of the past from repeating itself and is in line with international law. Furthermore, the courts are inclined to make findings that are in accordance with international law, such as requiring the state and those who stand to be evicted to meaningfully engage with each other to find a plausible solution and providing alternative accommodation for those who will be evicted.

²³⁷ 2008 (3) SA 208 (CC).

²³⁸ Act 103 of 1977.

²³⁹ Act 103 of 1977.

4 6 Regional International Law

4 6 1 Introduction

As indicated, South Africa is not a party to the ICESCR.²⁴⁰ Therefore, international law on the right to housing is not directly binding on South Africa law, but it can be considered as an interpretive guide for the various reasons stipulated above. However, South African courts are bound to consider the protection afforded to adequate housing that might exist in the African Union. Furthermore, to the extent that the right to housing is protected within the European Union and the Organisation of American States, it should be considered by the courts.²⁴¹ It will become clear that none of the regional international law systems discussed contains a right to housing or shelter. Even so, the relevant interpretive and enforcement bodies of these regional international law systems have tried to protect the right to adequate housing and the development in this regard that took place will be discussed.

4 6 2 The African Charter on Human and Peoples' Rights

The regional international law developed under the African Union is of specific relevance to South Africa, since South Africa is part of this Union. The African Charter on Human and Peoples' Rights (the 'Banjul Charter')²⁴² was adopted in July 1981 and is currently regulated by the African Union and monitored by the African Commission on Human and Peoples' Rights (the 'African Commission'). Therefore, the Banjul Charter and the subsequent reports made by the African Commission are useful in guiding courts in interpreting the right of access to adequate housing, since the Banjul Charter is directly applicable in South African law in terms of section 231 of the Constitution.

²⁴⁰ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

²⁴¹ In *S v Makwanyane* 1995 (3) SA 391 (CC) para 35, the Constitutional Court specifically mentioned the European Court of Human Rights, the European Commission on Human Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights as institutions that have considered comparable instruments that can provide guidance on the correct interpretation of certain provisions.

²⁴² Adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force 21 October 1986, OAU doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58, (1982).

As already indicated, neither a right to housing nor a right to shelter is included in the Banjul Charter. However, the right to housing has been derived from other articles in the Banjul Charter in the communication of the African Commission relating to the case of *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.²⁴³ In this communication it was submitted that the Nigerian Military Government is greatly involved in oil production in the country. They exploit the country's oil reserves with not a thought spared to the health of its citizens and the well-being of the environment. The communication alleged that the Nigerian Security Forces had attacked, burned and destroyed several of the Ogoni peoples' villages and homes, leaving these peoples homeless.

The Commission decided that the complaint was admissible in terms of article 56 of the African Charter. The Federal Republic of Nigeria incorporated the Banjul Charter into its domestic legal system, which would allow the Nigerian national courts to utilise the rights contained in the Charter. However, since the Nigerian Military Government ousted the jurisdiction of the national courts, the Ogoni people would be unable to seek redress in the courts for violation of their human rights.²⁴⁴

The complaint was based on articles 2, 4, 14, 16, 18(1), 21 and 24 of the Banjul Charter. Of these articles, only articles 14, 16, 18(1), 21 and 24 were considered in detail by the Commission. Article 14 protects the right to property and requires certain requirements to be present before the right to property can be encroached upon. Article 16 protects mental and physical health and urges the state to provide those who are sick with sufficient care. Article 18(1) recognises that the family is the natural unit basis of society and that the family and its physical and moral health shall be protected by the state. Article 21 confers on all the right to freely dispose of their wealth and natural resources and provides that in case of spoliation, recovery of the disposed thing and compensation are required. Article 24 affords all people the right to have a satisfactory environment that is favourable to their development.

²⁴³ African Commission, Communication 155/96 (2001) AHRLR 51 (ACHPR 2001).

²⁴⁴ *SERAC and CESR v Nigeria*, African Commission, Communication 155/96 (2001) AHRLR 51 (ACHPR 2001) para 41.

Based on articles 14, 16 and 18(1), the African Commission stated the following:

‘Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of provision protecting the rights to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) read into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.’²⁴⁵

The African Commission, relying on their finding that there is a right to housing or shelter in the Charter, laid down certain obligations pertaining to the right. The Commission found that, as a minimum, violation of the right to housing would occur if the government were to destroy the homes of people and, in addition, if they prevented the people from rebuilding their homes after it had been destroyed.

Therefore, the African Commission also explained the duty to respect and protect the right to housing:

‘The State’s obligation to respect housing rights requires it, and thereby all of its organs and agents, 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. Its obligations to protect obliges it to prevent the violation of any individual’s right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.’²⁴⁶

The Commission was of the opinion that the right to shelter meant something more than a right to a roof over one’s head. It also means to live somewhere in peace and privacy. In addition, the African Commission found that the protection against forced evictions is a

²⁴⁵ *SERAC and CESR v Nigeria*, African Commission, Communication 155/96 (2001) AHRLR 51 (ACHPR 2001) para 60.

²⁴⁶ *SERAC and CESR v Nigeria*, African Commission, Communication 155/96 (2001) AHRLR 51 (ACHPR 2001) para 61.

component of the implicit right to adequate housing. The Commission drew on the work done by the Committee on Economic, Social and Cultural Rights concerning forced evictions and found that evictions may be dramatic and cause physical, psychological and emotional distress; break up families; increase homelessness and in some instances even lead to death. Relying on the 4th General Comment²⁴⁷ of the Committee, the Commission stated that there has been a violation of the right to adequate housing enjoyed by the Ogoni people.²⁴⁸ Therefore, the Commission ruled that there were violations of articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter, which includes a right to adequate housing. The Commission further urged the Nigerian State to ensure the effective protection of the Ogoni people.

Realising that the practice of forced eviction has a negative impact not only on the right to housing, but also on various other human rights, the Commission offered protection to the housing rights of the Ogoni people. When the right to housing is protected, other rights such as the right to health and family life are also protected. In this regard, South African courts should take note of the importance of protecting the right to adequate housing, since the right to housing consists of more than just protecting a roof over a person's head.²⁴⁹

4 6 3 The European Convention on Human Rights and Fundamental Freedoms

The European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'European Convention')²⁵⁰ does not contain a right to housing. However, in many instances, article 8 and article 1 of the First Protocol²⁵¹ of the European Convention are

²⁴⁷ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23.

²⁴⁸ *SERAC and CESR v Nigeria*, African Commission, Communication 155/96 (2001) AHRLR 51 (ACHPR 2001) para 63.

²⁴⁹ In *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 7 the Committee on Economic, Social and Cultural Rights states that the right to housing should not simply be interpreted to mean a roof over one's head, but 'seen as a right to live somewhere in security, peace and dignity'. This was accepted in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 18, where the Constitutional Court stated that a home is more than just shelter from the elements, but that is an area of personal intimacy and family security.

²⁵⁰ Signed in Rome on 4 November 1950, entered into force on 3 September 1953, 213 UNTS 222, ETS 5.

²⁵¹ European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, entered into force on 3 September 1953. First Protocol to the Convention signed in Paris on 20 March 1952 (213 UNTS 222, ETS 5).

used to assert the right to housing.²⁵² In addition, article 6 is often used to make a finding that the eviction that took place was arbitrary. Article 8(1) of the European Convention grants everyone the 'right to respect for his private and family life, his home and his correspondence'. Article 8(2) spells out the manner in which interference by a public authority with the right in article 8(1) may take place.²⁵³ Article 1 of Protocol 1 to the European Convention protects the peaceful enjoyment of possessions and allows for the interference with the right as prescribed by the article. The right to property in houses is protected by article 1 of Protocol 1.²⁵⁴

In terms of article 8 of the ECHR, certain rights flow from the right of respect for the home. In *Chapman v the United Kingdom*,²⁵⁵ the European Court of Human Rights ruled that article 8 of the European Convention does not give a plaintiff the right to receive a home but only protects interference with an established home.²⁵⁶ Therefore, where it is established that premises constitute a home for the purposes of article 8, the right of access and occupation as well as the right not to be evicted from the home are put in

²⁵² Clements L and Simmons A 'European Court of Human Rights: Sympathetic Unease' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 409-427 at 416. There is also tension between the right to housing and the right to property which the European Court of Human Rights has to reconcile. This tension mostly arises in the relationship between the landlord and tenant or unlawful occupier. According to Clements and Simmons, the European Court will give precedence to the right to housing to the less affluent in society over the economic rights of the property owner. In *Akdivar v Turkey*, 99/1995/605/696, Council of Europe, 30 August 1996 para 88 the European Court stated that 'there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions. No justification for these interferences having been proffered by the respondent Government - which have confined their response to denying involvement of the security forces in the incident -, the Court must conclude that there has been a violation of both Article 8 of the Convention (art. 8) and Article 1 of Protocol No. 1 (P1-1)'.

²⁵³ In terms of art 8(2), interferences with the right in art 8(1) may take place on the grounds of national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals or for the protection of the rights and freedoms of others.

²⁵⁴ Harris DJ, O'Boyle M and Warbrick C *Law of the European Convention on Human Rights* (1995) 319. The right to property in article 1 of Protocol 1 to the European Convention was discussed in chap 3 at 3 3 3.
²⁵⁵ (2001) 3 EHRR 18.

²⁵⁶ This point of view was first adopted in a decision made by the European Commission on Human Rights in the case of *X v Germany* (1956) 1 *Yearbook ECtHR* 202, and later confirmed in rulings of the European Court: Fox L *Conceptualising Home: Theories, Laws and Policies* (2007) 460; Leckie S 'The Human Right to Adequate Housing' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 149-168 at 160; Kenna P 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 2 *EHRLR* 193-208 at 203. Kenna agrees that art 8 does not require the state to provide a home for everyone but argues that in terms of the decision in *Marzari v Italy* (2000) 30 EHRR DC 218 there are certain circumstances in which a positive obligation may be placed on the state to solve an applicant's housing problem. In this case the applicant was severely disabled and obtained an allocated apartment. The applicant ceased to pay rent for reason that the apartment was inadequate to cater for his needs. The European Court stated that although art 8 does not require the state to solve the applicant's housing needs, if such refusal has a negative impact on the applicant's private life, it might raise concerns in terms of art 8.

place.²⁵⁷ In addition, Kilkelly states that where it is established that the premises occupied constitute a home for the purposes of article 8, article 8 will protect the plaintiff's rights in the following instances: protection from wilful damage, protection from nuisance and protection from environmental damage.²⁵⁸ This interference is normally interpreted to mean interference from the state, thereby making the European Convention apply vertically.²⁵⁹

In terms of article 8 of the European Convention, cases are usually brought on the grounds that the eviction of people from their homes is in violation of article 8.²⁶⁰ Most cases heard by the European Court of Human Rights concerning homes relate to armed forces that destroy people's houses, leaving them homeless.²⁶¹ As was mentioned above, the European Court, with due cognisance of the margin of appreciation in article 1 of the European Convention, has refrained from ordering a state to provide housing. However, according to Kenna there are certain circumstances in which a positive obligation may be placed on the state to solve an applicant's housing problem.²⁶² In *Marzari v Italy*,²⁶³ the applicant was severely disabled and obtained an allocated apartment. According to the applicant the apartment was inadequate to cater for his specific needs and, therefore, he ceased to pay rent until such time as alterations could be effected to render it suitable for his needs. The European Court stated that although article 8 does not require the state to solve the applicant's housing needs, if such refusal has a negative impact on the

²⁵⁷ Clements L and Simmons A 'European Court of Human Rights: Sympathetic Unease' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 409-427 at 409; Harris DJ, O'Boyle M and Warbrick C *Law of the European Convention on Human Rights* (1995) 319.

²⁵⁸ Kilkelly U *The Right to Respect for Family and Private Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights* (2001) 59.

²⁵⁹ Fox L *Conceptualising Home: Theories, Laws and Policies* (2007) 465. According to Fox, the question whether or not the article should be applied horizontally is highly problematic. (Fox's focus in this book is on the creditor and occupier relations and rights pertaining to each in relation to a home. In this sense, the creditor's proprietary right can be protected by applying art 1 of Protocol 1, and the occupier's home interest can be protected by art 8.)

²⁶⁰ See Leckie S 'The Human Right to Adequate Housing' in Eide A, Krause C and Rosas A (eds) *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed 2001) 149-168 at 159; Kenna P 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 2 *EHRLR* 193-208 at 202.

²⁶¹ For instance, in *Akdivar v Turkey*, 99/1995/605/696, Council of Europe: European Court of Human Rights, 30 August 1996, the European Court found a violation of art 8 due to the fact that security forces had destroyed the plaintiff's homes, which made them abandon their village. In *Moldovan v Romania* (no 2), 41138/98; 64320/01, Council of Europe: European Court of Human Rights, 12 July 2005, family homes were destroyed after a riot occurred. The affected persons had to leave their village and occupied hen houses and pig sties for long periods of time. The European Court found that there was a violation of art 8.

²⁶² Kenna P 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 2 *EHRLR* 193-208 at 203.

²⁶³ (2000) 30 *EHRR* DC 218.

applicant's private life, it might raise concerns in terms of article 8. With regard to homelessness, the European Court has refrained from inferring a right to housing in terms of article 8 of the European Convention.²⁶⁴ However, as Clements and Simmons explain:

'[t]he Convention may impose a positive duty to provide housing where it is established that the State is directly culpable for the homelessness. In such situations the Convention obligation to provide accommodation may be more accurately characterised as remedial – to compensate for a deprivation of housing.'²⁶⁵

The European Court has also made evictions subject to the protection of article 6 of the European Convention. Article 6 of the European Convention states that when a person's civil rights and obligations (as well as any criminal charge against him) need to be determined, he/she 'is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. In *Connors v United Kingdom*,²⁶⁶ the European Court found that the eviction (a serious interference with the applicant's rights) that took place without being properly justified, was in breach of article 6.²⁶⁷ The European Court held that the plaintiff had no 'effective access to Court against the very serious interference with his home and family.'²⁶⁸ Therefore, 'the deprivation of a home requires a fair and public hearing and the other procedural requirements which have developed from the jurisprudence of Art. 6 of ECHR'.²⁶⁹

It is clear from the jurisprudence of the European Court that a right of access to housing is not protected within the European Union as it has not been derived from the judgments of the court. In South African law the right of access to housing is entrenched in the Constitution, and there is unfortunately no means to compare this aspect of the right to housing with the law of the European Union. However, the protection afforded existing homes in terms of article 8 of the European Convention, the protection against deprivation thereof in terms of article 1 of Protocol 1 and the procedural safeguards in the case of

²⁶⁴ Kenna P 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 2 *EHRLR* 193-208 at 204.

²⁶⁵ Clements L and Simmons A 'European Court of Human Rights: Sympathetic Unease' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 409-427 at 413.
²⁶⁶ (2004) 40 *EHRR* 9.

²⁶⁷ Kenna P 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 2 *EHRLR* 193-208 at 201.

²⁶⁸ *Connors v United Kingdom* (2004) 40 *EHRR* 9 para 102.

²⁶⁹ Kenna P 'Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights' (2008) 2 *EHRLR* 193-208 at 201.

evictions in terms of article 6 may be of guidance to the South African courts when giving effect to section 26(3) of the Constitution, or when any matter concerning eviction is brought in terms of any legislation.

4 6 4 *The American Convention on Human Rights*

Like the European Convention, the American Convention on Human Rights (the 'American Convention')²⁷⁰ does not contain a provision that protects a right to housing. However, quite different from the European Convention, jurisprudence has begun to emerge from the Inter-American Commission and Inter-American Court of Human Rights with regard to the right to adequate housing and housing related resources, such as access to land.²⁷¹ According to Melish these developments have taken place in four areas: forced eviction and removals; abuses of landless persons who organise themselves in order to receive land from the government; the slow pace and administrative inadequacy on the part of the governments in realising land claims; and confiscation of both property and housing.²⁷² The confiscation of property, which includes the physical house and possessions of the people in terms of the American Convention, was discussed in chapter 3.

The Inter-American Commission on Human Rights has considered several cases on the issue of forced evictions. Although the Commission's communications are not binding on South African law, it can still be important to consider them as they might 'provide guidance as to the correct interpretation of particular provisions'²⁷³ in the bill of rights. In *Corumbiara v Brazil*,²⁷⁴ landless people who occupied private land were evicted in terms of a court order. According to the Commission, the use of force and violence by the military police and privately hired gunmen during the eviction that took place at night resulted in inhumane treatment. During the eviction at least nine squatters were killed and over a hundred wounded. All the settlements, as well as all the evictees' possessions, were

²⁷⁰ Signed at San Jose, Costa Rica on 22 November 1969, entered into force on 18 July 1978, 1144 UNTS 123, OASTS 36.

²⁷¹ Melish TJ 'The Inter-American Commission on Human Rights: Defending Social Rights through Case-based Petitions' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339-371 at 356.

²⁷² Melish TJ 'The Inter-American Commission on Human Rights: Defending Social Rights through Case-based Petitions' in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339-371 at 356.

²⁷³ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

²⁷⁴ Case 11.556 Report Nr 77/98.

burned. The Commission reported that Brazil violated article 4, the right to life, and article 5, the right to humane treatment.

The right to housing as such has not yet been considered by the Inter-American Court of Human Rights. However, it has been addressed under articles 4 and 5 of the American Convention; the right to life and the right of personal integrity respectively. The Inter-American Court has recognised that the right to health, education, food, recreation, sanitation and *adequate housing* are necessary components of a life that is dignified.²⁷⁵

The Inter-American Court has,

‘rather than recognise the autonomous rights of individual to health, to education or to adequate housing under article 26 of the Convention, . . . preferred, at least to date, to subsume these basic rights into a broadly-understood concept of the ‘right to life’ and, more specifically, the ‘right to harbor a project of life.’²⁷⁶

Although a right to housing does not exist in the American Convention, arbitrary eviction seems to be protected by articles 4 and 5 of the Convention. Although the courts may grant eviction orders, eviction should take place in a manner that does not derogate the right to life and the right to humane treatment. Although the right to housing is not protected, it is possible to protect the right to housing in terms of article 21 of the Convention.²⁷⁷ Article 21 requires that the deprivation of property can only take place with the payment of just compensation, if it is in the public interest and in terms of the established law. Therefore, if these requirements are not met when the applicant’s house is confiscated, the applicant may rely on article 21.²⁷⁸

²⁷⁵ Melish TJ ‘The Inter-American Court of Human Rights: Beyond Progressivity’ in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 371-427 at 388.

²⁷⁶ Melish TJ ‘The Inter-American Court of Human Rights: Beyond Progressivity’ in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 371-427 at 388. Art 26 of the American Convention urges state parties to implement measures to progressively realise the Convention rights, especially if they are of economic and technical nature, in order to achieve the full realization of the rights.

²⁷⁷ See chap 3 at 3 3 4. See also Melish TJ ‘The Inter-American Court of Human Rights: Beyond Progressivity’ in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 371-427 at 358-359.

²⁷⁸ See chap 3 at 3 3 4. See also Melish TJ ‘The Inter-American Court of Human Rights: Beyond Progressivity’ in Langford M (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 371-427 at 358-359. Melish argues that in most instances such disputes revolve around the issue concerning the issue of just compensation.

The position regarding eviction in the Inter-American system is more or less similar to the position described with regard to international law. The Inter-American Court has found that the right to housing is an important right and that violation of the right, such as arbitrary eviction, violates the right to housing. Furthermore, the Inter-American Commission on Human Rights stated that evictions accompanied by violence, which in certain instances led to death, equate to inhumane treatment and cannot stand. Therefore, the position regarding eviction in the Inter-American system renders support to the international concepts described above and as a result, they should be used by South African courts in guiding the interpretation of the right to housing.

4 7 Housing Rights of Specific Vulnerable Groups of People

4 7 1 Children

Children's right to shelter is protected in section 28(1)(c) of the Constitution. The rights in section 28(1) are not subject to the limitations provided for in section 26, namely that of available resources and progressive realisation. Therefore, besides the claim under section 26 of the Constitution, the respondents in *Grootboom*²⁷⁹ also relied on section 28(1)(c) of the Constitution for relief for those among the respondents who were children. Since the claim based on section 26 had to fail due to the fact that there was a rational housing programme in place, the High Court, ruling in terms of section 28(1)(c), ordered the state to provide all respondents who are children as well as their parents with shelter.²⁸⁰ The Constitutional Court overturned this decision by the High Court. Examining the layout of section 28, the Constitutional Court found that the primary responsibility of providing children with shelter lies with the parents. In the event that parents are unable to provide for their children, the duty to provide children with shelter shifts to the state.

In the *Grootboom*²⁸¹ case, the Constitutional Court took cognisance of the Convention on the Rights of the Child (the 'CRC'),²⁸² which was ratified by South Africa in 1995. According to the Court, the CRC imposes obligations on state parties to ensure that

²⁷⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

²⁸⁰ *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C).

²⁸¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

²⁸² General Assembly Resolution 44/25 of 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3, 28 ILM 1456 (Text is reproduced as amended by General Assembly Resolution 50/155 of 21 December 1995 and as amended on 19 November 2002).

children's rights are adequately protected and section 28 of the Constitution is one such provision that seeks to fulfil that obligation. Article 27(3) of the CRC requires that the state must assist parents or others that might be responsible for children by providing material assistance and support programmes, particularly with regard to housing. The right of a child to housing is deemed necessary in order for the child to ascertain 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development' as emphasised in article 27(1) of the CRC.

The CRC does not add any significant guidelines for the South African courts in interpreting the rights of the child regarding housing. The reasoning of the Constitutional Court concerning children's right to shelter is in accordance with international law. The CRC envisages in article 27(2) that parents bear the primary responsibility to care for their children and it is the state's duty to share that duty if the parents are unable to care for their children. Furthermore, the state has a duty to implement the structures necessary to assist the parents to fulfil their obligations. Therefore, in the *Grootboom* case, Yacoob J recognised that the obligation placed on the parents is reinforced by the use of civil and criminal law as well as social welfare programmes.²⁸³

The African Charter on the Rights and Welfare of the Child,²⁸⁴ which South Africa ratified in 2000, is a document that could have been useful in giving meaning to children's right to shelter. Article 20(1) of this Charter, entitled 'parental responsibilities', emphasises the fact that parents or other persons responsible for the child have the primary responsibility to care for the child. Article 20(2) of the Charter places an obligation on the state to provide assistance to parents who have the need and provide them with material assistance and support programmes particularly with regard to housing. As a result, this Charter could have strengthened the Court's reasoning in *Grootboom* that only in the event that parents are unable to provide their children with shelter, does the responsibility shift to the state.

²⁸³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 76.

²⁸⁴ OAU doc CAB/LEG/24.9/49 (1990) adopted in July 1998, entered into force on 29 November 1990.

It follows then, that both in international law and national law, as was found in *Grootboom*, the primary obligation to provide shelter²⁸⁵ is placed on the parents and only if parents are unable to fulfil their obligation does the obligation shift to the state. If children are without parents or the parents are unable to provide for their children, the obligation reverts automatically back to the state. Yacoob J did not allow the High Court order to stand out of concern that children may become 'stepping stones'²⁸⁶ for adults to receive shelter on demand. This perspective is also in line with international law.²⁸⁷

Article 3 of the CRC states that in all matters concerning the child, 'the best interest of the child shall be a primary consideration'. Similarly, in section 28(2) of the Constitution, the child's best interest is of crucial importance in any matter concerning the child. As a result, whenever a case concerns a child or children, their best interest should always be of 'paramount importance'²⁸⁸ as both the Constitution and international law require.

4 7 2 Refugees

In chapter 3 at 3 5 2 it was indicated that refugees are entitled to certain rights contained in the bill of rights to the extent that they do not exclusively apply to citizens. It was submitted that refugees are entitled to the protection under section 25(1)-(3) of the Constitution but not to section 25(5)-(9). It was also indicated that the Refugee Act²⁸⁹ gives effect to the Convention Relating to the Status of Refugees, (the 'Refugee Convention')²⁹⁰ the Protocol Relating to the Status of Refugees²⁹¹ and the Organization of African Unity (the 'OAU') Convention Governing the Specific Aspects of Refugee Problems in Africa,²⁹² all of which are binding on South African law.

²⁸⁵ This will also include other necessities such as nutrition and clothing.

²⁸⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 71.

²⁸⁷ Numerous articles in the CRC prohibit the exploitation of children, be it for economic or sexual purposes.

²⁸⁸ S 28(2) of the 1996 Constitution.

²⁸⁹ Act 130 of 1998, as amended by the Refugee Amendment Act 33 of 2008.

²⁹⁰ Resolution 429 (V) of the General Assembly of the United Nations of 14 December 1950, adopted at Geneva on 25 July 1951, 189 UNTS 150.

²⁹¹ Resolution 2198 (XXI) of the General Assembly of the United Nations of 16 December 1966, entered into force 4 October 1967, 606 UNTS 267.

²⁹² Addis Ababa, 10 September 1969, entered into force 2 September 1974, 1001 UNTS 45.

In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*,²⁹³ Mokgoro J stated that refugees have the right of access to adequate housing in terms of section 26(1)-(2). According to Van Wyk, refugees require special attention in terms of section 26(1) because they can be regarded as a vulnerable group.²⁹⁴ At the very least refugees would have access to adequate housing on an equal footing as citizens in need of housing and at the very most refugees would be able to receive special treatment with regard to the right.

If refugees already have a home, they can rely on section 26(3) of the Constitution if there is an infringement of their right to adequate housing. The protection afforded to refugees in terms of section 26(3) will be protection against eviction as discussed above. Similar to the protection of property, which is not explicitly protected by the Refugee Act,²⁹⁵ courts may use article (21) of the Refugee Convention²⁹⁶ to support the protection of the right to adequate housing of refugees.

Article 21 of the Refugee Convention²⁹⁷ states this right as follows:

‘As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.’

Therefore, it is clear that persons who have received refugee status are entitled to the full protection of section 26 of the Constitution. Refugees are entitled to the right of access to adequate housing and they have the right in terms of section 26(3) of the Constitution not be evicted in an arbitrary manner once the right is enjoyed.

²⁹³ 2004 (6) SA 505 (CC).

²⁹⁴ Van Wyk J ‘The Relationship (or Not) Between Rights of Access to Land and Housing: De-linking Land from its Components’ (2005) 16 *Stell LR* 466-487 at 469.

²⁹⁵ Act 33 of 1998.

²⁹⁶ Convention Relating to the Status of Refugees of 1951, 189 UNTS 150.

²⁹⁷ Convention Relating to the Status of Refugees of 1951, 189 UNTS 150.

4 7 3 Women

Section 9 of the Constitution, also known as the equality clause, states that all are equal before the law and that discrimination may not take place on the grounds of gender or sex.²⁹⁸ Irrespective of gender or sex (and all of the other factors), equality relates to the full and equal enjoyment of all the rights in the bill of rights. Therefore, in relation to section 26, women and men are equal in claiming access to adequate housing. The case against discrimination is also an important area in international law, as is evident through the numerous sources and work done in the field of eradicating discrimination.

As illustrated above, article 11(1) of the ICESCR²⁹⁹ includes the right to adequate housing as a subset to an adequate standard of living. This right is granted to '*himself and his family*'. The Committee has indicated that this formulation came as a result of the gender roles and economic activity that was in place when the Covenant was adopted. Therefore, the Committee is of the opinion that the right to housing applies to everyone and that the article cannot be read to place any limitation on the rights of women to adequate housing.³⁰⁰

Women's housing rights have long been a concern to the international community, especially with regard to the increase of female-headed households. In 1981, the Convention on the Elimination of All Forms of Racial Discrimination against Women (the 'CEDAW')³⁰¹ was adopted. This Convention's purpose is to eradicate all forms of discrimination against women based on their gender, and recognises the equality between men and women.

²⁹⁸ S 9(3) lists the grounds on which discrimination may not take place, which also includes race, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 was promulgated to give effect to s 9 of the Constitution.

²⁹⁹ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 entered into force on 3 January 1976, 993 UNTS 3.

³⁰⁰ Committee on Economic, Social and Cultural Rights *General Comment 4: The Right to Adequate Housing Article 11(1) of the ICESCR*, 13 December 1991, UN doc E/1992/23 para 6.

³⁰¹ General Assembly Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981, 1249 UNTS 13.

Article 14(2)(h) of the CEDAW aims to eradicate discrimination against women in rural areas and urges states to ensure that women enjoy 'adequate living conditions, particularly in relation to housing'. Since migration from rural areas to urban areas is on the increase, the argument is made that the protection granted to women in rural areas should be extended to women living in urban areas due to the fact that women may be subject to male oriented housing policies which apply in the urban areas.³⁰²

In addition, the purpose of the International Convention on the Elimination of All Forms of Racial Discrimination (the 'CERD')³⁰³ is to eradicate all forms of discrimination based on race, colour, sex, language, religion and national origin. Article 5(e)(iii) of the CERD has as its purpose the elimination of discrimination in the sphere of socio-economic rights with regard to housing. Although women's housing rights are protected through a liberal interpretation of article 11(1) of the ICECSR and additional anti-discrimination conventions, the Special Rapporteur on women and adequate housing, Miloon Kothari, has identified discriminatory cultural and social norms, which include discriminatory family and personal laws, as significant in determining women's right to adequate housing.³⁰⁴ For instance, certain cultural norms deprive women of their right to land, inheritance and property, having a negative impact on their right to adequate housing.

As an example, Kothari describes the situation in the Islamic Republic of Iran, where a woman may not inherit land from her deceased husband's estate, but only liquid assets. In addition, she may only inherit one-eighth in the event that they had children and one-fourth if they had none. Furthermore, single and divorced women face difficulties in acquiring housing in their own name for two reasons. Women in search for housing need permission from a male relative in order to qualify for the necessary banking schemes. Also, Kothari

³⁰² Farha L 'Women and Housing' in Askin KD and Koenig DM (eds) *Women and International Human Rights Law Volume 1* (2000) 483-532 at 501.

³⁰³ General Assembly Resolution 2106A (XX) of 21 December 1965, entered into force on 4 January 1969, 660 UNTS 195.

³⁰⁴ Report by the Special Rapporteur Miloon Kothari *Adequate Housing as a Component of a Right to an Adequate Standard of Living and on the Right to Non-discrimination*, 66th Session of the Commission on Human Rights, 27 February 2006, UN doc E/CN.4/2006/118 para 37.

notes that in the North American tribal regimes, women stand to lose their tribal rights if they marry a man outside of their own tribe.³⁰⁵

In the case of *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa*,³⁰⁶ which was discussed in chapter 3 at 3 5 3, the discrimination women faced in inheriting property under African customary law came to light. The Constitutional Court ruled that the principle of male primogeniture, which prevented female heirs from inheriting property (including houses), was unconstitutional. Therefore, South African courts are willing to eradicate discrimination based on sex or gender to have the effect that women are given equal opportunity to inherit housing in conformity with international law.

Furthermore, the Committee on Economic, Social and Cultural Rights emphasises that women suffer disproportionately under the practice of forced evictions.³⁰⁷ Before, during and after evictions, women are exposed to violence and emotional distress. During evictions, verbal abuse, rape and other violence often occur, and following the eviction these hardships will continue as they are more often than not moved to informal settlements and inadequately housed.³⁰⁸

The Committee further states that

‘women ... are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or right of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless’.³⁰⁹

Therefore, the Committee contends that where eviction does occur, measures should be taken by the state to ensure that no form of discrimination is involved.

³⁰⁵ See Report by the Special Rapporteur Miloon Kothari *Adequate Housing as a Component of a Right to an Adequate Standard of Living and on the Right to Non-discrimination*, 66th Session of the Commission on Human Rights, 27 February 2006, UN doc E/CN.4/2006/118 paras 37-42.

³⁰⁶ 2005 (1) SA 580 (CC).

³⁰⁷ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV.

³⁰⁸ Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing Fact Sheet 21 (Rev 1 2009)* 18.

³⁰⁹ Committee on Economic, Social and Cultural Rights *General Comment 7: The Right to Adequate Housing Article 11(1) of the ICESCR (Forced Evictions)*, 20 May 1997, UN doc E/1998/22 Annex IV para 10.

It is clear that women are on an equal basis to men, bearers of the right to adequate housing in international law. Women's right to adequate housing is further enhanced by additional measures contained in the CEDAW and CERD discussed above. When women's right to adequate housing needs to be interpreted, international law should be used in addition to the protection women receive in domestic law.

4 8 Conclusion

In this chapter it became clear that the right to adequate housing is a well developed area of international law. It has been stated that 'the right to housing has generated more discussion, debates, legal opinions, and comments than any other right contained in the ICESCR'.³¹⁰ The ICESCR,³¹¹ which contains a right to housing as a subset for an adequate standard of living in article 11(1), has been the source of further development in this area. The General Comments made by the Committee on Economic, Social and Cultural Rights, provide effective guidelines as to what the right to adequate housing entails in international law and what it could consist of in domestic legal systems. These General Comments set out the right to adequate housing in a clear manner, so that it can be used by legislative bodies when interpreting this right in their respective domestic legal systems.

It also became clear in this chapter that a right to adequate housing is not found in the regional international law instruments discussed above and as a result the right to adequate housing is not as developed in regional international law when compared to the development that already occurred in international law. However, it became clear that the right to housing is starting to gain importance in regional international law. In the African regional system, a right to housing was read into the Banjul Charter. In the European Union, established homes are protected from arbitrary interferences while the Inter-American Court of Human Rights regards housing as an important component of a life that is dignified. In addition, all three regional international law systems recognise that forced

³¹⁰ Farha L 'Woman and Housing' in Askin KD and Koenig DM (eds) *Women and International Human Rights Law Volume 1* (2000) 483-532 at483.

³¹¹ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

evictions should be regulated and take place in a manner that is not in conflict with international law by violating fundamental human rights.

Therefore, interpreting the right to housing and fulfilling the obligation in terms of section 39(1)(b) of the Constitution, article 11(1) of the ICESCR, the Committee on Economic, Social and Cultural Rights' General Comments as well as the sources in regional international law that deal with the right to adequate housing should be consulted. These sources are available to courts in interpreting the right of access to adequate housing as found in section 26 of the Constitution, but the South African context needs to be kept in mind.

In the case law that was discussed, namely *Grootboom*³¹² and *Jaftha*,³¹³ it became clear that the Constitutional Court is prepared to consult the sources of international law when interpreting the right to adequate housing. However, in *Grootboom*³¹⁴ the Constitutional Court failed to give any content to the term 'adequacy' as it is used in section 26(1) of the Constitution and in international law. In *Jaftha*,³¹⁵ Mokgoro J admitted that the Constitutional Court had not considered this term in any detail.³¹⁶ However, the Court in *Jaftha*³¹⁷ did not elaborate and failed to give further content to the term 'adequacy,' but it used one of the factors, namely that of security of tenure, to adjudicate that case. The courts could consider the factors of adequacy as laid down in international law by the Committee on Economic, Social and Cultural Rights in future case law in order to give the concept of adequacy content in domestic law.

After international law has been used to interpret the right to adequate housing, regard should be had to regional international law. It was established that the protection afforded adequate housing in regional international law is either limited to protecting existing housing rights (in which event it only addresses the negative obligation to respect the rights to housing) or not protected at all. However, all three regional international law

³¹² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

³¹³ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

³¹⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

³¹⁵ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

³¹⁶ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 23.

³¹⁷ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

systems recognise that forced evictions should be regulated and take place in a manner that is not in conflict with international law. Therefore, any acts of violence that accompany forced evictions which directly or indirectly violate fundamental human rights are unlawful. Consequently, with reference to forced evictions and section 26(3) of the Constitution, all courts, tribunals and forums could draw reference from the sources in regional international law.

The South African government accepts that forced evictions have negative effects on peoples' lives and has put legislation in place to regulate eviction which affords greater protection of human rights when evictions do occur. Furthermore, the National Housing Department and the courts have to a great extent relied on international law in order to give effect to and interpret the right to housing so that it is in accordance with the international law principles. For instance, the Constitutional Court in both *Port Elizabeth Municipality v Various Occupiers*³¹⁸ and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*³¹⁹ required the relevant government departments to consult with the occupiers before the eviction takes place and in some instances required that alternative accommodation be made available once an eviction order is granted. Therefore, the interdependence between the right to housing and forced evictions needs to be kept in mind whenever forced eviction is considered.

In addition to the general international and regional international law that concerns the right to adequate housing, regard should be had to the specific plaintiffs before the courts. The housing rights of children, refugees and women are highly developed in international law and provide these vulnerable groups with additional protection. This protection flows from the history of injustices these groups faced in the past and still face today in many parts of the world. Therefore, when these vulnerable groups face difficulties in receiving adequate housing or their right to housing is threatened, international law as well as regional international law sources are useful in giving effect to their rights.

³¹⁸ 2005 (1) SA 217 (CC).

³¹⁹ 2008 (3) SA 208 (CC).

In terms of the right of access to adequate housing, courts are prepared to fulfil the obligation placed by section 39(1)(b) of the Constitution to consider international law. As a result of the vast amount of literature concerning the right of access to adequate housing in international law, and owing to the fact that this right is defined in international law by the Committee on Economic, Social and Cultural Rights, it is easier to consider the international law on adequate housing than the right to property, as discovered in chapter 3. However, courts must be cautious to apply international law consistently. In interpreting the right of access to adequate housing by using international law sources, the proper approach should be followed. Courts, tribunals and forums should first have regard to the International Covenant on Economic, Social and Cultural Rights and then turn to regional international law. In the event that specific groups of people claim protection or realisation of their housing rights, the specific housing rights in international law should also be considered.

5

Conclusion

5 1 Introduction

This thesis set out to explore whether or not courts, especially the Constitutional Court, optimally apply international law in interpreting the bill of rights as mandated by section 39(1)(b) of the Constitution. Using international human rights law to interpret the bill of rights would arguably make it possible to expand the protection of human rights in the South African legal system. In this thesis the Constitutional Court's use of international law was considered. The Court does not consistently apply international law in interpreting the bill of rights. Therefore, the aim of this thesis was to present the international law sources available to the courts to interpret the right to property and the right of access to adequate housing. In addition, a possible method for the application of international law sources will be discussed in this chapter.

During the course of this thesis, it became apparent that international law was for a long time regarded as an inferior system of law. As a result, international law did not receive sufficient attention in the South African legal system. However, with the promulgation of the 1993 and 1996 Constitutions, international law was set to take its rightful place in South African law. As discussed in chapter 2, the 1993 and 1996 Constitutions contain various sections dealing with international law.

The purpose of this concluding chapter is to highlight some important conclusions with regard to the position of international law in South African law, as well as the Constitutional Court's use of international law in interpreting the right to property and the right of access to adequate housing. A method is also proposed in this chapter to indicate to all courts, tribunals and forums on how they can apply relevant international law in interpreting the bill of rights.

5 2 South Africa and International Law

The thesis commenced with an overview of the constitutional history of South Africa with regard to the protection of human rights and the use of international law by South African courts. In chapter 2 it was argued that the principle of the sovereignty of Parliament, together with the courts' inability to test the substance of legislation, made the implementation of the apartheid system possible. As a result of the apartheid system, South Africa was isolated from the international community and the developments that took place in the area of international human rights law. Since the South African apartheid government regarded international law as inferior and the apartheid policy itself violated international law principles,¹ international law and the protection of human rights were neglected during this period.

When South Africa entered a new democratic era in 1994, a bill of rights in a Constitution that is the highest law in the Republic was introduced. Furthermore, the protection of human rights became of utmost importance and the courts were entrusted with the task to safeguard the human rights of all citizens. With regard to international law, the Constitution favours the integration of international law into South African law in order to advance and interpret the bill of rights. With regard to international law, the 1996 Constitution emphasises the position regarding international agreements,² thereby seeking to include South Africa once again in the international community by making it possible, and somewhat easier, for international agreements to be incorporated into South African law. The Constitution also makes reference to other areas of international law, such as customary international law and gives such law constitutional standing.³ Furthermore, when courts interpret legislation, they are under an obligation to interpret legislation in favour of international law if such an interpretation is reasonably possible.⁴ Therefore, it was concluded in chapter 2 that international law is deemed to be important in the new constitutional era.

¹ Scholtz W 'A Few Thoughts on Section 231 of the South African Constitution, Act 108 of 1996' (2004) 29 *SAYIL* 202-216 at 1.

² S 231 of the 1996 Constitution.

³ S 232 of the 1996 Constitution.

⁴ S 233 of the 1996 Constitution.

5 3 International Law as Interpretive Guide

The manner in which the courts must interpret the bill of rights as set out in section 39(1) of the 1996 Constitution was discussed in chapter 2. In terms of section 39(1)(b), the courts are placed under an obligation to consider international law when interpreting the bill of rights. In this thesis, the use of international law by the Constitutional Court was considered. In *S v Makwanyane* (hereafter 'Makwanyane')⁵ it was established that international law for purposes of this section includes binding and non-binding international law. In *Government of the Republic of South Africa v Grootboom* (hereafter 'Grootboom')⁶ the principle laid down in *Makwanyane*⁷ was accepted, but the Constitutional Court stated that the weight to be attached to each principle of international law will vary, thereby seeking an interpretation that is context sensitive.

However, during the course of this thesis it became clear that the Constitutional Court does not consistently adhere to the obligation to consider international law when interpreting the bill of rights. Through the discussion of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*⁸ in chapter 3, it became clear that the Constitutional Court, although accepting that it has an obligation to consider international law, failed to make proper reference to international law in interpreting the right to property. Furthermore, it was argued that the Constitutional Court confuses international law with foreign law, which is evident through the discussion of article 1 of Protocol 1 to the European Convention together with the discussion of the legal principles of national jurisdictions such as Australia, Germany and the United States of America. This collapses the distinction made by the Constitution in section 39(1)(b) and 39(1)(c). In terms of section 39(1)(b) courts *must* consider international law when interpreting any right in the bill of rights, and in terms of section 39(1)(c) courts *may* consider foreign law when interpreting any right in the bill of rights.

⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) para 35.

⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 26.

⁷ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁸ 2002 (4) SA 768 (CC).

Although the Constitutional Court reached sensible conclusions based on article 1 of Protocol 1 of the European Convention and the jurisprudence of the European Court, the Court confused regional international law with foreign law and miscalculated its importance as international law. In the subsequent Constitutional Court cases concerning the right to property discussed in chapter 3, namely *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bisset v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*⁹ and *Du Toit v Minister of Transport*,¹⁰ no reference was made to international law that might have been available.

Furthermore, it was indicated in chapter 3 that the right to property is controversial in international law. However, there are international and regional international law sources that relate to property rights. In addition, it was discovered that property rights in regional international law is more developed than in international law. The property rights of women and refugees are also more developed and it was argued that these sources should be considered when the property rights of these groups of people need to be interpreted. Therefore, the omission of any reference to international and regional international law when the right to property is interpreted is not justifiable.

This leads to the conclusion that there is no justification for the practice of the Court not to consider international law when the right to property is interpreted. Since there are international law sources that might be able to guide the Court's interpretation of the right to property in the South African context, these international law sources should be considered.

In contrast, it became apparent in chapter 4 that the Constitutional Court is more willing to consider international law when interpreting the right of access to adequate housing in section 26 of the Constitution. In chapter 4 it was discovered that the right to adequate housing is a well developed area of international law. The right to adequate housing is found in article 11(2) of the International Covenant on Economic, Social and Cultural

⁹ 2005 (1) SA 530 (CC).

¹⁰ 2006 (1) 297 (CC).

Rights, (the 'ICESCR')¹¹ as a subset of the right to an adequate standard of living. The General Comments of the Committee on Economic, Social and Cultural Rights have given further content to the right to adequate housing in international law and have been used by the Constitutional Court to interpret section 26 of the Constitution. These General Comments, as examined in chapter 4, can be useful in guiding South African courts to a better interpretation of the right to adequate housing.

In the case law that was discussed, namely *Grootboom*¹² and *Jaftha v Schoeman; Van Rooyen v Stoltz* (hereafter '*Jaftha*')¹³ it was argued that the Constitutional Court is prepared to consult the sources of international law when interpreting the right to adequate housing. However, in *Grootboom*¹⁴ the Constitutional Court failed to give any content to the term 'adequacy' as it is used in section 26(1) of the Constitution and in international law. In *Jaftha*,¹⁵ Mokgoro J admitted that the Constitutional Court had not considered this term in any detail. However, the Court in *Jaftha* did not elaborate and failed to give further content to the term 'adequacy,' but it used one of the factors, namely that of security of tenure, to adjudicate the case. Furthermore, in neither *Grootboom*¹⁶ nor *Jaftha*¹⁷ did the Court outline the status of the ICESCR and the General Comments of the Committee on Economic, Social and Cultural Rights it used. The South African government has not yet ratified this Covenant, so it is not directly binding on South African law. Although the Court is permitted to consult the ICESCR to interpret the right of access to adequate housing, the status of the ICESCR within South African law should have been made clear by the Constitutional Court before it or the additional sources pertaining to the Covenant was used.

In addition, it was recognized in chapter 4 that a right to adequate housing is not found in the regional international law instruments discussed. Therefore, the right to adequate housing is not as developed in regional international as on the international level. However, the right to housing is starting to gain importance in regional international law. In

¹¹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

¹² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹³ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

¹⁴ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁵ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 23.

¹⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁷ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

the African regional system, a right to housing has been read into the African Charter on Human and Peoples' Rights.¹⁸ In the European Union, established homes are protected from arbitrary interferences while the Inter-American Court of Human Rights considers housing as an important component of a life that is dignified. In addition, all three regional international law systems that were discussed recognise that forced evictions should be regulated and take place in a manner that is not in conflict with international law by violating fundamental human rights.

It was further illustrated in chapter 4 that the South African government accepts that forced evictions have negative effects on peoples' lives and has put legislation in place to regulate eviction which affords greater protection of human rights when evictions do occur. Furthermore, the National Housing Department and the Constitutional Court have to a great extent relied on international law in order to give effect to and interpret the right to housing so that it is in accordance with the international law principles. The Court's willingness to adhere to international law principles is seen in *Port Elizabeth Municipality v Various Occupiers*¹⁹ as discussed in chapter 4. In that case, the Court had to consider the PIE Act.²⁰ The PIE Act does not make mention of the requirement set by international law that consultation with the affected parties should take place before an eviction order is granted. However, the practice of consulting with affected parties before eviction takes place was established by the Court in this decision. Similarly, in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*,²¹ the Constitutional Court also gave an engagement order. Therefore, court orders which obliges government departments to consult with the occupiers before evicting them and to provide them with alternative accommodation if they were to be evicted, is in accordance with established international law principles.

In addition to the general international and regional international law that concerns the right to adequate housing it was argued that Court should have regard to the specific plaintiffs before the courts. It was indicated that the housing rights of children, women and

¹⁸ Adopted by the 18th Assembly of Heads of State and Government of the Organisation of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU doc CAB/LEG/67/3rev5, 1520 UNTS 217, 21 ILM 58, (1982).

¹⁹ 2005 (1) SA 217 (CC).

²⁰ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

²¹ 2008 (3) SA 208 (CC).

refugees are highly developed in international law and provide these vulnerable groups with additional protection. This protection flows from the history of injustices these groups faced in the past and still face today in many parts of the world. Therefore, when these vulnerable groups face difficulties in receiving adequate housing or their right to housing is threatened, international and regional international law sources are useful in giving further content to their rights.

During the course of this thesis it was discovered that in the event that international law is underdeveloped with regard to a certain right, regional international law compensates for this lacuna. This is evident from chapters 3 and 4. With regard to the right to property, international law is not as developed as regional international law and as a result regional international law compensates for the lack of clear guidelines in international law. With regard to the right to housing, international law is more developed than regional international law. This leads to the conclusion that between international and regional international law the necessary guidance should be found, if not from the one, then from the other. Therefore, not referring to international or regional international law is not justifiable.

5 4 Recommendations

In this thesis, two points became clear. Firstly, the Constitutional Court does not always fulfil its obligation in terms of section 39(1)(b) of the Constitution, and when an attempt is made to consult international law, it is sometimes done incorrectly. In relation to the right to property in section 25(1)-(3) of the Constitution this was illustrated through the discussion of the *FNB* case, where the Court confused regional international law with foreign law. Secondly, the Constitutional Court has to date not provided a method as to how it uses the international law sources. As a result, the status of the international law sources used by the Court is not given proper regard.

As a result the following method is proposed for using international law sources as a guide to interpretation. In this regard, the suggested method would not only find application to the Constitutional Court, but to all courts as well as tribunals and forums, in order to realize the obligation in terms of section 39(1)(b). When a right in the bill of rights needs to be

interpreted, the obligation in terms of section 39(1)(b) should be recognised and acknowledged if there is relevant applicable international law. The international law sources that might aid the courts in interpreting the right in question should be identified. Such an undertaking should start with the international bill of rights; the Universal Declaration of Human Rights,²² the International Covenant on Economic, Social and Cultural Rights²³ and the International Covenant on Civil and Political Rights.²⁴ The international bill of rights contains a vast array of human rights and should be consulted. Thereafter, published work of the committees established under the international bill of rights should be considered.²⁵ These committees, responsible for monitoring compliance with the relevant Covenant, produce General Comments on the interpretation and application of specific rights contained in the relevant Covenant. The General Comments of the Committee on Economic, Social and Cultural Rights, as illustrated in chapter 4, have been helpful in guiding South African courts with regard to the interpretation of the right to adequate housing. Courts could also consider the reports made by the Special Rapporteurs on the rights of specific persons as discussed in chapter 4.

As discussed, when courts interpret the bill of rights, it should also have regard to regional international law. Special attention should be given the African Charter²⁶ and the communications made by the African Commission on Human Rights, because it is binding on South African law. Furthermore, the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, together with the communications from the Inter-American Commission on Human and Peoples' Rights, should also be considered. Reference to these sources is important because in the event that international law adds little or no interpretive guidelines, regional international law may prove to be a guide for interpretation. This was illustrated in chapter 3, where the property rights in regional international law are much more developed than in international law.

²² Adopted by the General Assembly of the United Nations Resolution 217(III) of 10 December 1948, UN doc A/810.

²³ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

²⁴ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, UNTS 171.

²⁵ The Human Rights Committee is entrusted with supervising compliance of the ICCPR, while the Committee on Economic, Social and Cultural Rights is entrusted with supervising compliance with the ICESCR. See Dugard J *International Law: A South African Perspective* (3rd ed 2005) 319-321.

²⁶ African Charter on Human and Peoples Rights, adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity on 27 June 1981, entered into force on 21 October 1986, OAU Doc CAB/LEG/67/3rev.5, 1520 UNTS 217, 21 ILM 58, (1982).

In the event that the property and housing rights of specific persons are at issue, courts, tribunals and forums should take cognisance of the international and regional international law sources available. This will also include the relevant jurisprudence and communications of the regional supervisory organs.

Finally, when the courts, tribunal and forums use international and regional international law sources to guide their interpretation, the status of these instruments must be made clear. If for instance, a court deals with international law sources, those international law sources should be distinguished from foreign law sources. Furthermore, whether the sources discussed are international treaties, recommendations of specific international committees or jurisprudence of regional international courts, the status of these sources should be outlined and explained. These international law sources each carry different weight when they are used to interpret the bill of rights. As a result, outlining the status of these sources provides for a clear method of international law to interpret the bill of rights. A clear framework of international law sources that are available to courts in interpreting the bill of rights will pave the way for sufficient regard of international law sources in future case law.

Abbreviations

ASSAL	Annual Survey of South African Law
EHRLR	European Human Rights Law Review
HVHRJ	Harvard Human Rights Journal
ICLQ	International and Comparative Law Quarterly
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
SAYIL	South African Yearbook of International Law
Stell LR	Stellenbosch Law Review
TSAR	Journal of South African Law

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