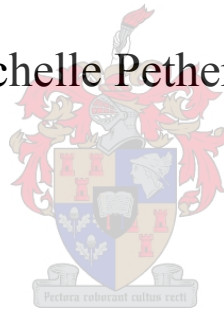


The Role of International Law in the Interpretation of Socio-Economic Rights in South Africa

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

The 1993 and 1996 South African Constitutions protect socio-economic rights as justiciable rights. As legal guarantees, these rights have the potential to address the socio-economic hardship experienced by many South Africans today. However, their contribution towards this will depend largely on how these rights are interpreted. The 1993 and 1996 Constitutions oblige courts to consider international law when interpreting the Bill of Rights. This dissertation examines the relationship between this interpretative mandate and the Constitutional Court's adjudication of the socio-economic rights entrenched in the Bill of Rights. In particular, this dissertation investigates whether the Court has developed a clear methodological approach to the consideration of international law in its interpretation of the Bill of Rights, and how the Court has applied such an approach to the interpretation of socio-economic rights.

This dissertation shows that, while the Constitutional Court has developed a methodological approach to the consideration of international law when interpreting the Bill of Rights, its approach remains embryonic. In particular, the Court has not fully developed clear analytic guidelines indicating how courts should consider international law sources. In addition, the Court has not fully explored the relevance of specific sources of international law to the interpretative exercise. Nevertheless, this dissertation argues that the methodological approach developed thus far provides the Court with an important means of engaging with international law in judicial reasoning, which can enrich the Court's interpretative process. Moreover, a detailed investigation into the Court's socio-economic jurisprudence reveals that the Court's consideration of international law is inconsistent and sporadic. However, the analysis also demonstrates that when the Court has considered international law in its adjudication of socio-economic rights, it has done so in various ways and to various degrees. In addition, the analysis reveals how the Court's application of the reasonableness model of review, developed within the context of positive duties imposed by socio-economic rights, limits a substantive consideration of international law in the development of the normative content of socio-economic rights. A key contribution of this dissertation is the detailed analysis of the Court's methodological approach to the consideration of international law sources developed thus far, and the demonstration of how this can be applied within the field of socio-economic rights. In addition, this dissertation identifies relevant international human rights standards and adjudicative approaches pertaining to socio-economic rights and illustrates how the Court can engage with these

sources to support and enhance the development of South Africa's socio-economic rights jurisprudence.

Opsomming

Die 1993 en 1996 Suid-Afrikaanse Grondwet beskerm sosio-ekonomiese regte as beregbare regte. As wetlike waarborge het hierdie regte die potensiaal om sosio-ekonomiese swaarkry wat tans deur baie Suid-Afrikaners ervaar word, aan te spreek. Die bydrae van hierdie regte is onderworpe aan die wyse waarop dit geïnterpreteer word. Die 1993 en 1996 Suid-Afrikaanse Grondwet verplig hulle om internasionale reg in ag te neem wanneer hulle die Handves van Regte interpreteer. Hierdie tesis ondersoek die verhouding tussen hierdie interpretatiewe mandaat en die Grondwetlike Hof se beoordeling van sosio-ekonomiese regte soos verskans in die Handves van Regte. In die besonder, ondersoek die tesis of die Hof 'n duidelike metodologiese benadering tot die inagneming van internasionale reg in terme van sy interpretering van die Handves van Regte ontwikkel het, en hoe die Hof hierdie benadering toegepas het ten opsigte van die interpretering van sosio-ekonomiese regte

Die tesis toon dat, alhoewel die Grondwetlike Hof 'n metodologiese benadering tot die inagneming van internasionale reg ontwikkel het wanneer die Handves van Regte geïnterpreteer word, die benadering nog grootliks onontwikkeld is. In die besonder het die Hof nie duidelike analitiese riglyne ontwikkel hoe internasionale regsbronne oorweeg moet word nie. Daarbenewens, het die Hof nie die relevansie van spesifieke bronne van internasionale reg vir die interpretatiewe oefening verken nie. Hierdie tesis argumenteer dat die metodologiese benadering wat wel tot dusver ontwikkel is ten opsigte van die interaksie met internasionale reg in terme van regspraak, die Hof se interpretatiewe proses kan verryk. Bowendien toon 'n gedetailleerde ondersoek rakende die Hof se sosio-ekonomiese regspraak dat die Hof se oorweging van internasionale reg teenstrydig en sporadies is. Die ondersoek toon ook dat wanneer die Hof internasionale reg in die beoordeling van sosio-ekonomiese regte oorweeg het, dit op verskillende wyses en grade gedoen is. Daarbenewens onthul die ondersoek ook dat die Hof se toepassing van die redelike model van hersiening, ontwikkel binne die konteks van positiewe verpligtinge soos opgelê deur sosio-ekonomiese regte, 'n substantiewe oorweging van internasionale reg in die ontwikkeling van die normatiewe inhoud van sosio-ekonomiese regte beperk.

'n Sleutel bydra van hierdie tesis is 'n gedetailleerde analise van die Hof se metodologiese benadering tot die oorweging van bronne van internasionale reg tot dusver en hoe dit toegepas kan word ten opsigte van sosio-ekonomiese regte. Daarbenewens identifiseer die tesis relevante internasionale menseregte standaarde met betrekking tot sosio-ekonomiese regte. Dit illustreer hoe die Hof betrokke kan raak by hierdie bronne met die doel om Suid-Afrika se sosio-ekonomiese regspraak te ondersteun en te versterk.

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Chapter 1

Introduction

1 1 Research Problem

International law has developed rapidly in the last few decades. The relatively recent development of the international legal landscape has been spurred on by, amongst others, the emergence of new fields of international law, regional legal developments, globalisation, and the rise of new international actors. Consequently, international law has expanded in terms of both its subject matter and the variety of international sources available today.¹ Courts engaging with international sources of law are therefore confronted with a vast, complex area of law, and judges are required to possess both knowledge and skill in order to navigate through, and successfully, apply it. In particular, judges would arguably have to possess a sound knowledge of the relevant fields of international law, and be able to identify its various sources. Furthermore, judges would have to possess the skill to engage with these sources methodically and apply them in a relevant manner.

International law features prominently in South Africa's new constitutional landscape. The Constitution of the Republic of South Africa, Act 200 of 1993 ("1993 Constitution") and the Constitution of the Republic of South Africa, 1996 ("1996 Constitution") add further complexity to a court's task of engaging with international law by providing for various ways in which international law can interact with municipal law. In particular, section 39(1)(b) of the 1996 Constitution obliges courts, tribunals or forums to consider international law when interpreting the Bill of Rights.² When applying this interpretative mandate to the field of socio-economic rights, which is the focus of this dissertation, it is clear that South African

¹ Article 38(1) of the Statute of the International Court of Justice ("ICJ") defines international sources of law in the following way:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

² Similarly, section 35(1) of the 1993 Constitution states that:

"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." (Emphasis added).

courts (“courts”) are presented with the intricate task of engaging with relevant international law sources in the complex process of socio-economic rights adjudication.

Socio-economic rights are included in both the 1993 Constitution and the 1996 Constitution as justiciable rights.³ Their inclusion as such signals the State’s recognition of the grave socio-economic violations and inequalities that pervaded the previous era of apartheid, and its responsibility to realise socio-economic rights. This is further highlighted by the constitutional obligation placed upon the State to “respect, protect, promote and fulfil the rights in the Bill of Rights”.⁴ The inclusion of socio-economic rights in the Bill of Rights is furthermore an important means of advancing the broader aims of the 1996 Constitution, which is clearly stated in its Preamble. It states that the 1996 Constitution was adopted to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.⁵ In addition, socio-economic rights have the potential to advance the commitment, stated in the Preamble, to “[i]mprove the quality of life of all citizens and free the potential of each person.”⁶ The 1996 Constitution entrenches the right of everyone to have access to adequate housing,⁷ healthcare, food, water, and social security.⁸ In addition, it protects the right of every child to “basic nutrition, shelter, basic health care services and social services”,⁹ and entrenches rights related to education.¹⁰ It also protects the

³ LM Du Plessis & H Corder *Understanding South Africa’s Transitional Bill of Rights* (1994); S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 7-22. See section 3 2 1 of chapter 3. The 1993 Constitution included only a limited number of socio-economic rights. However, these still formed the foundation upon which a more comprehensive list of socio-economic rights was included in the 1996 Constitution. See Liebenberg *Socio-Economic Rights* 16.

⁴ Section 7(2) of the 1996 Constitution.

⁵ Preamble, Constitution of the Republic of South Africa, 1996.

⁶ Preamble, Constitution of the Republic of South Africa, 1996.

⁷ Section 26 of the 1996 Constitution. This right is qualified in section 26(2), which states that: “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” Furthermore, section 27(3) states that: “[n]o 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.”

⁸ The right to have access to health care, food, water, and social security is entrenched in section 27 of the 1996 Constitution. These rights are qualified in section 27(2), which states that: “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” Section 27(3) of the 1996 Constitution states that: “[n]o one may be refused emergency medical treatment.”

⁹ Section 28(1)(c) of the 1996 Constitution.

¹⁰ Section 29(1) and (2) of the 1996 Constitution state the following:

“(1) Everyone has the right-

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.”

right of detainees, including sentenced prisoners, “to conditions of detention that are consistent with human dignity, including at least ... the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment, ...”.¹¹ These legal guarantees are also important in the struggle against poverty in South Africa and the upliftment of the poor and marginalised sectors of society. The violations of socio-economic rights are likely to, amongst others, leave individuals homeless, without water, sanitation, electricity or even basic health care. These violations may result in severe human suffering that deeply affects the quality of human life and impedes on an individual’s ability to live a life of dignity. In addition, the prevalence of poverty threatens the economic security and independence of many South Africans, and in turn, negatively affects the realisation of individual freedom and their ability to participate as equals in society.¹² The entrenchment of socio-economic rights as justiciable rights are therefore a crucial means of enabling impoverished people to turn to the courts to challenge infringements of their rights.¹³

Furthermore, the interrelatedness between socio-economic rights and civil and political rights necessitates that socio-economic rights be addressed to allow individuals to flourish socially, economically, and politically.¹⁴ In addition, former Chief Justice Pius Langa draws a strong connection between socio-economic justice and reconciliation in South Africa. He argues that reconciliation that facilitates the nation’s development is dependent on redressing poverty and the gap that exists between the poor and the affluent in South Africa.¹⁵

Twenty years have passed since South Africa’s first democratic Constitution entered into force. However, many South Africans continue to live in abject poverty, and are increasingly voicing their dissatisfaction over service delivery in various parts of South Africa. The prevalence of poverty, and the heightened frustration with the social conditions under which many South Africans continue to live in today, question the relevance of socio-economic rights in South Africa as a means of responding to these hardships. While courts are not the only actors that influence the enforcement and realisation of socio-economic rights in South Africa, courts have an important role to play in developing the role of social-economic rights in South Africa.¹⁶ The manner in which courts engage with the nature and scope of socio-economic rights will largely determine how the judicial enforcement of these rights will translate into transformative outcomes and impact the social and economic hardship that

¹¹ Section 35(2)(e) of the 1996 Constitution.

¹² P Langa “The Role of the Constitution in the Struggle against Poverty” in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 4 5.

¹³ Socio-economic rights bind the State and, to a certain extent, private parties.

¹⁴ Langa “The Role of the Constitution in the Struggle Against Poverty” in *Law and Poverty* 5.

¹⁵ 6-7.

¹⁶ In South Africa, socio-economic rights are also enforced and realised through, amongst others, national legislation, socio-economic policies, and civil society groups and organisations.

many South Africans face on a daily basis.¹⁷ In this regard, Liebenberg states that courts primarily serve as an “influential forum”, in which different aspects of poverty and the social responses to this can be evaluated within the context of constitutional rights and values.¹⁸ Courts therefore create a normative context within which to understand socio-economic rights.

The South African Constitutional Court (“Court”)¹⁹ has developed a reasonableness model of review to adjudicate claims based upon the positive obligations arising from socio-economic rights entrenched in the Constitution. The reasonableness model of review was developed in *Soobramoney v Minister of Health, KwaZulu-Natal*,²⁰ *Government of the Republic of South Africa v Grootboom*,²¹ *Minister of Health v Treatment Action Campaign (no. 2)*,²² and more recently confirmed in *Mazibuko v City of Johannesburg*.²³ An important feature of the reasonableness model of review is that the Court affords a generous margin of discretion to the executive in respect of the assessment of the measures taken by the State in fulfilment of its obligations. In this regard, the Court has held that it will not enquire into whether a more favourable measure would have been appropriate, but rather whether the measure adopted by the State was reasonable.²⁴ Therefore, the Court has clearly adopted a deferential approach towards the adjudication of socio-economic rights. Scholars have criticised this approach as arguably avoiding an interpretation of socio-economic rights that engages with, and substantively develops, the scope and content of these rights.²⁵ In this regard, Liebenberg argues that this model of review can be developed so that it includes a more substantive interpretation of socio-economic rights.²⁶ This raises the question of what interpretative approach and tools could be used in the development of a substantive interpretation of socio-economic rights.

As indicated above, the 1993 and 1996 Constitutions expressly provide a set of interpretative tools that can assist courts in the interpretation of the Bill of Rights. In particular, section 39(1)(b) of the 1996 Constitution states that when a court, tribunal, or forum interprets the Bill of Rights, these bodies must “promote the values that underlie an

¹⁷ Liebenberg *Socio-Economic Rights* 37.

¹⁸ 37.

¹⁹ Unless the context provides otherwise, “the Court” refers to the Constitutional Court, while “courts” will be used as general reference to all South African courts.

²⁰ 1998 1 SA 765 (CC) (“*Soobramoney*”).

²¹ 2001 1 SA 46 (CC) (“*Grootboom*”).

²² 2002 5 SA 721 (CC) (“*TAC*”).

²³ 2010 4 SA 1 (CC) (“*Mazibuko*”). See Liebenberg *Socio-Economic Rights* 151-155; D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007); K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009).

²⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

²⁵ Liebenberg *Socio-Economic Rights* 175-177.

²⁶ 227.

open and democratic society based on human dignity, equality and freedom”.²⁷ Furthermore, these bodies are obliged to consider international law when interpreting the Bill of Rights.

The Constitutional Court has considered international law as an interpretative tool in accordance with section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution in the interpretation of a broad spectrum of rights. In this regard, the Court has made important pronouncements concerning the manner in which courts are to approach the exercise of considering international law in the interpretation of the Bill of Rights. In particular, the Constitutional Court’s seminal decision of *S v Makwanyane*²⁸ establishes that, within the context of section 35(1) of the 1993 Constitution, “public international law would include both binding and non-binding international law”.²⁹ Furthermore, the judgment establishes that international agreements and customary international law provide a framework within which the Bill of Rights is to be evaluated and understood.³⁰ Consequently, this statement provides a first step towards a methodological approach for the use of international law in the interpretation of the Bill of Rights.³¹ The judgment is also significant for its recognition of a generous breadth of sources, which includes soft law,³² in the interpretation of the Bill of Rights. Although the Constitutional Court has engaged with international law in the interpretation of the Bill of Rights, it does not appear as though it has developed a clear methodological approach in respect of the consideration of international law subsequent to *Makwanyane*. In addition, scholars such as Botha and Olivier argue that the Court’s practice of invoking international law is often fraught with inconsistencies.³³

Notwithstanding, the interpretative mandate has the potential to be particularly relevant to the interpretation of socio-economic rights in South Africa when the vast field of international human rights law that affords protection to socio-economic rights is considered. Various international and regional courts, tribunals, and committees have interpreted these provisions in an effort to develop these standards and guide States parties in their implementation of socio-economic rights. While I do not depart from the assumption that international law is the panacea to the challenges facing socio-economic rights adjudication today, this source of law may form one part of the Constitutional Court’s interpretative

²⁷ Section 39(1)(a) of the 1996 Constitution.

²⁸ 1995 3 SA 391 (CC) (“*Makwanyane*”).

²⁹ Para 35.

³⁰ Para 35.

³¹ The term “methodological” has been used by E De Wet in her analysis of the South African Constitutional Court’s treatment of international law in its jurisprudence. See E De Wet “The ‘Friendly but Cautious’ Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks” (2004) 28 *Fordham International Law Journal* 1529-1565.

³² For a discussion on the definition of soft law, see chapter 4.

³³ See N Botha & M Olivier “Ten Years of International Law in the South African Courts: Reviewing the Past and Assessing the Future” (2004) 29 *SAYIL* 42-77.

strategy. When considering the relative novelty of socio-economic rights adjudication in South Africa, international law may assist courts in developing both the positive and negative obligations placed upon the State and in this way, assist in substantively developing the nature and scope of socio-economic rights entrenched in the Bill of Rights.

Moreover, in 2011 the Constitutional Court delivered judgment in the case of *Glenister v President of the Republic of South Africa*³⁴ in which it made an important statement concerning the relevance of international law to the application of the reasonableness model of review. In this case, the Court concluded that a consideration of international law must form part of the process of determining which reasonable measures the State must take to protect and fulfil the rights entrenched in the Bill of Rights.³⁵

However, the Constitutional Court's socio-economic rights jurisprudence appears to indicate a minimal and sporadic consideration of international law. In light of the above discussion, I aim to explore the underlying reasons for this. In particular, I investigate firstly, whether this apparent neglect is connected to the methodology employed by the Court in its consideration of international law. Therefore, I question whether the Constitutional Court has developed a general methodological approach to the consideration of international law in the interpretation of fundamental rights and applied this to the interpretation of socio-economic rights. Secondly, I investigate whether the Court's minimal and sporadic consideration of international law is connected to the relevance of international and regional human rights standards to socio-economic rights interpretation. I therefore question whether international and regional human rights standards are able to contribute towards the interpretation of socio-economic rights in South Africa.

1 2 Research Questions and Hypotheses

In light of the above discussion, I address two over-arching research questions in this dissertation. Firstly, whether the Constitutional Court has developed a general methodological approach to the consideration of international law in the interpretation of the Bill of Rights in light of the mandate entrenched in section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. Secondly, whether the Constitutional Court has applied section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, and the methodological approach developed in this regard, in its interpretation of socio-economic rights in South Africa, given the Court's adoption of the reasonableness model of review.

³⁴ 2011 3 SA 347 (CC) ("*Glenister*").

³⁵ Para 192.

The hypothesis I set out to explore in respect of my first research question is that, despite elaborating on the role of international law in the interpretation of the Bill of Rights, the Constitutional Court's methodological approach remains largely embryonic. A primary objective of this thesis is therefore to establish whether this assumption is correct, and if so, what are the consequences thereof. In respect of my second research question, I explore the hypothesis that the Constitutional Court has been inconsistent in its application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution in the adjudication of socio-economic rights. Furthermore, I investigate the hypothesis that the interpretative mandate has, on occasion, been neglected, despite the availability of relevant international human rights standards that can strengthen and support judicial reasoning in the adjudication of socio-economic rights in South Africa.

1 3 Overview and Methodology

The abovementioned research questions and hypotheses are investigated over four substantive chapters. In particular, the first research question is addressed over chapters 2, 3 and 4. In this regard, chapter 2 canvasses the methodological approaches of colonial and apartheid courts to international human rights law, while chapter 3 focuses on specific provisions contained in the 1993 and 1996 Constitution that regulate international law in municipal law and impact the consideration of international human rights in constitutional interpretation. In addition, chapter 4 provides a critical evaluation of South African Courts' application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. The second research question is explored in chapter 5, which investigates the role of international human rights law in the interpretation of socio-economic rights in South Africa.

More specifically, the aim of chapter 2 is two-fold. Firstly, I seek to provide a historical overview of the status of socio-economic rights in South Africa during the periods preceding the adoption of the 1993 Constitution. My first point of departure is that socio-economic rights were not protected as justiciable rights during these periods. Furthermore, national policies and legislation aimed at advancing racial discrimination and segregation in South Africa frequently left many Black South Africans³⁶ exposed to grave human rights violations that could not be addressed as infringements of constitutionally protected rights. In order to investigate the above statements, I evaluate legislation³⁷ and the effects of these on

³⁶ This historical discussion of racial classification under apartheid has unfortunately made it necessary to refer to racial categorisations in this chapter. The term "Black" is used in this chapter to collectively describe individuals classified as African or "Bantu", Coloured, Indian, or Asian, under apartheid legislation.

³⁷ Such as the Natives Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936.

the socio-economic interests of the Black majority in South Africa. This evaluation provides an important historical context that illustrates the effects of racial discrimination on socio-economic interests that did not enjoy constitutional protection.

Secondly, I give a comparative, historical account of South African courts' relationship with international law generally on the one hand, and its relationship with the specific field of international human rights law on the other, during the periods preceding the 1993 Constitution. In particular, I examine how South African courts used these sources of law during this time. The main assumption I set out to explore is that during these periods, and in particular, the period of apartheid, international law was applied frequently in South African courts. However, South African courts only applied international norms that did not contradict its racial policies and ignored important developments in the realm of international human rights law, especially with regard to socio-economic rights. In order to investigate these assumptions, I examine South African jurisprudence and in particular, the methodological approaches to the application of international law in the form of customary international law and international treaties. I compare these methodological approaches with the courts' treatment of international human rights law, in order to determine whether international human rights law played any significant role in the jurisprudence of the South African courts. This historical overview will serve to illustrate the effects of South Africa's political ideology on the recognition and application of international human rights law by South African courts prior to the adoption of the 1993 Constitution.

In Chapter 3, I explore the significant changes brought about by the adoption of the 1993 and 1996 Constitutions concerning firstly, the inclusion of socio-economic rights, and secondly, the relationship between international law and municipal law. In terms of the former, I examine the status of socio-economic rights as justiciable rights in the 1993 and 1996 Constitutions. Furthermore, I seek to establish the extent to which international human rights instruments influenced the selection and drafting of socio-economic rights included in the constitutional texts. My assumption in this regard is that the relevant provisions for socio-economic rights are genetically connected to provisions found in various international human rights treaties, given the major influence of the latter on the drafting of these in the 1993 and 1996 Bill of Rights. In order to investigate this assumption, I analyse which international and regional human rights instruments were relied upon during the drafting processes and explore the extent to which these assisted drafters in the formulation of socio-economic rights. To do so, I rely on literature outlining the drafting processes preceding the adoption of the 1993 Constitution and undertake a detailed analysis of the preparatory materials created by drafters during the drafting of the 1996 Constitution. The significant role of international and regional

human rights instruments in the drafting of provisions for socio-economic rights may strengthen the argument that these instruments should remain a relevant source to be considered when interpreting these provisions.

Moreover, I explore the relationship between international law, international human rights law, and the 1993 and 1996 South African Constitutions. My hypothesis is that the inclusion of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution affords international law, and particularly international human rights law, a profound role as an interpretative tool in constitutional interpretation. Furthermore, these provisions allow courts to engage with international norms and standards in an unprecedented manner in South Africa. Consequently, these international norms and standards have the potential to assist courts in informing the values underlying our society as well as guide them in the development of the nature and scope of the rights entrenched in the 1993 and 1996 Bill of Rights. To test these assumptions, I focus on those constitutional provisions that regulate the status of international treaties and customary international law in the South African municipal system. I proceed to distinguish these from the interpretative mandate entrenched in section 35(1) and section 39(1)(b) of the 1993 and 1996 Constitutions, respectively. Furthermore, I address arguments that support the consideration of international law in constitutional interpretation and examine the increasing trend among courts to do so. Lastly, I analyse the benefits that may be derived from the consideration of international law in constitutional interpretation in general, and socio-economic rights in particular. This inquiry requires that I examine the 1993 and 1996 South African Constitutions and consult literature analysing the advantages of international law in constitutional interpretation. Against the backdrop of chapter 2, this analysis is relevant to my research for its elaboration on the significant changes ushered in by the new constitutional dispensation in respect of international law. In particular, it explains how the relevant provisions of the 1993 and 1996 Constitutions contribute to regulating the relationship between international law and municipal law and highlights the new status conferred upon international law through the interpretative mandate entrenched in section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. This provides an important background to the following chapter, which analyses the Constitutional Court's application of these provisions.

In chapter 4, I explore whether the Constitutional Court has developed a general methodological approach to the consideration of international law in light of the interpretative mandate entrenched in section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. Thus, I examine the Court's approach in relation to international law in general and not only within the specific field of international human rights law. My hypothesis is that

the Court's methodological approach towards the consideration of international law, in general, within this context is largely undeveloped. In order to assess this, I analyse all the decisions delivered by the Constitutional Court between 1993 and 2014 that have invoked section 35(1) of the 1993 Constitution or section 39(1)(b) of the 1996 Constitution, to be able to select those cases that refer specifically to the existence or development of a methodological approach towards the consideration of international law in the interpretation of the Bill of Rights. In particular, I analyse the Constitutional Court's decision in *Makwanyane* and the development of the so-called "framework dictum".³⁸ Furthermore, I examine subsequent case law that may assist in developing the framework dictum and provide further insight into the manner in which courts should consider international human rights law in the interpretation of the Bill of Rights. These include the decisions in *Grootboom*,³⁹ *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*,⁴⁰ and *Glenister*.⁴¹ Through this evaluation, I determine the extent to which the Constitutional Court has engaged with the interpretative mandate and explored the development of a methodological approach to the consideration of international law in the interpretation of the Bill of Rights. Furthermore, I illustrate the guidance presently available to courts when adhering to the interpretative mandate in the interpretation of the Bill of Rights. This evaluation therefore lays the foundation for the following chapter, in which I determine whether the Constitutional Court has applied section 35(1) of the 1993 Constitution and section 39(1)(b), and the methodological approach developed in this regard, to the interpretation of socio-economic rights.

Secondly, I analyse how courts have applied section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution and in particular, the manner in which courts have engaged with international human rights law sources generally in the interpretation of the Bill of Rights. In this regard, my hypothesis is that South African courts have, on occasion erred, in their application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, therefore advancing methodological misconceptions in their jurisprudence. To address this hypothesis, I examine reported decisions of the Constitutional Court and High

³⁸ As will be discussed below in section 4.2.1 of chapter 4, Chaskalson P elaborated on the sources of international human rights law that are to be used when interpreting the Bill of Rights. Du Plessis has phrased this elaboration as the "framework dictum". See LM du Plessis "Beyond Parochialism? Transnational Contextualisation in Constitutional Interpretation in South Africa (with Particular Reference to Jurisprudence of the Constitutional Court)" in M Faure & AJ van der Walt (eds) *Globalization and Private Law: The Way Forward* (2010) 145-168.

³⁹ 2001 1 SA 46 (CC).

⁴⁰ 1996 4 SA 671 (CC) ("*AZAPO*"). Although this case illustrates a more restrictive approach to the role of international law within the interpretation of the Bill of Rights, it inadvertently underscores the relevance of the framework dictum.

⁴¹ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 149.

Courts handed down from 1996 up until 2014. This includes searching for relevant law reports on the legal databases provided by LexisNexis Butterworths and Juta. These search engines allow me to search for specific constitutional provisions that have been relied upon in case law. Accordingly, I am able to locate law reports that invoke section 35(1) of the 1993 Constitution or section 39(1)(b) of the 1996 Constitution in the interpretation of the Bill of Rights. These cases are selected on the basis of their reliance on section 35(1) of the 1993 Constitution or section 39(1)(b) of the 1996 Constitution, with the specific aim of identifying the manner in which courts relied upon international law and the extent to which it was used as an interpretative tool. Therefore, this evaluation is not limited to socio-economic rights, but explores courts' application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution over a broad spectrum of rights. This investigation revisits and builds upon a study conducted by Botha and Olivier in which they identify various trends that characterise courts' use of international law within the context of section 35(1) and section 231 of the 1993 Constitution, and section 39(1)(b) of the 1996 Constitution.⁴² The investigation also draws on the works of De Wet in which she identifies inconsistencies in courts' treatment of non-binding international law.⁴³ In addition, I explore various factors that may influence courts' consideration of international law, such as legal education in South Africa, potential challenges that courts encounter in their fulfilment of the mandate to consider international law in the interpretation of the Bill of Rights, and the role of legal representatives, *amici curiae*, and judges. Although these findings may not necessarily characterise the Constitutional Court's socio-economic rights jurisprudence, they are still relevant to the extent that they highlight patterns that are generic to court's application of the interpretative mandate more generally.

In chapter 5, I explore the Constitutional Court's application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution in the interpretation of socio-economic rights and in particular, the application of the Constitutional Court's methodological approach which is set out in chapter 4. The assumption I investigate is that the Court has applied the interpretative mandate entrenched in the abovementioned provisions inconsistently and has not fully utilised the methodological approach which it has established thus far. Furthermore, the Court has missed opportunities to draw from relevant international human rights standards that may have assisted it in substantively interpreting socio-economic rights. However, international human rights law will only be relevant to the substantive interpretation of socio-economic rights if the Constitutional Court adopts a substantive model

⁴² Botha & Olivier (2004) *SAYIL* 42-77.

⁴³ De Wet (2004) *Fordham International Law Journal* 1529-1565.

of reasonableness review. I contend that through the application of a substantive model of review in the adjudication of socio-economic rights, the Court engages with the scope and content of the rights and is consequently afforded greater opportunity to evaluate socio-economic rights against the framework of international law, as envisaged in *Makwanyane*.

In order to test this hypothesis, I seek to determine firstly, the extent to which the Constitutional Court has applied section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution and considered international human rights standards in the interpretation of socio-economic rights. Secondly, I address the Court's application of the reasonableness model of review to determine whether this model of review permits substantive engagement with international human rights law. Thirdly, I assess international human rights standards with the purpose of determining whether, and to what extent, these are relevant to the interpretation of socio-economic rights in South Africa. Finally, I analyse the variety of international human rights standards considered by the Constitutional Court in the adjudication of socio-economic rights to determine which of these the Court appears most comfortable or familiar with, which standards remain underutilised, and possible reasons for this.

To address these questions, I conduct a comprehensive analysis of the Constitutional Court's socio-economic rights jurisprudence. In addition, I examine international human rights standards canvassed in instruments and developed in jurisprudence. This includes examining the relevance of the International Covenant on Economic, Social and Cultural Rights⁴⁴ and the normative standards developed by the Committee on Economic, Social and Cultural Rights ("CESCR") for the Court's interpretative process. It also includes discussing relevant regional human rights instruments and jurisprudence developed in the African, European and Inter-American human rights systems. The relevance of international and regional human rights standards is determined according to their ability to afford substantive content to socio-economic rights as well as their potential to assist the Constitutional Court in providing a clearer description of the obligations placed upon the State by these rights.

In chapter 6, I set out the conclusions I have reached in my investigations into the historical treatment of socio-economic rights, international law and international human rights law in South Africa, the South African court's application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution and the Constitutional Court's development of a methodological approach to the consideration of international law in the

⁴⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ("ICESCR"). As of October 2014, there are 70 signatories and 162 parties to the ICESCR.

interpretation of socio-economic rights. Furthermore, I set out the conclusions I have reached concerning the Constitutional Court's compliance with the interpretative mandate established in the above mentioned provisions and its application of the methodological approach developed in this respect, to socio-economic rights adjudication. In addition, I indicate my findings pertaining to the relevance of international and regional human rights law for socio-economic rights interpretation in South Africa. Lastly, I make recommendations in light of my findings.

1 4 Significance of the Research Project

Although the South African Constitution entrenches a range of socio-economic rights, courts must engage with the meaning of these rights in order to determine their role in addressing social and economic hardship. This study highlights international law as an important interpretative tool that the Constitutional Court must consider when interpreting socio-economic rights. An investigation into the application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, and the Constitutional Court's development of a methodological approach in this regard, may offer insight into ways in which the interpretative mandate can be applied in a more effective, consistent, and relevant manner. This study also emphasises the need for greater engagement with international law and the provision of more in-depth justifications in judicial reasoning if this source is not considered in the interpretation of fundamental rights. An examination of the Constitutional Court's consideration of international law within the specific field of socio-economic rights provides a "testing ground", the outcome of which may provide a point of departure for further work in areas such as children's rights and the rights of prisoners in South Africa, as well civil and political rights. Furthermore, this study, importantly, draws attention to international and regional human rights law that has substantively developed interpretations of socio-economic rights. The study highlights that these interpretations may assist courts in substantively interpreting socio-economic rights, and in this way engage more specifically with the realities of socio-economic hardship in South Africa. In addition, this study draws attention to those international and regional human rights instruments that South Africa has signed and ratified, highlighting that these should play a more prominent role in the interpretation of socio-economic rights.

1 5 Scope of the Study

Although the 1993 and 1996 South African Constitutions contain a number of provisions pertaining to international law,⁴⁵ I focus primarily on the role of international law in the interpretation of the Bill of Rights in this dissertation, as provided for in section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. Furthermore, I examine the relationship between the abovementioned provisions and section 231 of the 1993 Constitution and section 231 and 232 of the 1996 Constitution. In addition, I only evaluate those socio-economic rights entrenched in section 26, section 27 and section 29 of the 1996 Constitution. The scope of this study has been limited in this way to prevent an overly broad analysis by focusing only on those socio-economic rights that are applicable to “everyone” in the general sense. This study therefore excludes an evaluation of socio-economic rights applicable to specific categories of persons namely, those entrenched in section 28(1)(c) of the 1996 Constitution, which protects socio-economic rights pertaining to children, and section 35(2)(e) of the 1996 Constitution, which protects the socio-economic rights of persons detained, including sentenced prisoners. As the main focus of this study concerns the role of international law in the socio-economic rights jurisprudence of the Constitutional Court, it is important to note that the Court has adjudicated upon section 28(1)(c) and section 35(2)(e) of the 1996 Constitution in very few cases that do not contribute significantly to an evaluation of the role of international law in the interpretation of these rights.⁴⁶

Due to the language used in section 35(1) of the 1993 Constitution⁴⁷ and section 39(1)(b) of the 1996 Constitution,⁴⁸ I refer to both “international law” and “public international law” in this dissertation. Amongst international scholars, the term “international

⁴⁵ The 1993 Constitution contains a number of provisions that concern international law. Section 82(1)(i) governs the negotiation and signing of treaties by the President. Section 116(2) concerns the duty placed upon the Human Rights Commission to report any proposed legislation to the relevant legislature if it is of the opinion that such proposed legislation conflicts with chapter 3 or with the norms of international human rights law. Furthermore, section 227(2) concerns international humanitarian law. Within the 1996 Constitution, section 233 regulates the use of international law in the interpretation of legislation. In addition to this, section 35(3)(l), section 37(4)(b)(i), and section 37(8) include references to international law.

⁴⁶ For example, while section 28(1)(c) was adjudicated upon in both *Grootboom* and *TAC*, there was only limited consideration of this section, which was subsidiary to section 26(1) and section 27(1) of the 1996 Constitution respectively.

⁴⁷ Section 35(1) of the 1993 Constitution states the following:

“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.”

⁴⁸ Section 39(1)(b) of the 1996 Constitution states the following:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum-

...
(b) must consider international law”.

law” is largely used to mean “public international law” and refers to that body of law that “primarily governs the relationship between states”.⁴⁹ Express reference is usually made to “public international law”, as opposed to “international law”, within the context of distinguishing international law described above, from private international law.⁵⁰ Although I use “international law” and “public international law” interchangeably, I refer primarily to the term “international law”, and only make use of the term “public international law” when discussing section 35(1) of the 1993 Constitution, and where courts and academic literature refer expressly to this term. Lastly, within the context of this study, international treaties should be understood as including international conventions.

In addition, both section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution direct courts to consider international law sources specifically within the context of interpreting fundamental rights entrenched in these Constitutions.⁵¹ While international human rights law is likely to be the most relevant branch of international law to the interpretation of fundamental human rights in South Africa, South African courts have considered international law sources relating to other branches of international law when applying these provisions.⁵² Thus, within the context of section 35(1) and section 39(1)(b), I refer to both “international law” and “public international law” in a broad, general sense that includes international sources of law from the different branches of international law, such as international human rights law, humanitarian law, and regional human rights law.

⁴⁹ P Malanczuk *Akehurst's Modern Introduction to International Law* 7 ed (1997) 72.

⁵⁰ 72. Dugard defines private international law as concerning “the relations between individuals whose legal relations are governed by the laws of different states.” J Dugard *International Law: A South African Perspective* 4ed (2011) 2.

⁵¹ N Botha “International Law and the South African Interim Constitution” (1994) 9 *South African Public Law* 245 246.

⁵² For example, in the *AZAPO* judgment, reference is made to international instruments that concern international humanitarian law, while in the *Glenister* decision the Court refers to international instruments pertaining to international criminal law. See chapter 4.

Chapter 2

The Methodological Approaches of Colonial and Apartheid Courts to International Human Rights Law

2 1 Introduction

The position of human rights and the role afforded to international human rights law during apartheid was epitomised in a statement made by the South African Law Commission in 1989.¹ The Commission was instructed to investigate and make recommendations on the definition and protection of group rights, the possible extension of existing individual rights, and the role of the courts in this regard. Within this context, the Commission concluded the following:

“[I]n practical and realistic terms it cannot be envisaged that human rights norms as enshrined in international law can to any extent play a part - let alone a significant part - in the decisions of our courts. The salvation of the protection of group and human rights in South Africa therefore does not lie in the hope that our courts will apply the norms of international law in this regard.”²

In this chapter, I investigate the conclusion reached in the statement above and examine the manner in which courts invoked international human rights law under the apartheid legal system. To achieve this, I briefly examine legislation enacted both before and during the era of apartheid in South Africa to analyse how racial discrimination was institutionalised in the State, its impact on socio-economic rights, and the limited role afforded to international law in the protection of fundamental rights. Furthermore, I investigate how international law was accepted and applied in South Africa over various periods of time in order to examine the application of international human rights law in the protection of fundamental rights in South Africa. In particular, I focus on the historical development of different methodological approaches used by the courts. Firstly, I analyse the courts’ treatment and utilisation of international law in the form of international treaties and international customary law from the period of Dutch occupation until the end of the apartheid legal order.

¹ South African Law Commission Working Paper 25 Project 58 *Group and Human Rights* (1989). This paper was prepared for the Commission under the leadership of Mr Justice PJJ Olivier and did not represent the final view of the South African Law Commission, but was intended to initiate deliberation. As a result, subsequent reports were submitted in 1991 and 1994 respectively.

² 182.

Secondly, I evaluate the courts' methodological approach to the application and utilisation of international treaties and international customary law within the specific context of international human rights law during the period of apartheid. Lastly, I address the extent to which these different approaches contributed towards the erosion of socio-economic rights in South Africa, specifically during the era of apartheid.

2 2 A Historical Background to Racial Discrimination in the Socio-Economic Sphere in South Africa

Legislation discriminating against South Africans on the grounds of race existed in South Africa before the rise of the apartheid regime in 1948. For example, White supremacy had been established and affirmed in the Union of South Africa in the Constitution of 1910.³ After 1910, the creation of discriminatory laws specifically authorising control over the administration of Black South African citizens in various matters, steadily gained momentum. Under the Union, various Acts governed the administration of so-called “natives” in South Africa.⁴ This included the Native Affairs Act 23 of 1920, which created the Native Affairs Commission and councils that would, amongst other responsibilities, consider both matters concerning the “native” population and legislation governing the administration of “native” affairs.⁵ The Native Administration Act 38 of 1927 provides another example. Through this

³ The Union of South Africa was established in 1910 after the Cape of Good Hope, Natal, the Orange River Colony and the Transvaal, all British colonies, joined to form the Union. The Union of South Africa was constituted through the South Africa Act, 1909. Section 147 dealt specifically with the vesting of control and the administration of “native” affairs and matters affecting asiatics, in the Governor-General-in-Council. The Act also referred to land used for the purposes of reserves for “natives”, indicating that distinctions based on race were already prevalent at this time, and used for the purposes of segregation amongst South Africans. Furthermore, the Act specifically provided that:

“No lands set aside for the occupation of natives which cannot at the establishment of the Union be alienated except by an Act of the Colonial Legislature shall be alienated or in any way diverted from the purposes for which they are set apart except under the authority of an Act of Parliament.”

Legislation discriminating against persons based on race also existed before the creation of the Union such as Act No 3 of 1885. This Act concerned Indians and amongst others, regulated the areas in which Indians lived as well as where fixed property could be purchased. Also see J Trengove “Perspectives on the Role of Judges in a Deeply Divided Society” in H Corder (ed) *Democracy and the Judiciary* (1989) 125 126.

⁴ Many of the Acts enacted in the apartheid and pre-apartheid era that discriminated between different races made use of the term “native”. The term is used in this context because of the terminology used in this legislation.

⁵ Section 2, Section 5 and section 7 of the Act provided for the establishment of local councils in any portion of the “native” areas. These councils were to advise the Commission on matters affecting the “native” population it represented. Section 14 of the Act also provided for the establishment of general councils.

Act, the Governor-General could amend or appeal any law in force in “native” areas, while new laws could be enacted, amended, and appealed by way of proclamation in the Government Gazette.⁶ Devenish argues that section 25 of the Act in particular transferred legislative power to the executive.⁷ Although section 26 of the Act stated that all proclamations must be tabled before Parliament, Devenish states that this was merely a “chimerical protection” as Parliament rarely controlled the actions of the executive during this time.⁸

In 1948, the National Party came into power and introduced a more rigorous system of institutionalised discrimination based on race. Consequently, the political, civil, social and economic interests of South Africans received differential treatment based on racial grounds. On occasion, individuals were further classified into a certain ethnic, or other group, within a designated race.⁹ Despite international criticism, the Government defended these racial classifications as a form of differentiation rather than discrimination on the basis that all South Africans were subject to classification regardless of race. Once an individual was classified as Black,¹⁰ the individual was demoted to a race group that suffered, amongst others, inferior social, economic and political status and was afforded limited rights.¹¹

⁶ Native Administration Act 38 of 1927 section 25.

⁷ GE Devenish “The Development of the Administrative and Political Control of Rural Blacks” in AJ Rycroft, LJ Boule, MK Robertson & PR Spiller (eds) *Race and the Law in South Africa: A Volume of Essays by Members of the School of Law, Howard College, University of Natal, Durban, to Commemorate the Sixtieth Anniversary of the Durban School* (1987) 27. The use of the term “native” in this section of the chapter is, unfortunately, as a result of the language used in the Native Administration Act. Under this Act, “native” was defined as including:

“any person who is a member of any aboriginal race or tribe of Africa: Provided that any person residing in an area proclaimed under section *six* (1) under the same conditions as a Native shall be regarded as a Native for the purposes of this Act.”

⁹ The Population Registration Act 30 of 1950 formed one of the pillars of the apartheid legal order. This Act authorised the Secretary of the Interior to compile a register of the South African population and classify South African individuals as either “White”, “Coloured” or “Bantu” and to be placed as such on the register. Furthermore, section 5(1) of the Act stated that every “coloured person” and “Bantu” person was to be further classified into ethnic or other groups. According to the Act, racial classification was determined on the basis of a person’s “habits, education and speech and deportment and demeanor in general” See also section 1, 1(2) and 5(5) of the Act. However, this Act is one of many that created racial classifications. Dugard argues that as a universal definition of races had not been enacted by the legislature, and as various Acts provided for various classifications and definitions, there was a lack of universal definitions of races. Furthermore, Dugard argues that this resulted in individuals being classified into more than one racial group depending on the purposes of the legislation. See J Dugard *Human Rights and the South African Legal Order* (1978) 60.

¹⁰ This historical discussion of racial classification under apartheid has unfortunately made it necessary to refer to racial categorisations in this chapter. The term “Black” is used in this chapter to collectively describe individuals classified as African or “Bantu”, Coloured, Indian, or Asian, under apartheid legislation.

¹¹ Dugard *Human Rights and the South African Legal Order* 62.

The Bantu Authorities Act 68 of 1951 further illustrates the authorisation given to Government to exercise control over the affairs of “natives”. This Act was responsible for establishing “Bantu” authority in the form of “tribal, regional and territorial authorities” over “native” tribes or communities as a hierarchical form of local government to attend to matters relating to “natives”. A further objective of the apartheid legal order was the realisation of the policy of “separate development” between the races in South Africa through the creation of self-governing units. This was advanced through the enactment of the Promotion of Bantu Self-government Act 46 of 1959. This Act provided for the division of “Bantu peoples” into separate national units based on language and culture, which were to be governed by the “Bantu systems of government”.¹² Furthermore, the Act removed the White members of Parliament who had previously represented African citizens.

Legislation created under the Union of South Africa and later, under the Republic of South Africa,¹³ proved detrimental to the socio-economic aspects of life for those classified as Black in South Africa. Under the Union of South Africa, legislation was enacted that endorsed the large-scale dispossession of “natives” from their land and their subsequent relocation to allocated “reserves”. The Natives Land Act 27 of 1913¹⁴ and the Native Trust and Land Act 18 of 1936¹⁵ in particular, established the so-called “reserves”, which were areas specifically demarcated for the occupation of “natives”.¹⁶ Furthermore, the Native Trust and Land Act authorised the Governor-General to demarcate certain areas as “black spots”, which were areas characterised as “native” owned properties surrounded by White owned farms. The

¹² Preamble to the Act. According to section 2 of the Act, the “Bantu population” was to be divided up into the following national units: North-Sotho unit, South-Sotho unit, Swazi unit, Tsonga unit, Tswana unit, Venda unit, Xhosa unit and Zulu unit.

¹³ South Africa gained its independence in 1931, by way of the Statute of Westminster 22 Geo. V, c.4. (1931). In 1948, the National Party came into power and in 1961, under the National Party Government, South Africa became a Republic by way of the South African Constitution Act 32 of 1961.

¹⁴ In this Act, “native” is defined as:

“[A]ny person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporated, if the persons who have a controlling interest therein are natives”.

This Act established extremely strict regulations concerning transactions and agreements entered into with “natives” regarding land.

¹⁵ Section 4(2) of this Act provided for the establishment of the South African Native Trust, a mechanism used for “the settlement, support, benefit, and material and moral welfare of the natives of the Union”. Furthermore, specific land was vested in the Trust and was allocated towards the exclusive use, and for the benefit, of “natives”. The Governor-General could do so based on reasons of public health or any reason promoting public welfare or was in the public interest.

¹⁶ The legislation refers to the term “natives”, which is defined in section 49 of the Act.

Governor-General was authorised to expropriate these “black spots”, which resulted in the relocation of the inhabitants, while the expropriation often deprived “native” landowners of their title deeds.¹⁷ Occasionally, “native” landowners were offered meagre compensation, but challenges to these offers were often too expensive to pursue.¹⁸

After South Africa became a Republic, the National Party Government increasingly enacted laws discriminating against South African citizens on the grounds of race. This included the enactment of legislation such as the Group Areas Act 36 of 1966,¹⁹ the Rural Coloured Areas Act 24 of 1963 and the Community Development Act 3 of 1966. From 1960 until 1980, roughly 3.5 million people were relocated from rural areas to urban areas.²⁰ The relocation of people on such a large scale resulted in the uprooting and separation of many communities and families.²¹ Numerous problems followed as a result of these resettlements as the homelands were subject to severe overcrowding and restrictions were placed on access to clean water, sanitation, and electricity.²² Furthermore, the locations demarcated for resettlement were often rural areas far removed from places of employment in the cities, which limited the opportunities of employment and promoted the increase of migrant labour. Moreover, the inhabitants of the homelands were often used as a cheap source of migrant labour for mines and farms.²³ Even before the enactment of apartheid legislation, a migrant labour system existed, which provided a vital force behind the economic and social development of the country. Due to the racial segregation

¹⁷ Section 13(2) of the Native Trust and Land Act 18 of 1936. This referred to land located outside a “Scheduled native area” and a “released area” that was owned by a “native”.

¹⁸ South African Human Rights Commission *South African National NGO Coalition (SANGOCO) Report on Poverty and Human Rights* (1997-1998) 5 7.

¹⁹ This Act is the product of pre-Union legislation that was aimed at controlling the influx of Indians into urban areas in the colonies. The various laws were later brought together under the Group Areas Act 41 of 1950, the Group Areas Act 77 of 1957 and finally culminated into the Group Areas Act 36 of 1966. For a historical account of this process and aims of the final Act see Dugard *Human Rights and the South African Legal Order* 79-83.

²⁰ South African Human Rights Commission *SANGOCO Report on Poverty and Human Rights* 7.

²¹ The removal of communities and families were often preceded by stopping essential services such as transport systems, clinics, postal services and schools, as seen in the case of the removal of the Roosboom Community in Northern KwaZulu Natal. Identified as a “black spot” under the 1913 and 1936 Land Acts, the removal and relocation of the members of this community to Ezakheni (25 km outside Ladysmith) is just one example of many such cases that arose under the National Party Government. See B Xulu & B Maharaj “Land Restitution during Apartheid’s Dying Days: The Struggle for Restoration and Resolution in Roosboom” (2004) 34 *Africa Insight* 48 48.

²² SF Khunou “Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism beyond Apartheid” (2009) 12 *PER* 81 89-90.

²³ H Coovadia, R Jewkes, P Barron, D Sanders & D McIntyre “The Health and Health System of South Africa: Historical Roots of Current Public Health Challenges” (2009) 374 *The Lancet* 817 823.

enforced in urban areas, Black migrant workers were restricted to Black urban areas that were often characterised by poor living conditions in overcrowded and unsanitary hostels and slums.²⁴

Policies and laws under the apartheid regime also affected the way Black South Africans were able to gain access to health services and the resources necessary to attain a certain level of health. Under the system of apartheid, health care facilities were segregated in accordance with race and health care services provided to the Black South African majority were of an inferior quality when compared to health care services provided to the White South African minority.²⁵

Within the context of education, legislation was enacted for the purposes of segregating learners as well as discriminating between White learners and Black learners.²⁶ Legislation such as the Bantu Education Act 47 of 1953 contributed significantly towards this.²⁷ The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) reported that this Act aimed to regulate the African education system as well as effect control over the system in accordance with State policy.²⁸ This legislation provided that the administration and control of “native” education was transferred from provincial administrations to the Government of the Union. Furthermore, the Minister was authorised to prescribe the medium of instruction to be used by so-called “Bantu schools”.²⁹ However, the “Bantu education” system developed by the apartheid Government resulted in the inferior educational development of the Black population. In 1976, Black students’ dissatisfaction with the “Bantu” system of education led to uprisings that ultimately

²⁴ 819.

²⁵ World Health Organization *Apartheid and Health* (1983) 25.

²⁶ However, Woker argues that even at the time of the establishment of the first missionary schools in 1658, discrimination existed. Woker states that the children of colonists were educated in preparation for their role as “masters”, while the education of Blacks was aimed at preparing them to serve these “masters”. See K Govender & TA Woker “Race and Social Rights” in A Rycroft, LJ Boule, MK Robertson & PR Spiller (eds) *Race and the Law in South Africa: A Volume of Essays by Members of the School of Law, Howard College, University of Natal, Durban, to Commemorate the Sixtieth Anniversary of the Durban School* (1987) 229 235-236.

²⁷ Section 1(i) of the Act stated that the term “Bantu” was defined as being synonymous with the term “native”. Section 1(v) of the Act defined “native” as “any person who is or is generally accepted as a member of any aboriginal race or tribe of Africa”. Legislation such as the Coloured Persons Education Act 47 of 1963 and the Indians Education Act 61 of 1965 advanced governmental control over other races in South Africa within the sphere of education.

²⁸ UNESCO *Apartheid: Its Effects on Education, Science, Culture and Information* (1967) 31.

²⁹ Section 15(1)(e). Section 1(vi) of the Act defined a “native school” or “Bantu school” as the following:

“[A]ny school, class, college, or institution for the education of Bantu children or persons, or for the instruction and training of Bantu persons who desire to become teachers or to improve their qualifications as teachers”.

resulted in demonstrations across the country.³⁰ Initially, this manifested as disapproval among African learners with the use of Afrikaans as the medium of instruction. However, this disapproval soon escalated to include dissatisfaction with the entire “Bantu” system of education. Although the Government introduced changes to address this dissatisfaction, there were still great disparities in the quality of education provided to White and Black learners, as indicated, for example, in the pupil-teacher ratios.³¹

Furthermore, the Extension of University Education Act 45 of 1959 provided for the establishment of university colleges for “Bantu” persons only³² and for “non-white persons other than Bantu persons”.³³ The Act provided that “non-white” students were not permitted to register with any university other than the University of South Africa without the written consent of the Minister.³⁴ Accordingly, non-white students could still attend “Open Universities”, however, White people were prohibited from registering and attending the university colleges³⁵ and such attendance constituted a criminal offence.

In conclusion, although not an exhaustive list of apartheid legislation, the above laws illustrate the manner in which apartheid was established through legislation in South Africa and how apartheid was strengthened under the guise of

³⁰ Dugard *The South African Legal Order* 83.

³¹ In 1978, the following statistics were made available using educational statistics provided by the National Department of Statistics. These ratios included primary, secondary and special classes: White - 1:19,7; Coloured - 1:29,2; Asian - 1:27,2; African - 1:49,2. South African Institute of Race Relations *Survey of Race Relations in South Africa 1979* 33 (1980) 487.

³² Section 2 of the Act.

³³ Section 3 of the Act. Before the adoption of this Act, Blacks were excluded from attending universities such as the University of Stellenbosch, the University of Pretoria, the University of the Orange Free State and the Potchefstroom University for Christian Higher Education. However, the University of Cape Town and the University of Witwatersrand were regarded as “Open Universities”, which permitted the attendance of Black students with a certain amount of segregation. The University of Natal also admitted Black students, but was not consistently referred to as an “Open University”. See UNESCO *Apartheid* 84. The University of Rhodes technically allowed Black students into certain programmes. However, Landis states that this was not done in practice. In addition, the University of South Africa established correspondence courses, for which Black students registered. Furthermore, Black students attended the University of Fort Hare. For a detailed discussion, see ES Landis “South African Apartheid Legislation II: Extension, Enforcement and Perpetuation” (1962) 71 *Yale Law Journal* 437 496-499. The Extension of University Education Act 45 of 1959 established the creation of separate universities for each ethnic group to prevent Black students from attending “Open Universities”. In addition, Africans were further divided into “tribal groups” and were forced to attend the colleges established for their respective “tribal” groups. Consequently, The University College at Fort Hare, the University of the North, the University of Zululand, the University of the Western Cape, and the University of Westville, were used for these purposes and were controlled entirely by the State. See Dugard *Human Rights and the South African Legal Order* 84.

³⁴ Section 31 and 32 of the Act.

³⁵ Section 17.

“separate development”. Furthermore, the discussion illustrates that the system of institutionalised racism was geared at attaining various degrees of segregation and discrimination between different races living in South Africa in all areas of life. Consequently, this resulted in the infringement of a broad spectrum of rights and interests, which included socio-economic interests.

2 3 The Reception of International Law into the Colonial Legal Order

As will be elaborated upon below, the doctrine of parliamentary sovereignty did not allow individuals the opportunity to challenge discriminatory legislation by way of judicial review.³⁶ In addition, socio-economic rights did not exist in the colonial and apartheid legal systems as justiciable or enforceable rights, which could be relied upon for the protection against infringement, or as a means to claim redress.³⁷ Citizens who were negatively affected by social legislation that promoted racial discrimination were left with little recourse to justice and few opportunities to rely upon human rights as recognised and protected under international law. In this discussion, I trace the reception, and use, of international law in the South African legal order over various periods to determine how the courts engaged with this source of law, and why it played such a limited role in the protection of human rights.

The emergence of the international community as it is known today began largely as a consequence of the Peace of Westphalia in 1648, which marked the end of the Thirty Years War.³⁸ Consequently, the fifteenth and sixteenth centuries witnessed the rise of countries such as England, Spain, France, and later, the Netherlands, as powerful forces desirous of independence and colonial expansion.³⁹

³⁶ For a history of the reception of the concept of parliamentary sovereignty into the South African legal system, see Dugard *Human Rights and the South African Legal Order* 14-36.

³⁷ In fact, the Preamble to the Constitution stated that:

“ WE DECLARE that we

...

ARE CONVINCED of the necessity of standing united and of pursuing the following national goals:

...

To respect and to protect the human dignity, life, liberty and property of all in our midst,
To respect, to further and to protect the self-determination of population groups and peoples,
To further private initiative and effective competition; ...”.

However, this Constitution did not have a bill of rights which constitutionally protected any rights as justiciable.

³⁸ The Peace Treaty of Westphalia was signed at Münster and Osnabrück in October 1648.

³⁹ A Cassese *International Law* (2005) 23-24.

These developments caused, amongst others, a change in the nature of State behaviour, which required a form of international regulation that differed from previous periods.⁴⁰ Scholars working in the field of law and inter-state relations during this time contributed significantly to the creation of a systematic body of rules that provided for such regulation. In particular, the Roman-Dutch writer, Hugo de Groot, more commonly known as Grotius, published a major treatise on international law known as the *De Jure Belli ac Pacis Libri Tres*⁴¹ in 1625. Grotius developed his treatise on international law based on natural law.⁴² A more positivist approach to international law was only developed later as evidenced, for example, in the views of scholars such as Van Bynkershoek who argued that the consent of nations, as found in custom or treaty, formed the basis for international law.⁴³ Despite these differing views regarding the basis of international law, Grotius and Van Bynkershoek, along with other Roman-Dutch scholars, blended references to municipal law and aspects of international law in their works.⁴⁴ This was done in a manner that did not distinguish between international law and municipal law.⁴⁵ *De Jure Belli ac Pacis* for example, dealt with aspects of international law and in addition to these, canvassed areas of contract law, the law of delict, criminal law, and family law.⁴⁶ International law and municipal law were dealt with as part of the same universal legal order, thereby confirming a monistic approach to the reception of international law into municipal law.⁴⁷

Since the works of Grotius were widely accepted by Roman-Dutch writers, international law was never regarded as a foreign system of law for practical purposes

⁴⁰ 23-24.

⁴¹ Grotius produced legal works before this namely, *De Jure Praedae* (1604-1606) which dealt with the law of prize and *Mare Liberum* (1609), which consisted of one chapter of his previous work from *De Jure Praedae*. However, none of these writings expounded upon international law as was done in the *De Jure Belli ac Pacis Libri Tres*, translated as “On the Law of War and Peace” (“*De Jure Belli ac Pacis*”).

⁴² For a detailed description on the works of Grotius, see CS Edwards Hugo Grotius, the Miracle of Holland: A Study in Political and Legal Thought (1981) and HR Hahlo & E Kahn The South African Legal System and its Background (1973) 550-553.

⁴³ J Dugard “The Place of Public International Law in South African Law” in C Visser (ed) *Essays in Honour of Ellison Kahn* (1989) 108 110. Works published by Van Bynkershoek that discussed this positivistic approach to international law included *De Domino Maris* (1702), *De Foro Legatorum* (1721) and *Quaestiones Juris Publici* (1737).

⁴⁴ J Dugard *International Law: A South African Perspective* 1 ed (1994) 37.

⁴⁵ Roman-Dutch writers such as Cornelius van Bynkershoek, Joannes Loenius, and Joannes van der Linden are amongst those scholars who followed a monist approach to applying international law directly into municipal law. See AJGM Sanders “The Applicability of Customary International Law in Municipal Law - South Africa’s Monist Tradition” (1977) 40 *THRHR* 147 148.

⁴⁶ J Dugard *International Law-A South African Perspective* 4 ed (2011) 43.

⁴⁷ Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 110.

in Holland.⁴⁸ It was practice to rely directly upon the rules of international law without any need to take further steps to incorporate them into the municipal law before applying them.⁴⁹ The argument that international law and municipal law should be distinguished from one another as two different legal orders was only raised at the end of the nineteenth century.⁵⁰ Dugard suggests that this argument did not originate from, nor did it significantly interest, the Roman-Dutch jurists.⁵¹ In this regard, Dugard argues that the Roman-Dutch jurists were loyal to the view that natural law formed the basis of international law and that this would have kept them from supporting the emerging argument that international law and municipal law were two separate legal orders.⁵²

Although seemingly far removed from the South African context today, it is against this backdrop that a discussion on international law within the South African legal system begins. It was the works of the Roman-Dutch scholars that travelled with the Dutch to the Cape that were subsequently transplanted into the South African municipal legal order. Consequently, the acceptance of Roman-Dutch law by the South African legal order began with the arrival of the Dutch in the Cape of Good Hope in 1652 under the auspices of the Dutch East India Company. The Dutch occupation lasted until 1795, and it was during this time that the law of Holland was enforced in the Cape.⁵³ After Dutch rule, the first occupation by the British occurred and the Cape remained under British rule until 1910.⁵⁴ Even after British occupation, the British Government chose to maintain Roman-Dutch law as the common law of the Cape and Roman-Dutch law was subsequently accepted in the Transvaal, the Orange Free State, and Natal.⁵⁵

In terms of their approach to international law, the method used by the Dutch found continued support on South African soil. Municipal law and international law were considered to form part of the same universal system. Consequently, during this time, South African courts applied international law directly within municipal law without requiring any legislative incorporation of international law into the municipal

⁴⁸ Dugard *International Law: A South African Perspective* 1 ed 38.

⁴⁹ Dugard "The Place of Public International Law" in *Essays in Honour of Ellison Kahn* 111.

⁵⁰ 111.

⁵¹ 111.

⁵² 111.

⁵³ Hahlo & Kahn *The South African Legal System and its Background* 572.

⁵⁴ 569. British occupation between 1795 and 1910 was briefly interrupted when the Cape was ruled by the Batavian Republic from February 1803 until January 1806.

⁵⁵ Hahlo & Kahn *The South African Legal System and its Background* 575-576.

legal order.⁵⁶ Case law dating back to 1881 provides evidence of this approach and demonstrates the importance attached to the role of international law in domestic matters by the South African judiciary. This is illustrated in one of the earliest cases of *Ncumata v Matwa*,⁵⁷ a case concerning the capture of an alleged rebel's property, which came before the Eastern Districts Court of the Cape of Good Hope in 1881 and 1882. In this case, the court rejected an argument put forward by the plaintiff that was based on the provisions of *placaaten*.⁵⁸ Instead, the judge directly applied principles of international law, as relied upon by the defendants,⁵⁹ without requiring their legislative incorporation into municipal law.⁶⁰

In 1894, the monistic approach to the use of international law (as elaborated further in section 2.4) was again illustrated in the case of *C.C. Maynard Et Alii v the Field Cornet of Pretoria*.⁶¹ In the judgment, Kotz CJ cited Sir Henry Maine as follows: “[T]he [municipal] law must be interpreted in such a way as not to conflict with the principles of International Law ...”.⁶² This judgment was, however, couched with a warning that would resonate in South Africa over 50 years later, and stated further that:

“It follows from the above, as put by Sir Henry Maine, ‘that the State which disclaims the authority of International Law places herself outside the circle of civilised nations.’ It is only by a strict adherence to these recognised principles that our young State can hope to acquire and maintain the respect of all civilised communities, and so preserve its own national independence.”⁶³

⁵⁶ Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 112.

⁵⁷ 1881-1882 2 EDC 272 279.

⁵⁸ *Placaaten* is a form of legislation. Certain *placaaten* for example, were received into the Cape from the States of Holland. See Hahlo & Kahn *The South African Legal System and its Background* 151. The particular *placaaten* relied upon in this case by the plaintiffs was the *Placaat* of the 10th of August 1778, which abolished the confiscation of the property of criminals. In addition to this, the plaintiffs relied upon the *Placaat* of the 22nd of April 1779, which abolished old forms of punishment that included the confiscation of property of persons who had been involved in rebellion.

⁵⁹ *Ncumata v Matwa* 1881-1882 2 EDC 272 277. To expound upon the law governing the taking of property from an enemy during war, the defendants cited international law authorities. The judgment does not reference these sources in full. However, considering the information provided and the date of judgment, it is submitted that these included amongst others Grotius, TD Woolsey *Introduction to the Study of International Law, Designed as an Aid in Teaching, and in Historical Studies* 5 ed (1879) and E Vattel *The Law of Nations or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* Translated by J Chitty (1866).

⁶⁰ *Ncumata v Matwa* 1881-1882 2 EDC 272 279.

⁶¹ 1894 (1) Off Rep 214.

⁶² 223.

⁶³ 223.

This case dealt with the obligations resting on foreigners to undertake military service. In deciding the matter, Kotz CJ referred to the manner in which the issues at hand were dealt with in scholarly works on international law.⁶⁴ In the same judgment, Jorissen J stated the following:

“There is no doubt that the laws of this Republic must be viewed and interpreted, in case of ambiguity, with due regard to the higher law, which is accepted in all civilized countries as ideal without further proof. And even if we wished to do otherwise, sect. 3 of the Grondwet is imperative, for it says, ‘They desire themselves to be recognised and respected by the civilized world as a free and independent people.’ What prevails as right in the whole civilized world must also prevail in this country, and the laws of the country must be interpreted in conformity therewith.”⁶⁵

Jorissen J went on to state that general international law relevant to the matter was derived from two sources - the *doctores juris* and the writers, as well as the treaties signed between civilized nations.⁶⁶ This case clearly indicates that matters of municipal law were addressed by relying on scholarly works of international law as well as treaties signed between other nations, without any need to transform these principles and norms into municipal law. Recourse was also had to international law in relation to issues raised by the South African War.⁶⁷ Dugard notes that municipal courts had to consider the rights of belligerents, the confiscation of property for war purposes, the seizure of enemy property, and the legality of the annexation of the Boer Republics within the context of international law.⁶⁸ The courts adjudicated these cases by seeking guidance from the Roman-Dutch jurists such as Grotius, Van Bynkershoek and Vattel, as well as examining more contemporary literature by authors such as Wheaton, Halleck, and Lawrence in determining the applicable rules of international law.⁶⁹ As in Roman-Dutch law, international law was consulted and directly applied as an integral part of municipal law. Through the courts’ consultation

⁶⁴ 223, 226-228. These authorities included amongst others, the writings of E Vattel, the work of AW Heffter as well as the writings of JK Bluntschli, WE Hall and HW Halleck, who published works in the field of international law.

⁶⁵ *C.C. Maynard Et Alii v the Field Cornet of Pretoria* 1894 (1) Off Rep 232.

⁶⁶ 232. Jorissen utilised the first source of law by consulting the opinion of Bluntschli and relied further on the writings of a Dutch lawyer who in turn quoted Vattel. In terms of the second source of international law, Jorissen considered the international treaties entered into by the Government and England.

⁶⁷ This war took place between 1899 and 1902.

⁶⁸ Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 112-113.

⁶⁹ J Dugard “The South African Judiciary and International Law in the Apartheid Era” (1998) 14 *SAJHR* 110 112.

and use of international legal sources, South African law was shaped in harmony with prevailing international law during colonial times.

2 4 The Monism / Dualism Debate in South Africa

The methods of incorporating international law into a domestic legal order centre around two different schools of thought concerning how and when international law becomes part of municipal law. The first school, known as the monist school, views the international legal order and municipal legal orders as part of a uniform, universal system of law.⁷⁰ Within this system, municipal law has a subordinate position, while the courts apply rules of international law directly without these laws undergoing any transformation or adoption into municipal law. The second school of thought, more commonly known as the dualist school, views the international legal order as separate from municipal legal orders.⁷¹ According to this theory, international law and municipal law differ in respect of their sources of law, their subjects of law, and in their subject matter.⁷² Consequently, if international law is to be applied in municipal law, this theory requires that the relevant rules of international law be transformed or adopted into municipal law in order to apply internally.⁷³

The monism-dualism divide originated at the beginning of the 19th century, eventually entering the legal academic debate in South Africa in 1971.⁷⁴ The theory of dualism was strongly supported by Booysen. He took the position that customary international law was a separate legal system and customary international rules could only be applied in appropriate cases.⁷⁵ In response, the theory of monism was

⁷⁰ T Maluwa “International Human Rights Norms and the South African Interim Constitution 1993” (1993) 51 *SAYIL* 14 28.

⁷¹ R Schaffer “The Inter-Relationship between Public International Law and the Law of South Africa: An Overview” (1983) 32 *International and Comparative Law Quarterly* 227 278-279.

⁷² Schaffer (1983) *International and Comparative Law Quarterly* 279; Cassese *International Law* 214.

⁷³ Maluwa (1993) *SAYIL* 28; Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 114; Schaffer (1983) *International and Comparative Law Quarterly* 280.

⁷⁴ This debate began in 1971 when Professor John Dugard reviewed the first of a trio of cases involving the question of whether customary international law formed part of South African law.

⁷⁵ H Booysen “Is Gewoonteregtelike Volkereg Deel van Ons Reg?” (1975) 38 *THRHR* 315-322. Booysen submits that it is incorrect to state that customary international law is part of South African law to the extent that the “act of state” doctrine does not exclude its application, and on condition that customary international law does not conflict with legislation. He argues that even though Roman-Dutch writers, such as Van Bynkershoek and Grotius, wrote about international law, this in no way means that modern international law formed part of Roman-Dutch law then or forms part of South African common law as it stands today. See also Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn*.

advocated by Dugard who maintained that customary international law had, save for a few exceptions, become part of the law of South Africa.⁷⁶

Even though the pre-Union courts adopted a favourable attitude towards the monist application of international law in the cases referred to above, the constitutions of 1910, 1961 and 1983 offered very little guidance as to how courts were to apply international law.⁷⁷ For example, the Republic of South Africa Constitution Act of 1983⁷⁸ made but scant reference in section 6⁷⁹ and section 94⁸⁰ to the relationship between international law in the form of international treaties and agreements and the domestic legal order. It was only in 1971, in the case of *South Atlantic Island Development Ltd v Buchan* that the Cape Provincial Division expressly declared the status of customary international law in South Africa.⁸¹ While it was regarded as trite that international customary law formed part of South African municipal law,⁸² no mention of the status of customary international law was made in any of the pre-1993 constitutions.

As international law does not generally instruct States on how they should go about incorporating international law into their domestic legal orders, such incorporation depends upon the approach chosen by the State. Therefore, a judge has to give effect to specific international norms or instruments according to whether the State has chosen to follow a dualist or monist approach to the incorporation of international law into a municipal legal system. International treaties were treated differently to customary international law during the apartheid regime. Therefore, the discussion that follows will focus on the approach taken by the South African courts

⁷⁶ N Botha “The Coming of Age of Public International Law in South Africa” (1992) 18 *SAYIL* 36 41.

⁷⁷ J Dugard “International Law and the ‘Final’ Constitution” (1995) 11 *SAJHR* 241 241; D Prévost “South Africa as an Illustration of the Development in International Human Rights Law” (1999) 24 *SAYIL* 211 219.

⁷⁸ Act 110 of 1983.

⁷⁹ Section 6 states the following:

“The State President and his powers:

(3) The State President shall, subject to the provisions of this Act, have power -
to enter into and ratify international conventions, treaties and agreements”.

⁸⁰ Section 94 states the following:

“All rights and obligations under conventions, treaties or agreements which were binding on any of the Colonies incorporated in the Union of South Africa at its establishment, and were still binding on the Republic immediately before the commencement of this Act, shall be rights and obligations of the Republic, just as all other rights and obligations under conventions, treaties or agreements which immediately before the commencement of this Act were binding on the Republic.”

⁸¹ 1971 1 SA 234 (C) (“*South Atlantic*”). See section 2 5 2 below. This case concerned an applicant’s request for an interdict against the respondent for allegedly violating the applicant’s fishing rights granted to him over certain territorial waters.

⁸² Dugard (1998) *SAJHR* 112.

during this period in respect of these two sources of international law. In addition, I will evaluate the approach followed by the courts concerning the application of international human rights law during the period of apartheid. These two methodological approaches will be compared to highlight the restricted use of international human rights law during this period.

2 5 The Role of the Judiciary in the Application of International Law and International Human Rights Law during Apartheid

2 5 1 A dualist approach to the incorporation of treaties into municipal law

The United Kingdom, and other countries of the British Commonwealth, followed a dualist approach to the incorporation of international treaties into their domestic legal orders. Even though South Africa was a former Commonwealth country, very little judicial authority existed before 1965 to confirm its use of a dualist approach, or any other practice, to the incorporation of international treaties.⁸³ In 1965, the Appellate Division of the Supreme Court of South Africa made its first pronouncement on the relationship between municipal law and international conventions in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*.⁸⁴ In this case, the appellant raised a defence based on the conditions of a treaty to which South Africa was a party namely, the provisions of the Bilateral Air Transport Agreement of 1947 between South Africa and the United States of America as well as the Universal Postal Convention of 1957. Steyn CJ upheld the view of counsel for the respondent and stated the following:

“It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process. The Universal Postal Convention and the Bilateral Air

⁸³ JW Bridge “The Relationship between International Law and the Law of South Africa” (1971) 20 *International and Comparative Law Quarterly* 746 746.

⁸⁴ 1965 3 SA 150 (A) (“*Pan American World Airways*”). The respondent in this case sued the appellant for delictual damages that resulted from the non-delivery of a registered parcel of diamonds received by the appellant from the General Post Office at Johannesburg for carriage to New York. In its defense, the appellant raised, amongst others, three alternative special defences. The respondent took the exception that these were not a defence to the actions, and these exceptions were allowed. The appellant appealed the decision in this case.

Transport Agreement are no exceptions. In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.”⁸⁵

Although this judgment did not reflect on the status of international human rights treaties in South African municipal law, it confirmed the use of a dualist approach towards international treaties generally. Accordingly, the executive was responsible for signing treaties, while the provisions of the treaty would only have domestic effect once legislatively enacted into municipal law.⁸⁶

The legislative process described above could take several forms. The treaty provisions could be included in the text of an Act of Parliament.⁸⁷ In addition, the treaty could take the form of a schedule to an Act, or an enabling Act could allow the executive authority to give domestic effect to the treaty by proclamation in the Government Gazette.⁸⁸

2 5 2 International treaties and the protection of human rights in South Africa

The method described above indicates that it was possible for treaty provisions to find application in the municipal legal order. Within the context of international human rights law, the Union of South Africa was an original member of the League of Nations and made positive contributions to the League in this regard.⁸⁹ South Africa also ratified the United Nations Charter on 7 November 1945, and was an original member of the instrument.⁹⁰ This involvement in the advancement of human rights under the auspices of South African leadership seemed to have set the scene for a significant and successful relationship between South Africa and the international community. In addition, South Africa was bound by the provisions of the UN Charter,

⁸⁵ 161.

⁸⁶ Prévost (1999) *SAYIL* 220.

⁸⁷ Maluwa (1993) *SAYIL* 32.

⁸⁸ 32.

⁸⁹ Dugard *International Law: A South African Perspective* 4 ed 18. General JC Smuts helped structure the League of Nations and assisted in drafting the Covenant of the League of Nations. While South Africa was admitted to original membership, it must be noted that South Africa was not an independent State at the time. Rather, the State was still constitutionally subordinate to the authority of the British Crown. Dugard highlights however, that although South Africa’s status was a debated issue, it was in fact recognised, for all League purposes, as a State of international law. See Dugard *International Law: A South African Perspective* 4 ed 17.

⁹⁰ General J.C. Smuts, the Prime Minister of South Africa at the time, assisted in the drafting of the Preamble to the United Nations Charter. See S Dubow “Smuts, the United Nations and the Rhetoric of Race and Rights” (2008) 43 *Journal of Contemporary History* 43 43. J Dugard *International Law: A South African Perspective* 1 ed 200. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

which called for the respect of human rights. This was most notably entrenched in articles 55(c)⁹¹ and 56⁹² of the UN Charter. However, the ill treatment of persons of Indian origin in South Africa was brought before the UN General Assembly (“UNGA”) in the following year.⁹³ In the following years, South Africa’s racial policies resulted in the increase of complaints brought before the UNGA and remained on the UN’s agenda until 1994.⁹⁴

Dugard argues that South Africa exploited the weaknesses of the human rights clauses contained in the UN Charter, which enabled it to defend its discriminatory practices.⁹⁵ In addition, he submits that, although South Africa was a party to the UN Charter, the Government had not taken any steps towards incorporating the provisions of the instrument into South African domestic law.⁹⁶ Consequently, in accordance with South Africa’s dualist approach to international treaties, the provisions of the UN

⁹¹ Article 55 of the UN Charter states the following:

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

⁹² Article 56 of the UN Charter states the following:

“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”

⁹³ See ‘Treatment of Indians in the Union of South Africa’ UNGA Res 44 (I) (8 December 1946). This was the first General Assembly resolution on the treatment of people of Indian origin in the Union of South Africa. This issue frequently appeared on the agenda until the General Assembly eventually combined this issue with the growing concern of apartheid in ‘The Policies of Apartheid of the Government of the Republic of South Africa’ UNGA Res 1761 (XVII) (6 November 1962).

⁹⁴ South Africa received support from various countries in its initial stages of defending apartheid before the General Assembly. The South African Government justified its internal policies by relying on article 2(7) of the UN Charter, and in particular, that this article took priority over the human rights provisions entrenched in the UN Charter. See Dugard *International Law* 1 ed 202.

⁹⁵ Dugard *International Law* 1 ed 201. Dugard argued that the human rights clauses contained in the UN Charter suffered from various defects. Firstly, he argued that the clauses were vague and it was therefore unclear which precise rights were subject to protection under the UN Charter, the right of non-discrimination being the exception. Secondly, the lack of enforcement mechanisms worsened matters as action was only taken in cases of severe human rights violations that threatened international peace and security according to Chapter VII of the UN Charter. Thirdly, although it has been suggested that article 56 implies that at the very least, States have a negative obligation to act in a manner that does not undermine human rights, Dugard argued that it was not certain whether States incurred any legal obligation under the UN Charter at all. Lastly, Dugard submitted that the principle of non-intervention, as expounded upon in article 2(7) of the UN Charter, conflicted with the UN Charter’s human rights clauses. According to Dugard, the above points weakened the legal status of the human rights clauses contained in the UN Charter, and South Africa was successfully able to exploit these weaknesses.

⁹⁶ J Dugard “The Role of International Law in Interpreting the Bill of Rights” (1994) 10 *SAJHR* 208 208.

Charter could not be directly invoked as part of South African municipal law in cases of human rights violations.

At an international level, the South African Government expressed its growing disregard for international human rights norms by its abstention from voting on the Universal Declaration of Human Rights⁹⁷ in 1948, and its subsequent refusal to be party to any other human rights instruments thereafter.⁹⁸

Consequently, it had become clear that the political regime in South Africa after 1948 envisaged a different fate for international human rights treaties that ultimately affected the protection of individual rights in South Africa. International human rights treaties could not play an effective role in protecting the rights and interests of individuals before South African courts during the period of apartheid. However, as will be elaborated upon in the following discussion, the courts did, on occasion, have the opportunity to invoke those human rights norms that formed part of customary international law, such as the principle of non-discrimination, as well as the common law presumption that a statute should not be interpreted to violate a rule of international law.

2 5 3 A monist approach to the incorporation of customary international law into municipal law

As stated above, the relationship between international law and South African municipal law was not addressed in any of the South African Constitutions prior to 1993, nor was it defined in South African legislation during apartheid and the periods preceding it. Scholars have submitted that this relationship was largely governed by rules found in English common law, which South Africa inherited from the United

⁹⁷ Universal Declaration of Human Rights UNGA Res 217 A (III) (adopted 10 December 1948) (“UDHR”).

⁹⁸ Prévost (1999) *SAYIL* 218. Various international human rights treaties had been created after the National Party came into power in 1948. These included the ICESCR, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (“ICCPR”), the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (“CERD”), the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (“CEDAW”) and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (“CAT”). Due to South Africa’s refusal to become party to any of these and other international human rights treaties under apartheid, none of these treaties could be legislatively incorporated into South African municipal law and thus could not be directly invoked and relied upon before municipal courts.

Kingdom.⁹⁹ Dugard argues that courts readily sought guidance from English law, as opposed to Roman Dutch law, which included seeking guidance from English law on matters of public international law.¹⁰⁰ English courts followed the “Blackstonian principle” in terms of which customary international law forms part of the law of the land.¹⁰¹ Case law from as early as 1735 provides evidence that English courts hold a long tradition of recognising, as well as taking judicial notice of, the law of nations.¹⁰²

Sanders argues that various factors played a role in influencing South African courts to act upon the basis of the “Blackstonian principle”.¹⁰³ First, South Africa’s governmental structure was based on the English model, and also contained three branches of government.¹⁰⁴ Second, South African courts not only closely resembled English courts, but also adopted the English principle of *stare decisis*.¹⁰⁵ Although Sanders admits that South African courts never expressly alluded to the “Blackstonian principle”, Sanders’ survey of South African case law from 1882 up until 1975 indicates that South African courts considered customary international law as having direct application in municipal law to the extent that courts could take judicial notice of it.¹⁰⁶

Before the 1993 Constitution entered into force in April 1994, South African courts discussed the status of customary international law within the South African

⁹⁹ Schaffer (1983) *International and Comparative Law Quarterly* 283. Sanders (1977) *THRHR* 150; Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 115.

¹⁰⁰ Dugard *International Law: A South African Perspective* 4 ed 45.

¹⁰¹ Sanders (1977) *THRHR* 148. Named after Sir William Blackstone, who was first to express the concept that international law forms part of the common law. In *Commentaries on the Laws of England* (1765-1769), Book IV, Ch 5, 67: Blackstone wrote:

“In arbitrary states this law (of nations), wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since, in England, no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be a part of the law of the land.”

W Blackstone *Commentaries on the Laws of England* 1 ed (1876).

¹⁰² *Barbuit’s Case in Chancery* (1735) Cases T Talbot 281 (25 ER 777) was one of the earliest cases to illustrate the acceptance of a monist approach to customary international law in English municipal law. For an extensive discussion on the application of the “Blackstonian principle” or “Blackstone doctrine” by English courts, see Schaffer (1983) *International and Comparative Law Quarterly* 283-296. For an additional discussion concerning the exceptions to the monist approach that have also occurred in English case law, see Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 115.

¹⁰³ Sanders (1977) *THRHR* 150.

¹⁰⁴ 150.

¹⁰⁵ 150.

¹⁰⁶ 150.

domestic legal order in a number of cases.¹⁰⁷ As noted above, the courts took judicial notice of customary international law based on the assumption that customary international law formed part of South African municipal law.¹⁰⁸ *Ex parte Schumann*,¹⁰⁹ a case heard before the Natal Provincial Division, is one such example in which Selke J states that:

“I see no reason to suppose that these principles of international law are other than principles of general application throughout the civilised world ... and, in my opinion, they are principles which are recognised by the law of this country.”¹¹⁰

According to Maluwa, this decision expressed the view that customary international law formed part of South African law and has since been interpreted as adopting a monist approach towards customary international law.¹¹¹ Similarly, in *S v Ramotse*,¹¹² a case heard before the Transvaal Provincial Division, Viljoen J readily accepted for the purposes of the judgment that customary international law formed part of South African municipal law.¹¹³ Furthermore, in *Parkin v Government of the Republique Democratique du Congo*,¹¹⁴ a case heard before the Witwatersrand Local Division, Myburgh J stated that:

“The problem that arises in this application is whether this court is entitled, in law, to attach the money of a foreign sovereign State to found jurisdiction against such a

¹⁰⁷ See Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 116 for a list of cases dating from 1914 to 1988 in which South African courts have applied customary international law as part of South African municipal law.

¹⁰⁸ Bridge (1971) *International and Comparative Law Quarterly* 747; Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 116.

¹⁰⁹ 1940 NPD 251. This case concerns an application made by the applicant to have her name included in the Parliamentary Voter’s Roll after both the registering officer and assistant revising officer refused to enrol her. The decision centres on whether the applicant is a “Union National” or not.

¹¹⁰ 254.

¹¹¹ Maluwa (1993) *SAYIL* 30. For a discussion on the status of customary international law within South African court jurisprudence, see DJ Devine “The Relationship between International Law and Municipal Law in the Light of the Interim South African Constitution 1993” (1995) 44 *International and Comparative Law Quarterly* 1 2.

¹¹² (TPD) 14-09-1970 (unreported judgment) (“*Ramotse*”).

¹¹³ 4. Viljoen J stated that he would “assume for purposes of this judgment that the rule of international law that one State may not exercise its police powers in the territory of another State, is part of our law.”

¹¹⁴ 1971 1 SA 259 (W) (“*Parkin*”). In this case, the applicant is an ex-mercenary who was severely disabled during his employment as a mercenary for the Congolese Army. The applicant’s terms of employment included the payment of compensation in the event of permanent total or partial disability as well as the payment of hospital and medical expenses for injuries sustained while on duty. In this case, the applicant alleged that he is still entitled to the payment of monies and this case concerns, amongst others, his *ex parte* application for an order attaching *ad fundandam jurisdictionem* moneys outstanding to the credit of a bank account held by the respondent in Johannesburg.

State. The answer to this problem is to be found in international law to the extent that our common law recognises such international law.”¹¹⁵

Bridge interpreted this to mean that, “to an undefined extent customary international law was seen as forming part of South African common law.”¹¹⁶ Yet, Sanders used this statement to illustrate the point that certain qualifications existed that limited the application of the principle that international law forms part of South African law namely, “to the extent that the South African common law recognises such international law.”¹¹⁷ Following a similar approach, Dugard cited *Parkin* as a case that “diluted” the monist approach affirmed later in *South Atlantic*.¹¹⁸

Many widely viewed *South Atlantic* as a pioneering judgment clearly expressing that customary international law formed part of South African municipal law, relying on English and American court practice to do so. In this decision, Diemont J stated that:

“Although I am surprised that there is no decision in which a South African Court has expressly asserted that international law forms part of our law, I would be even more surprised if there were a decision asserting the contrary. It appears to have been accepted in both the English and the American courts that international law forms part of their own law... . And there are also one or two indications in decisions in our courts that judicial notice will be taken of international law... . In my view it is the duty of this court to ascertain and administer the appropriate rule of international law in this case.”¹¹⁹

This case also highlights the view that international law was not a foreign system of law that had to be proven before the courts by way of an affidavit.¹²⁰

The judgments of *Ramotse*, *Parkin*, and *South Atlantic* do not expressly state whether the principles laid down therein are to be applied to international treaties or customary international law, or to both. However, Bridge argues that the rules stated therein apply to customary international law.¹²¹ This is based on the fact that *Pan American World Airways* expressly laid down specific principles that alluded to a

¹¹⁵ 260-261.

¹¹⁶ Bridge (1971) *International and Comparative Law Quarterly* 746-749.

¹¹⁷ Sanders (1977) *THRHR* 152.

¹¹⁸ Dugard *International Law: A South African Perspective* 1 ed 42.

¹¹⁹ *South Atlantic Island Development Ltd v Buchan* 1971 1 SA 234 (C) 238.

¹²⁰ Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 116. In this case, the court refused to accept an affidavit that provided evidence that international law was not a foreign system of law and struck this evidence out on the grounds of being neither necessary, nor admissible. See *South Atlantic Island Development Ltd v Buchan* 1971 1 SA 234 (C) 238.

¹²¹ Bridge (1971) *International and Comparative Law Quarterly* 749.

different methodological approach to be used in the incorporation of treaties into municipal law.¹²² In 1977, the Appellate Division stated the following in the case of *Nduli v Minister of Justice*:

“While it is obvious that international law is to be regarded as part of our law, it has to be stressed that the *fons et origo* of this proposition must be found in Roman-Dutch law.”¹²³

Although the judgment is considered to be the leading precedent on the role of customary international law in the South African municipal legal order prior to the advent of the 1993 Constitution, it did attract criticism.¹²⁴ The judgment was criticised as not fully clarifying the application of international customary law in the South African legal order, as it may be construed as supporting both a dualist and monist approach.¹²⁵ Dugard’s criticism centres on the court’s decision to base the proposition that customary international is part of the law of the Republic, on Roman-Dutch law, as opposed to referring to previous case law that confirmed such incorporation.¹²⁶ Dugard argues that such a proposition affirms that customary international law forms part of municipal law without legislative, or any other, act of incorporation and therefore affirms the monist approach.¹²⁷ However, he argues further that by stating that the *fons et origo* (translated as the “source”) of the proposition should be found in Roman-Dutch law, the dictum may also suggest that some act of adoption is required before customary international law is accepted as forming part of South African municipal law.¹²⁸ The court accepted the argument of the counsel for the appellant namely, that according to the law of the Republic, rules of customary international law will only be regarded as being part of our law if they are universally recognised

¹²² 749.

¹²³ *Nduli v Minister of Justice* 1978 1 SA 893 (A) 906 (“*Nduli*”). In this case, the appellants were brought before the court with criminal charges pending against them. The question to be decided was whether the charges gave the court jurisdiction to try the appellants on these, or any, charges regardless of whether the appellants were kidnapped from Swaziland and forcibly taken from there to the Republic of South Africa by members of the South African Police. In addition, it must be noted that Swaziland had granted both appellants political asylum. Furthermore, the Swaziland Government is a sovereign independent State that had not waived or relinquished its territorial rights in respect of the appellants.

¹²⁴ Devine (1995) *International and Comparative Law Quarterly* 2.

¹²⁵ Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 117.

¹²⁶ 117. Such as in the cases of *Parkin v Government of the Republique Democratique du Congo* 1971 1 SA 259 (W), *South Atlantic Island Development Ltd v Buchan* 1971 1 SA 234 (C) or *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881.

¹²⁷ Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 117.

¹²⁸ 117.

or have received the assent of our country.¹²⁹ However, Dugard argues that such requirements may be construed as supporting the view that the court affirmed a dualistic approach to the incorporation of customary international law into South African municipal law.¹³⁰

Dugard concludes that Rumpff CJ's dictum should not be read as indicating that the source of international law is Roman-Dutch law.¹³¹ Rather, it should be understood to mean that the source of the proposition (or more simply, the rule favouring this principle of incorporation) should be found in Roman-Dutch law, as opposed to English law.¹³² Dugard argues further that it was Rumpff CJ's commitment to a "purist" approach that turned his focus to Huber, François (the Dutch jurist) as well as Hahlo and Kahn, instead of referring to the English case of *Trendtex Trading Corporation v Central Bank of Nigeria*,¹³³ or the South African precedent, namely *South Atlantic*.¹³⁴

The *Nduli* judgment created further uncertainty. The court's acceptance of the argument that South African law only recognised those rules that had attained universal recognition or had received the country's assent, further narrowed the application of international customary law in South African municipal law.¹³⁵ Since the court did not indicate how such "assent" should be demonstrated, the words "country's assent" as well as the test for "universal recognition" has been criticised as being too vague.¹³⁶ In sum, the *Nduli* judgment left the relationship between international customary law and municipal law more uncertain than appears to be the case at first glance.

Despite these uncertainties, two other courts namely, the Transvaal Provincial Division and the Eastern Cape Division, subsequently confirmed the Appellate Division's view in *Nduli* namely, that customary international law forms part of South African municipal law. The cases in question are *Kaffraria Property Co (Pty) Ltd v*

¹²⁹ *Nduli v Minister of Justice* 1978 1 SA 893 (A) 906.

¹³⁰ Dugard "The Place of Public International Law" in *Essays in Honour of Ellison Kahn* 117. Authors such as Hercules Booyesen argued that *Nduli* supported a dualistic approach to the incorporation of customary international law into the South African municipal system. See H Booyesen *Volkereg: 'n Inleiding* (1980).

¹³¹ Dugard "The Place of Public International Law" in *Essays in Honour of Ellison Kahn* 117-118.

¹³² 117-118.

¹³³ [1977] 1 All ER 888-890. In this case, Lord Denning followed the doctrine of incorporation (as opposed to the doctrine of transformation), which promotes the monist approach to the reception of international law into English law.

¹³⁴ Dugard "The Place of Public International Law" in *Essays in Honour of Ellison Kahn* 117.

¹³⁵ Prévost (1999) *SAYIL* 220.

¹³⁶ Maluwa (1993) *SAYIL* 31.

*Government of the Republic of Zambia*¹³⁷ and *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique*.¹³⁸ In *Inter-Science Research*, the court stated the following:

“International law is part of the law of South Africa, save in so far as it conflicts with South African legislation or common law. Our courts will take judicial cognizance of international law, and it is their duty in any particular case to ascertain and administer the appropriate rule of international law.”¹³⁹

In addition to confirming that international customary law forms part of South African law, the decision in *Inter-Science Research* was also important for its pronouncement on the meaning of “universal recognition”.¹⁴⁰ Within this context, it is important to note that in an earlier decision by the Supreme Court of the Cape of Good Hope namely, *Du Toit v Kruger*, De Villiers CJ put forward a stringent test to determine whether a rule qualified as customary international law.¹⁴¹ According to this test, customary international law had to be “universally accepted”.¹⁴² As discussed above, more than 70 years later, identical words were used in the *Nduli* decision, whereby Rumpff CJ stated that only those rules of customary international law that are either universally accepted, or have received the assent of the country, will be regarded as part of our law.¹⁴³ However, in *Inter-Science Research*, Margo J considered this test as too strict and stated that the meaning of “universal recognition” was not an absolute one, irrespective of the ordinary meaning attached to

¹³⁷ 1980 2 SA 709 (E) 715 (“*Kaffraria Property*”). In this case, the appellant appealed the refusal of firstly, an *ex parte* application for leave to attach property in order to found jurisdiction in a proposed action against the respondent, and secondly, the refusal of an application to sue the respondent by edictal citation. As the respondent is the Government of the Republic of Zambia, the court had to determine whether the principle of sovereign immunity was recognised and accepted in South African law or whether a more restricted approach to sovereign immunity was applicable in the case.

¹³⁸ 1980 2 SA 111 (T) (“*Inter-Science Research*”). This case concerned an application for leave to attach an alleged interest of the Government of Mozambique in particular immovable properties and monies for the purposes of founding, or alternatively, confirming jurisdiction in the proposed action, as well as for leave to sue by edictal citation.

¹³⁹ 124.

¹⁴⁰ Maluwa (1993) *SAYIL* 31.

¹⁴¹ *Du Toit v Kruger* 1905 22 (SC) 234. Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 119-120.

¹⁴² *Du Toit v Kruger* 1905 22 (SC) 238. The court stated that:

“[t]he rules which are laid down by some writers for exempting the private property of an enemy from capture have not been so universally accepted and acted upon as to justify this Court in treating them as binding principles of law.”

¹⁴³ *Nduli v Minister of Justice* 1978 1 SA 893 (A) 906. Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 120.

“universal”.¹⁴⁴ Conradie J later confirmed this qualification in *S v Petane*.¹⁴⁵ In *Petane*, the question placed before the Cape Provincial Division was whether Protocol I of the Geneva Convention Relative to the Treatment of Prisoners of War¹⁴⁶ had acquired customary international law status in South Africa.¹⁴⁷ South Africa had ratified the Geneva Convention Relative to the Treatment of Prisoners of War, but had not yet acceded to the abovementioned Protocol.¹⁴⁸ In his consideration of this question, Conradie J cited the Appellate Division’s finding in *Nduli* whereby it affirmed that customary international law was directly operative in municipal law, on condition that it was not in conflict with any statutory or common law.¹⁴⁹ Furthermore, the court reiterated the requirements discussed in *Nduli* namely, that only those international rules that have either been universally recognised or have received the assent of this country, would be applicable in South African municipal law.¹⁵⁰ However, Conradie J qualified this *dictum* with the following:

“It is not clear to me whether Rumpff CJ in giving the judgment meant to lay down any stricter requirements for the incorporation of international law usages into South African law than the requirements laid down by international law itself for the

¹⁴⁴ *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) 125. To support this statement, Margo J cited literature on international law which stated that:

“if a custom becomes established as a general rule of international law, it binds all States which have not opposed it, whether or not they themselves played an active part in its formation.”

In addition, Margo J referred to article 38 of the Statute of the ICJ, which states the following:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) ...

(b) international custom, as evidence of a general practice accepted as law;

...”

See also Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 120.

¹⁴⁵ 1988 3 SA 51 (C) (“*Petane*”).

¹⁴⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

¹⁴⁷ More specifically, the accused was indicted on, amongst others, three counts of terrorism in terms of section 54(1) of the Internal Security Act 74 of 1982. The accused refused to plead before the court and challenged the court’s jurisdiction to try him by arguing that in terms of Protocol 1 to the Geneva Conventions, the accused was entitled to be treated as a prisoner-of-war. As a result of such status, the protecting power appointed to oversee prisoners of war was to be given notice of the accused’s impending prosecution of an alleged offence. As the trial could not proceed without such a notice, the necessity of the notice in this case was to be determined before evidence was led. The court thus needed to determine whether the terms of the Protocol were applicable to this case.

¹⁴⁸ *S v Petane* 1988 3 SA 51 (C) 56. Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

¹⁴⁹ *S v Petane* 1988 3 SA 51 (C) 56.

¹⁵⁰ 56.

acceptance of usages by States. International law does not require universal acceptance for a usage of States to become a custom.”¹⁵¹

Relying on the *dicta* of Margo J in *Inter-Science Research*, Conradie J agreed with the view that the term “universal”, as used in *Nduli*, was not intended to mean that the relevant rule was universally accepted, irrespective of the ordinary meaning of the term, “universal”.¹⁵² In particular, the court qualified the abovementioned requirements laid down in *Nduli* by stating that custom would at least have to be widely accepted before it would be considered as being incorporated into South African municipal law.¹⁵³

The principle that customary international law formed part of the law of the land was subject to certain qualifications in the South African context. First, the legislative sovereignty of Parliament meant that if a conflict existed between customary international law and legislation, the legislation would prevail.¹⁵⁴ Second, by following the judicial policies of *stare decisis*, courts kept to their own precedents irrespective of whether these were in conflict with customary international law.¹⁵⁵ Lastly, treating foreign policy matters as non-justiciable meant that the validity of certain acts such as acts of state, or certain executive acts carried out under the duty of “managing foreign affairs”, could not be challenged using customary international law.¹⁵⁶

2 5 4 Customary international law and the protection of human rights

As discussed above, the South African courts adopted a monistic approach towards the incorporation of customary international law into the municipal legal system during the period of apartheid. However, during this period, the courts also demonstrated reluctance towards recognising certain international instruments as generating rules of customary international law.

During the period of apartheid, the UNGA adopted numerous resolutions that condemned the practice of apartheid. It was therefore not surprising that South African courts took a cautious approach towards recognising such resolutions as

¹⁵¹ 56.

¹⁵² 56.

¹⁵³ 57.

¹⁵⁴ Maluwa (1993) *SAYIL* 32.

¹⁵⁵ Maluwa (1993) *SAYIL* 32; Sanders (1977) *THRHR* 152.

¹⁵⁶ Sanders (1977) *THRHR* 153.

creating rules of customary international law.¹⁵⁷ For example, the judgment delivered in *Petane* addressed whether the UDHR, as well as relevant UNGA resolutions, had attained the status of customary international law and would therefore be incorporated into the South African municipal legal order. In respect of UNGA resolutions, Conradie J stated that it was doubtful whether these resolutions could qualify as State practice.¹⁵⁸ Furthermore, he stated that resolutions and declarations made by States could not be classified as State practice that gives rise to custom.¹⁵⁹ Conradie J added that these State resolutions and declarations may constitute *opinio juris* and if, in addition, sufficient *usus* or usage has occurred, the relevant resolutions would create a rule of customary international law.¹⁶⁰ However, he added that if there was no *usus*, customary international law had not been created. Furthermore, Conradie J indicated that a mere declaration made by a State could not produce a rule of customary international law.¹⁶¹ In terms of the UDHR, Conradie J stated that while the assertion was made that the provisions of the UDHR were rules of customary international law, such statements needed to be weighed against concrete acts made by a State.¹⁶² He stated further that it was only “material, concrete and/or specific acts of States which are relevant as *usus*.”¹⁶³ Conradie J described *usus* as follows:

“The substance of the practice required is that States have done, or abstained from doing, certain things in the international field: eg that they have exercised diplomatic protection in certain circumstances, or recognised the rights of other States to do so; that they have refrained from bringing or permitting legal proceedings against visiting diplomats; that they have claimed certain areas of submarine territory or recognised such right claimed by other States. State practice, as the material element in the formulation of custom, is, it is worth emphasizing, material: it is composed of acts by States with regard to a particular person, ship, defined area of territory, each of which amounts to the assertion or repudiation of a claim relating to a particular apple of discord.”¹⁶⁴

Therefore, Conradie J placed significant weight on the requirement of settled practice. According to Conradie J, the practice of condemning South Africa’s racial policies proved only that there was a general dislike for South Africa’s internal

¹⁵⁷ Dugard *International Law* 4 ed 32.

¹⁵⁸ *S v Petane* 1988 3 SA 51 (C) 58.

¹⁵⁹ 58.

¹⁶⁰ 58.

¹⁶¹ 58.

¹⁶² 58.

¹⁶³ 59.

¹⁶⁴ 59.

policies.¹⁶⁵ Moreover, the existence of a general dislike was insufficient to create a rule of customary international law.¹⁶⁶ Furthermore, Conradie J argued that an instrument of recommendatory character was incapable of exhibiting a general recognition that a rule of law or legal obligation was involved.¹⁶⁷ The court's restrictive approach becomes particularly noticeable when considering that, approximately eight years earlier, a United States Second Circuit Court of Appeals relied upon the UDHR and a UNGA resolution to support the creation of a rule of customary international law.¹⁶⁸ Although Dugard notes that the Court in *Filartiga* did not enquire thoroughly into the existence of state practice pertaining to torture, he criticises the judgment in *Petane* as raising too high a standard in terms of the requirement of *usus*.¹⁶⁹ To support this criticism, Dugard draws from the jurisprudence of the International Court of Justice, and in particular, the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*.¹⁷⁰ In this regard, he states that the ICJ's decision in this case suggests that a rule of customary international law may be established without much evidence of settled practice in cases where the State's *opinio juris* is indicated clearly by their support for UNGA resolutions.¹⁷¹

Later, in *S v Rudman*,¹⁷² a case heard before the Eastern Cape Division, Cooper J adopted a similar approach towards the UDHR when he commended international instruments such as the UDHR, the ICCPR, the European Convention

¹⁶⁵ 59.

¹⁶⁶ 59.

¹⁶⁷ 57-59.

¹⁶⁸ Dugard *International Law* 4 ed 32. *Filartiga v Pena-Irala* 630 F.2d 876; 1980 U.S. (“*Filartiga*”). In this case, the United States Second Circuit Court of Appeals relied upon the UDHR and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment UNGA Res 3452 (XXX) (9 December 1975) to support the finding that a customary international rule prohibiting state torture had been created.

¹⁶⁹ Dugard *International Law* 4 ed 32.

¹⁷⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14.

¹⁷¹ Dugard *International Law* 4 ed 33.

¹⁷² *S v Rudman* 1989 3 SA 368 (E). This case comprised of three appeals. In each appeal, the appellants argued that they were not legally represented at their trial. In addition, each appellant argued that the magistrate adjudicating their cases failed to inform them of both their entitlement to the assistance of a legal advisor and that they were further entitled to approach the Legal Aid Board for financial assistance to secure legal representation. In this case, the court had to adjudicate upon the appellants' contentions that the failure to inform an accused of his right to representation and the failure to provide an accused with legal representation constitute irregularities that *per se* lead to the failure of justice and vitiate proceedings.

for the Protection of Human Rights and Fundamental Freedoms¹⁷³ and the American Convention on Human Rights¹⁷⁴ as instruments inspired by laudable ideals, but nonetheless held that they “did not form part of customary international law”.¹⁷⁵

From this analysis it can be concluded that human rights norms that gained the status of customary international law and did not conflict with South African legislation, could have been recognised as part of South Africa’s municipal law. However, as discussed above, South Africa’s racial policies were so deeply entrenched in legislation that very little room remained for the protection of human rights by way of customary international law.¹⁷⁶ Furthermore, the courts were reluctant to recognise UNGA resolutions that protected human rights as generating rules of customary international law. In this regard, Dugard makes the important point that while South Africa may have advanced the view that UNGA resolutions did not qualify as law, as in *Petane*, in practice, these resolutions had serious implications for South Africa.¹⁷⁷ In particular, the General Assembly called for action against South Africa through resolutions, which included the call that economic sanctions be imposed against the State.¹⁷⁸

2 5 5 The protection of human rights through the use of common law

In 1989, the South African Law Commission made the following statement in a working paper that analysed the protection of group rights and the possible extension of the existing protection of individual rights:

“There is full recognition of and respect for the rights of the individual as recognized in our common law. The courts see it as their task to protect these rights, and it is said that the courts form a bulwark between the individual and the executive.”¹⁷⁹

¹⁷³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (opened for signature 4 November 1950, entered into force 3 September 1953) CETS 005 (“ECHR”).

¹⁷⁴ American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (“AmCHR”).

¹⁷⁵ *S v Rudman* 1989 3 SA 368 (E) 376. Cooper J relied on the works of Booysen to support the argument that customary international law did not form part of South African municipal law.

¹⁷⁶ Dugard (1994) *SAJHR* 209.

¹⁷⁷ Dugard *International Law* 1 ed 32.

¹⁷⁸ 299.

¹⁷⁹ SA Law Commission, Working Paper 25, Project 58: *Group and Human rights* (1989) 169.

Trengove argues that, despite the judiciary's advanced knowledge and ability to apply the principles of common law, the courts' inability to defend these principles can be attributed to the acceptance of parliamentary sovereignty and the absence of a Bill of Rights.¹⁸⁰ The doctrine of parliamentary sovereignty adopted in South Africa placed the judiciary in a very weak position in terms of interpreting and testing the validity of apartheid legislation. According to the doctrine, most courts were only empowered to give effect to the intention of the legislature.¹⁸¹ Consequently, if an Act of Parliament infringed a recognised human right, the court would first have to analyse the Act in question to determine the intention of the legislature. If, after examination, it was found that the legislature in fact intended to violate the human right involved, the court was obliged to give effect to the legislative intent and thus enforce the provisions of the Act. As a result, while the courts had very little opportunity to invoke human rights-friendly principles of the common law, they were also enforcing discriminatory laws that violated the provisions of the UN Charter to which South Africa was a party.¹⁸² Devenish notes that even if courts were willing to apply common law principles, the fact that apartheid was so deeply embedded in South African legislation, resulted in a very limited application of these principles.¹⁸³

However, common law presumptions existed that were used in the process of interpreting legislation. Hahlo and Kahn regard these presumptions of interpretation as a tertiary source of assistance in the interpretation of legislation, and defines them as: "assumptions of legislative intent in cases ... where uncertainty prevails after invocation of the objective primary and secondary rules of construction."¹⁸⁴ These

¹⁸⁰ Trengove "Perspectives on the Role of Judges" in *Democracy and the Judiciary* 127.

¹⁸¹ Section 34(3) of the Republic of South Africa Constitution Act 110 of 1983 stated that: "[N]o court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament."

However, section 34(2)(a) of this Constitution stated the following:

"Any division of the Supreme Court of South Africa shall, subject to the provisions of section 18, be competent to inquire into and pronounce upon the question as to whether the provisions of this Act were complied with in connection with any law which is expressed to be enacted by the State President and Parliament or by the State President and any House."

This meant that while courts could not pronounce upon the content or matter of an Act of Parliament, the Supreme Court could test whether procedural and other requirements contained in the Constitution had been followed when the Act was adopted. In this way, the Court could test the manner and form of the Act.

¹⁸² J Dugard "The Conflict between International Law and South African Law: Another Decisive Factor in South African Society" (1986) 2 *SAJHR* 1 23.

¹⁸³ GE Devenish *Interpretation of Statutes* (1992).

¹⁸⁴ Hahlo & Kahn *The South African Legal System and its Background* 202.

presumptions have been referred to as common-law *a priori* guidelines and principles that are used by courts to interpret the law.¹⁸⁵

According to English law, when a statute is ambiguous, a municipal court may have regard to unincorporated treaty obligations when interpreting the statute. A similar approach existed within the context of South African common law, a presumption exists namely, that in the event of a statute being ambiguous or unclear, a statute would not be interpreted to violate a rule of international law.¹⁸⁶ Devenish formulates the presumption in another way namely, that a statute will not be interpreted so as to violate a rule of international law or international obligations.¹⁸⁷ According to this presumption, Parliament did not intend to derogate from, or legislate in conflict with, the principles of international law when enacting a statute.¹⁸⁸ Therefore, South African courts should always have attempted to adopt an interpretation of a statute that would not conflict with their international treaty obligations.¹⁸⁹ Accordingly, during the time of apartheid, judges could have sought guidance from international treaties that were signed and ratified, but not yet legislatively incorporated into municipal law, as well as those not yet signed, as interpretative aids.¹⁹⁰

The Supreme Court of Transvaal confirmed the recognition of this presumption as early as 1905 in the case of *Harajee v Ismail*.¹⁹¹ Furthermore, in *Maluleke v Minister of Internal Affairs*,¹⁹² a case brought before the Bophuthatswana

¹⁸⁵ Devenish *Interpretation of Statutes* 156. To the extent that these presumptions could assist in protecting certain rights, Devenish stated that:

“South Africa does not as yet have a justiciable bill of rights to elevate libertarian principles, such as equality before the law and other civil and political liberties, to the status of fundamental laws. The so-called presumptions of interpretation can, however, be considered as a surrogate for a bill of rights since, considered as a whole, they reflect overwhelmingly the libertarian ethos of our common law.”

See Devenish *Interpretation of Statutes* 42-43.

¹⁸⁶ GM Cockram *Interpretation of Statutes* (1983) 131. Similarly, in English law, when a statute is ambiguous, a municipal court may have regard to unincorporated treaties.

¹⁸⁷ Devenish *Interpretation of Statutes* 212.

¹⁸⁸ 212.

¹⁸⁹ J Dugard “International Human-Rights Norms in Domestic Courts: Can South Africa Learn from Britain and the United States?” in E Kahn (ed) *Fiat Iustitia: Essays in Memory of Oliver Deneys Schreiner* (1983) 233.

¹⁹⁰ Dugard (1994) *SAJHR* 209.

¹⁹¹ 1905 TS 451 456. The appellant in this case had been sued in the Magistrate’s court for arrear rental. The appellant had excepted the summons that was personally served upon him on the grounds that he was not subject to the jurisdiction of the court. The exception however, was overruled and in this case, the appellant was appealing this decision.

¹⁹² 1981 1 SA 707 (B). In this case, the applicant had made derogatory remarks about the President of Bophuthatswana, which prompted the Bophuthatswana Minister of Internal Affairs to withdraw the

Supreme Court, Hiemstra CJ referred to and supported the approach in *Pan American World Airways* and added the following:

“The rights of the subject are not affected by a treaty as such, nor does the subject derive any rights from it - still less an alien. If legislation is passed to give effect to a treaty, that will be the source of the citizen’s rights...When interpreting such legislation, the Courts are entitled to take treaties into account, but only as a guide on doubtful points ... a treaty is no more than an aid to interpretation.”¹⁹³

Three years later in 1984, the Ciskei Supreme Court also confirmed the use of unincorporated treaty obligations in the interpretation of an ambiguous statute in *Mabuda v Minister of Co-operation and Development*.¹⁹⁴ In 1988, in the case of *Binga v Cabinet for South West Africa*,¹⁹⁵ which was heard before the Appellate Division, Van Heerden JA cited the decision made by Diplock LJ in the English Court of Appeal in the case of *Salomon v Commissioner of Customs and Excise*¹⁹⁶ who followed a more restrictive approach to the use of international treaties in the interpretation of legislation. Diplock LJ stated that before an international convention may be consulted in the interpretation of legislation, there must be cogent evidence that the relevant statute was intended to give effect to the convention.¹⁹⁷ He stated further that in English law, when interpreting legislation “one does not start with the *a priori* assumption that Parliament intended to fulfil its treaty obligations.”¹⁹⁸

A second, less restrictive approach to the use of unincorporated treaties in the interpretation of an ambiguous statute was adopted in *R v Secretary of State for Home Affairs, Ex parte Bhajan Singh*, a case brought before the English Court of Appeal.¹⁹⁹ In this case, Lord Denning MR held that an international convention should be taken into account “whenever interpreting a statute which affects the rights and liberties of

applicant’s permission of entry into Bophutswana. In this case, the applicant thus seeks to have this decision overturned before the court.

¹⁹³ 713.

¹⁹⁴ 1984 2 SA 49 (Ck). This case concerned a trial action wherein the plaintiff, a resident of the Republic of Ciskei, claimed damages from the defendant after suffering personal injuries caused by a collision between himself and a motor vehicle owned by the defendant, but driven by the defendant’s employee during the scope of his employment. The court’s jurisdiction had been challenged in this matter and the court had to address the question of implied consent to jurisdiction by the Republic of South Africa in these circumstances.

¹⁹⁵ 1988 3 SA 155 (A) 184.

¹⁹⁶ [1966] 3 All ER 871 (CA) 875.

¹⁹⁷ 875-876.

¹⁹⁸ *Binga v Cabinet for South West Africa* 1988 3 SA 155 184.

¹⁹⁹ [1975] 2 All ER 1081 (CA).

the individual.”²⁰⁰ Van Heerden JA preferred Diplock LJ’s “restrictive” approach compared to that of Lord Denning MR, and concluded that the presumption could not be applied since there was no evidence that the legislation concerned (the South-West Africa Constitution Act) was enacted with the intention of giving effect to an obligation of the relevant treaty. Therefore, according to Van Heerden JA, an international treaty obligation could only influence the interpretation of a statute in cases where the statute is ambiguous and if evidence exists that the legislature created the statute with the aim of giving effect to the obligations under a treaty.²⁰¹ Although Van Heerden JA’s pronouncement on the presumption is obiter, Dugard has criticised this restrictive approach as not fully considering the necessary authorities.²⁰² In this regard, Dugard argues that several English decisions existed in which the ECHR was invoked as a progressive guide to statutory interpretation.²⁰³

As was pointed out above, although the UN Charter was ratified by South Africa, this instrument could not be applied directly in domestic disputes since it had not been legislatively incorporated into South African municipal law.²⁰⁴ However, in accordance with the arguments advanced above, there were other means of relying on the rights entrenched in the UN Charter. For instance, articles entrenching the principle of non-discrimination could potentially have been used as an aid in the interpretation of an ambiguous statutory provision. This strategy could have been pursued in accordance with the presumption that the legislature did not intend to violate international law.²⁰⁵ The case of *S v Werner*²⁰⁶ presented the first opportunity for a South African court to rule on South Africa’s obligations under the UN Charter. This case challenged the validity of a proclamation issued under the infamous Group Areas Act 36 of 1966 that provided for the racial zoning of urban areas into White, Coloured, Indian, and Black areas. The Group Areas Act itself did not demarcate these areas, but by way of a proclamation, the executive was authorised to make the various demarcations. As the proclamation did not expressly authorise the unequal or

²⁰⁰ 1083.

²⁰¹ Devenish *Interpretation of Statutes* 214.

²⁰² J Dugard “Public International Law” (1988) *Annual Survey of South African Law* 68 78.

²⁰³ 78. These cases include *Waddington v Miah* [1974] 2 All ER 377 (HL) and *Ahmad v Inner London Education Authority* [1978] 1 All ER 574 (CA).

²⁰⁴ Dugard (1994) *SAJHR* 209. However, it must be recalled that, although not legislatively incorporated into South African municipal law, the UN Charter still imposed legal obligations upon South Africa *vis-a-vis* the international community and the UN as an organisation.

²⁰⁵ 209.

²⁰⁶ 1980 2 SA 313 (W).

discriminating treatment in the demarcation process, it was argued, amongst others, that the Appellate Division could have used the opportunity to interpret the Group Areas Act in line with South Africa's obligations of non-discrimination under the UN Charter, specifically articles 55 and 56. Unfortunately, the court did not attach much weight to this argument. Instead, the court held that the Group Areas Act was not ambiguous and therefore permitted discrimination and injustice.

Relying on the decision of the ICJ in 1971 in the case of *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution*,²⁰⁷ Dugard argues that the human rights clauses contained in the UN Charter imposed certain legal obligations upon member States, even though South Africa had ratified the UN Charter, but not yet incorporated it into municipal law.²⁰⁸ As South Africa was party to the UN Charter, Dugard states that South Africa was bound by the human rights clauses contained therein at the international level. The human rights provisions contained in the UN Charter only broadly describe the obligations of member States. However, Dugard states that there was increasing support for recourse to the UDHR and conventions such as the ECHR, the AmCHR, and the ICCPR, to clarify the scope of the State's obligations under the UN Charter.²⁰⁹ In support of this argument, Dugard submits that this was an established method of statutory construction in both British and American courts when interpreting an ambiguous statute that influenced a human right. Consequently, Dugard argues that South African courts could have invoked the provisions of the UN Charter as elaborated on by the UDHR and other human rights conventions to which South Africa was not a party.²¹⁰

In *S v Werner*, neither the Appellate Division nor the trial court answered the question whether the judiciary could rely on unincorporated treaties when interpreting an ambiguous statute. Instead, the court concluded that the Group Areas Act was clear and unambiguous, and therefore clearly permitted racial discrimination. *S v Werner* has been cited as illustrative of the readiness of the South African courts to find a

²⁰⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) [1971] ICJ Rep 16 [129]-[131].

²⁰⁸ Dugard "International Human-Rights Norms" in *Fiat Iustitia* 234.

²⁰⁹ 235.

²¹⁰ 235-238. Dugard has also argued that a South African Court may declare subordinate legislation unreasonable on the grounds of violating South Africa's international obligations.

statute, which adversely affects a human right, clear and unambiguous.²¹¹ The Act clearly made provision for a proclamation that would have a discriminatory effect on different racial groups. To this extent, an interpretation in accordance with the human rights provisions of the UN Charter and other relevant treaties would have challenged the validity of such a proclamation.²¹²

In *S v Khanyile*,²¹³ the Natal Provincial Division found that the accused was entitled to be provided with legal representation. In this judgment, Didcott J relied on the provisions of treaties that were neither signed by South Africa nor incorporated into South Africa's municipal law namely, the ICCPR and the ECHR. This approach was, however, rejected one year later in the abovementioned case of *S v Rudman*.²¹⁴ In this case, the appellant relied on the provisions of the UDHR, the ICCPR, the ECHR, and the AmCHR, stating that these instruments reflected a universal acceptance of the right to legal representation. Cooper J, however, held that as South Africa was not a party to the UDHR, ICCPR, ECHR or the AmCHR, these instruments could not be relied upon in support of the appellant's contention that a universal right to legal representation existed.

In the context of the common law presumption, the term, 'international law' should be understood as referring only to customary international law, as *Pan-American World Airways* established those principles concerning the incorporation of treaties into municipal law.²¹⁵ Dugard argues that many of the principles that govern the relationship between customary international law and international treaties, as well as the role of international law when interpreting ambiguous statutes in South African law, are identical to those used by the Anglo-American courts.²¹⁶ Based on this premise, Dugard argues that a number of situations existed in which South African courts could have applied customary international law to protect human rights, as the American courts have done on occasion.²¹⁷ Firstly, customary international law could have been used where a gap existed in the common law.

²¹¹ 241.

²¹² Prévost (1999) *SAYIL* 220.

²¹³ *S v Khanyile* 1988 3 SA 795 (N) 801. Followed in *S v Dladla* 1989 4 SA 172 (N). This case involved two men who had stood trial together on charges of house breaking and theft. Both men were found guilty and imprisoned for one year. The case concerns the automatic review of the decision.

²¹⁴ *S v Rudman* 1989 3 SA 368 (E).

²¹⁵ *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A).

²¹⁶ Dugard "International Human Rights Norms" in *Fiat Iustitia* 233.

²¹⁷ 233.

According to Dugard, certain provisions of the UDHR had attained the status of customary international law.²¹⁸ However, despite attaining such a status, apartheid judges had very little scope to employ customary international law as statutes took precedence over customary international law and the common law.²¹⁹ Secondly, the common law principles that were not yet settled could have been reinforced by South Africa's international obligations that existed under customary international law (and convention).²²⁰ Lastly, Dugard argues that, following the approach suggested by Lord Scarman in *Attorney-General v British Broadcasting Corporation*,²²¹ the Appellate Division was not completely bound by precedent and as a result, judges of the court could have considered South Africa's international obligations when considering a possible departure from precedent.²²² In the event of any conflict arising between a rule of international customary law and a rule of common law, the court was in the same position as when considering a conflict between two conflicting common-law principles.²²³ In *Liebowitz v Schwartz*,²²⁴ the Transvaal Provincial Division had to choose between a principle of international law²²⁵ and a common law principle²²⁶ and found that:

“Plainly, one of two conflicting principles must yield ... There can be no doubt in my mind that it is the second principle, which must give way. The first is founded on grave and weighty considerations of public policy, international law and comity.”²²⁷

Even though the court could have obtained support from the Appellate Division to rule in favour of the municipal law rule,²²⁸ its decision to apply customary

²¹⁸ *Fernandez v Wilkonson* 505 F Supp 787 (D Kan 1980). In this case, the Court relied upon the UDHR.

²¹⁹ Dugard “International Human Rights Norms” in *Fiat Iustitia* 234.

²²⁰ 234.

²²¹ *Attorney-General v British Broadcasting Corporation* [1980] 3 All ER 161 (HL).

²²² Dugard “International Human Rights Norms” in *Fiat Iustitia* 234.

²²³ Dugard “The Place of Public International Law” in *Essays in Honour of Ellison Kahn* 121.

²²⁴ 1974 2 SA 661 (T). In this case, the applicants intended to institute an action for an order declaring the will of the deceased SA Leibowitz null and void. In particular, the applicants proposed to sue specific beneficiaries of the will by way of edictal citation. This case was complicated by the fact that the residuary heir under the will was the State of Israel. This situation resulted in a conflict between two legal principles, one of which was a principle of public international law.

²²⁵ This stated that the courts of a country will not by their process make a foreign state a party to legal proceedings against its will.

²²⁶ This declared that “all beneficiaries under a will must be joined as defendants in an action wherein is claimed an order declaring that will invalid”.

²²⁷ *Liebowitz v Schwartz* 1974 2 SA 661 (T) 662.

²²⁸ As ruled in *Kethel v Kethel's Estate* 1949 3 SA 598 (A).

international law instead implied that the prevalence of a municipal law over a conflicting customary international law rule was not always certain.²²⁹

In the discussions above, I have investigated the restricted role granted to international human rights law in the form of treaties and customary international law, and the possible reasons for this. However, in 1983, Dugard identified a number of additional elements that contributed towards the judiciary's weak reliance on international human rights norms.²³⁰ In his opinion, the lack of *amicus curiae* had an important impact on the under reliance on human rights concepts in public interest litigation which challenged apartheid legislation. Dugard argues that *amici curiae* briefs would have constituted invaluable instruments that would allow both qualified and concerned parties to contribute to a decision. He also suggests that the activist approach found in Anglo-American courts could not have been expected in the South African courtrooms, as many South African judges were not sympathetic to the human rights arguments before them, displaying a similar attitude to the South African executive in these matters. Thus, as a consequence of the legal and judicial culture in South Africa at the time, the judiciary tended to defer to parliament and the executive, despite being presented with arguments based on international human rights law. To this extent, the judiciary illustrated a culture of deference and formalism in the interpretation of statutes and, although said to be independent, was criticised for being too executive-minded, especially in cases where political controversies were involved. In relation to this, it must also be noted that international law, and particularly international human rights law, was afforded a very limited role in the law curricula of South African Universities. As a consequence, international law, and particularly international human rights law, remained unfamiliar to many judges and lawyers, probably resulting in fewer arguments based upon international human rights being brought before the courts and accepted.

2 6 Conclusion

In summary, the historical evaluation of the court's treatment of international law outlined in this chapter illustrates firstly, that across all spheres of life, Black South Africans, which constituted the majority of the South African population, were

²²⁹ Dugard "The Place of Public International Law" in *Essays in Honour of Ellison Kahn* 121.

²³⁰ Dugard "International Human Rights Norms" in *Fiat Iustitia* 221.

subject to the discriminating effects of apartheid legislation and policies. As emphasised above, these Acts and policies also impacted negatively on the socio-economic welfare of Black South Africans and affected, amongst others, the areas of health and health care, land possession, education, working conditions and social security.²³¹

Secondly, this historical account has provided evidence that the recognition of and reliance on international law by South African courts was not an unfamiliar exercise. In South Africa, customary international law formed part of the common law. However, in the event of international law conflicting with legislation or acts of state, the latter prevailed. Furthermore, treaties could have direct application in municipal law, provided that they were directly incorporated into municipal law.

Thirdly, I showed that after the rise of apartheid, the use of these sources changed significantly when applied in the context of human rights. The law of apartheid changed the relationship between South Africa and the international community as South Africa isolated itself from the international human rights movement and the international community distanced itself in various ways from South Africa. South African citizens suffered as the responsibility of human rights protection was placed in the hands of an executive-minded judiciary who was reluctant to employ international human rights norms. Thus, through the analysis, I showed that distinct methodological approaches towards international human rights law and international law were created and developed during this time. Furthermore, I emphasised that, despite the growing international movement towards the protection of these human rights, opportunities to rely on international instruments were subject to stringent qualifications, restricting the assistance that these may have offered in instances of human rights violations. Furthermore, this assessment highlights that the development of international human rights law indicated a change in the nature of State responsibility towards individuals. On the one hand, South Africa relied vehemently upon the principles of State sovereignty and non-intervention,²³² which

²³¹ See section 2.2 of this chapter.

²³² This was, to a certain extent, endorsed by the UN Charter and, despite its commitment to the promotion of human rights, the UN Charter continued to affirm the more traditional approach recognising only States, and not individuals, as subjects of international law. This was determined by article 2(7), which provided the following:

“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters, which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

supposedly prevented any external involvement in the abuse of individual rights and left all South Africans under the exclusive jurisdiction of their State. On the other hand, the international community signalled a shift away from an approach characterised by the avoidance of public interest, the pursuit of self-interest by States and legal relations based on reciprocity.²³³

This historical evaluation forms a point of departure for the following chapters by underscoring the importance and necessity of affirming the status of international human rights law in the Constitution. It also provides insight into the attitudes prevalent during the apartheid era towards the international community and the use of international human rights law, which form an undeniable part of South Africa's legal culture. Consequently, international human rights law remained an unfamiliar source of law in South African judicial reasoning during the apartheid era. The affects of this may, in part, account for a reluctance to fully embrace international human rights law in the substantive development of socio-economic rights, as will be explored in chapter 5. In the following chapter, I examine the significant changes brought about by the 1993 and 1996 Constitutions concerning the role of international law, particularly international human rights law, in the interpretation of the Bill of Rights.

This was further emphasised in article 2(1) of the UN Charter, which stated that the Organisation itself was based on “the principle of the sovereign equality of all its Members.” The Union of South Africa, which at the time was governed by the United Party under the leadership of General Smuts, became a signatory to the UN Charter on 7 November 1945.

²³³ Cassese *International Law* 396.

Chapter 3

International Human Rights Law and the 1993 and 1996 South African Constitutions

3 1 Introduction

The fall of the apartheid legal order and the advent of the new constitutional dispensation in South Africa brought about a transition from parliamentary sovereignty to constitutional supremacy.¹ The adoption of the 1993 and 1996 South African Constitutions, and their accompanying Bills of Rights, ushered in a new culture of human rights. More specifically, the 1993 and 1996 Bills of Rights included various socio-economic rights as justiciable rights.² A further feature of both Constitutions is the prominent role that they give to international law. In particular, both the 1993 and 1996 Constitutions contain provisions that regulate the procedural requirements that must be met in order for South Africa to become party to any

¹ Section 4 of the 1993 Constitution states the following:

“(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

(2) This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.”

Similarly, section 2 of the 1996 Constitution declares the supremacy of the 1996 Constitution and states the following:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

² The 1993 and 1996 Constitutions incorporate both civil and political rights as well as economic, social, and cultural rights as justiciable rights. Section 38 of the 1996 Constitution (section 7(4)(a) of the 1993 Constitution) entitles anyone listed in the section to the right to approach a competent court with a claim that a right within the Bill of Rights has been violated or threatened. In terms of this section, the court may grant appropriate relief, which can include a declaration of rights. These provisions permit rights bearers to approach courts with claims based on civil and political rights and socio-economic rights, with the effect that these rights are justiciable rights before South African courts.

international agreements.³ The 1993 and 1996 Constitutions also include provisions governing the status of customary international law in South Africa's municipal law namely, section 231(4) and section 232 respectively.⁴ Furthermore, section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution afford a significant role to international law in the interpretation of the Bill of Rights.

Following the historical overview presented in chapter 2, I analyse the inclusion of socio-economic rights in both the 1993 and 1996 Bill of Rights. In addition, I explore the drafting processes that preceded the adoption of the 1993 and 1996 Constitutions and in particular, I investigate the role played by international human rights law during the drafting of the socio-economic rights entrenched in the 1993 and 1996 Bills of Rights. Furthermore, I analyse the significant role of international human rights law in the determination of “universally accepted” fundamental rights to be included in the 1996 Constitution. Thereafter, I proceed to focus on the provisions contained in the 1993 and 1996 Constitutions that govern the manner in which international treaties and customary international law operate in municipal law. Lastly, I examine the constitutional provisions that mandate the courts' consideration of international law as an interpretative tool in the interpretation of the Bill of Rights, and their relevance to socio-economic rights in South Africa.

³ Section 231(2)-(3) and section 231 of the 1993 and 1996 Constitutions respectively. The term “international agreement” is not defined in the 1993 or 1996 Constitutions of South Africa. However, Dugard maintains that the definition of an international agreement is equal to that of a “treaty” and is defined in accordance with article 2(1)(a) of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties (adopted 23 May, entered into force 27 January 1980) 1155 UNTS 331 (“VCLT”). Dugard *International Law* 4 ed 60-61. In support of this definition of an “international agreement”, Olivier states that South Africa considers the provisions of the VCLT as customary international law, despite not being a party to the Convention. See ME Olivier “International Human Rights Agreements in South African Law: Procedure, Policy and Practice (Part 2)” (2003) 3 *TSAR* 490 493. The VCLT defines “treaty” in article 2(1)(a) as follows:

“[A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; ...”.

⁴ These are not the only provisions within the 1993 Constitution that concern international law. Section 82(1)(i) governs the negotiation and signing of treaties by the President. Section 116(2) concerns the duty placed upon the Human Rights Commission to report any proposed legislation to the relevant legislature if it is of the opinion that such proposed legislation conflicts with chapter 3 or with the norms of international human rights law. Furthermore, section 227(2) concerns international humanitarian law. Within the 1996 Constitution, section 233 regulates the use of international law in the interpretation of legislation. In addition to this, section 35(3)(l), section 37(4)(b)(i), and section 37(8) include references to international law. Although these provisions address certain aspects of international law, they fall outside the scope of the present study.

3 2 The Inclusion of Socio-Economic Rights in the South African Legal Order

3 2 1 The 1993 and 1996 Constitutions

In March 1993, various political parties of South Africa entered into a structured process of negotiations known as the Multi-Party Negotiating Process (“MPNP”).⁵ The purpose of these negotiations was to reach agreement on, and ultimately adopt, a new Constitution for South Africa.⁶ The Negotiating Council⁷ was the body responsible for the negotiations and decision-making concerning, amongst others, the selection of fundamental rights that were to be included in the 1993 Constitution. However, these negotiations were fraught with disagreement and compromise between negotiating parties, which was largely attributed to the so called “minimalist-optimalist debate”.⁸ According to Du Plessis and Corder, the “minimalists” comprised those political parties that were not convinced of the legitimacy of the MPNP and argued that the process was not adequately representative.⁹ Consequently, these political parties argued that the MPNP could only generate an interim constitutional text.¹⁰ To this extent, the “minimalists”¹¹ advocated for the inclusion of only those rights that were absolutely necessary to facilitate the transition.¹²

⁵ The MPNP was by no means the first attempt at negotiations of this nature. Political parties had previously attempted negotiations by way of the Convention for a Democratic South Africa (“CODESA”) and the second Convention for a Democratic South Africa (“CODESA II”) that preceded the MPNP. CODESA itself was the product of a gradual interaction among political parties whose beginnings can be traced from as early as the 1980’s. Interaction and negotiations among political parties gained momentum especially after FW de Klerk’s election within the National Party and the subsequent national election in which the National Party was once again voted into power in South Africa. For a detailed account of significant political events leading up to the MPNP, see Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 1-7.

⁶ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 39.

⁷ The Negotiating Council was a body within the MPNP and consisted of two delegates from each political party, one of which had to be a woman, as well as two advisors. This Council convened three to four days of the week and was responsible for creating those agreements that were to be placed before the plenary for ratification. The plenary was made up of 208 members and represented 26 parties. While it was the highest decision-making body, the more complex political decisions were dealt with in the Negotiating Council. The Negotiating Council was assisted by seven Technical Committees who were responsible for preparing the documentation presented to the Negotiating Council for discussion. The Technical Committee on Constitutional Issues was responsible for the drafting of the 1993 Constitution while the Technical Committee on Fundamental Rights was required to draft the 1993 Bill of Rights. Therefore, the Technical Committee on Fundamental Rights was responsible for presenting the Negotiating Council with a proposed list of rights that were to be included in the Bill of Rights.

⁸ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 40-46.

⁹ 40.

¹⁰ 40.

So called “optimalists” consisted of those political parties who did not enjoy majority support in South Africa, and were vexed by the possible threat of being marginalised once other largely supported political parties came into power.¹³ Thus, the “optimalists” argued for a more comprehensive list of rights to be included in the new Constitution that would assist in protecting their interests after the elections.¹⁴ The outcome of the “minimalist-optimalist” debate played a determinative role in the limited manner in which socio-economic rights were provided for in the 1993 Constitution. This was particularly apparent by the inclusion of predominantly civil and political rights, and only a handful of socio-economic rights, in the 1993 Bill of Rights. For this reason, the set of fundamental rights that was to form the 1993 Bill of Rights was described as “neither fatally limited nor satisfactorily comprehensive”.¹⁵

The socio-economic rights that were eventually incorporated into the 1993 Constitution included the right of detained persons, including sentenced prisoners, to be detained in a manner that, amongst others, included “at least the provision of adequate nutrition, reading material and medical treatment at state expense.”¹⁶ Furthermore, the 1993 Bill of Rights also entrenched rights related to economic activity,¹⁷ rights related to labour relations,¹⁸ property rights,¹⁹ environmental rights,²⁰ the rights of children to security, basic nutrition, basic health and social services,²¹ and rights related to education.²² As noted, the selection of socio-economic rights incorporated in chapter three of the 1993 Constitution was rudimentary in relation to the many important socio-economic rights protected in international human rights instruments.²³ Such rights include the right to adequate housing,²⁴ the right to

¹¹ The African National Congress (“ANC”) was amongst those political parties that supported this view, together with the Governments of Transkei and Venda.

¹² Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 40-41.

¹³ 41.

¹⁴ 41. The Inkatha Freedom Party, the Government of Ciskei, the Government of Bophuthatswana, and the South African Government, which comprised of members of the National Party, shared this point of view.

¹⁵ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 41.

¹⁶ Section 25(1)(b).

¹⁷ Section 26.

¹⁸ Section 27.

¹⁹ Section 28.

²⁰ Section 29.

²¹ Section 30(1)(c).

²² Section 32.

²³ Such as those contained in the ICESCR. See S Liebenberg “The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa” (1995) 11 *SAJHR* 359 376. The African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21

adequate food,²⁵ the right to social security,²⁶ and the right to the highest attainable standard of physical and mental health.²⁷ However, the rights that the 1993 Bill of Rights included formed the foundation upon which a more comprehensive edifice of socio-economic rights could be built in the 1996 Constitution.²⁸

International human rights law significantly influenced the drafting of the rights contained in chapter 3 of the 1993 Constitution. Firstly, the drafters had been inspired by, and relied upon, international human rights instruments in the formulation of provisions entrenching human rights.²⁹ These instruments included the UDHR, the ICESCR, the ICCPR, and the ECHR. These sources were especially helpful in the drafting of more controversial provisions.³⁰ Secondly, the Technical Committee considered draft proposals for a Bill of Rights submitted by political parties, interest groups, and organisations. Many of these proposals contained aspects that were inspired by international human rights law, and in this way, this source of law influenced the work of the Technical Committee.³¹

The 1993 Constitution constituted a transitional constitutional text and prepared the way for the 1996 Constitution by creating the processes and mechanisms for the adoption of the latter. It was the task of the Constitutional Assembly, which consisted of the National Assembly and the Senate sitting in joint session, to draft and

October 1986) (1982) 21 ILM 58 (“AfCHPR”) as well as the UDHR also contain socio-economic rights that were not included in the 1993 Constitution.

²⁴ Article 11 of the ICESCR recognises everyone’s right 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.”

Article 25 of the UDHR recognises everyone’s right to:

“a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

²⁵ Article 11 of the ICESCR and article 25 of the UDHR.

²⁶ Article 9 of the ICESCR recognises everyone’s right to “social security, including social insurance.”

Article 22 of the UDHR provides for everyone’s right to social security, while article 25 provides for the right to security under specific circumstances.

²⁷ Article 12 of the ICESCR recognises everyone’s right to “the enjoyment of the highest attainable standard of physical and mental health.” See article 25 of the UDHR above. Article 16 of the AfCHPR recognises every individual’s right “to enjoy the best attainable state of physical and mental health.”

²⁸ Liebenberg *Socio-Economic Rights* 16. For the academic debates concerning the inclusion of socio-economic rights in the 1993 Constitution, see N Haysom “Constitutionalism, Majoritarian Democracy and Socio-Economic Rights” (1992) 8 *SAJHR* 451-463, E Mureinik “Beyond a Charter of Luxuries: Economic Rights in the Constitution” (1992) 8 *SAJHR* 464-474 and DM Davis “The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights except as Directive Principles” (1992) 8 *SAJHR* 475-490.

²⁹ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 47.

³⁰ 48. In these cases, the Technical Committee relied more heavily upon the wording of the international text.

³¹ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 48.

adopt the 1996 Constitution.³² Furthermore, the 1993 Constitution contained thirty-four Constitutional Principles,³³ to which the 1996 Constitution had to comply, subject to certification by the Constitutional Court.³⁴ The importance of these thirty-four Constitutional Principles to the process of creating the 1996 Constitution is not to be underestimated.³⁵ The Constitutional Principles were the product of negotiations between political parties and have been characterised as a “political contract” that was necessary for the transition.³⁶ Furthermore, these Principles provided a broad structure for the construction the 1996 Constitution, and were not to be diverted from or neglected.³⁷ Du Plessis and Corder describe these Principles as reflecting the manifest distrust that permeated the opinions of particular political parties concerning the election of a government based on a majority vote.³⁸

3 2 2 Determining the “universal acceptance” of fundamental rights

Constitutional Principle II was pivotal to the creation of the 1996 Bill of Rights as it assisted the drafters in determining which fundamental rights were to be included in the text. It stated that:

³² The mandate placed on the Constitutional Assembly in this regard is located in section 68(2) of the 1993 Constitution. This provision requires the Constitutional Assembly to draft and adopt the new constitutional text in accordance with chapter five of the 1993 Constitution. Section 71(1)(b) of the 1993 Constitution also requires that the Constitutional Assembly be responsible for passing the new Constitution in accordance with chapter 5. For a description of the process whereby the 1996 Constitution was drafted and adopted see J Sarkin “The Drafting of South Africa’s Final Constitution from a Human-Rights Perspective” (1999) 47 *The American Journal of Comparative Law* 67-87.

³³ The 1993 Constitution Schedule Four.

³⁴ The 1993 Constitution section 71(1)(a). Section 71(2) of the 1993 Constitution stated that “[t]he new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).”

This section states in particular that the constitutional text drafted by the Constitutional Assembly shall comply with the Constitutional Principles that are contained in Schedule Four.

³⁵ The importance of the thirty-four Constitutional Principles to the creation of a final Constitution was underscored by section 74(1)(a) of the 1993 Constitution. This provision states that the Constitutional Principles detailed in Schedule Four of the 1993 Constitution could not be subject to amendment or appeal. Similarly, section 74(1)(b) of the 1993 Constitution stated that the provisions of chapter 5 relating to the Constitutional Principles, as well as the provision that mandated compliance between the new constitutional text and the Constitutional Principles, could not be subject to appeal or amendment. Du Plessis and Corder submit that if the Constitutional Principles were neglected, the Government may have risked losing political legitimacy, and conflict and economic deterioration may have ensued. These submissions further underscored the significance of the Constitutional Principles in the process of creating the 1996 Constitution.

³⁶ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 15.

³⁷ 15.

³⁸ 13.

“Everyone shall enjoy all *universally accepted* fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter three of this Constitution.”³⁹

Theme Committee Four of the Constitutional Assembly (“Theme Committee Four”) was tasked with drafting a proposed Bill of Rights for the 1996 Constitution.⁴⁰ A Technical Committee advised Theme Committee Four and provided guidance and assistance in determining which rights adhered to the abovementioned criteria of “universal acceptance”.⁴¹ The Technical Committee examined the jurisprudence of South African courts as a possible source of guidance. It found that, within the context of customary international law, South African courts interpreted the phrase “universal” acceptance to mean the widespread or general acceptance of rules by States.⁴² Furthermore, South African courts did not require that every State consent to a specific rule of customary international law in order for it to achieve “universal” acceptance.⁴³ Following this, the Technical Committee advised that the same principles should apply to the “universal acceptance” of human rights.⁴⁴ Therefore, the Technical Committee held that rights would be recognised as “universally” accepted if it could be established that these rights received widespread and general acceptance or recognition by States.⁴⁵ Additionally, the Technical Committee advised

³⁹ Constitutional Principle II (emphasis added).

⁴⁰ The 1996 Constitution Theme Committee Four of the Constitutional Assembly.

⁴¹ The Technical Committee assisted Theme Committee Four by preparing an Explanatory Memorandum. This Memorandum was based on the Theme Committee Report and dealt with certain aspects concerning particular rights. The Memorandum also detailed the process of researching, formulating, and selecting provisional draft formulations of fundamental human rights. The Technical Committee was also responsible for examining the submissions made by political parties and the public regarding the proposed Bill of Rights and made recommendations in this regard. This Technical Committee differed from the Technical Committee that assisted in the drafting of the 1993 Constitution and consisted of Prof. Halton Cheadle, Prof. John Dugard, Prof. Ignatius Rautenbach and Sandra Liebenberg. Professor John Dugard in particular specialised in the field of human rights and international law and contributed to the strong international law expertise on the Committee. Liebenberg *Socio-Economic Rights* 17.

⁴² See chapter 2. Technical Committee (Theme Committee 4) *The meaning of “universally accepted fundamental rights” in Constitutional Principle II, Schedule 4 to the Constitution of the Republic of South Africa Act 200 of 1993* (1995) para 2 (document on file with author). The Technical Committee cited *Inter-Science Research and Developments Services (Pty) Ltd v Republica Popular de Mozambique* 1980 2 SA 111 (T) 125 and *S v Petane* 1988 3 SA 51 (C) 56-57 in support of its conclusion.

⁴³ Technical Committee (Theme Committee 4) *The meaning of “universally accepted fundamental rights”* para 2 (document on file with author).

⁴⁴ Para 3.

⁴⁵ Para 3.

Theme Committee Four that it was not required that every State recognise and accept these fundamental rights in order for them to achieve “universal acceptance”.⁴⁶

According to the Technical Committee, international human rights treaties and UN declarations contain “universally accepted” fundamental rights.⁴⁷ In terms of the former, the Technical Committee held that their claim to universal acceptance is based upon the number of States that have ratified these instruments.⁴⁸ Moreover, the Technical Committee noted that the “universal acceptance” of fundamental rights contained in UN declarations is determined by the number of States that have voted in favour of such declarations.⁴⁹

In addition, the Technical Committee submitted that national bills of rights lack general acceptance and are therefore not “universally accepted” fundamental rights.⁵⁰ They stated that these domestic instruments are often created within a very particular political and historical context that largely determines the selection of rights entrenched in the constitutional text.⁵¹ However, the Technical Committee also recognised that certain national bills of rights had engaged with international human rights instruments in some form. This occurred when national bills of rights played an influential role in the formulation of provisions entrenched in international instruments.⁵² It also included those instances in which a national bill of rights was inspired, or shaped by, provisions found in international instruments.⁵³ Consequently,

⁴⁶ Para 3.

⁴⁷ Para 4, 6-7. In its memorandum, the Technical Committee identified certain international and regional instruments and declarations as highly significant, and indicated the number of parties that had become members of these instruments at the time of writing. These included the following: the UN Charter (184 parties); the UDHR (In 1948, this resolution was approved by 48 of the 56 member States of the UN); the ICCPR (over 120 parties of which 36 were African States). Although the memorandum does not explain the meaning of “over 120 parties”, it is assumed that this refers to the amount of States that had signed and ratified these instruments at the time. In addition, the Technical Committee referred to the ICESCR (over 120 parties), the ECHR, the AmCHR as well as the AfCHPR. The Technical Committee also mentioned the following specialised human rights treaties: the CERD (over 137 parties) and the CEDAW (over 130 parties). The Technical Committee also referred to the CAT (over 80 parties) and the CRC (over 154 parties). The Technical Committee also took note of the importance of declarations adopted by international conferences to clarify the manner in which the international community viewed human rights obligations, such as the Vienna Declaration on Human Rights and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

⁴⁸ Technical Committee (Theme Committee 4) *The meaning of “universally accepted fundamental rights”* para 4.

⁴⁹ Para 4.

⁵⁰ Para 8.

⁵¹ Para 8.

⁵² Para 8. The Technical Committee noted that the United States Bill of Rights was an example of this.

⁵³ Para 8. The Technical Committee referred to the Canadian Charter of Rights and Freedoms, s2, Part I of the Constitution Act, 1982 being schedule B to the Canada Act 1982 (UK), 1982, c 11 (entered into force 17 April 1982) as well as the Constitution of the Republic of Namibia, 1990 as providing examples of this.

the Technical Committee advised that Theme Committee Four of the Constitutional Assembly could refer to these national texts for assistance when formulating rights found in “universally accepted” instruments.⁵⁴ However, if a right was entrenched in a national bill of rights, but not in a “universally accepted” international instrument, Theme Committee Four could not consider the right.⁵⁵ According to the Technical Committee, this understanding of “universally accepted fundamental rights” was aligned with section 35(1) of the 1993 Constitution to the extent that it accorded a higher status to international human rights norms than national comparative norms.⁵⁶ In addition, Theme Committee Four was advised to consider the way rights were interpreted by courts, investigative commissions, and committees established by particular international conventions.⁵⁷

To ensure compliance with the requirement embedded in Constitutional Principle II, the Technical Committee investigated the “universal acceptance” of every fundamental right that was considered for inclusion in the Bill of Rights.⁵⁸ The Technical Committee did not exempt socio-economic rights from this process. For example, the Technical Committee investigated the universal acceptance of the fundamental right to housing or housing-related rights. It identified international human rights treaties, declarations, and resolutions that recognised and protected these rights,⁵⁹ and established that these rights were also recognised in national

⁵⁴ Technical Committee (Theme Committee 4) *The meaning of “universally accepted fundamental rights”* para 8.

⁵⁵ Para 8.

⁵⁶ Para 8.

⁵⁷ Para 9.

⁵⁸ The importance of the requirement of “universal acceptance” of a fundamental right is further illustrated in the deliberations over section 26 of the 1993 Constitution. This section provided for the right to freely engage in economic activity. One of the criticisms directed towards retaining this right by most political parties was that it was not included in any international instruments, and foreign constitutions had not given it strong support. This argument partly fuelled the lack of support by political parties for the inclusion of this right in the 1996 Constitution, and it was not included in the Bill of Rights. See Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights, volume one, Explanatory Memoranda*, 9 October 1995 1-285 106 (document on file with author).

⁵⁹ These included the following: the UDHR (article 25); the ECHR (article 8(1); article 1; Protocol 1); the International Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (“Refugee Convention”) (article 21); the ESC (articles 16, 19(4); article 4, Additional Protocol); the ILO Convention C117: Social Policy (Basic Aims and Standards) Convention (Convention Concerning Basic Aims and Standards of Social Policy) (46th Conference Session Geneva 22 June 1962) (articles 2, 4(d) and 5(2)); the ICESCR (article 11); the CERD (article 5(e)(iii)); the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243 (“Convention on the Crime of Apartheid”) (article 11(b) and (d)); the CEDAW (article 14(2)(h)); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) 28 ILM 156 (1989) (“Additional

constitutions.⁶⁰ Furthermore, it highlighted that, on occasion, international tribunals and national courts interpreted rights such as the right to life, the right to security of the person, and the right to dignity, to include the protection of housing-related rights.⁶¹

The Technical Committee also regarded the right to education as a fundamental right for the purposes of Constitutional Principle II.⁶² This recommendation was based on evidence collected from a range of international and regional human rights instruments that recognised and protected the right to education.⁶³ The Technical Committee identified article 13 and article 14 of the ICESCR as the main provisions that influenced the drafting of rights related to

Protocol to the American Convention on Human Rights”) (article 11); the CRC (article 27(3)); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (“Migrant Workers Convention”) (article 43(1)(d)). In addition, the Technical Committee identified the following declarations and resolutions that recognised housing rights: the American Declaration on the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) (“American Declaration”) (articles 8, 11, 23); the ILO Recommendation R115: Workers’ Housing Recommendation (45th Conference Session Geneva 28 June 1961) Principle 2; the UN Declaration on Social Progress and Development UNGA Res 2542 (XXIV) (11 December 1969) Part II, article 10; the UN Declaration on the Rights of Disabled Persons UNGA Res 3447 (XXX) (9 December 1975) (article 9); the Vancouver Declaration on Human Settlements, adopted at the UN Conference on Human Settlements, Vancouver, Canada, 31 May to June 1976; the UN Commission on Human Settlements Resolution 14/6 on “The Human Right to Adequate Housing” adopted on 5 May 1993; the UN Declaration on the Right to Development UNGA Res 41/128 (4 December 1986) UN Doc A/RES/41/128 (article 8(1); the Resolution on Shelter for the Homeless in the European Community, adopted by the European Parliament on 16 June 1987; the UNCHR (Sub-Commission), ‘Promoting the Realization of the Right to Adequate Housing’ (26 August 1994) UN Doc E/CN.4/SUB.2/1994/38; the UNCHR (Sub-Commission), ‘Forced Evictions’ (26 August 1994) UN Doc E/CN.4/SUB.2/RES/1994/39. Furthermore, the Technical Committee referred to a study that was being prepared by the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. This would focus specifically on the “right to adequate housing” that could proceed to the creation of an International Convention on Housing Rights. (“The Right to Adequate Housing”, second progress report, E/CN. Sub.2/1994/20).

⁶⁰ Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights* 141-148. The Technical Committee listed examples of provisions from the constitutions of Belgium, Brazil, Colombia, the Dominican Republic, Greece, India, Mexico, the Netherlands, Nigeria, Philippines, Poland, Portugal, the Russian Federation, Seychelles, Spain, Suriname, and Switzerland.

⁶¹ 148. The Technical Committee referred to a decision delivered by the Indian Supreme Court namely, *Tellis v Bombay Municipal Council* [1987] LRC (Const) 351 (Ind.SC) at 368 per Chandrachud CJ. In terms of the right to life, Chandrachud CJ stated that “[a]n equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood ...”.

⁶² Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights* 165.

⁶³ These instruments included: the UDHR (article 26); the ECHR (article 2, Protocol I); the UNESCO Convention against Discrimination in Education; the CEDAW (article 10); the AfCHPR (article 17); the Additional Protocol to the American Convention on Human Rights (article 13). The latter instrument was not yet in force at the time of the Technical Committee’s writing of the Explanatory Memorandum. Lastly, the Technical Committee referred to the CRC (articles 28 and 29).

education in other international treaties and national constitutions.⁶⁴ Lastly, the Technical Committee examined the way rights relating to education were protected in national constitutions.⁶⁵ The Technical Committee also addressed the right to have access to sufficient food and clean water, and found this right to be recognised in a range of international human rights instruments.⁶⁶ Furthermore, the Technical Committee referred to a variety of international human rights instruments⁶⁷ and national constitutions⁶⁸ that recognised and protected the right to health and access to medical treatment.⁶⁹ In particular, it highlighted that the right to reproductive health care is afforded significant protection in CEDAW, while the Beijing Declaration and Platform for Action⁷⁰ creates obligations for States in this regard. Rights relating to access to social security, including social assistance were also found in international human rights instruments.⁷¹ The Technical Committee further identified that the right to benefit from various forms of social security and assistance is also protected in a

⁶⁴ Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights* 165.

⁶⁵ This investigation analysed the entrenchment of rights relating to education in the constitutions of Germany, Canada, India, Portugal, Denmark, and Namibia. See Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights* 166.

⁶⁶ The UDHR (article 25); the ICESCR (article 11); the CEDAW (articles 12(2) and 14(2)(h)); the CRC (article 24(c)); the Additional Protocol to the American Convention on Human Rights (article 12). The latter instrument was not yet in force at the time of the Technical Committee's writing of the supplementary memorandum. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights and Party Submissions* (1995) 19 (document on file with author).

⁶⁷ The UDHR (article 25); the ICESCR (article 12); the CERD (article 5(e)(iv)); the CEDAW (articles 12 and 14(2)(b)); the CRC (article 24); the ESC (articles 11 and 13); the AfCHPR (article 16); the Additional Protocol to the American Convention on Human Rights (article 10). The latter instrument was not yet in force at the time of the Technical Committee's writing of the supplementary memoranda. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights* 17.

⁶⁸ These included the constitutions of Angola, and El Salvador, Greece, Italy, the Netherlands, Namibia, Portugal, Spain, and Turkey. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights* 18.

⁶⁹ The UDHR (article 25); the ICESCR (article 12); the CERD (article 5(e)(iv)); the CEDAW (articles 12 and 14(2)(b)); the CRC (article 24); the ESC (articles 11 and 13); the AfCHPR (article 16) and the Additional Protocol to the American Convention on Human Rights (article 10). The latter instrument was not yet in force at the time of the Technical Committee's writing of the supplementary memoranda. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights* 17.

⁷⁰ Beijing Declaration and Platform for Action adopted by the Fourth World Conference on Women, Beijing, 15 September 1995.

⁷¹ These included: the UDHR (article 22 and 25); the ICESCR (articles 9 and 11); the CERD (articles 5(e)(i) and (iv)); the CEDAW (articles 11(1)(e), 11(2)(b) and 14(2)(c)); the CRC (articles 26 and 27); the ESC (articles 12 and 13); the International Labour Organisation Convention no. 102 Concerning Minimum Standards of Social Security; the AfCHPR (article 18) and the Additional Protocol to the American Convention on Human Rights (article 9). The latter instrument was not yet in force at the time of the Technical Committee's writing of the supplementary memorandum. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights* 19-20.

variety of national constitutions.⁷² Following from the above, the approach adopted by the Technical Committee shows that international and regional standards played a determinative role in the Technical Committee's advice on the selection of rights to be included in the proposed Bill of Rights. Furthermore, its comprehensive investigation into international and regional human rights treaties and declarations provides evidence that the rights protected in the proposed Bill of Rights were aligned with a comprehensive array of international and regional human rights norms and standards.

During its investigations, the Technical Committee also clarified the status to be assigned to socio-economic rights in the draft Bill of Rights. In particular, it emphasised the difficulties of maintaining the distinction between first, second, and third generation rights.⁷³ Furthermore, it highlighted that such distinctions challenged the approach established in the Vienna Declaration and Programme of Action,⁷⁴ which stated that:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be born in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁷⁵

Lastly, the Technical Committee emphasised that all universally accepted fundamental rights should be protected through an effective national remedy in instances of violation, noting that this approach would be in harmony with the approach adopted in international human rights law.⁷⁶ The Technical Committee therefore argued that socio-economic rights were not to be treated as inferior to civil and political rights in the draft Bill of Rights.

⁷² Provisions were found in the constitutions of Denmark, Germany, Greece, Italy, Japan, the Netherlands, Portugal, Spain, Switzerland, and Turkey. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights* 20-21.

⁷³ Technical Committee (Theme Committee 4) *The meaning of “universally accepted fundamental rights”* para 12.

⁷⁴ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

⁷⁵ Para 5.

⁷⁶ See Technical Committee (Theme Committee 4) *The meaning of “universally accepted fundamental rights”* para 12.

The Technical Committee presented the Constitutional Assembly with the recommendations discussed above. The Assembly largely accepted these recommendations concerning the range of rights to be included, and the integrated treatment of all rights in relation to enforcement proceedings. However, the Constitutional Court adopted a different interpretation of “universal acceptance” in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*.⁷⁷ It held that, although a strict literal interpretation should not be applied to the term “universal”, it nevertheless established a strict test.⁷⁸ The Court held further that the drafters of Constitutional Principle II intended “that only those rights that have gained a wide measure of international acceptance as fundamental human rights must necessarily be included in the [1996 Bill of Rights].”⁷⁹ However, the Court held that beyond the abovementioned prescription, the Constitutional Assembly enjoyed discretion in determining other rights to be included in the Bill of Rights.⁸⁰ To support this, the Court relied on the wording of Constitutional Principle II which states that the Constitutional Assembly must give “due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution”. The Court held that the rights in the 1993 Constitution merely had to be considered, and not necessarily duplicated or matched.⁸¹ In this regard, the Court stated that:

“To the extent that the [1993 Constitution] afforded rights which went beyond the ‘universally accepted’ norm, the [Constitutional Assembly] was entitled to reduce them to that measure. By like token, the [Constitutional Assembly] was entitled to formulate rights more generously than would be required by the ‘universally accepted’ norm, or even to establish new rights.”⁸²

⁷⁷ 1996 4 SA 744 (CC) (“*First Certification judgment*”). The first draft of the Constitution was presented to the Constitutional Court for certification. Section 71(2) of the 1993 Constitution stated that:

“[t]he new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(a).”

However, the Court did not certify this text. The amended text of the Constitution was only certified in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC) (“*Second Certification judgment*”).

⁷⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 51.

⁷⁹ Para 51.

⁸⁰ Para 51.

⁸¹ Para 51.

⁸² Para 52.

Therefore the Court found that the requirement of universal acceptance did not prevent the Constitutional Assembly from also including provisions in the proposed Bill of Rights that were not “universally accepted”. This disposed of objections raised against the inclusion of socio-economic rights in the proposed Bill of Rights on the basis that these rights were not universally accepted fundamental rights.⁸³ In conclusion, the different interpretations held by the Technical Committee and the Constitutional Court concerning the interpretation of Constitutional Principle II and its core concept of “universally accepted” fundamental rights did not, in the end, detract from the significant impact which international law in fact had on the drafting of the Bill of Rights.

3 2 3 The role of international human rights law in the formulation of socio-economic rights

In addition to providing evidence of the “universal acceptance” of fundamental human rights, the abovementioned international and regional instruments, and the interpretations accorded to them by the relevant supervisory bodies, provided further guidance in the precise formulation of the relevant provisions. The Technical Committee advised that these sources were valuable to the work of Theme Committee Four for two reasons. Firstly, these could assist Theme Committee Four in determining how “universally accepted fundamental rights, freedoms and liberties” could be entrenched in a constitution.⁸⁴ Secondly, these international conventions specified the nature of the protection that South Africa would be required to give to such rights when it ratified these instruments.⁸⁵ In this regard, the Technical Committee argued that the protection afforded by the Constitution should not fall short of the protection that would be expected in terms of the country’s international obligations.⁸⁶ The following sections will discuss the manner in which international

⁸³ Para 76. These objections were raised against sections 26, 27, 28 and 29 of the proposed Bill of Rights that protect the right to access to housing, health care, sufficient food and water, social security, basic education and the socio-economic rights afforded to children respectively.

⁸⁴ Para 11.

⁸⁵ Para 11.

⁸⁶ Technical Committee (Theme Committee 4) *The meaning of “universally accepted fundamental rights”* para 11. See also Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights* 17. By 1993 South Africa had signed, but not yet ratified, a number of international human rights treaties namely, the CEDAW, the CAT, and the CRC.

and regional human rights law influenced the formulation of provisions relating to socio-economic rights to be included in the Bill of Rights.

3 2 3 1 *The right to housing*

In its investigation of the scope and content of the right to adequate housing in international human rights law, the Technical Committee focused particularly on the formulation of article 11(1) of the ICESCR.⁸⁷ The Technical Committee read this article together with article 2 of the ICESCR, which defines the nature and scope of States parties' obligations under the ICESCR.⁸⁸ The Technical Committee also examined General Comment 4, adopted by the CESCR,⁸⁹ describing it as “the most authoritative and detailed elaboration of international standards regarding the right to housing.”⁹⁰ In respect of General Comment 4, the Technical Committee examined the CESCR's approach to the content of the right to housing, the nature of State obligations, and the legal measures to respect, protect, promote, and fulfil the right to adequate housing.⁹¹

During the drafting of section 25⁹² and section 26⁹³ of the proposed Bill of Rights, the Technical Committee suggested that the concept of “adequate housing”, as found in article 11 of the ICESCR, be used in the proposed formulation of the right to housing.⁹⁴ It argued that a similar formulation of the right to housing in the South African Constitution would be advantageous on two grounds.⁹⁵ Firstly, it would assist

⁸⁷ South Africa signed the ICESCR in October 1994. Article 11(1) of the ICESCR states the following: “The State Parties to the present Covenant recognize 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. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

⁸⁸ Article 2 of the ICESCR states the following: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

⁸⁹ UNCHR ‘General Comment 4’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9 (“General Comment 4”).

⁹⁰ Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights* 149.

⁹¹ 149-151.

⁹² This section dealt with rights related to housing and land.

⁹³ This section dealt with rights related to health, food, water and social security.

⁹⁴ Technical Committee IV *Memorandum on Sections 25 and 26 of the Working Draft of the Constitution* (14 February 1996) (document on file with author).

⁹⁵ Technical Committee IV *Memorandum on Sections 25 and 26 2*.

in maintaining consistency between South Africa's domestic policies and laws, and its international human rights obligations.⁹⁶ In this regard, the Technical Committee emphasised that, as the legislature and executive were the main branches of government tasked with adopting policy and legislation that would give effect to the right, this consistency would be important.⁹⁷ Secondly, a formulation similar to that of the ICESCR would assist the courts when interpreting the right, by directing the courts to a "legitimate international source" that would also accord with section 39(1)(b) and (c) of the 1996 Constitution.⁹⁸ Lastly, one of the main reasons for the Technical Committee's adoption of the phrase "adequate housing", over the term shelter, was that the phrase was consistent with the right found in international human rights instruments, and a body of international standards had developed around the right to "adequate housing".⁹⁹ This formulation was ultimately used, and appears in section 26 of the Bill of Rights of the 1996 Constitution.

The Technical Committee also proposed that the phrase, "reasonable measures to achieve the progressive realisation of the right" be included in the formulation of the right to adequate housing, and be consistent with the formulation found in article 2 of the ICESCR, the leading international treaty protecting economic, social and cultural rights.¹⁰⁰ In addition, the phrase was adopted into the provisional text as it delineated the State's responsibilities in relation to the fulfilment of these rights. In this regard, the Technical Committee reiterated paragraph 2 of General Comment 3 namely, that the measures used by the Government to fulfil these obligations had to be "deliberate, concrete and targeted as clearly as possible".¹⁰¹ In defining the meaning of the term "progressive" within the context of the progressive realisation of rights, the Panel of Experts¹⁰² drew particularly from article 2 of the ICESCR and the obligations resting upon the State parties in this regard.¹⁰³ Amongst other remarks, the

⁹⁶ 2.

⁹⁷ 2.

⁹⁸ 2.

⁹⁹ Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bills of Rights* 17.

¹⁰⁰ Technical Committee IV *Memorandum on Sections 25 and 26* 2.

¹⁰¹ 3. UNCHR 'General Comment 3' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev. 9 ("General Comment 3").

¹⁰² The Panel of Experts was distinct from the Technical Committee and were called upon to assist the Technical Committee in respect of very specific matters that required particular expertise.

¹⁰³ The term "progressive" is used in the formulation of section 25(3) and section 26(2) of the Working Draft of the proposed Bill of Rights. These sections deal specifically with housing and land rights as well as rights concerning health, food, water and social security. In light of this, a panel of

Panel of Experts stated the following in terms of the meaning of “progressive” in international law:

“[T]he term ‘progressive’ in international law captures the idea that the full realization of socio-economic rights will generally not be achieved in a short period of time, that economic realities are taken into account, and that the need for flexibility is taken into account, although the achievement of these rights have to be a matter of priority.”¹⁰⁴

In conclusion, international human rights law, particularly the ICESCR and the General Comments adopted by the CESCR, played a very influential role in the formulation of the right to adequate housing proposed by the Technical Committee.

3 2 3 2 *The right to health care, food, water and social security*

The Technical Committee investigated the international recognition of the right to health and access to medical treatment and found such recognition in numerous international instruments.¹⁰⁵ Furthermore, the Technical Committee highlighted that these rights are protected in various ways in national constitutions.¹⁰⁶ The Technical Committee also noted the special protection given to the right to reproductive health care in the CEDAW and its inclusion in the Beijing Declaration and Platform for Action.¹⁰⁷ In addition, the Technical Committee highlighted the various international instruments that recognised the right to food or adequate nutrition and water.¹⁰⁸ Various factors influenced the Technical Committee’s formulation of the right related

constitutional experts was required to provide information regarding the use of the term “progressive” in international human rights law. See Panel of Constitutional Experts *The Meaning of “Progressive” (Sections 25 and 26)* (6 February 1996) (document on file with author).

¹⁰⁴ 6.

¹⁰⁵ These include article 25 of the UDHR, article 12 of the ICESCR, article 5(e)(iv) of the CERD, article 12 and 14(2)(b) of the CEDAW, article 24 of the CRC, article 11 and article 13 of the ESC, article 16 of the AfCHPR, and article 10 of the Additional Protocol to the American Convention on Human Rights. The latter instrument was not yet in force at the time of the Technical Committee’s writing of the supplementary memorandum. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights* 19.

¹⁰⁶ These include the constitutions of Angola and El Salvador, Greece, Italy, Namibia, the Netherlands, Portugal, Spain and Turkey. See Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights* 18.

¹⁰⁷ Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights* 18.

¹⁰⁸ These included article 25 of the UDHR, article 11 of the ICESCR, article 12(2) and article 14(2)(h) of the CEDAW, article 24(c) of the CRC and article 12 of the Additional Protocol to the American Convention on Human Rights. The latter instrument was not yet in force at the time of the Technical Committee’s writing of the supplementary memorandum. Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights* 19.

to social security and social assistance. One such factor was the general tendency to interpret the concept of social security broadly, so that it accorded with international trends to develop comprehensive systems of social protection.¹⁰⁹ These systems were created in response to factors such as the increased mobility of labour, and changing global work patterns such as the growth of the informal sector, home-based work, and temporary work.¹¹⁰ The Technical Committee held that the proposed formulation, which appears in an almost identical form in the 1996 Bill of Rights, was consistent with the general scope accorded to the right in the international human rights instruments previously listed.¹¹¹ As discussed above, the Panel of Experts also drew significantly from article 2 of the ICESCR to determine the meaning of “progressive” within the context of health rights, and the right to food, water, and social security. In particular, the Panel of Experts compared concepts used in the ICESCR such as “progressive”, “to the maximum of its available resources”, and “all appropriate means including particularly the adoption of legislative measures”, with terms used in the working draft.¹¹²

3 2 3 3 *The right to education*

In formulating the right to education, the Technical Committee focused particularly on articles 13 and 14 of the ICESCR, and the obligations imposed on States parties by these provisions. The Technical Committee argued that these were not only the main provisions that expressly protected and recognised the rights to education in international human rights law, but that these also influenced other international treaties and national constitutions.¹¹³ In its evaluation of article 13 of the ICESCR, the Technical Committee analysed the particular obligations established in this provision namely, that States parties must agree to the aims of education as set out in the ICESCR, and are required to take progressive, positive steps towards the full realisation of the right of everyone to education. In addition, they are required to respect the liberty of parents and legal guardians, and refrain from interfering with the liberty of individuals and bodies to establish and direct educational institutions.

¹⁰⁹ Constitutional Assembly, Constitutional Committee *Supplementary Memorandum on Bill of Rights* 21.

¹¹⁰ 21.

¹¹¹ 22.

¹¹² Technical Committee IV Memorandum on Sections 25 and 26 5-6.

¹¹³ Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights* 165.

Furthermore, the Technical Committee investigated the “core elements” of the right to education found in article 13 of the ICESCR.¹¹⁴ The Technical Committee also examined article 14 of the ICESCR, which places an obligation upon States that have not yet secured free and compulsory primary education, to develop a “detailed plan of action”.¹¹⁵ Therefore, ICESCR was used to highlight obligations placed upon States parties in relation to the right to education, and formed part of the drafting process involved in the formulation of rights relating to education in the proposed Bill of Rights. The product of such involvement is clearly visible in section 29 of the 1996 Constitution, which entrenches rights relating to education. Drawing from articles 13(3) and (4) of the ICESCR,¹¹⁶ and from article 20 of the Namibian Constitution, the Technical Committee proposed a formulation of section 29(1)(3) that appeared in almost exactly the same terms as the two abovementioned texts in the 1996 Bill of Rights.¹¹⁷

In conclusion, the extent to which socio-economic rights are entrenched in the 1996 Constitution extends beyond that of its predecessor. The discussion above highlights that international law played a significant role not only in the selection of socio-economic rights included in the 1996 Bill of Rights, but also influenced the formulation of the provisions discussed above by playing a direct role in the deliberations concerning the drafting of the rights. Many of these provisions were also formulated to give effect to the State’s international law obligations. In light of the above, these provisions are, to a certain degree, genetically connected to international and regional human rights treaties,¹¹⁸ and declarations. This should serve as a further

¹¹⁴ 168.

¹¹⁵ 167.

¹¹⁶ Constitutional Assembly, Constitutional Committee Sub-Committee *Draft Bill of Rights* 174. Article 13(3) of the ICESCR refers to the liberty of parents and legal guardians to send their children to the school of their choice that adheres to the State’s minimum educational standards but which also conforms with the moral and legal beliefs of parents and guardians. Furthermore, parents and legal guardians are not bound to those schools provided by the State. Article 13(4) of the ICESCR states that article 13 should not be understood as interfering with the liberty of individuals and bodies to establish and direct educational institutions. These institutions must however still adhere to the State’s minimum educational requirements and conform to principle 1 of the article.

¹¹⁷ Clause 2 of the provisional text stated that:

“(2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that-

- (a) do not discriminate on the basis of race
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.”

¹¹⁸ It must be noted that the Technical Committee made no reference to the AfCHPR in the formulation of the socio-economic rights contained in the draft Bill of Rights, despite the fact that the AfCHPR had

impetus for South African courts to avail themselves of the meaning and content of the relevant provisions found in international and regional human rights law.

The engagement with international and regional human rights standards, as described above, did not conclude South Africa's interaction with international and regional human rights law. By the end of January 1993, the South African Government signed the CEDAW, the CRC, and the CAT.¹¹⁹ The signing of the CERD, the ICCPR, and the ICESCR in 1994, which occurred in conjunction with President Nelson Mandela's address to the UNGA, followed this.¹²⁰ These actions provided further evidence of South Africa's commitment to the protection of human rights as a new constitutional democracy.¹²¹ The signing and, in some cases,¹²² the subsequent ratification of international human rights treaties, signalled an intention by South Africa to realign itself with the developments occurring within international human rights law and mend the negative reputation the country had gained within the international community, as discussed in chapter two.

3 3 Constitutional Provisions Governing the Role of International Law in the South African Municipal Legal Order

3 3 1 The role of international human rights law in the interpretation of the 1993 and 1996 Bill of Rights

In the process of drafting the 1993 Bill of Rights, the Technical Committee recommended to the negotiating Council that the Bill of Rights should provide that when interpreting its provisions, a court of law should "where appropriate, have regard to public international law applicable to the protection of rights entrenched in

been adopted at the time of these negotiations, and was a prominent human rights instrument from Africa, which protected the right of every individual to enjoy the best attainable state of physical and mental health, and the right of every individual to education.

¹¹⁹ South Africa signed the CEDAW, the CRC and the CAT on 29 January 1993.

¹²⁰ Address by President Nelson Mandela of South Africa to the 49th session of the General Assembly of the United Nations on 3 October 1994. South Africa signed the CERD, the ICCPR and the ICESCR on 3 October 1994.

¹²¹ In this regard, see T Ginsberg "Locking in Democracy: Constitutions, Commitment and International Law" (2006) 38 *New York University Journal of International Law and Politics* 707-760.

¹²² For example, while South Africa signed the ICESCR in 1994, it only ratified this instrument on 12 January 2015.

the Chapter, ...”.¹²³ In response to the Committee’s recommendation, section 35(1) was included in the 1993 Constitution.¹²⁴ Section 31(1) reads:

“In interpreting the provisions of the Chapter a court 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.”

Therefore, section 35(1) ensured that the various international human rights instruments, amongst them those that inspired the drafting of the fundamental rights in chapter 3 of the 1993 Constitution, would not be neglected during the process of interpretation. Furthermore, international human rights law in the context of constitutional interpretation did not require prior approval by legislative or executive bodies. Thus, the judiciary was accorded a significant amount of discretion in drawing on international law in the interpretation of fundamental rights in contrast to the role given to judges in the pre-constitutional era as discussed in chapter two. Deemed a “jewel in the Constitution”, section 35(1) of the 1993 Constitution also ensured, to a certain extent, that South Africa prioritised a commitment to international human rights law.¹²⁵ To this extent, the word “shall” indicated, in a peremptory vein, that courts were required “where applicable” to “have regard to public international law applicable to the protection of the rights entrenched” in the Bill of Rights.¹²⁶

The phrase, “public international law applicable to the protection of the rights” referred to the protection of fundamental rights.¹²⁷ Such fundamental rights are

¹²³ Technical Committee *Tenth Progress Report* (5 October 1993).

¹²⁴ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 121. Ford has (optimistically) stated that even in the absence of a provision in the Bill of Rights requiring such use of international law in the interpretative process, South African courts would still, out of necessity, have turned to international human rights law for guidance. See J Ford “International and Comparative Influence on the Rights Jurisprudence of South Africa’s Constitutional Court” in M du Plessis & S Pete (eds) *Constitutional Democracy in South Africa 1994-2004: Essays in Honour of the Howard College School of Law* (2004) 33 35. See also Dugard (1994) *SAJHR* 211.

¹²⁵ Dugard (1995) *SAJHR* 241.

¹²⁶ Section 35(1) of the 1993 Constitution.

¹²⁷ Not all scholars of international law agree with categorising international human rights law as a separate body of law from international law. Brownlie notes that while it may be convenient to identify a separate body of norms from international law known as “International Human Rights Law”, it is actually a source of confusion, since no such body of law really exists. Brownlie argues that in a procedural context, a human rights issue is dealt with by referring to the “specific and relevant applicable law”, such as the law of a particular State, the provisions of a human rights convention, or to principles of general international law that are relevant to the case. Brownlie suggests that as “International Human Rights Law” does not exist in practice, it is not a distinct body of law that can be applied. I Brownlie *Principles of Public International Law* 6 ed (2003) 530. However, Botha argues that the South African 1993 Constitution actually provides for the creation of such a category, by referring to the mandate in section 35(1) of the 1993 Constitution which, he argues, provides for the application of international human rights law in particular, and not international law generally. See

commonly termed “human rights”, implying that in terms of section 35(1) of the 1993 Constitution, courts were to apply that body of public international law more generally termed, “international human rights law”.¹²⁸ For purposes of constitutional interpretation, section 35(1) authorised the courts to rely on all sources of international law applicable to the protection of the rights contained in the Bill of Rights.¹²⁹ The implication of this was that a claim to a right remained a domestic claim that would be dealt with on a domestic level. However, by virtue of section 35(1), the “fleshing out of such a claim” occurred with the assistance of international human rights law.¹³⁰

The body of international human rights law available to the courts as an interpretative aid under section 35(1) of the 1993 Constitution is made up of various components. Courts find the various sources of public international law set out in article 38(1) of the Statute of the International Court of Justice. Courts are not restricted to regard only those international instruments to which South Africa is bound, but can pursue an enquiry beyond these for the purposes of interpretation. At the time of the adoption of the 1993 Constitution, the role of international treaties not yet signed, as well as customary international law, had not yet been clarified in the interpretive process. However, Dugard states that it was not the intention of the drafters to limit the applicable rules of international law in such a way.¹³¹ In particular, he submits that limitations had not been placed on the meaning of the term, “public international law” as it appeared in section 35(1). Furthermore, Dugard argues that the Constitution confirmed its approach towards international human rights law in section 116(2), whereby the Human Rights Commission was instructed as follows:

“[T]o measure any proposed legislation against the Bill of Rights or norms of international human rights law which form part of South African law or other

Botha (1994) *SA Publiekreg/Public Law* 246. The implications of this argument is that section 39(1)(b) of the 1996 Constitution, which refers only to international law, also requires that courts consider international human rights law, as opposed to international law generally.

¹²⁸ Botha (1994) *SA Publiekreg/ SA Public Law* 246. Botha argues that the distinction between fundamental human rights and human rights is semantic, and settles for the general, internationally accepted term of human rights. However, as noted in chapter 1, the Constitutional Court has considered fields of international law other than international human rights law in its application of section 39(1)(b) of the 1996 Constitution.

¹²⁹ Du Plessis & Corder *Understanding South Africa’s Transitional Bill of Rights* 121; Dugard (1994) *SAJHR* 212.

¹³⁰ Botha (1994) *SA Publiekreg/ SA Public Law* 247.

¹³¹ Dugard (1994) *SAJHR* 212; Dugard (1995) *SAJHR* 243.

relevant norms of international law and report any conflict between such norms and the proposed legislation to the relevant legislature.”

The implications of this argument were that even if South Africa was not a party to an international agreement, or had not yet signed or ratified a convention containing human rights law, such an agreement or convention could still be used as an interpretative aid.¹³² Furthermore, the application of customary international in South African municipal law was regulated in section 231(4) of the 1993 Constitution. However, by virtue of section 35(1) of the 1993 Constitution, customary international law could also be invoked as an interpretative aid to assist in giving meaning and content to fundamental rights.

The inclusion of section 35(1) in the Bill of Rights allowed courts to seek guidance from the wording of international treaties, and from the interpretations given to them by different adjudicative bodies, without having to prove that these principles were binding upon South Africa.¹³³ The decisive factor in using these sources, however, remained whether or not the source of international law was applicable to the rights in the Bill of Rights.¹³⁴ According to Du Plessis and Corder, the drafters of section 35(1) of the 1993 Constitution intended for the section to be understood in a broad sense namely, that a large corpus of international human rights jurisprudence would be recognised as “applicable”, to “give maximum effect to the otherwise incomplete catalogue of rights entrenched in chapter 3”.¹³⁵ The application of this section was, however, qualified. The phrasing of section 35(1) of the 1993 Constitution indicates that courts were only required to “have regard to” this source of law. Courts were therefore only required to take applicable public international law into account when interpreting the Bill of Rights, as opposed to being required to apply it. Botha and Olivier support the view that international interpretations of a provision will almost always be applicable.¹³⁶ However, Olivier has attributed the qualification “where applicable” to the traditional caution shown towards the use of international law by courts and politicians.¹³⁷ Olivier states that this qualification may

¹³² *S v Makwanyane* 1995 3 SA 391 (CC); Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* 121; Dugard (1994) *SAJHR* 212.

¹³³ Dugard (1994) *SAJHR* 213.

¹³⁴ Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* 121.

¹³⁵ 121.

¹³⁶ Olivier (2003) *TSAR* 491; Botha (1994) *SA Publiekreg/ SA Public Law* 245.

¹³⁷ Olivier (2003) *TSAR* 491.

have been to safeguard local remedies from an overly extensive use of international law.¹³⁸

Section 35(1) of the 1993 Constitution was replaced with section 39(1) in the 1996 Constitution with only minor modifications.¹³⁹ Section 39(1)(b) states: “When interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law”. Section 39(1) differs from its predecessor as it not only refers to “courts of law”, but also broadens its application to include tribunals and forums.¹⁴⁰ Furthermore, section 39(1)(b) mandates these adjudicative bodies to “consider” international law, as opposed to the language of its predecessor, which obliged courts to “have regard to” public international law. In addition, the reference made in section 35(1) to “public international law” was replaced in section 39(1)(b) of the 1996 Constitution with the term “international law”.

The most striking difference between section 35(1) and section 39(1)(b) is the removal of the words, “where applicable” from section 39(1)(b). Thus, the abovementioned adjudicative bodies are no longer limited to only regarding public international law when they deem it applicable to a case, as was the approach laid down in section 35(1). Rather, these bodies are now obliged to “consider international law” whether they deem it applicable or not. This modification precludes adjudicative bodies from making use of the “escape route” provided by section 35(1) of the 1993 Constitution that potentially allowed courts to question the applicability of international law. In addition, the 1996 Constitution has maintained that both international law and foreign law can be used as interpretive aids when interpreting the Bill of Rights.¹⁴¹ To this extent, the 1993 Constitution has preserved this distinction, namely that the relevant adjudicative bodies “must” consider international law, while they “may” consider foreign law.

¹³⁸ 491.

¹³⁹ Section 39(1) of the 1996 Constitution provides the following:

“(1) 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

(c) may consider foreign law.”

¹⁴⁰ Olivier (2003) *TSAR* 492.

¹⁴¹ 492.

3 3 2 The signing, ratification and incorporation of international treaties

The 1993 Constitution introduced significant changes to the law governing the status of international treaties, and the manner in which these were to be incorporated into municipal law. Section 82(1)(i) of the 1993 Constitution indicated that the President was competent to sign and negotiate international treaties, therefore reserving this function for the Executive.¹⁴² Together with this mandate, section 231(2)¹⁴³ stated that Parliament could agree to the accession to, or the ratification of, international agreements.¹⁴⁴ The 1993 Constitution therefore afforded Parliament a primary role in the accession, or ratification, of international treaties.¹⁴⁵ According to section 231(3), where Parliament agrees to the ratification of, or accession to, an international agreement, such an agreement becomes binding, and forms part of domestic law, once two conditions are met. Firstly, an agreement becomes binding once Parliament expressly provides so, and secondly, such an international agreement has to be consistent with the Constitution. In respect of the former, Keightley argues that Parliament was no longer restricted to transforming international agreements into municipal law only by way of an Act of Parliament.¹⁴⁶ While the 1993 Constitution did not define the other means by which treaties could be incorporated into municipal law, Keightley submits that a resolution, or an “endorsement”, from Parliament was

¹⁴² Keightley notes that the President had taken a predominant role in the signing of international agreements after the 1993 Constitution came into force. This is in contrast to Dugard’s view that this function was usually that of the Minister of Foreign Affairs. Keightley derived evidence for this practice from the memorandum to all Ministers and Heads of Government, namely the “Procedures for the Conclusion of International Agreements”. See R Keightley “Public International Law and the Final Constitution” (1996) 12 *SAJHR* 405 409.

¹⁴³ Section 231 of the 1993 Constitution states that:

“(1) All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.

(2) Parliament shall, subject to this Constitution, be competent to agree to the ratification of or accession to an international agreement negotiated and signed in terms of s 82(1)(i).

(3) Where Parliament agrees to the ratification of or accession to an international agreement under subs (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

(4) The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.”

¹⁴⁴ Keightley submits that, within this context, Parliament’s agreement to such treaties had the effect of ratification, and that Parliament’s assent was required before the treaty had international effect. She argues that this approach was contrasted with the approach of the State before the adoption of the 1993 Constitution. Keightley (1996) *SAJHR* 409.

¹⁴⁵ Keightley (1996) *SAJHR* 409.

¹⁴⁶ 409.

considered as an acceptable form of transformation.¹⁴⁷ Keightley argues further that this change had positive practical implications for the domestication of international treaty provisions.¹⁴⁸ She argues that section 231(3) ensured that the domestication of treaty provisions would be achieved much quicker, and was particularly relevant to the various international human rights treaties that were already signed by the Government, and still in need of ratification at the time.¹⁴⁹ The 1996 Constitution regulates the status of treaties in section 231.¹⁵⁰ This provision confirms the dualist approach to the incorporation of international treaties into domestic law, followed in the 1993 Constitution. The Constitutional Court has elaborated on the nuanced process entrenched in section 231 of the 1996 Constitution in *Glenister*.¹⁵¹ In this case, the Court held that the negotiating and signing of international agreements by the national executive does not render such agreements binding upon the Republic.¹⁵² In accordance with section 231(2), such an agreement only becomes binding once it has subsequently received approval by both houses of Parliament namely, the National Assembly and the National Council of Provinces, by way of resolution.¹⁵³ The only exception to this is found in section 231(3), concerning agreements that are “technical, administrative or executive in nature”.¹⁵⁴ Furthermore, as confirmed by the

¹⁴⁷ 409.

¹⁴⁸ 410.

¹⁴⁹ 410.

¹⁵⁰ Section 231 of the 1996 Constitution provides as follows:

“(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

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

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

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

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”

¹⁵¹ 2011 3 SA 347 (CC). For a more detailed description of the facts of the case, see page 115.

¹⁵² Para 180.

¹⁵³ Para 180.

¹⁵⁴ Section 231(3) provides that:

“An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National

Court in *Glenister*, the approval of an international treaty by Parliament in accordance with section 231(2) only binds the Republic to the international agreement under international law.¹⁵⁵ Therefore, Parliamentary approval does not transform “the rights and obligations contained in international agreements into home-grown constitutional rights and obligations.”¹⁵⁶

However, the Court stated that international treaties that are ratified, and thus approved by Parliament but not yet incorporated into municipal law, still have value in the international sphere. Ngcobo CJ held that, in accordance with the VCLT, Parliamentary approval provides evidence that South Africa intends to bind itself to the relevant international agreement under international law.¹⁵⁷ The Court held that such approval indicates that, at an international level, a State agrees to take the necessary steps to comply with the international agreement.¹⁵⁸ This will occur either by way of legislatively incorporating the agreement into municipal law, or by aligning municipal laws with the provisions of the treaty to the extent that they lack compliance with the treaty provisions.¹⁵⁹

Furthermore, Ngcobo CJ stated that Parliament’s ratification of an international agreement is a positive assertion to the signatories of the agreement that Parliament will act in accordance with the ratified treaty, subject to the provisions of the Constitution.¹⁶⁰ Therefore, South Africa is accountable to signatory States, and may be held responsible for failing to adhere to the international treaty.¹⁶¹ Furthermore, section 231(4) of the 1996 Constitution expressly provides for the incorporation of international agreements into municipal law. The Court in *Glenister* argued that, as section 231(4) provides specifically for the domestication of international agreements into municipal law, section 231(2) could not give “binding internal constitutional force to agreements merely because Parliament has approved

Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.”

¹⁵⁵ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 181.

¹⁵⁶ Para 181.

¹⁵⁷ Para 91. This was expressed in the minority judgment of Ngcobo CJ. Reference is made to the VCLT article 2, paragraph 1(b), which defines “ratification”, “acceptance”, “approval”, and “accession” to mean in each case that: “the international act so named whereby a State establishes on the international plane its consent to be bound to a treaty.”

¹⁵⁸ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 91.

¹⁵⁹ Para 91.

¹⁶⁰ Para 96.

¹⁶¹ Para 92.

them.”¹⁶² In accordance with section 231(4), provisions that have received such approval must be enacted into municipal law by way of national legislation before they form part of municipal law.¹⁶³ Therefore, the process of incorporating international agreements into municipal law, as governed by section 231(4), does not confer constitutional status upon these rights and obligations, but transforms these into statutory rights and obligations.¹⁶⁴ This provision therefore reintroduces the legal situation prior to the adoption of the 1993 Constitution in terms of which an Act of Parliament was required to domesticate an international agreement..¹⁶⁵

When international agreements are incorporated into domestic law by way of national legislation, they, according to Ngcobo CJ, assume the same status as legislation.¹⁶⁶ Furthermore, such legislation will only prevail over other national legislation if that intention is clearly expressed by Parliament.¹⁶⁷ In the event of a conflict between an international agreement that has been legislatively incorporated into municipal law in terms of section 231(4), and ordinary legislation, the principles of statutory interpretation, and those governing superseding legislation, must be applied.¹⁶⁸ In addition, Ngcobo CJ reaffirmed that those international agreements, which are duly incorporated into municipal law and have assumed the status of ordinary legislation, give rise to rights and obligations in municipal law. However, he stated that these rights and obligations would only exist to the extent provided for by the legislation that incorporated the agreement into municipal law.¹⁶⁹ Lastly, Ngcobo CJ established that if an international agreement contains a self-executing provision, which is duly incorporated into municipal law in accordance with section 231(4), this

¹⁶² Para 181.

¹⁶³ Section 231(4). The legislature incorporates international treaty provisions into municipal law in three ways. Firstly, the Act itself can contain the provisions of the international agreement. Secondly, an international agreement can accompany the Act as a schedule to the Act. Thirdly, the executive can give the provisions of an international agreement the force of domestic law if it receives authorisation to do so from enabling legislation. The agreement is then given domestic effect by way of a proclamation, or by way of notice in the *Government Gazette*.

¹⁶⁴ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 181. Ngcobo CJ expressed similar sentiments in the minority judgment in paragraph 92.

¹⁶⁵ See Keightley (1996) *SAJHR* 410-412 for an elaboration on possible reasons for the change, and criticisms of the approach followed in the 1996 Constitution.

¹⁶⁶ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 100.

¹⁶⁷ Para 100.

¹⁶⁸ Para 101.

¹⁶⁹ Para 102.

provision would still assume the status of an ordinary statute, and would not constitute a constitutional obligation.¹⁷⁰

3 3 3 The status of customary international law

Section 231(4) of the 1993 Constitution not only removed all uncertainties that previously concerned the court's use of customary international law, as discussed in chapter 2, but also clarified the status of customary international law in the South African municipal legal order. Section 231(4) maintained the monist approach to the incorporation of customary international law into municipal law. Accordingly, no legislative transformation needed to take place before customary international law was regarded as binding upon domestic law. However, this was subject to the condition that customary international law was not found to be inconsistent with the Constitution, or an Act of Parliament.

Section 232¹⁷¹ of the 1996 Constitution reaffirms the monist approach to the incorporation of customary international law into municipal law followed in the 1993 Constitution. This approach is also subject to the qualification that any inconsistencies with the Constitution, or an Act of Parliament, will render the application of customary international void.

3 4 The Relevance of International Human Rights Law to Constitutional Interpretation

After the Second World War, non-state actors increasingly interacted with the State and today, the international and national landscape is characterised by such trans border interactions. The existence and influence exerted by actors such as transnational and multinational corporations, and inter-governmental organisations such as the UN, the International Monetary Fund, the World Trade Organisation and

¹⁷⁰ Para 103. Ngcobo CJ made this statement in respect of the United Nations Convention Against Corruption (adopted on 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41. South Africa signed the instrument on 9 December 2003 and ratified it on 22 November 2004. For a discussion on self-executing treaties within the South African context, see Dugard *International Law* 4 ed 56-57; E Ngolele "The Content of the Doctrine of Self-Execution and its Limited Effect in South African Law" (2006) 31 *SAYIL* 141-172. This study does not undertake a detailed analysis of self-executing provisions within the South African context, as these have not impacted on South African courts' application of section 39(1)(b) of the 1996 Constitution.

¹⁷¹ Section 232 states that: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

the European Union, indicate that international law is no longer confined to regulating the relations between States. Globalisation, however, should not only be understood as portraying an ideal state of affairs. In this regard, Bryde criticises the notion of an idyllic global village stating that:

“[W]e are not living in a global village but a global megapolis of the sort that we know from the third world: with a few upper class districts, heavily guarded but by no means secure, some middle class areas and a lot of slums and no-go areas.”¹⁷²

Bryde argues that, as a result of globalisation, there is an increased demand for international law that is capable of addressing concerns that can only be dealt with at an international level.¹⁷³ He argues that the emergence of concerns such as climate control and environmental conservation, international terrorism, and particularly for the purpose of this study, human suffering related to poverty, can no longer be conceived of as a domestic concern confined within State borders. Similarly, Fraser argues that poverty in particular, has too often only been presented and addressed within “the Westphalian frame” namely, as internal to the modern territorial State.¹⁷⁴ To this extent, redress has been sought by way of invoking national constitutions and national law.¹⁷⁵ Fraser argues that although this approach to redress is plausible, such a conceptualisation ignores the reality of “global poverty”.¹⁷⁶ Furthermore, she argues that by “misframing” poverty in this manner, transnational actors and external sources responsible for contributing to the causes of poverty are excluded from accountability.¹⁷⁷ In addition to this, Fraser argues that in these instances, adequate redress cannot be found at a national level.¹⁷⁸ Lastly, Fraser argues that addressing global poverty as a national concern masks the necessity for mechanisms that can provide redress on a broader scale.¹⁷⁹ Thus, there is not only a need for recognising, and reconceptualising, social problems associated with poverty as existing on scales

¹⁷² B Bryde “International Democratic Constitutionalism” in R St. John Macdonald & DM Johnston (eds) *Towards World Constitutionalism* (2005) 103.

¹⁷³ 104.

¹⁷⁴ N Fraser “Social Exclusion, Global Poverty, and Scales of (In)Justice: Rethinking Law and Poverty in a Globalising World” in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 10 10.

¹⁷⁵ 10.

¹⁷⁶ 10.

¹⁷⁷ 15-16.

¹⁷⁸ 10.

¹⁷⁹ 11.

beyond that of the territorial state. There is also a need for these issues to be addressed by legal mechanisms that function beyond the national level.

Efforts to address emerging concerns regarding the welfare and protection of the individual are particularly evident within the realm of international human rights law. The periods following the Second World War witnessed the creation of a proliferation of international instruments aimed specifically at recognising human beings as subjects of international law. Benhabib argues that, since the adoption of the UDHR, global civil society has entered into a period characterised by a “transition from *international* to *cosmopolitan* norms of justice”.¹⁸⁰ In this regard, Benhabib explains that cosmopolitan norms are afforded to individuals, who are regarded as moral and legal persons in a world wide civil society.¹⁸¹ Furthermore, these norms oblige States to treat their citizens and residents in accordance with certain human rights standards.¹⁸² This resonates with Kant’s approach to global justice namely, that municipal law cannot be seen in abstract from the international or “cosmopolitan” community in which rights are situated.¹⁸³ Thus, the individual has emerged as a subject of international law.

This is illustrated in the language of the UDHR, which indicates that individuals are recognised as bearers of universal, fundamental human rights, applicable to all citizens of the world. In addition, it is expressed in international human rights instruments such the ICESCR, the ICCPR, the CEDAW, the CAT, and the CERD. Moreover, the Preamble to the UN Charter states that Member States are determined to:

“[R]eaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom ...”

A normative feature of human rights, also embodied in the international human rights instruments above, is their claim to universality through the concept of human

¹⁸⁰ S Benhabib “Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty (2009) 103 *American Political Science Review* 691 695.

¹⁸¹ 695.

¹⁸² 695.

¹⁸³ Cassese *International Law* 336.

dignity.¹⁸⁴ This concept serves to underscore that human rights are moral rights as well as legal rights. Although not clearly defined, and certainly open to differences in interpretation, Bielfeldt argues that the meaning of human dignity can be derived from human rights, while texts protecting human rights may also provide aspects of a definition.¹⁸⁵ Human dignity is furthermore represented by principles of equality and freedom.¹⁸⁶ Within this context, the principle of equality affirms that individuals are equal in their claims to self-determination.¹⁸⁷ In regards to the principle of freedom, all human rights are argued to be “rights of freedom”, while the principle of freedom also affirms the freedom of individuals to claims of self-determination.¹⁸⁸

Domestic constitution drafters have also attempted to protect certain universal, fundamental human rights and values. The so-called “cross fertilization” between international law and national constitutions signals, and promotes, the concept of a universal recognition of these rights.¹⁸⁹ For example, amongst the more recent democracies in Africa, constitutions have been designed to give recognition to universal values, amongst them freedom, equality and human dignity.¹⁹⁰ Recognition of the universality of international human rights norms was clearly illustrated in the drafting of the 1996 South African Bill of Rights. In this case, drafters sought to include only those fundamental human rights that adhered to the requirement of “universal acceptance”. Consequently, this promotes the idea that shaping national constitutional provisions in accordance with these international and regional standards will strengthen the protection of these rights in the national sphere.

International human rights law increasingly influences more than just the drafting of constitutional provisions. In this regard, there is an increasing trend amongst these emerging democracies to include within their constitutions, provisions

¹⁸⁴ H Bielefeldt “Philosophical and Historical Foundations of Human Rights” in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* (2009) 3 5.

¹⁸⁵ 6.

¹⁸⁶ 6.

¹⁸⁷ 6.

¹⁸⁸ 6. To this extent, Beilefeldt characterises social and economic rights as rights of freedom to the extent that their fulfillment assists in the upliftment of poor social conditions, thereby: “operat[ing] as tools to broaden the space for freedom.”

¹⁸⁹ T Maluwa *International Law in Post-Colonial Africa* (1999) 129. For a detailed account of the impact of international human rights law on constitutions around the world, see T Franck & A Thiruvengadam “International Law and Constitution-Making” (2003) 2 *Chinese Journal of International Law* 467-518

¹⁸⁹ Maluwa *International Law in Post-Colonial Africa* 121-122.

¹⁹⁰ NJ Udombana “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” (2005) 5 *African Human Rights Law Journal* 51.

permitting the use of international law in constitutional interpretation. In this way, courts are cutting across the traditional monism-dualism approach, which characterises the manner in which international law is incorporated into municipal law, by seeking interpretive guidance from international human rights law. Various constitutions provide for the utilisation of international law specifically for the task of constitutional interpretation. Constitutions that have afforded international law such a role in the interpretation of their constitutional provisions include that of Angola,¹⁹¹ Malawi,¹⁹² Romania,¹⁹³ Namibia,¹⁹⁴ South Africa,¹⁹⁵ and Papua New Guinea.¹⁹⁶ The

¹⁹¹ Constitution of the Republic of Angola section 26 states the following:

“(2) Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola.

(3) In any consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.”

¹⁹² Constitution of the Republic of Malawi section 11(2) states the following:

“In interpreting the provisions of this Constitution a court of law shall promote the values which underlie an open and democratic society; take full account of the provisions of Chapter III and Chapter IV; and where applicable, have regard to current norms of public international law and comparable foreign case law.”

¹⁹³ Constitution of Romania article 20 states the following:

“(1) Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.

(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.

¹⁹⁴ Constitution of the Republic of Namibia article 144 states the following:

“Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”

¹⁹⁵ Constitution of South Africa section 39(1)(b) states the following:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum-

...

(b) must consider international law.”

¹⁹⁶ Constitution of Papua New Guinea section 39(3):

“For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to-

(a) the provisions of this Constitution generally, and especially the National Goals and Directive Principles and the Basic Social Obligations; and

(b) the Charter of the United Nations; and

(c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and

(d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms; and

(e) judgements, reports and opinions of the International Court of Justice, the European Commission of Human Rights, the European Court of Human Rights and

existence of these provisions indicate that constitutional drafters recognise the relevance of international law, and particularly international human rights law, to the interpretation of their constitutional provisions.

As early as 1988, the growing trend of using international human rights law for the purposes of, amongst others, interpreting constitutional provisions, was evidenced and acknowledged by judges at a colloquium in Bangalore, India. The colloquium was dedicated solely to the “Domestic Application of International Human Rights Norms”, and was attended by judges predominantly from Commonwealth countries¹⁹⁷ as well as from the United States of America. This colloquium underscored and summarised crucial aspects of utilising international human rights law for the purposes of constitutional interpretation in the so-called “Bangalore Principles”.¹⁹⁸ Through these Principles, the judges acknowledged international human rights instruments as important sources of guidance in cases addressing human rights and freedoms.¹⁹⁹ Furthermore, the body of jurisprudence that has developed through the interpretation of human rights and freedoms, and the application thereof, is recognised as both practically relevant and valuable to judges and lawyers.²⁰⁰ The Principles declared that the judges relied increasingly upon unincorporated international treaties in instances where domestic law (constitutional law, statute or common law) suffered from uncertainty or was incomplete.²⁰¹ Furthermore, the Principles indicated that this increased reliance upon unincorporated international treaties is affirmed and welcomed. This signalled respect for the universality of fundamental human rights, while emphasising the independent role of

other international courts and tribunals dealing with human rights and fundamental freedoms; and

(f) previous laws, practices and judicial decisions and opinions in the country; and

(g) laws, practices and judicial decisions and opinions in other countries; PNG National Legislation and

(h) the Final Report of the pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974, as affected by decisions of that House on the report and by decisions of the Constituent Assembly on the draft of this Constitution; and

(i) declarations by the International Commission of Jurists and other similar organizations; and

(j) any other material that the court considers relevant.

¹⁹⁷ Judges from Australia, India, Malaysia, Mauritius, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom and Zimbabwe.

¹⁹⁸ *The Bangalore Principles* (1988) 14 *Commonwealth Law Bulletin* 1196-1211.

¹⁹⁹ *Bangalore Principles*, Principle 2.

²⁰⁰ *Bangalore Principles*, Principle 3.

²⁰¹ *Bangalore Principles*, Principle 4 acknowledges that in most countries whose legal systems are governed by common law, international conventions only become part of, and thus directly enforceable, in municipal law once these provisions are legislatively incorporated into municipal law.

the judiciary.²⁰² Bangalore Principle 7 acknowledged that courts were, in fact, well suited to refer to unincorporated international treaties and stated the following:

“It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.”²⁰³

Although the Bangalore Principles affirmed the use of international law when interpreting national constitutions, legislation or the common law, such use was qualified. The Principles stated that local laws, traditions, circumstances, and needs must be taken into account.²⁰⁴ Furthermore, the courts should not rely upon international law where national law was clear but inconsistent with the State’s international obligations.²⁰⁵

Admittedly, the Bangalore Principles were developed from the opinions and judicial interpretive activities of only a small sub-set of judges from Commonwealth states (and one non-Commonwealth judge). However, their exchange underscores the necessity of judges to acknowledge that international law, particularly international human rights law, is increasingly relied upon to enrich constitutional interpretation beyond the traditional monism-dualism divide.

Contemporary scholars have provided similar evidence indicating the increasing tendency among common law courts to rely on public international law, not yet incorporated into their municipal legal system, for the purposes of constitutional interpretation. Waters argues that the rise of international human rights treaties, and supra-national institutions, have drawn domestic courts into a tension between their obligations under a dualist system, and the universal normative aspirations of international human rights law. Through a phenomenon she describes as “creeping monism”, Waters argues that common law courts are gradually utilising a more flexible approach to the use of unincorporated human rights treaties in the interpretation of constitutional provisions.²⁰⁶ Thus, common law courts are no longer

²⁰² *Bangalore Principles*, Principle 5.

²⁰³ *Bangalore Principles*, Principle 7.

²⁰⁴ *Bangalore Principles*, Principle 6.

²⁰⁵ *Bangalore Principles*, Principle 8.

²⁰⁶ MA Waters “Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties” (2007) 107 *Columbia Law Review* 628-705 633.

restricting themselves to the distinction of incorporated and unincorporated treaties, as required by dualism, but are adopting “monist-orientated interpretive incorporation techniques”. Waters argues further that such a reliance on unincorporated treaties does not fall into the traditional category of binding treaty law, nor can their use be classified as providing evidence of customary law. Instead, these interpretative techniques are being categorised in international law as operating in a “grey zone”, utilised for their persuasive value in international law, or as a means to incorporate soft law sources into municipal law.²⁰⁷ Slaughter has described this interaction between national law and international law as a judicial interaction characteristic of “judicial globalization”.²⁰⁸ She describes this as a

“diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law.”²⁰⁹

According to Slaughter, at the core of each interaction described by judicial globalization, lies the recognition of “participation in a common global enterprise of judging, an awareness that provides a foundation for a global community of law.”²¹⁰ She adds that in this endeavour, judges, litigants, and lawyers alike, are realising that they form part of a wider world.²¹¹

Alston exemplifies the value of international human rights law to the process of interpreting constitutional provisions in the following statement:

“If the international human rights regime can succeed in acting as a force for convergence [in approaches across different domestic jurisdictions], in much the same way as other developments act in an increasingly globalised world economy, the prospects that the new bills of rights will not only survive but will flourish, should be greatly enhanced.”²¹²

This statement reflects the powerful way in which international human rights law can endorse and support the goals, values, and rights entrenched in a bill of rights.

²⁰⁷ 634.

²⁰⁸ A Slaughter “Judicial Globalization” (2000) 40 *Virginia Journal of International Law* 1103 1104.

²⁰⁹ 1104.

²¹⁰ 1104.

²¹¹ 1124.

²¹² P Alston “A Framework for the Comparative Analysis of Bills of Rights” in P Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 1 14.

South African courts have acknowledged the importance of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution as a means of positioning themselves within the broader dialogue of the international community. As indicated in *Coetzee v Government of the Republic of South Africa*,²¹³ Sachs J held the following:

“In deciding whether or not sending people to jail for not paying their debts is justifiable in an open and democratic society based on freedom and equality we need to locate ourselves in the mainstream of international democratic practice.”²¹⁴

The international instruments that Sachs J relied on for assistance included the American Declaration of the Rights and Duties of Man,²¹⁵ the AmCHR,²¹⁶ the ICCPR,²¹⁷ and the Fourth Protocol to the European Convention,²¹⁸ which the Court invoked through section 35(1) of the 1993 Constitution. Furthermore, in *S v Williams*, Langa J held the following:

“While our ultimate definition of these concepts [contained in s 11(2) of the interim Constitution] must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.”²¹⁹

The South African Constitution has been designed to attend to the domestic needs and values of South African citizens, and was created in response to South Africa’s unique past. For this reason, the document can be characterised as “inward-looking”.²²⁰ However, the Constitution is also outward looking to the extent that it was designed to facilitate the transformation of a society that would be established upon new social and political goals.²²¹ In this context, the Constitution must be recognised as a “living instrument”, which serves a society that is in a process of

²¹³ 1995 4 SA 631 (CC).

²¹⁴ Para 51.

²¹⁵ Para 52.

²¹⁶ Para 52.

²¹⁷ Para 53.

²¹⁸ Para 53.

²¹⁹ *S v Williams* 1995 3 SA 632 (CC) para 23.

²²⁰ Ford “International and Comparative Influence” in *Constitutional Democracy in South Africa* 53.

²²¹ 53.

change and reformation.²²² International human rights law can be particularly relevant and informative in providing valuable guidance to the substance of these new rights and freedoms. Within the South African context, such a consideration of international human rights law should not be viewed as an element in a procedural checklist of interpretative strategies. Rather, the injunction in section 39(1)(b) of the 1996 Constitution should be considered within the context of the Constitution as a whole and the overall goals that it seeks to achieve. In this regard, it is recalled that both the 1993 and 1996 Constitutions were created with the purpose of establishing a new democratic order. The values, which form part of the bedrock of this new social order, are expressed in the Preamble,²²³ as well as section 1²²⁴ of the 1996 Constitution.²²⁵ Furthermore, section 39(1)(a) of the 1996 Constitution emphasises the values that should guide the interpretation of the Bill of Rights namely, that:

²²² Udombana (2005) *African Human Rights Law Journal* 56. The view that constitutions should be regarded as “living instruments” is strongly opposed by so-called originalists who deny the legitimacy of judicial comparative engagement and argue that the national legal order does not recognise international law (or foreign law) as a legitimate source of law suitable for the interpretation of a Constitution. This view is especially prevalent in debates concerning constitutional interpretation in the United States. See *Lawrence v Texas* 539 U.S. 558, 598 (2002) (Scalia, J., dissenting), *Atkins v Virginia* 536 U.S. 304, 347-48 (2002), *Stanford v Kentucky*, 492 U.S. 361 (1989). See also JEK Murkens “Comparative Constitutional Law in the Courts: Reflections on the Originalists’ Objections” (2008) 41 *Verfassung und Recht in Übersee* 32-50; N Dorsen “The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Scalia and Justice Stephen Breyer” (2005) 3 *International Journal of Constitutional Law* 519-541; K Schiemann “Response to The Judge as Comparatist” (2005-2006) 80 *Tulane Law Review* 281 295; BS Markesinis & J Fedtke *Engaging with Foreign Law* (2009) 192.

²²³ The Preamble to the 1996 Constitution states the following:

“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
 Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”

²²⁴ Section 1 of the Constitution of the Republic of South Africa states the following:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voter’s roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

²²⁵ The wording of section 35(1) of the 1993 Constitution also underscores that these values are to underlie the entire interpretive exercise. Section 35(1) states the following:

“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.”

Furthermore, in *S v Zuma* 1995 2 SA 642 (CC) para 17, Chaskalson J stated the following:

“[I]t cannot be too strongly stressed that the Constitution does not mean whatever we wish it to mean. We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which is to be respected. If the language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination.”

“(1) 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.”

South Africa’s domestic courts are therefore tasked with constructing decisions that will reflect the values inherent in the Constitution. As a system that follows a dualist approach²²⁶ to the incorporation of treaties into the municipal system, the inclusion of section 39(1)(b) of the 1996 Constitution is truly unique to the South African legal order. Sections 39(1)(a) and 39(1)(b) place courts in an interesting position whereby they are, on the one hand, mandated to interpret the Bill of Rights in a manner that will promote domestic, democratic values, while regarding South Africa’s history and local context. On the other hand, courts are also required to consider public international law when delineating the content and meaning of these constitutional provisions.

Ford states that by having such recourse to global standards and experiences, interpreters are able to determine what a society based on these values might require.²²⁷ The consideration of public international law is thus a tool to be used in the interpretation of the Bill of Rights that can assist in informing the values of our society. Drawing from international jurisprudence as a means of strengthening a domestic decision can serve an additional dual purpose. Firstly, a domestic court’s decision can gain a certain degree of legitimacy when a court’s authority is embedded in the support of international jurisprudence.²²⁸ Secondly, the international norms are even further fortified when relied upon by domestic courts.²²⁹ Constitutional mechanisms like that of section 39(1)(b) of the 1996 Constitution can serve as judicial conduits whereby courts can gain access to established international jurisprudence for guidance, perspective, inspiration, and even support for a certain approach.²³⁰

However, the consideration or use of international law in constitutional interpretation will not necessarily lead to an expansion of the meaning or scope of a

²²⁶ The treatment of self-executing treaties, as dealt with in section 231(3) of the 1996 Constitution, is an exception to this.

²²⁷ Ford “International and Comparative Influence” in *Constitutional Democracy in South Africa* 33.

²²⁸ MA Burnham “Cultivating a Seedling Charter: South Africa’s Court Grows its Constitution” (1997) 3 *Michigan Journal of Race and Law* 29 44.

²²⁹ 44.

²³⁰ 59.

particular domestic provision.²³¹ The nature of the constitutional provision, as well as the nature of an international treaty, may circumscribe its relevance to the interpretive exercise.²³² Furthermore, a court can derive assistance from an international norm as a persuasive force in the interpretation of a constitutional provision that is similar, or identical, to that of the international norm.²³³ In this regard, Neumann argues that, on a functional level, the international norm may provide courts with empirical evidence indicating the success or failure of a certain interpretation and the consequences thereof.²³⁴ Furthermore, through the consideration of international law, courts may be informed of how values are realised in other domestic jurisdictions and at an international level, thus challenging them in the way they have addressed the fulfilment of such values in their own jurisdictions.²³⁵

South African courts may profit from a consideration of international human rights law, particularly within the context of interpreting socio-economic rights. Firstly, as a relatively new constitutional democracy, which protects socio-economic rights as justiciable rights, it may be argued that South Africa's socio-economic rights' jurisprudence may gain useful insight from more developed regional and international standards that engage further with the scope and content of socio-economic rights. Secondly, as highlighted in the discussion above, certain socio-economic rights entrenched in the 1993 and 1996 Constitutions were inspired by, or borrowed from, international human rights instruments. These instruments may also guide South African courts in their interpretative process. Lastly, a connection has been identified between the use of international law in the interpretation of socio-economic rights, and the advancement of transformative constitutionalism²³⁶ in South African courts. The use of international law may provide insight into the meaning and

²³¹ GL Neumann "International Law as a Resource in Constitutional Interpretation" (2006) 30 *Harvard Journal of Law and Public Policy* 177 185.

²³² 185-186. Neumann gives the example of a treaty created on a short-term, ad hoc basis between a certain set of states. The use of such a treaty in the interpretation of a constitutional provision will depend however, on whether it provides a particular standard that may appear relevant.

²³³ 187.

²³⁴ 187.

²³⁵ 187.

²³⁶ See also K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150. The concept of transformative constitutionalism was defined by Klare as:

"[A] long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law."

scope of socio-economic rights in a manner that would assist South African courts, and other adjudicative bodies, in their call to transformative adjudication.²³⁷ In this regard, Liebenberg states that:

“This process of considering international law standards promotes the kind of critical self-reflection which should underpin the development of a transformative jurisprudence on socio-economic rights.”²³⁸

As discussed above, South African courts are mandated to consider international human rights law when interpreting the Bill of Rights. However, the abovementioned discussion provides further evidence that this source of law can make a meaningful contribution to the interpretive process. However, the use of international human rights law for the purposes of interpreting constitutional provisions is not without its critics. As the Constitution mandates South African courts to consider international law when interpreting the Bill of Rights, many of the criticisms directed at the use of international law within the context of constitutional interpretation are overcome. However, even within the South African context, the use of this source of law as an interpretive tool is not necessarily free from legitimacy concerns. For example, Ford submits that the manner in which courts consider international human rights law for the purposes of constitutional interpretation may challenge the democratic legitimacy of this source of law.²³⁹ This concern raises two distinct challenges. Firstly, judges must be transparent in justifying how they arrive at their conclusions when relying on international law.²⁴⁰ Secondly, judicial outcomes must be based upon value-oriented reasoning. This implies that courts must adapt the value-based principles from other systems into a local context, and thus aim at resolving local issues in a justified manner.²⁴¹ Therefore, a key objective of the interpretive project should be to create an indigenous interpretation that is applicable to the domestic context.

Furthermore, international law may be accused of suffering from ambiguity, and is thus argued to be irrelevant. Kirby J argues that such cases may indeed exist, however, many international law principles have been elaborated on and are therefore detailed. These include decisions handed down from the European Court of Human

²³⁷ Liebenberg *Socio-Economic Rights* 102.

²³⁸ 117.

²³⁹ Ford “International and Comparative Influence” in *Constitutional Democracy in South Africa* 49.

²⁴⁰ 49.

²⁴¹ 49.

Rights (“ECtHR”) and the Inter-American Court of Human Rights (“IACtHR”).²⁴² More particularly, the General Comments issued by the HRC, as well as the CESCR, are designed specifically with the aim of assisting States parties with adhering to the obligations created under their respective Covenants. Furthermore, these General Comments help to clarify and develop the meaning of provisions contained in the relevant international instruments and are particularly rich in content. Therefore, the existence of ambiguity and vagueness of international human rights is diminishing as international adjudicative bodies interpret these rights.

Lastly, scholars such as McGinnis and Somin argue that the international law-making processes used in formulating human rights norms are undemocratic, and therefore inferior to the more democratic processes offered within the municipal system of a democracy.²⁴³ The authors only apply this argument to so called “raw” international law that has not yet been ratified by a domestic, democratic process, or incorporated into a municipal system of law by way of legislation. The authors argue that a democracy is better placed to afford certain rights with the status of fundamental human rights.²⁴⁴ Furthermore, the authors argue that the use of international human rights law as a tool in constructing an interpretation can result in displacing domestic law-making processes, as it would result in an outcome that would differ if domestic political decision-making were the only determining factor.²⁴⁵

Despite such criticisms, it must be recalled that, within the South African context, international human rights law is only one tool of interpretation used to achieve a value-orientated outcome and is not given a determinative role that dictates to courts the decisions they should take. However, the application of section 39(1) of the 1996 Constitution (and section 35(1) of the 1993 Constitution) still challenges courts to provide consistent, transparent and qualitative reasoning when relying on international human rights law.

²⁴² M Kirby “International Law-The Impact on National Constitutions” (2006) 21 *American University International Law Review* 327 351.

²⁴³ JO McGinnis & I Somin “Democracy and International Human Rights Law” (2009) 84 *Notre Dame Law Review* 1739 1739.

²⁴⁴ 1741.

²⁴⁵ 1748.

3 5 Conclusion

In this chapter, I demonstrated that international human rights law played an important and determinative role in the formulation of socio-economic rights contained in the 1993 and 1996 Bill of Rights. This prominent role underscores the significant weight that was attached to this source of law during the drafting process and highlights the belief held that international human rights law encapsulates a universal standard of protection of fundamental human rights. Moreover, this historic connection between international human rights law and the socio-economic rights contained in the Bill of Rights serves to strengthen the motivation for adjudicative bodies to consider international human rights law when interpreting socio-economic rights.

Furthermore, I described those constitutional provisions in the 1993 and 1996 Constitutions that regulate the status of international treaties and customary international law within the South African legal system. In addition, I examined the provisions in the 1993 and 1996 Constitutions that oblige courts to consider international human rights law in the interpretation of the Bill of Rights. In this discussion, I illustrated the differences between the abovementioned provisions, and highlighted the changes effected by these provisions to the approach followed by the courts before the adoption of the 1993 Constitution. Furthermore, I emphasised that the entrenchment of section 35(1) in the 1993 Constitution, and section 39(1)(b) of the 1996 Constitution, is a clear vindication of the State's decision to re-enter the community of nations, and remain receptive to this community's evolving normative values. In this chapter, I also engaged with arguments that support as well as oppose the use of international law in the process of constitutional interpretation. The analysis of these arguments indicated that despite the inclusion of section 35(1) and section 39(1)(b), South African courts are not exempt from providing clearly justified, consistent, and transparent decisions when considering international human rights law in the interpretation of the Bill of rights. This conclusion thus forms a point of departure for the following chapters 4 and 5, which will investigate the manner in which international human law has been invoked by South African courts in their endeavour to interpret rights entrenched in the Bill of Rights.

Chapter 4

A Critical Evaluation of the South African Courts' Application of Section 35(1) of the 1993 Constitution and Section 39(1)(b) of the 1996 Constitution

4 1 Introduction

Since the 1993 Constitution came into force, South African courts have been afforded the opportunity to draw from the developing body of international law when giving meaning and content to the Bill of Rights. As discussed in chapter 3, section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution oblige courts to consider international law and, in doing so, establish this source of law as an interpretive tool in the interpretation of fundamental rights. However, the 1993 and 1996 Constitutions do not expressly provide a methodology that is able to guide courts in their endeavour to consider international law in this context. Thus, it is up to the courts to determine which sources should be considered, and the extent of their engagement with these, when applying section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution.

In this chapter, I focus on the South African courts' application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution in the interpretation of the Bill of Rights. My aim is to firstly, examine the Constitutional Court's development of a methodological approach to the application of the abovementioned provisions. To achieve this, I identify and analyse those cases in which the Constitutional Court has invoked section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. In particular, my analyses focus on the decisions delivered in *Makwanyane*, *Grootboom*, *AZAPO*, and *Glenister*.

Secondly, I analyse the South African courts' application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, with the aim of identifying misconceptions that have evolved in the courts' application of these provisions and their consideration of international law sources. My analysis is not

limited to social economic rights jurisprudence, but will canvass the courts' use of international law in constitutional interpretation generally.¹

Lastly, I identify the possible causes of these misconceptions, and focus specifically on the impact of various factors such as legal education, the accessibility and availability of resources, the role of legal representation, *amicus curiae*, and the judges, on the courts' consideration of international law.

4 2 The Development of a Methodological Approach

In this analysis, I have selected four judgments delivered by the Constitutional Court for their engagement with the role of section 35(1) of the 1993 Constitution, or section 39(1)(b) of the 1996 Constitution. These include the decisions delivered in *Makwanyane*, *Grootboom*, *AZAPO*, and lastly, *Glenister*.² The discussion below analyses the contribution made by each case to the development of a methodology that can assist courts in their application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, and guide them in their consideration of international law.

4 2 1 *S v Makwanyane*

In *Makwanyane*, the South African Constitutional Court was required to determine the constitutionality of the death penalty as a competent sentence for the crime of murder in light of various fundamental rights entrenched in the 1993 Constitution.³ In its determination, the Court considered the status of this form of punishment in international law. In this regard, the court stated the following:

¹ As elaborated on in the Introduction, reported decisions of the Constitutional Court and High Courts handed down between 1996 and 2014 were examined to identify the courts' approach. These cases were selected on the basis of their reliance on section 35(1) of the 1993 Constitution, or section 39(1)(b) of the 1996 Constitution, with the specific aim of identifying the manner in which the provisions were applied, and the extent to which international law was used as an interpretive tool.

² This analysis draws largely from a similar investigation undertaken by Du Plessis on the role of international law in the interpretation of the Bill of Rights. See Du Plessis "Beyond Parochialism?" in *Globalization and Private Law* 145-162.

³ These included the right of everyone to "equality before the law and to equal protection of the law", entrenched in section 8, every person's right to life entrenched in section 9, every person's right to "respect for and protection of his or her dignity" protected in section 10 and lastly, the prohibition of "cruel, inhumane or degrading treatment or punishment", protected in section 11(2) of the 1993 Constitution.

“In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, 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, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.”⁴

The Court’s reference to binding and non-binding law was accompanied by a footnote wherein Chaskalson P relied upon Dugard’s assertion that section 35(1) of the 1993 Constitution required that regard must be given to all the sources recognised by Article 38(1) of the Statute of the ICJ namely:⁵

- “(a) international conventions, whether general or particular, establishing rules expressly recognised by the consenting states;
- (b) international custom, as evidence of a general practice accepted by law;
- (c) the general principles of law recognised by civilized nations; and
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”⁶

Consequently, in what has been termed the “framework dictum”,⁷ Chaskalson P introduced a methodological approach whereby international law is to be used as an interpretive framework within which the Bill of Rights is to be evaluated and understood. Furthermore, Chaskalson P established that a generous selection of international law sources may be relied upon in the context of section 35(1) of the 1993 Constitution namely, binding and non-binding law.⁸ This statement deserves further consideration to establish the differences between binding law and non-binding law, as the definition of non-binding law, and the sources that qualify as such, have received minimal attention in South African case law.

⁴ *S v Makwanyane* 1995 3 SA 391 (CC) para 35 (footnotes omitted).

⁵ Para 35 footnote 46. Article 38(1) of the ICJ provides a statement of the sources of international law that may be used by the ICJ. However, it has been accepted that this is the most comprehensive statement on the existing sources of international law in general. For a comprehensive discussion on the sources of international law as established in article 38 of the Statute of the ICJ, see I Brownlie *Principles of Public International Law* 7 ed (2008) 3-29.

⁶ *S v Makwanyane* 1995 3 SA 391 (CC) para 35 footnote 46. In this footnote, Chaskalson P referred to a contribution made by John Dugard in Dawid van Wyk *et al* (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 192-5.

⁷ Du Plessis “Beyond Parochialism?” in *Globalization and Private Law* 149.

⁸ *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

As elaborated in chapter 3, sections 231(1) - (3) of the 1993 Constitution, and section 231 of 1996 Constitution, regulate the status of international treaties within municipal law. According to this section, binding international law refers to international treaties to which South Africa has become a party, through the signing and ratification thereof. To this extent, South Africa is bound to the international treaty or convention under international law. Furthermore, section 231(4) of the 1993 Constitution and section 232 of the 1996 Constitution provide that international customary law is binding upon South African municipal law, subject to being consistent with an Act of Parliament and the Constitution. Therefore, the abovementioned treaties and international customary law to which South Africa is bound, constitutes binding international law.

Within the South African context, non-binding international law may include treaties to which the State cannot be a party, such as the ECHR, or the AmCHR. However, non-binding international law may also include the category of so-called “soft law”. Wallace and Martin-Ortega state that there is no accepted definition of soft law.⁹ However, they define the category of soft law as:

“[N]on-legally binding international instruments ... which contain[s] norms, principles, commitments or standards expected to be complied with by states, and increasingly non-state actors.”¹⁰

Therefore, although not legally binding, non-compliance with soft law instruments can still have negative consequences for a State.¹¹ According to their definition, this includes treaties that contain general obligations, which they term “legal soft law”.¹² In addition, they define soft law as including voluntary resolutions, statements of intent, codes of conduct produced by international and regional organisations, and statements made by individuals.¹³ Wallace and Martin-Ortega submit that statements made by individuals would include, for example, international principles that have been articulated by groups of eminent international lawyers, which they describe as “non-legal soft law”.¹⁴ In addition, they argue that soft law must exist in written

⁹ R Wallace & O Martin-Ortega *International Law* 7 ed (2013) 30.

¹⁰ 30.

¹¹ F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 30. Viljoen states that a State’s non-compliance with soft law may impact negatively on a State’s international relations for example.

¹² Wallace & Martin-Ortega *International Law* 30.

¹³ 30.

¹⁴ 30.

form.¹⁵ According to Cassese, soft law is characterised by the following three features. Firstly, soft law points towards emerging modern trends whereby international organisations and collective bodies have the task of promoting action taken on issues of general concern.¹⁶ Secondly, soft law addresses new concerns, which previously did not draw the attention of the international community.¹⁷ Lastly, soft law is created when States are unable to reach complete agreement on the standards and views contained in these instruments or documents to the extent that they are able to agree on legally binding obligations.¹⁸ As such, soft law is not legally binding, however, it manifests a certain measure of agreement in the form of guidelines, statements reflecting common positions, or policies.¹⁹ In accordance with the abovementioned features, a fundamental difference between a legally binding agreement and soft law is the intention with which each is created.²⁰ Guzman and Meyer illustrate the definition of soft law in the following way:

“In our view, ... , soft law is best understood as a continuum, or spectrum, running between fully binding treaties and fully political positions. Viewed in this way, soft law is something that dims in importance as the commitments of states get weaker, eventually disappearing altogether.”²¹

Arguably, an instrument or document categorised as soft law may develop into legally binding international law or so-called “hard law”.²² For example, sufficient State practice and the requisite *opinio iuris* may result in soft law developing into customary international law at a later stage.²³ In addition, provisions contained in a soft law instrument may later be included in a treaty.²⁴ Viljoen makes the important argument that soft law instruments such as statements made by UN and regional quasi-judicial human rights treaty bodies, which include General Comments and Concluding Observations, may attain significant persuasive force through various factors such as their quality, dissemination, and subsequent use by the domestic

¹⁵ 30.

¹⁶ Cassese *International Law* 196.

¹⁷ 196.

¹⁸ 196.

¹⁹ 196.

²⁰ 196.

²¹ A Guzman & T Meyer “International Soft Law” (2010) 2 *Journal of Legal Analysis* 171 173.

²² Cassese *International Law* 196.

²³ 197.

²⁴ Wallace & Martin-Ortega *International Law* 30.

court.²⁵ This suggests that different weight should be attached to different soft law instruments.

In *S v Makwanyane*, it is clear that Chaskalson P regarded Article 38(1) of the Statute of the ICJ as a sufficient statement of the sources of international law to be considered in the Court's application of section 35(1) of the 1993 Constitution.²⁶ Importantly, it appears that Chaskalson P hereby regards international soft law as fitting comfortably within the definitions provided in Article 38(1) of the Statute of the ICJ. Dugard supports Chaskalson P's approach and in particular, his interpretation of the term "public international law" within the context of section 35(1) of the 1993 Constitution, which includes only those sources of international law accepted as traditionally falling within the scope of Article 38(1) of the Statute of the ICJ and treaties that South Africa has not yet signed.²⁷ Moreover, Dugard argues that such an interpretation would grant the courts access to the entire field of international human rights law, as intended by the drafters of the Constitution.²⁸

However, Chaskalson's P's distinction between binding and non-binding international law has been subject to criticism in light of the sources established in Article 38(1) of the Statute of the ICJ. In particular, Botha and Olivier argue that Chaskalson P's reference to "non-binding" international law in *Makwanyane* led to the assumption that he was taking a progressive approach towards the sources of international law by including sources that did not fit into the traditional sources

²⁵ Viljoen *International Human Rights Law in Africa* 31.

²⁶ Dugard confirms his support of Chaskalson P's approach in an article published subsequent to the decision.

²⁷ J Dugard "International Law and the "Final" Constitution" (1995) 11 *SAJHR* 241 242. In this article Dugard confirms his understanding of "public international law" within the context of section 35(1) of the Constitution in the following passage:

"In order to ensure that there is no backsliding in this regard and that courts do not confine their enquiries to those treaties to which South Africa is a party, it would be wise to include a subclause to s 35(1) which makes it clear that a broad approach is to be adopted to the interpretation of the phrase 'public international law'. Such a clause might read:

' "Public international law" in section 35(1) is to be interpreted to include all the sources of international law referred to in Article 38(1) of the Statute of the International Court of Justice. A court may have regard not only to treaties to which South Africa is a party but also to other treaties which may assist the court in ascertaining the relevant norm of international law."

Furthermore, Dugard emphasised that section 116(2) of the 1993 Constitution in particular, was a clear indication that the drafters of the 1993 Constitution intended that the entire "field of international human rights law" was to be accessible within the context of section 35(1). Section 116(2) of the 1993 Constitution states that the Human Rights Commission must ensure that national and provincial legislation must comply with "norms of international human rights law which form part of South African law or to other relevant norms of international law".

²⁸ Dugard (1995) *SAJHR* 243.

mentioned in Article 38(1) of the Statute of the ICJ namely, soft law.²⁹ They furthermore question Chaskalson P's reference to Dugard in the case, and his emphasis on only those traditional sources of international law stated in Article 38(1) of the Statute of the ICJ. Consequently, they question whether Chaskalson P's reference to "non-binding" international law was not merely a reference to treaties to which South Africa is not a party, and to articles (c) and (d) of Article 38(1) of the Statute of the ICJ. In particular, these provisions refer to general principles of law recognised by civilised nations and judicial decisions and teachings of the most highly qualified publicists.³⁰

The *Makwanyane* judgment therefore sparked a discussion on the adequacy of Article 38(1) of the Statute of the ICJ as a method of determining the status of all sources of international law. According to Olivier, Chaskalson P's statement limited non-binding international law sources, within the context of section 35(1) of the 1993 Constitution, to only those "traditional" sources stated in Article 38(1) of the Statute of the ICJ.³¹ She argues further that Dugard's interpretation excludes certain non-binding international sources that do not fit in the traditional categories provided by Article 38(1) of the Statute of the ICJ.³² Oliver argues in particular that resolutions adopted by the UNGA, and specifically the UDHR, are such examples and, although very valuable, fall outside the scope of the traditional sources of international law.³³ Arguing otherwise, Maluwa suggests that Chaskalson P did in fact intend for the scope of international law to include both the "hard" law of customary rules, treaty provisions, and judicial decisions *as well as* the soft law contained in resolutions, declarations, and guidelines drawn up by international bodies and international law not binding on South Africa.³⁴

²⁹ Botha & Olivier (2004) *SAYIL* 42 46.

³⁰ 46.

³¹ M Olivier "Interpretation of the Constitutional Provisions Relating to International Law" (2003) 6 *PER* 26 30.

³² 30.

³³ 30. Olivier has challenged the adequacy of the traditional sources of international law as stated in article 38(1) of the Statute of the ICJ as a method of determining the status of all international human rights law. See M Olivier "The Relevance of "Soft Law" as a Source of International Human Rights" (2002) 35 *CILSA* 289-307. Olivier has argued that the legal status of UNGA Resolutions can be adequately accommodated under the category of "soft law", which is not legally binding and therefore cannot constitute a new source of international law, but still remains legally relevant. Alternatively, she has suggested that under exceptional circumstances, the possibility exists that the legal status of such resolutions may be determined within the context of customary international law.

³⁴ T Maluwa "The Incorporation of International Law and its Interpretational Role in Municipal Legal Systems in Africa: An Exploratory Survey" (1998) 23 *SAYIL* 45 59-60.

Challenges to the adequacy of Article 38(1) of the Statute of the ICJ as a means of determining the status of the sources of international law has not, however, led to an exclusion of certain non-binding international law sources, such as the UDHR, in practice. This was seen for instance in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*.³⁵ In this judgment, Sachs J affirmed Dugard's view that section 35(1) of the 1993 Constitution requires that regard be had to (a) treaties ratified by South Africa, (b) customary rules accepted by South African courts, (c) "international law contained in general treaties, custom, general principles of law, the writings of jurists, and the decisions of international and municipal courts". Furthermore, Sachs J referred to Dugard and his reference to section 116(2) of the 1993 Constitution, whereby the Human Rights Commission must take into account "other relevant norms of international law" to support his contention.³⁶ Thereafter, Sachs J proceeded to consider a vast range of sources of international human rights law that included the traditional sources stated in Article 38(1) of the Statute of the ICJ, references to the UDHR, and the General Comments of the HRC in respect of the ICCPR.³⁷ Sachs J therefore understood Dugard's statements as

³⁵ 1996 3 SA 165 (CC) ("*Ex Parte Gauteng Provincial Legislature*").

³⁶ *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* footnote 9.

³⁷ Sachs J conducted a laudable analysis into principles of international law relating to the protection of minority rights, which aimed to determine whether international law required a different interpretation of section 32(c) of the Constitution as that proposed by the Court. Sachs J contextualised his investigation by citing the objectives listed in article 26(2) of the UDHR and article 13(1) of the ICCPR. Sachs J also traced the historical development of minority protection from its initial existence as a tolerance toward minorities, to the development of the protection of national groups and the eventual shift towards guaranteeing the rights of individuals. This included examining those developments made under the League of Nations and the United Nations, and included an investigation into the relevance of the ICCPR. Reference was made to Dr Capotorti, the Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and his work on the application of article 27 of the ICCPR as well as to authors that supported minority rights and debated the application of article 27. Sachs J also highlighted the creation of instruments that affected the rights of migrant workers and indigenous peoples for example, the ILO Convention C143: Migrant Workers (Supplementary Provisions) Convention (Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers) (60th Conference Session Geneva 24 June 1975) and the ILO Convention C169: Indigenous and Tribal Peoples Convention (Convention Concerning Indigenous and Tribal Peoples in Independent Countries) (76th Conference Session Geneva 27 June 1989). Furthermore, Sachs J referred to the adoption of a General Comment by the UN HRC that focuses on the interpretation of section 27 of the ICCPR and identified six interrelated principles that operated in international law protecting minority rights. These included the right to existence, non-discrimination, equal rights, the right to develop autonomously within civil society, affirmative action, and positive support from the State. In his examination of these principles, Sachs J referred to international instruments including the UN Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 ("Convention on the Crime of Genocide"), the UDHR, the ICCPR, the ECHR, the

endorsing a broad definition of the term “public international law”, which includes a wide selection of sources that still fall within the scope of Article 38(1) of the Statute of the ICJ.³⁸

As will be discussed further in chapter 5, the Constitutional Court’s decision in *Grootboom* illustrates another example in which the Constitutional Court clarified the role of non-binding law in the interpretation of the Bill of Rights. In this case, Yacoob J relied upon General Comments of the CESCR in a decision that centred on the interpretation of the right to adequate housing as protected in the 1996 Constitution. The Constitutional Court’s consideration of these General Comments, and its reliance on certain aspects of this source in the interpretation of the right to adequate housing, has clarified that non-binding international law includes the General Comments adopted by the CESCR in the interpretation of rights.³⁹

In summary, *Makwanyane* underscored the obligation to consider international human rights law in the process of evaluating and understanding the rights entrenched in the Bill of Rights. Furthermore, it established a generous approach to the use of sources of public international law as tools in the process of interpreting the Bill of Rights. However, as will be discussed in part 4 3 2 below, Chaskalson P appears to err in the following statement in which he claims: “We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.”⁴⁰ While this statement highlights the fact that courts’ need not follow the international law and foreign law sources consulted within the context of section 35(1) of the 1993 Constitution, Chaskalson P neglected to add that South African courts are obliged to follow international law binding upon the Republic in terms of section 231 of the

CERD, the CEDAW, jurisprudence from the ECtHR namely, the *Belgian Linguistics Case* (1968) 1 EHRR 252 as well as *Kjeldsen, Busk, Madson and Pedersen v Denmark* Series A, No 23, 7 Dec 1976. Furthermore, Sachs J referred to the Convention on the Crime of Apartheid, UNESCO, ‘Convention Against Discrimination in Education’ (14 December 1960) and the Framework Convention for the Protection of National Minorities (entered into force 1 February 1998). See *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 44-68.

³⁸ Although *Ex Parte Gauteng Provincial Legislature* provides evidence that a wide breadth of sources may be considered in the application of section 35(1) of the 1993 Constitution, the methodology applied by the Court in this case in its consideration of soft law has been criticised. These criticisms will be explored in chapter 5. See E de Wet “The ‘Friendly but Cautious’ Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks” (2004) 28 *Fordham International Law Journal* 1529-1565.

³⁹ Du Plessis “International Law and the Evolution of (Domestic) Human-Rights Law” in *New Perspectives* 331.

⁴⁰ *S v Makwanyane* 1995 3 SA 391 (CC) para 39.

Constitution.⁴¹ In this regard, Du Plessis argues that Chaskalson P erroneously created the belief that international law and foreign law are equivalent in constitutional interpretation, a misconception that will be discussed more comprehensively below.⁴² Despite these shortcomings, *Makwanyane* represents a significant statement on the relevance of section 35(1) of the 1993 Constitution (and, by implication, section 39(1)(b) of the 1996 Constitution)⁴³ and has assisted in guiding courts in their application of this provision.

4 2 2 *Azanian Peoples Organisation v President of the Republic of South Africa*

The 1993 Constitution instructed Parliament to provide for the granting of amnesty under certain circumstances.⁴⁴ In response to this, the Promotion of National Unity and Reconciliation Act 34 of 1995⁴⁵ was enacted, establishing the Truth and Reconciliation Commission. According to section 20(7) of the Act, once granted amnesty, a person would no longer be held criminally liable for the act, omission or offence in question. Furthermore, persons granted amnesty would not incur any civil liability towards victims who incurred damages as a result of human rights violations during apartheid.⁴⁶ The applicants contested the constitutionality of section 20(7) of the Act, claiming that the section was inconsistent with section 22 of the 1993 Constitution.⁴⁷ The applicants argued further that the State was obliged by international law to prosecute those responsible for gross human rights violations.

⁴¹ Du Plessis “Beyond Parochialism” in *Globalization and Private Law* 150.

⁴² 150.

⁴³ The *Makwanyane* decision, by implication, also affects the consideration of international law in terms of section 39(1)(b) of the 1996 Constitution since this provision is drafted in similar terms as section 35(1) of the 1993 Constitution. Furthermore, section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution serve the same purpose namely, to establish international law as an interpretative tool in the interpretation of fundamental rights.

⁴⁴ The 1993 Constitution states the following:

“In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.”

⁴⁵ This was also referred to in colloquial terms as the Truth and Reconciliation Act.

⁴⁶ Section 20(7) of the Act also provided that the State would also be exempt from any civil liability if such acts, omissions or offences were committed by a person during the course, and within the scope, of their employment by the State. Further provision was made for the discharging of other bodies, organisations, or persons from vicarious liability resulting from the acts or omissions.

⁴⁷ Section 22 of the 1993 Constitution protected the right of every person to have justiciable disputes settled in a court of law or, where appropriate, another independent and impartial forum.

Accordingly, the applicants submitted that provisions authorising the granting of such amnesty resulted in a breach of international law.⁴⁸ In the majority judgment, Mahomed DP stated the following:

“The issue which falls to be determined in this Court is whether s 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of international law.”⁴⁹

Furthermore, Mahomed DP interpreted section 231(3) of the 1993 Constitution to mean that international treaties that have been acceded to, or ratified, by Parliament only become part of municipal law, and therefore enforceable before South African courts by private individuals, once they are legislatively enacted into municipal law,⁵⁰ and on condition that the agreement is consistent with the Constitution.⁵¹

In addition, Mahomed DP found that section 231(1) of the 1993 Constitution indicated that an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the 1993 Constitution.⁵² The judge also referred to section 231(4) of the 1993 Constitution, holding that this provision had a similar effect on customary international law.⁵³ Furthermore, Mahomed DP interpreted section 35(1) of the 1993 Constitution as being completely consistent with the abovementioned views, emphasising that: “[t]he court is directed only to ‘have regard’ to public international law if it is applicable to

⁴⁸ *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 25. The applicants relied on article 49 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 50 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 129 of the third Geneva Convention Relative to the Treatment of Prisoners of War and article 146 of the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. These Conventions all provide that: “The high contracting Parties undertake to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches ...”.

⁴⁹ *AZAPO v President of the Republic of South Africa* 1996 4 SA 672 (CC) para 26 (emphasis added).

⁵⁰ Para 26.

⁵¹ Para 27.

⁵² Para 27.

⁵³ Para 27. Section 231(4) of the 1993 Constitution states the following: “The rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.”

the protection of the rights entrenched in the Chapter.”⁵⁴ Applying this, the judge concluded that if section 20(7) of the Act was authorised by the Constitution, the rules contained in the Geneva Conventions were irrelevant to the case.⁵⁵ In addition, Mahomed DP noted that the rules relied upon in the Geneva Conventions did not, in any event, assist the applicants as it was doubtful whether these rules were even applicable to the situation in South Africa during the time of apartheid.⁵⁶ To justify this claim, the Court referred to a distinction made in international literature concerning perpetrators in State conflicts. In particular, there are perpetrators that participate in conflicts between States.⁵⁷ However, these perpetrators must be distinguished from the armed forces of a particular sovereign State, as well as other dissident armed forces operating under responsible command within that State, who carry out violent acts within that State.⁵⁸ Mahomed DP stated that a contracting State was not obliged to prosecute the perpetrators of violent acts carried out under the latter circumstances.⁵⁹ He cited article 6(5) of Protocol II of the Geneva Convention⁶⁰ as justification for this, and emphasised that the complexities involved in the reconstruction of a society after civil conflict within a State played a significant role in this approach.⁶¹ Mahomed DP was therefore not convinced that anything in section 20(7) of the Act was in violation of the country’s obligations under international humanitarian law.⁶² In addition, the Court held that the postamble to the 1993 Constitution “trumped” section 22 of the 1993 Constitution, while section 20(7) of the Act was found to be constitutional.

This judgment negatively affected the interpretation of section 35(1) of the 1993 Constitution. The manner in which this occurred becomes clearer when three important aspects concerning the application of section 35(1) of the 1993 Constitution

⁵⁴ *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 27.

⁵⁵ Para 28.

⁵⁶ Para 28-29.

⁵⁷ Para 30. This includes armed conflicts between liberation movements desiring self-determination against colonial and alien powers.

⁵⁸ Para 30.

⁵⁹ Para 30.

⁶⁰ Article 6(5) of Protocol II of the Geneva Convention states the following:

“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

⁶¹ *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) para 31.

⁶² Para 32.

are identified.⁶³ Firstly, section 35(1) obliges courts to have due regard to public international law when interpreting the Bill of Rights. Therefore, the application of section 35(1) is prescriptive and courts must adhere to this mandate when interpreting the Bill of Rights. The framework dictum developed in *Makwanyane*, and discussed in part 4 2 1 above, is relevant in this regard as it established that international agreements and customary international law “provide a framework within which [Chapter 3] can be evaluated and understood.”⁶⁴ Secondly, when undertaking a consideration of international law, a number of sources may be considered. In this regard, *Makwanyane* established that a generous range of sources may be canvassed in the application of section 35(1) of the 1993 Constitution. Lastly, these sources need not be adopted or applied, as the mandate is to only consider them. Ideally, this final aspect should prompt a court to justify why it will, or will not, draw from the international law considered.

As mentioned above, Mahomed DP held that an enquiry into whether or not a different duty exists in international law is irrelevant when determining whether section 20(7) of the Act is inconsistent with the Constitution.⁶⁵ With this finding, the Court restricts the very first element discussed above namely, the application of section 35(1) of the 1993 Constitution and dismisses the mandate entrenched in this provision concerning its role in the interpretation of fundamental rights. Motala highlights further that the Court interpreted the term “shall”, in section 35(1) of the 1993 Constitution, as referring to a discretion that it could exercise, as opposed to an obligation placed upon it to consider international law. As will be addressed below, the restrictive application of section 35(1) arguably led to the Court’s failure to regard relevant international law sources.

With respect to the Courts’ interpretation of 231(1), Motala draws attention to section 231(1)⁶⁶ of the 1993 Constitution, and submits that it contains a “claw back-clause”⁶⁷ that makes provision for Parliament to change obligations imposed upon

⁶³ See chapter 3 for a detailed discussion of section 35(1) of the 1993 Constitution.

⁶⁴ *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

⁶⁵ Para 26.

⁶⁶ Section 231(1) of the 1993 Constitution states the following:

“All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament.”

⁶⁷ This terminology is also found in the AfCHPR.

South Africa by international agreements.⁶⁸ Motala argues that Mahomed DP continued to apply the “claw-back clause” from section 231(1) to section 35(1) of the 1993 Constitution.⁶⁹ Thus, Motala argues that in this case, the phrase “to have regard” was interpreted by Mahomed DP to mean that the Court may consider public international law, but such considerations could be overridden by Parliament by way of ordinary legislation.⁷⁰

Du Plessis argues that Mahomed DP’s decision has led to the creation of an absurd situation in which section 231 of the 1993 Constitution must first be invoked to determine the international law binding upon South Africa. He argues that only once this is completed can section 35(1) be used to justify reliance on binding international law when interpreting provisions of the Bill of Rights.⁷¹ In this regard, Du Plessis argues that *AZAPO* renders provisions like section 35(1)⁷² largely superfluous. Du Plessis defends the relevance of section 35(1) by stating that courts should, in any event, be aware of their responsibilities under section 231 of the Constitution. Furthermore, he argues that section 35(1) could not have had any other purpose than to oblige courts to at least have “due regard” to public international law that was not binding in terms of section 231 of the 1993 Constitution.⁷³

Adopting a different tack, Dugard argues that the judgment has a more probable meaning namely, when the constitutional validity of a statute is challenged that involves a rule of international law, the Court has a duty to ascertain the content of this rule and interpret the Constitution in a manner that accords with it.⁷⁴ Furthermore, Dugard argues that the Constitution will only prevail once this becomes impossible. He submits that such impossibility may be caused by inconsistencies between the international rule and the Constitution.⁷⁵ Dugard argues that this is the likely meaning of Mahomed DP’s judgment, as firstly, it accords more with the

⁶⁸ Z Motala “The Constitutional Court’s Approach to International Law and its Method of Interpretation in the ‘*Amnesty Decision*’: Intellectual Honesty or Political Expediency?” (1996) 21 *SAYIL* 29 34.

⁶⁹ 34.

⁷⁰ 34.

⁷¹ Du Plessis “International Law and the Evolution of (Domestic) Human-Rights Law” in *New Perspectives* 330.

⁷² As well as section 39(1)(b) of the 1996 Constitution.

⁷³ Du Plessis “International Law and the Evolution of (Domestic) Human-Rights Law” in *New Perspectives* 330. This is also applicable to section 231, section 232 and section 233 of the 1996 Constitution.

⁷⁴ J Dugard “Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question” (1997) 13 *SAJHR* 258 266.

⁷⁵ 266-267.

intention of the drafters of the 1993 Constitution.⁷⁶ Secondly, Dugard states that a proper interpretation of the Constitution cannot take place without considering international law.⁷⁷ Lastly, Dugard submits that such an understanding of the decision accords with section 233 of the 1996 Constitution.⁷⁸ Dugard's arguments, however, do not appear to acknowledge that the judgment fails in respect of these three reasons and exhibits an incorrect understanding of section 35(1) of the 1993 Constitution.

As argued, the *AZAPO* case is significant for its failure to acknowledge the obligation to consider international human rights law when interpreting the Bill of Rights. I argue that the Court should have acknowledged the obligation entrenched in section 35(1) of the 1993 Constitution and provided sufficient justification as to why the provision of amnesty should override international humanitarian law. Recognition must be given to the extensive policy reasons that were advanced in the judgment, which underscored the necessity of amnesty and its relevance in assisting with a peaceful transition to democracy. However, it is the Court's attitude reflected in this judgment towards the role of section 35(1) of the 1993 that is under scrutiny. Arguably, the objectives achieved through this judgment were accomplished at the unnecessary cost of restricting section 35(1) of the 1993 Constitution. Du Plessis further criticises this finding, stating that it replaces the generous monistic approach in favour of international law as laid down in *Makwanyane* with a more restrictive dualism.⁷⁹ In terms of the Court's interpretative strategy used in *AZAPO*, Du Plessis states that *AZAPO* represents not only a withdrawal from international law, but also a reversal of Chaskalson P's framework dictum in *Makwanyane*. Motala argues further that the approach followed in *AZAPO* was not only archaic, but also problematic in that States do not have unrestrained freedom to create legislation.⁸⁰ He finds evidence in international law of a peremptory duty to prosecute perpetrators of war crimes, as well as crimes against humanity. States are required to act in accordance with the

⁷⁶ 267.

⁷⁷ 267.

⁷⁸ 267. Section 233 of the 1996 Constitution states the following:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

⁷⁹ Du Plessis “International Law and the Evolution of (Domestic) Human-Rights Law” in *New Perspectives* 328.

⁸⁰ Motala (1996) *SAYIL* 37.

principles of international law, especially *jus cogens*, and may not justify their non-compliance with international law norms by invoking their domestic law.⁸¹

In addition to the above criticisms that focus on the restrictive interpretation of section 35(1) of the 1993 Constitution, Dugard criticises the *AZAPO* judgment for its failure to adequately examine whether international law imposes a duty on successor states to punish perpetrators of a prior regime for their commission of crimes under international law.⁸² In particular, Dugard argues that the Court should have at least engaged with the evidence that exists in both international treaties and customary international law in favour of such a duty. He states that various international treaties⁸³ impose such a duty on successor regimes to punish perpetrators who were members of the preceding regime for violations that are recognised as crimes under international law.⁸⁴ However, Dugard notes that of these treaties, only the 1949 Geneva Conventions on the Laws of War were applicable to South Africa, as the country was not party to the others at the time that the relevant acts were committed.⁸⁵ The Geneva Conventions oblige States parties to punish the perpetrators for acts defined by the Geneva Conventions as “grave breaches”.⁸⁶ These had not been legislatively incorporated into South African municipal law by Parliament at the time. Despite this, Dugard argues that these conventions were incorporated into municipal law “by the exercise of the prerogative power”.⁸⁷

Furthermore, Dugard argues that the Court failed to consider customary international law and in particular, the possible obligation to prosecute crimes against humanity. In this regard, Dugard argues that there is widespread acceptance that the practices of apartheid are recognised as a crime against humanity.⁸⁸ To justify this statement, Dugard states that various international sources recognise many of the acts and practices committed under apartheid in South Africa as crimes against humanity.⁸⁹ Furthermore, international sources have expressly recognised apartheid as

⁸¹ 37.

⁸² J Dugard “Reconciliation and Justice: The South African Experience” (1998) 8 *Transnational Law & Contemporary Problems* 277.

⁸³ These include the Genocide Convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the CAT, and possibly the ICCPR.

⁸⁴ Dugard (1998) *Transnational Law & Contemporary Problems* 302-303.

⁸⁵ 303.

⁸⁶ 303.

⁸⁷ 303.

⁸⁸ 304.

⁸⁹ 303-304. Dugard contends that the customary international law definition of crimes against humanity are found in instruments such as the Nuremberg Charter, the Statute of the International Tribunal for

a crime against humanity.⁹⁰ Additionally, he argues that international instruments, including General Assembly resolutions, and academic writers, confirm that States are obliged to try or extradite perpetrators that have allegedly committed crimes against humanity. Dugard notes that there is insufficient *usus* or settled practice amongst states to submit that there is an obligation under customary international law that requires a successor regime to prosecute perpetrators of a prior regime for crimes against humanity.⁹¹ However, he submits that jurists have argued strongly in favour of such an obligation, and the South African Court should have considered this argument more seriously.⁹²

Dugard also criticises the Court's finding that article 1(4) of the Additional Protocol I to the Geneva Conventions is not applicable. In this regard, he argues that the Court failed to consider that historically, this instrument was aimed at addressing apartheid in South Africa.⁹³ Lastly, Dugard criticises the Court for neglecting to consider relevant jurisprudence from the AmCtHR and the Inter-American Commission of Human Rights ("IACommHR") that concerns the investigation and prosecution of international human rights violations.⁹⁴ Dugard's arguments do not challenge the correctness of the order. Rather, he highlights the Court's failure to engage with important international and regional law sources that could assist in determining whether there is an obligation to prosecute perpetrators for committing human rights violations that would challenge the decision to grant such perpetrators amnesty.

Once again, it must be recalled that the Court did raise important policy reasons for its decision to allow the granting of amnesty, but, is this sufficient to render an engagement with these international arguments unnecessary, and, as in this case, ignore relevant international law that states otherwise? The Court may have avoided this criticism through clarifying, in much stronger terms, its decision not to

the Former Yugoslavia, the Statute of the International Tribunal for Rwanda, the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, and the Rome Statute of the International Criminal Court. This definition includes "systematic murder, torture, persecution on political, racial, religious or ethnic grounds, and forced disappearance of persons."

⁹⁰ Dugard (1998) *Transnational Law and Contemporary Problems* 304. Dugard refers to UNGA Resolution "Policies of Apartheid of the Government of South Africa" UNGA Res 39/72A (1984), the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and the Rome Statute of the International Criminal Court.

⁹¹ 305.

⁹² 305.

⁹³ 263.

⁹⁴ 306.

apply relevant international and regional law, and to justify its decision to do so in respect of specific instruments or rules of international customary law. Therefore, the *AZAPO* judgment not only restricted the application of section 35(1) of the 1993 Constitution, but did not provide sufficient justification for its decision not to engage with, or have “due regard” for, relevant international and regional law. In this way, the judgment casts a shadow on the more generous approach established in *Makwanyane*.

4 2 3 *Government of the Republic of South Africa v Grootboom*

Yacoob J’s judgment in *Grootboom* presented renewed optimism in the context of section 39(1)(b) of the 1996 Constitution and the framework dictum developed in *Makwanyane*.⁹⁵ In order to acquaint itself with the concept of the minimum core, as will be discussed further in chapter 5, the Constitutional Court considered a General Comment issued by the CESCR. Du Plessis argues that in so doing the Court firstly, reinstated that which *Makwanyane* had declared namely, that the term ‘international law’ includes both binding and non-binding international law, and that both are to be used as tools of interpretation. Secondly, the Court permitted the reliance on relevant international law without requiring such law to be prescriptive.⁹⁶ In its consideration of international law, the Court highlighted the significant weight it attached to international law in this case. The Court then referred to section 39(1)(b) of the 1996 Constitution, which mandates the Court, at the very least, to consider international law as a tool of interpretation. Yacoob J cited Chaskalson P’s reference for the use of international law in *Makwanyane*, but added to this stating that:

“The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”⁹⁷

This statement clarifies that the status of international law in the municipal legal order is not only governed by section 39(1)(b). International law can also be binding on the

⁹⁵ This discussion relates only to the Constitutional Court’s use and development of the framework dictum established in *Makwanyane*, and this case will be discussed in greater detail in chapter 5.

⁹⁶ LM Du Plessis “Interpretation” in S Woolman, T Roux, M Bishop (eds) *Constitutional Law in South Africa* 2 ed (original service 06-08 2008) 32-180.

⁹⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26.

Republic if it accords with the requirements set out in sections 231 and 232 of the 1996 Constitution, as discussed in chapter 4. Thus, unlike Chaskalson P's decision in *Makwanyane*, the statement above reaffirms the distinction between international law as an interpretive tool and as binding international law.

4 2 4 *Glenister v President of the Republic of South Africa*

In 2011, the Constitutional Court delivered a significant judgment in *Glenister*, wherein the majority judgment reaffirmed the differences between the distinctive functions of section 231 and section 39 of the 1996 Constitution. Furthermore, the Court elaborated on the significant interpretive value of international treaties that are binding upon the State in terms of section 231(1) and 231(2) of the 1996 Constitution, but not yet incorporated into domestic law. This judgment added significantly to the understanding of section 231, and assisted in “fleshing out” the framework dictum even further. It did so by developing the role of binding international treaties not yet incorporated into municipal law, in the interpretation of the Bill of Rights.

In this case, the applicant challenged the constitutional validity of national legislation that firstly, established the Directorate for Priority Crime Investigation (“DPCI”),⁹⁸ and secondly, disbanded the Directorate of Special Operations.⁹⁹ The Court had to address two critical questions. Firstly, whether the obligation resting upon the State to create and maintain an independent body aimed at combating corruption and organised crime, had its basis in the Constitution.¹⁰⁰ If so, the second question posed to the Court was whether the body established by the legislation was sufficiently independent.¹⁰¹

In terms of the first question, the Court located the actual source of the State's duty to combat corruption within the Constitution itself.¹⁰² In this regard, the Court held that the Constitution, considered as a whole, imposed a duty upon the State to “set up a concrete and effective mechanism to prevent and root out corruption and

⁹⁸ The South African Police Service Amendment Act 57 of 2008. This body is popularly known as the Hawks.

⁹⁹ The National Prosecuting Authority Amendment Act 56 of 2008. This body was popularly known as the Scorpions.

¹⁰⁰ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 163.

¹⁰¹ Para 163.

¹⁰² Para 175.

cognate corruption practices.”¹⁰³ In particular, the Court highlighted that section 7(2) of the 1996 Constitution provides that the State has a duty to “respect, protect, promote and fulfil the rights in the Bill of Rights.” As corruption threatens democracy and corrodes the rights contained in the Bill of Rights, the Court found that section 7(2) of the 1996 Constitution therefore obliged the State to establish efficient anti-corruption mechanisms.¹⁰⁴

In terms of the second question to be determined, the applicant challenged the validity of the impugned legislation, arguing that the corruption-fighting unit that was established was insufficiently independent on both a structural and operational level.¹⁰⁵ Consequently, the impugned legislation was challenged as being inconsistent with South Africa’s international obligations and therefore with the Constitution.¹⁰⁶ Although the legislation itself provides that the Directorate must have the necessary independence in order to perform its functions, “necessary independence” is not defined within the text. Consequently, the Court held that it must engage with international agreements that bind the Republic in an effort to delineate the content of “independence”.¹⁰⁷ It is within this context that the Court relied upon *Makwanyane*’s framework dictum in support of considering both binding and non-binding instruments of international law. The Court stated further that:

“[O]ur Constitution takes into its very heart obligations to which the Republic, through solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measure of the State’s conduct in fulfilling its obligations in relation to the Bill of Rights.”¹⁰⁸

Both the minority and majority judgments expounded upon the status of unincorporated treaties to which the State is bound under international law, but from which no rights or obligations arise in domestic law. In sum, the Court confirmed that the negotiating and signing of an international agreement by the national executive in terms of section 231(1) of the 1996 Constitution does not render such an agreement binding upon the State.¹⁰⁹ Such an agreement only becomes binding upon the State

¹⁰³ Para 175.

¹⁰⁴ Para 175.

¹⁰⁵ Para 178.

¹⁰⁶ Para 178.

¹⁰⁷ Para 179.

¹⁰⁸ Para 178.

¹⁰⁹ Para 180.

once it has received approval by both houses of Parliament, namely the National Assembly and the National Council of Provinces. This must be done by way of resolution as required by section 231(2) of the 1996 Constitution.¹¹⁰ The only exception to this is provided for in section 231(3) concerning agreements of a technical, administrative or executive nature.¹¹¹ Once the requisites of section 231(1) and 231(2) have been fulfilled, these international agreements only bind the State in the international sphere, between States parties, unless they are agreements that are governed by section 231(3) of the 1996 Constitution.¹¹²

The majority judgment in *Glenister* established that although the specific agreements discussed above are only binding upon South Africa under international law, they are still able to exert influence on domestic constitutional provisions. In relation to the international agreements that bind South Africa in terms of section 231(2),¹¹³ the Court stated that the obligation referred to in these agreements, namely the requirement to create an anti-corruption unit that has the necessary independence, are both “clear and unequivocal”. Therefore, in the international sphere, these obligations exist and bind the State. However, this duty is also found in the domestic sphere and is located within section 7(2) of the 1996 Constitution itself, which requires the State to “respect, protect, promote and fulfil the rights in the Bill of

¹¹⁰ Para 180.

¹¹¹ Section 231(3) provides that:

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

¹¹² *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 181.

¹¹³ These included the United Nations Convention against Corruption (adopted 9 December 2003, entered into force 14 December 2005) (2004) 43 ILM 37, the Southern African Development Community Protocol on Combating Illicit Drugs (adopted on 24 August 1996, entered into force 20 March 1999), and the Southern African Development Community Protocol against Corruption (adopted on 14 August 2001, entered into force 6 July 2005). South Africa ratified this Protocol on 15 May 2003 and it entered into force in South Africa on 6 July 2005. South Africa is also bound by the African Union Convention on Preventing and Combating Corruption (adopted 11 July 2003, entered into force 5 August 2006). South Africa signed this Convention on 16 March 2004 and ratified this Convention on 11 November 2005. The *amicus* also referred the Court to a report by the Organisation for Economic Co-operation and Development (OECD): *Specialised Anti-corruption Institutions: Review of Models* (“OECD report”) that does not bind States under international law. The Court stated that this report can be used to assist with the interpretation, and content, of the obligations contained in certain international conventions, and justified this by relying on article 31(3)(b) of the VCLT which states the following:

“3. There shall be taken into account, together with the context:
 (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 ... ”.

Rights.” The Court recognised that this duty to create an anti-corruption unit with the necessary independence, is a constitutional duty derived from section 7(2) of the 1996 Constitution and not a duty derived from external sources.

The Court held that section 39(1)(b) of the 1996 Constitution is only invoked to assist in answering “in-part” the question of which reasonable measures the State is required to take in order to protect and fulfil the rights in the Bill of Rights.¹¹⁴ However, the Court stated that the international conventions, agreements, and protocols all clearly indicate that South Africa is obliged to create an anti-corruption unit that holds the necessary independence.¹¹⁵ The Court declared that it is of great interpretive significance that South Africa has acceded to these instruments and bound itself to the obligations contained in them in the international sphere. In this context, these instruments can provide guidance in determining whether the State’s obligations in accordance with section 7(2) namely, to respect, protect, promote, and fulfil the rights in the Bill of Rights, have been fulfilled.¹¹⁶ Furthermore, the Court stated that the fact that these agreements are binding upon the South Africa in accordance with section 231(2) significantly influences the delineation of the State’s obligations in terms of protecting and fulfilling the rights in the Bill of Rights.¹¹⁷

The consideration of international law in this context was not merely a superficial inventory of every international instrument that aims to combat corruption. Rather, the Court clearly emphasised the important interpretive weight that should be attached to agreements not yet incorporated into municipal law. Furthermore, it was already implicit that the State had a duty to establish an anti-corruption mechanism. It was also expressed that whatever measure the State implemented in fulfilment of its obligation, had to be reasonable and effective. Thus, the binding international obligations assisted, in part, in determining which reasonable measures the State may use.

Furthermore, the Court emphasised that this use of international law was not to be construed as inserting international agreements into the Constitution, but rather “to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions.”¹¹⁸ In addition, the

¹¹⁴ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 192.

¹¹⁵ Para 192.

¹¹⁶ Para 194.

¹¹⁷ Para 182.

¹¹⁸ Para 195.

Court emphasised that the content of the obligations created by section 7(2) of the 1996 Constitution could have been determined without the use of international law.¹¹⁹ However, the Court found that the mandate placed upon it by section 39(1)(b) of the 1996 Constitution creates a constitutional obligation to do so.¹²⁰ To this extent, international law cannot be used as a mechanism to “manufacture constitutional obligations.”¹²¹ Rather, the Court held that:

“It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic’s external obligations under international law, and their domestic impact.”¹²²

Through this statement, the Court confirms the obligatory nature of section 39(1)(b) of the 1996 Constitution, which constitutionally mandates the courts’ consideration of international law when interpreting the Bill of Rights. Furthermore, the above evaluation provides evidence that the framework dictum, as established in *Makwanyane*, has provided courts with a structure within which they can apply international human rights law. The strong criticisms levelled at the Court for its restrictive treatment of the framework dictum in *AZAPO*, indicates that although the application of the dictum is not always consistent, it is still preferable and its use has become a yardstick with which to measure a court’s consideration of international law in the interpretation of the Bill of Rights. For this reason, the interpretive framework established in *Makwanyane* can be regarded as a methodological approach to the use of international law in the interpretation of the Bill of Rights. The judgment delivered in *Glenister* added substantially to the framework dictum by reaffirming the obligatory nature of section 39(1)(b) of the 1996 Constitution and expounding upon the significant weight attached to international treaties to which South Africa is bound, but from which no rights and obligations can be derived in municipal law. To this extent, the *Glenister* judgment contributed to further delineating the interpretive role of “binding” international law.

Although aspects of the framework dictum are still in need of jurisprudential development, such as the weight to be attached to non-binding law, the introduction

¹¹⁹ Para 201.

¹²⁰ Para 201.

¹²¹ Para 201.

¹²² Para 201.

of the framework dictum and its subsequent developments, provide a methodological approach which South African courts can utilise and simultaneously strive to develop. This will ensure that the practice of considering international law in the interpretation of the Bill of Rights not only maintains a high standard of critical scrutiny and research, but also remains relevant to the Court's task of giving meaning to the provisions of the Bill of Rights.

4 3 Methodological Misconceptions

In the discussion above, I examined how the Court developed guidelines pertaining to its use of international sources of law as interpretative aids. In the following section, I highlight the methodological misconceptions namely, the ways in which South African courts have misunderstood the interpretative mandate, that characterise the courts' application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. In addition, I investigate the interaction between the abovementioned provisions and section 231 of the 1993 Constitution and section 231 and 232 of the 1996 Constitution. Furthermore, I analyse the potential challenges that the courts' may encounter in their consideration of international law in constitutional interpretation.

4 3 1 The conflation of the distinction between international law and foreign law

Both section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution refer to international law¹²³ and foreign law as two different sources of law. In order to maintain this distinction, courts must recognise that their consideration of international law is *mandatory*¹²⁴ when interpreting the Bill of Rights, while their consideration of foreign law is discretionary.¹²⁵ Under the 1993 Constitution, courts have interpreted section 35(1) as requiring them to have regard to comparable foreign case law. This misconception is illustrated in the decision of the

¹²³ Section 35(1) of the 1993 Constitution refers to "public international law".

¹²⁴ This is indicated in the wording of section 35(1) of the 1993 Constitution, which states that: "a court *shall*, where applicable, have due regard to public international law" (emphasis added), while section 39(1)(b) of the 1996 Constitution states that "a court, tribunal or forum ... *must* consider international law" (emphasis added).

¹²⁵ Section 35(1) of the 1993 Constitution states that courts may "have regard to comparable foreign case law".

Supreme Court in *Qozeleni v Minister of Law and Order*.¹²⁶ In this case, the court stated the following:

“Although s 35(1) of the Constitution *enjoins* one to have regard to comparable foreign case law where applicable in interpreting the provisions of chap 3 of the Constitution, this should be done with circumspection because of the differing contexts within which foreign constitutions were drafted and operate in, and the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting.”¹²⁷

This case shows that section 35(1) was erroneously interpreted as requiring the court to regard comparable foreign case law.¹²⁸ This misconception is further illustrated in the decision of the Supreme Court in *Fose v Minister of Safety and Security*.¹²⁹ In this case, Van Schalkwyk J addressed the use of international law and foreign law in the context of section 35(1) and stated the following:

“While the Courts are *enjoined*, by the provisions of section 35(1) of the Constitution to have regard to public international law as well as comparable foreign case law in interpreting the provisions of Chapter 3, this must be done with circumspection. Different legal systems apply different principles and the rules are frequently so crafted to accommodate the idiosyncrasies which are inherent to each particular system.”¹³⁰

This case reveals that the court’s obligation to consider international law, and its discretion to regard comparable foreign case law, is conflated to the extent that the

¹²⁶ *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E) (“*Qozeleni*”).

¹²⁷ 633 (emphasis added).

¹²⁸ The error of conflating public international law and foreign law as found in *Qozeleni* has not gone completely unnoticed. In *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal* 1995 1 SA 608 (T), the role afforded to public international law and foreign law by the Transvaal Provincial Division in this decision was firstly, clearly demarcated in the heading “Public international law and foreign judgments” after which section 35(1) of the 1993 Constitution was cited. Secondly, and more importantly, Cloete J recognised the error made between public international law and foreign law by Froneman J in *Qozeleni*. Cloete J cited Froneman J who stated that:

“Although s 35(1) of the Constitution enjoins one to have regard to comparable foreign case law where applicable in interpreting the provisions of chap 3 of the Constitution, this should be done with circumspection because of the differing contexts within which foreign constitutions were drafted and operate in, and the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting.”

However, Cloete J goes on to state that he would “only add that section 35(1) does not ‘enjoin’; the word used is ‘may’”. See *Shabalala v Attorney-General, Transvaal; Gumede v Attorney-General, Transvaal* 1995 1 SA 608 (T) 642. The use of the term “enjoin” equates public international law and foreign law to the extent that regard for both sources are erroneously construed as mandatory, while section 35(1) of the 1993 Constitution only enjoins the consideration of public international law when interpreting the Bill of Rights.

¹²⁹ 1996 2 BCLR 232 (W).

¹³⁰ 237 (emphasis added).

court is obliged to consider both.¹³¹ In the remainder of the decision, the reader is confronted with many references to, amongst others, Canadian and American municipal law and jurisprudence, and case law from New Zealand and Trinidad and Tobago. Only one reference is made to public international law namely, Article 50 of the ECHR, while three references are made to decisions delivered by the ECtHR.¹³² Botha critically observes that, given Van Schalkwyk J's reading of section 35(1), such a focus on foreign case law in the rest of the judgment is unsurprising.¹³³

By equating the manner in which public international law and foreign law should be considered, adjudicative bodies misconstrue their responsibility to consider public international law. In addition, Botha suggests that such conflation allows courts to draw from the case law of familiar foreign jurisdictions as opposed to more unfamiliar international law. In this regard, Botha submits that judgments conflating international law and foreign law usually rely on one, or two, references to international decisions. He states further that these cases are often decisions delivered from one of the more regularly relied upon courts or tribunals, such as the ECtHR. Furthermore, he argues that these minimal references to international decisions are followed by an extensive citation of foreign case law.¹³⁴ The case above illustrates this tendency, as references to foreign case law dominated this judgment.

Writing in 1996, Botha notes that there is a strong tendency for courts to rely on Canadian law and the law of the United States of America.¹³⁵ He argues that the heavier reliance on these laws is attributed to courts' preferences for these more familiar sources.¹³⁶ The argument proceeds along the lines that, as certain foreign jurisdictions are more familiar to South African judges, their inclusion in the interpretative process is often more prevalent than the more unfamiliar forms of

¹³¹ Botha & Olivier (2004) *SAYIL* 42 55.

¹³² *Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W) 242. These cases included *Lingens v Austria* (1986) Series A no 103, *Young, James and Webster v United Kingdom* (1982) Series A no 55 and *Goddi v Italy* (1984) Series A no 76.

¹³³ N Botha "Riding the Tide: South Africa's 'Regular' Courts and the Application of International Law" (1996) 21 *SAYIL* 174 177. Apart from raising issue with Van Schalkwyk J's version of section 35(1) wherein he equates foreign law and international law, Botha criticises Van Schalkwyk J's (mis)treatment of international law in this case.

¹³⁴ Botha (1996) *SAYIL* 179.

¹³⁵ 179. To justify this statement, Botha refers to *Moeketsi v Attorney-General Bophuthatswana* 1996 7 BCLR 947 (B), in which the judge relied heavily on Canadian and American judgments. Another example includes *Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W), in which the court relied extensively on Canadian law.

¹³⁶ Botha (1996) *SAYIL* 180.

international law.¹³⁷ The decision of Constitutional Court in *S v Zuma*¹³⁸ illustrates this point. In this case, Kentridge AJ investigated various principles of constitutional interpretation and referred to *dictum* from the Privy Council, the courts of Canada, Botswana and the Supreme Court of Namibia.¹³⁹ In order to determine the legitimacy of a provision that creates a “reverse onus”, Kentridge AJ considered case law from courts that were “undoubtedly Courts of open democratic societies”. These included the United States Supreme Court, the Canadian Supreme Court, the Privy Council and the ECtHR.¹⁴⁰ In order to address the problem of reconciling presumptions of reverse onus of proof with the constitutional presumption of innocence, the Court referred to case law from the United States, Canada and the Privy Council. In addition, the Court referred to the United States Constitution and the Hong Kong Bill of Rights in respect of their approach to the limitation of rights.¹⁴¹ Therefore, the decision in *Zuma* was dominated by a consideration of foreign case law, as international authority was cited only once.

In addition, Olivier argues that court decisions illustrating an over-reliance on foreign law usually reflects a somewhat superficial use of international law in the interpretation of fundamental rights.¹⁴² In particular, Olivier argues that regard for international law, and specifically international human rights law, has taken the form of mere references, often without any further analysis or interpretation.¹⁴³ This is

¹³⁷ Reverting to the Privy Council as well as to other superior courts in Britain or Commonwealth countries for the purposes of statutory interpretation is a familiar exercise for South African courts. Judicial precedent dating back to 1916 indicates that when South African courts interpreted South African legislation that originated from English law or in cases where a South African statute consisted of English law principles and elements, the interpretation given by an English court should have been followed. A more distinct position has evolved in later judgments concerning the interpretation of South African legislation that originates from English law or in cases where a South African statute consists of English law principles and elements. Evidence shows that in these cases, the interpretation or construction of a statute that is given by the Privy Council in terms of the English counterpart is to be followed, subject to certain conditions. In the case of considering the jurisprudence from other British high courts or the high courts of Commonwealth countries, such decisions (and the construction of statutes emanating there from) were valuable for their persuasive force and could be considered, but were not binding on South African courts. Du Plessis notes further that the law of statutory interpretation in South Africa has in many ways echoed the English common law. This has resulted in the regular citation of English jurisprudence and case law to confirm or support the chosen canon of construction or method of interpretation. The citation of English law was therefore not an alien exercise in South African courts. LM Du Plessis *Re-Interpretation of Statutes* (2002) 265-266.

¹³⁸ *S v Zuma* 1995 2 SA 642 (CC) (“*Zuma*”).

¹³⁹ 651-653.

¹⁴⁰ 653. As was discussed above, reference to the ECtHR as an open democratic society is indicative of a misunderstanding between foreign law and international law.

¹⁴¹ 653-656.

¹⁴² Olivier (2003) *TSAR* 502.

¹⁴³ 502.

illustrated in the decision of the Constitutional Court in *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*.¹⁴⁴ In this case, mere statements were made of relevant provisions found in international instruments, and were designated to a footnote in the judgment. In analysing the right to receive information within the context of freedom of expression, Mokgoro J stated that:

“Section 35 of the Constitution provides that this Court ‘shall, where applicable, have regard to public international law applicable to the protection of (chap 3 rights)’. It is significant that at least four international human rights instruments provide specifically for the right to receive information under the general head of the right to free expression.”¹⁴⁵

A footnote appearing in the above text refers to article 9(1) and (2) of the AfCHPR, article 10 of the ECHR, article 19(e) of the UDHR and article 19(e) of the ICCPR. Mokgoro J then proceeded to analyse case law from courts in Zimbabwe, India, the United States, and also included case law from the Ontario High Court of Justice. Olivier criticises such regard to international law as passing and superficial.¹⁴⁶ She describes it as a merely formal, as opposed to a substantive, form of judicial reasoning in the relevant cases.¹⁴⁷ Consequently, scant references to international law that are lacking in depth undermine the purpose of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, and severely restrict the contribution that international law can make to the interpretive process.

In addition to the above examples, the following case illustrates another way in which the court’s obligation to consider public international law when interpreting the Bill of Rights, and the discretion it is given to regard comparable foreign law, is conflated. In *Moeketsi v Attorney-General, Bophuthatswana*,¹⁴⁸ the Supreme Court of the Bophuthatswana Provincial Division misconstrued section 35(1) of the 1993 Constitution is to mean that courts *may* have regard to *both* international law and foreign law. In particular, Friedman P stated that:

¹⁴⁴ 1996 3 SA 617 (CC).

¹⁴⁵ Para 29.

¹⁴⁶ Olivier (2003) *TSAR* 502.

¹⁴⁷ 502.

¹⁴⁸ 1996 7 BCLR 947 (B).

“I *may* also ‘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.’”¹⁴⁹

This case highlights the courts’ failure to recognise the obligation entrenched in section 35(1) to regard public international law. From the selected cases, it is clear that in various ways, section 35(1) of the 1993 Constitution is misconstrued at times to conflate a court’s obligation to regard public international law and its discretion to have regard to comparable foreign case law.¹⁵⁰

Case law examined under the 1996 Constitution appears to produce far fewer examples illustrating the conflation of the courts’ constitutional obligation to consider international law and the permission granted to them to consider foreign law, in the interpretation of the Bill of Rights. However, one such illustration is found in the decision of the Constitutional Court in *Sanderson v Attorney - General, Eastern Cape*¹⁵¹ wherein Kriegler J states that “both the interim and final Constitutions, moreover, indicate that *comparative research* is either mandatory or advisable.”¹⁵² In response to this statement, Du Plessis argues that while comparative research is advisable, the consideration of international law is always mandatory.¹⁵³ Furthermore, Kriegler J’s use of the term “comparative research” assumes that international law bears the same meaning as foreign law. In this regard, Du Plessis states that Kriegler J equates international law and foreign law, thereby conflating these.¹⁵⁴ Consequently, Du Plessis suggests that such an error may serve as one possible explanation for the court’s constant failure to engage with international law and their seeming partiality towards case law from foreign jurisdictions.¹⁵⁵

Moreover, the courts’ decisions demonstrate that international law and foreign law are not always clearly distinguished, which is illustrated in the case of *S v Williams*.¹⁵⁶ In this case, the Constitutional Court was required to interpret section 11(2) of the 1993 Constitution, which concerns the right to freedom and security of

¹⁴⁹ 960 (emphasis added).

¹⁵⁰ Botha & Olivier (2004) *SAYIL* 42.

¹⁵¹ 1998 2 SA 38 (CC).

¹⁵² Para 26 (emphasis added).

¹⁵³ Du Plessis “Interpretation” in *CLOSA* 32-173.

¹⁵⁴ 173.

¹⁵⁵ 173.

¹⁵⁶ 1995 3 SA 632 (CC).

the person. Langa J delved extensively into comparative sources,¹⁵⁷ and clearly distinguished between international law and foreign law by treating these as two distinct sources of law. However, in the discussion subsequent to this, Langa J did not clearly distinguish between discussions concerning international law and foreign law. Consequently, the discussion represented a mix of both sources of law without clarifying that the court is obliged to consider international law, while it may have regard to foreign law.¹⁵⁸

The discussion above illustrates the courts' tendency to conflate international law and foreign law, to the detriment of international law. The courts have, in some cases, misconstrued the meaning of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution so as to conflate the manner in which international law and foreign law may be invoked. Conflation also occurs when courts refer to international law and foreign law as part of "comparative research", thereby equating these two sources of law. In addition, conflation occurs in those instances where judicial officers neglect to clearly distinguish between discussions based on foreign law, and those based on international law. Lastly, to a much smaller extent, references to public international law have been erroneously categorised as municipal sources.¹⁵⁹

¹⁵⁷ Emphasising the manner in which section 11(2) conformed with many international human rights instruments, Langa J made specific reference to article 5 of the UDHR which forbids: "torture ... or cruel, inhumane or degrading treatment or punishment." Furthermore, Langa J referred to P Sieghart *The International Law of Human Rights* (1983), which emphasises that significantly similar versions of this right to freedom and security of person occur in a number of other international instruments and national constitutions adopted since 1949. Article 7 of the ICCPR, article 3 of the ECHR, and article 5 of the AfCHPR were used to illustrate this point. Reference was also made to article 8 of the Namibian Constitution and to the interpretation given by the UN HRC. Langa J also referred to the work of P van Dijk and GJH van Hoof *Theory and Practice of the European Convention on Human Rights* in which they discuss the interpretation of Article 3 of the ECHR. The definition of inhumane treatment under the European Commission on Human Rights was also considered. Reference was also made to the Eighth Amendment to the Constitution of the United States of America as well as to Article 12 of the Canadian Charter of Rights and Freedoms that prohibits cruel and unusual punishment.

¹⁵⁸ Botha and Olivier have identified additional case law wherein the Constitutional Court does not distinguish between international law and foreign law as two different sources of law. These include *Bernstein v Bester* 1996 2 SA 751 (CC) and *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC). Botha & Olivier (2004) *SAYIL* 42.

¹⁵⁹ These instances include referring to the decisions of international tribunals as foreign law. Such an example is the inclusion of a decision delivered by the ECtHR in a section of the judgment that canvasses only foreign case law. This is erroneous as the ECtHR is a specialised, regional court that has been given the jurisdiction to adjudicate on matters arising from the ECHR. This court should be distinguished from municipal courts as it does not pronounce on municipal law or European law and therefore decisions delivered by this court cannot be referred to as "European" or "of Europe". Instead, these decisions should be considered as forming part of those sources of law dealt with under public international law. This error might not necessarily appear to jeopardise the decision which a judge reaches and may thus not appear worth highlighting. However, it is still indicative of a misunderstanding regarding the differences between public international law and foreign law.

4 3 2 The use of international law as an interpretive tool rather than as a source of directly binding obligations

Section 35(1) of the 1993 Constitution was expected to have a significant effect on South African law.¹⁶⁰ Its use was evident in early jurisprudence and international law was used as an interpretative tool in cases such as *Zuma*, *Makwanyane* and *Williams*, as discussed above.¹⁶¹ In contrast, section 231 of the 1993 Constitution has received scant attention from the courts. It is apparent that courts tend to show a preference towards the method of invoking public international law as an interpretive tool rather than referring to binding treaty obligations arising out of section 231. The court's reluctance to engage with section 231 of the 1993 Constitution is also fuelled by an apparent conflation with the status of international law as an interpretative tool, and international law as binding upon the State. As mentioned above, this is specifically illustrated in decision of the Constitutional Court in *S v Makwanyane*:

“In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this is to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, *but we are in no way bound to follow it.*”¹⁶²

Chaskalson P's use of the term “public international law” appears to refer to public international law generally, drawing no distinction between the differences found between this source of law in the context of section 35(1) and section 231 of the 1993 Constitution. By maintaining that courts are in no way bound to follow public international law generally, but can only derive assistance from it, Chaskalson P fails to give recognition to section 231. Section 231 has an important effect on the adjudication of rights. In particular, courts are bound to treaties that the State has ratified under section 231 of the 1993 Constitution and section 231 of the 1996 Constitution, as well as to customary international law in accordance with section 232 of the 1996 Constitution.¹⁶³

¹⁶⁰ N Botha “South African Judicial Decisions: International Law in the Constitutional Court” (1995) 20 *SAYIL* 222.

¹⁶¹ Olivier (2003) *TSAR* 510.

¹⁶² *S v Makwanyane* 1995 3 SA 391 (CC) para 39 (emphasis added).

¹⁶³ Maluwa (1998) *SAYIL* 60.

Cases handed down by South African courts after the 1996 Constitution came into force reveal that while South African courts are still, albeit decreasingly, invoking section 39(1)(b), courts are also visibly reluctant to engage with section 231 of the Constitution. In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus)*,¹⁶⁴ for example, the Supreme Court of Appeal stated the following:

“The Constitutional Court has held ... that the State is, furthermore, obliged under international law to protect women against violent crime and against the gender discrimination inherent in violence against women. This obligation was imposed on the State by s 39(1)(b) of the Constitution, read with the preamble to the *Universal Declaration of Human Rights*; article 4(d) of the *Declaration on the Elimination of Violence against Women* and art 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* ...”¹⁶⁵

While the international obligations on the State are acknowledged, the international instruments referred to above are confined to being relied upon as interpretative aids by way of section 39(1)(b) of the 1996 Constitution. South Africa has ratified the CEDAW,¹⁶⁶ and this instrument should have been relied upon in terms of section 231 of the 1996 Constitution. Similarly, in *Prince v President of the Law Society, Cape of Good Hope*,¹⁶⁷ the High Court invoked section 39(1)(b) and proceeded to highlight three international instruments that dealt with the use of certain narcotics. In this regard, Friedman JP indicated the following:

“[H]aving regard to these instruments it is clear that cannabis is regarded internationally as a drug, the possession and use of which should be strictly regulated and controlled.”¹⁶⁸

By invoking section 39(1)(b), it is correct that due regard must be had to these international instruments,¹⁶⁹ but South Africa's international obligations arising from the Single Convention on Narcotic Drugs (1961) and the UN Convention on Psychotropic Substances (1971), both of which South Africa is a party to, are not mentioned. These two instruments have only been relied upon as guides to

¹⁶⁴ 2003 1 SA 389 (SCA).

¹⁶⁵ Para 15.

¹⁶⁶ Ratification took place on the 15th of December 1995.

¹⁶⁷ 1998 8 BCLR 976 (C).

¹⁶⁸ 985.

¹⁶⁹ These instruments include the Single Convention on Narcotic Drugs (1961) and the UN Convention on Psychotropic Substances (1971), both of which South Africa is a party to.

interpretation, irrespective of the fact that these instruments require parties to strictly regulate and control the possession of cannabis. Reliance on section 39(1)(b) of the 1996 Constitution promotes the *Makwanyane* framework dictum, as discussed above, but fails to recognise that South Africa's obligations in terms of these instruments should inform the interpretation of a right as a self-standing argument.¹⁷⁰ Reference to these instruments should not only provide a means of understanding the international position on cannabis, but should also have emphasised that the international agreement was an impetus for South Africa's own domestic regulation and control.

Similarly, in *Director of Public Prosecutions v Bathgate*¹⁷¹ evidence was submitted before the High Court indicating that South Africa was party to the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which gives rise to certain international obligations. In particular, this agreement required South Africa to enact measures that would provide for restraint, pending the confiscation of property suspected of having been obtained from the proceeds of crime.¹⁷² The provisions of the relevant legislation are said to reflect the South African Government's respect for the international practice that has evolved in this regard, as well as its willingness to co-operate in the global objectives against particular conduct. The applicant's legal representative relied upon section 39(1)(b) of the 1996 Constitution and argued that one of the main sources of applicable international law is the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, an international agreement that South Africa ratified, and is therefore bound to.¹⁷³ Unfortunately, this instrument was not relied upon in terms of section 231 of the 1996 Constitution. Olivier has criticised this approach as

¹⁷⁰ *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C) 985. Cannabis is listed as a drug in two of the schedules to the Single Convention. The Single Convention obliges the parties to it to adopt any special measures of control which in their opinion are necessary, having regard to the particularly dangerous properties of a drug included in the schedule. Parties are also required to implement provisions aimed at limiting the possession and use of drugs, of which Cannabis is included, to medical and scientific purposes. The Convention also requires that each party adopt such measures as will ensure that, *inter alia*, possession of those drugs shall be a punishable offence. The UN Convention on Psychotropic substances also lists cannabis as a psychotropic substance and requires that parties to the Convention shall prohibit all use except for scientific and very limited medicinal purposes. Although South Africa is not a signatory to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, this Convention also lists cannabis as a psychotic substance and requires parties to adopt such measures as may be necessary to establish as a criminal offence under its domestic law, the possession of psychotropic substances for personal consumption.

¹⁷¹ 2000 2 SA 535 (C).

¹⁷² Para 26.

¹⁷³ Para 33.

resembling the decision in *Makwanyane* to the extent that South Africa has ratified a treaty that is not brought to the forefront of the argument by only invoking section 39(1)(b) of the 1996 Constitution.¹⁷⁴

The respondent in this case also referred to section 39(1)(b), calling for a purposive and generous interpretation of the section in the Constitution with “due regard to applicable international law”.¹⁷⁵ The respondent argued that: “[i]nasmuch as South Africa has obligations in terms of international law, they should not lightly be disregarded.”¹⁷⁶ This submission appears to recognise that South Africa might be bound to certain international obligations in terms of section 231, yet the argument does not go beyond this point. While the respondent relied upon section 10 (human dignity), section 14 (the right to privacy), and section 25 (the right not to be deprived of private property) of the 1996 Constitution, no evidence was presented that could indicate which international obligations might exist in relation to these provisions.¹⁷⁷

Furthermore, during the enquiry based on section 36 of the 1996 Constitution, no connection was drawn between the purpose of the legislation and South Africa’s international obligations under the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic substances.¹⁷⁸ These obligations required that legislative measures be created in South Africa’s municipal law so to give effect to South Africa’s international obligations that have arisen from section 231 of the 1996 Constitution. In agreement with the evidence, Van Zyl J only stated that South Africa is obliged to follow and apply the international precedents, and that full and unequivocal cooperation is essential.¹⁷⁹ This denies the true power of section 231 as the obligations to which Van Zyl J refers to are not expressly identified and no references to international precedents are made.

The above jurisprudential analysis highlights that, while the State has signed and ratified a number of international instruments, the courts have often relied upon these by way of section 35(1) of the 1993 Constitution or 39(1)(b) of the 1996 Constitution, as opposed to invoking section 231 of the 1993 and 1996 Constitutions. The signing and ratification of treaties is a deliberate step by the State to bind itself,

¹⁷⁴ Olivier (2003) *TSAR* 509.

¹⁷⁵ *Director of Public Prosecutions v Bathgate* 2000 2 SA 535 (C) para 36.

¹⁷⁶ Para 36.

¹⁷⁷ For example, the right to privacy is protected in article 17 of the ICCPR.

¹⁷⁸ *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C) 985.

¹⁷⁹ *Director of Public Prosecutions v Bathgate* 2000 2 SA 535 (C) para 88.

on an international level, with other States parties to the treaty. Surely these treaties should be held in higher regard in the interpretation of the Bill of Rights than soft law, or for example treaties that have not yet been signed by the State. Despite the criticisms directed at the courts in the discussions above, the courts have nonetheless indicated a willingness to rely on public international law by way of invoking provisions such as section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution.

4 4 Conclusion

The investigation into the Constitutional Court's application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution reveals that the Court has developed a methodological approach to the consideration of international law when interpreting fundamental rights. In this regard, the framework dictum established in *Makwanyane* provides a structure within which courts should operate when relying on international law in the interpretation of the Bill of Rights. Furthermore, the decision in *Grootboom* endorses the distinction between international law as an interpretative tool and as international law binding upon South Africa. The decision also clarifies that different weight should be attached to different sources of international law. The academic criticisms raised by the Constitutional Court's approach in *AZAPO* indicate that the framework dictum has made a valuable contribution to the methodology used by courts when considering international human rights law in the interpretation of the Bill of Rights. Furthermore, *Glenister* has developed the framework established in *Makwanyane* by elaborating on the interpretative role of international treaties binding upon South Africa under international law, but not yet incorporated into municipal law. To this extent, the framework dictum, and its subsequent developments, provide a methodological approach to the use of international law in the interpretation of the Bill of Rights. However, this approach remains embryonic, and needs to be further developed to enable courts to draw upon relevant sources of international law in a structured and relevant way that will ensure the effective use of the interpretative mandate enshrined in section 39(1)(b) of the 1996 Constitution. In particular, the Court's methodology should be developed to include clear analytical steps that can be followed when court's consider international law. It may be argued that the Court's methodological

approach may then run the risk of becoming a superficial procedural checklist, which courts adhere to for the sake of obliging the interpretative mandate. However, such an argument misses the value that a well-structured approach can add to the Court's interpretative strategy. International law will no longer be an unfamiliar, uncharted source of law, and court's will be better equipped to evaluate their decision-making against the framework of international law sources.

Lastly, this chapter investigated the manner in which courts have invoked section 35(1) and section 39(1)(b) through an extensive evaluation of case law. This investigation shows that, within the context of section 35(1) and section 39(1)(b), public international law and foreign law are often conflated, which signals a less than optimal use of international law. Furthermore, this conflation has contributed to the neglect of public international law in the context of section 35(1), which has often manifested in the form of an over reliance on foreign law. In this way, courts neglect the force that international treaty obligations can exert. Possible factors may contribute towards the treatment of international law highlighted above. Writing in 1996, Botha argues that academic training has neglected the field of public international law, which has largely been ascribed to the minimal role public international law and particularly international human rights law, played under the apartheid regime. As a logical consequence courts, lawyers and (most) judges initially faced an unfamiliar area of law that may have influenced their reluctance to rely on international law.¹⁸⁰

¹⁸⁰ Botha (1996) *SAYIL* 179. An examination of the state of legal education at tertiary level also indicates that universities were not necessarily prepared for the new demand for public international law in the form of international human rights. Booysen investigated the subject of international law as a university course and succinctly described how international law was presented in South African universities in 1996. See H Booysen "International Law as a University Course" (1996) 17 *SAYIL* 147-154. Booysen suggested that apart from the University of South Africa, South African Universities offered international law as a subject without any focus on international human rights. Furthermore, Booysen suggested that because only one or two papers were offered on this topic, it could be assumed that the basic concepts of international law would dominate the content of the courses. The result was that a subject such as international human rights law, which was regarded as a more recent addition to the field of international law, fell outside the scope of the classic content of international law. In conclusion, Booysen aptly remarked that:

“[I]f all universities offer only the same course on the very basic aspects of the classic public international law of previous centuries, the country will lack the necessary expertise to play its proper role in the international sphere.”

In terms of those persons already practising in the field, the important role of legal representation in advancing arguments based on public international law, as well as the judges presiding over these matters, cannot be underestimated. Heyns and Viljoen draw a distinction between law graduates before 1994 and those after, stating that the former might be unaccustomed to rely on international law. The latter on the other hand, are equipped with not only a better understanding of the Bill of Rights, but would also have benefitted from exposure to international human rights law in their legal training. See

The treatment of international law, and specifically international human rights law, in tertiary institutions, has changed dramatically over the last decade. Despite this, Heyns and Viljoen argue that most lawyers do not come into frequent contact with treaties in judicial proceedings, with the exception of those lawyers who specialise in constitutional litigation.¹⁸¹ Heyns and Viljoen suggest that this judicial resistance to the use of international law in judicial proceedings is not only due to the novelty of international law in the South African legal order, but is also caused by an insensitivity towards the value of international law.¹⁸² The inevitable implication is that students should, to a greater extent, be exposed to international instruments and how they are applied, as well as gain insight into developing legal arguments based on international law.

In addition, the availability of, and access to, information on public international law can also play an important role in determining whether international treaties will be relied upon in constitutional interpretation.¹⁸³ Furthermore, *amicus curiae*¹⁸⁴ can deliver insight into important aspects of international law and introduce them to the court for consideration, as was illustrated in *Grootboom*.¹⁸⁵ In this case, the *amicus* introduced arguments based on the CESCR's General Comment 3 pertaining to the minimum core obligation. Although South Africa initially signed and ratified only a handful of international human rights treaties when the 1993 Constitution came into force, this number has increased substantially. One can question the extent to which judges and lawyers alike are aware of the status of these treaties in South Africa, and South Africa's obligation in terms of them. As seen above, legal representatives and judges do, on occasion, acknowledge that South Africa is party to a treaty, and yet they proceed to invoke section 39(1) of the 1996

C Heyns & F Viljoen "South Africa" in C Heyns & F Viljoen (eds) *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 551.

¹⁸¹ Heyns & Viljoen "South Africa" in *The Impact of the United Nations Human Rights Treaties* 551.

¹⁸² 551.

¹⁸³ The *Oxford Reports on International Law* provides one such example. This is an internet-based source dedicated to providing easier access to international case law emanating from international courts, domestic courts, and ad hoc tribunals. It also includes analytical commentary and can assist litigators in their research. Case law is divided into five categories, two of which concern the domestic application of international law in domestic courts as well as case law specific to international human rights law. See *Oxford Reports on International Law* <<http://www.oxfordlawreports.com>> (accessed on 30 October 2014).

¹⁸⁴ The term "*amicus curiae*" translates literally from Latin into "friend of the court" and is defined as a professional person or organisation that is not a party to the legal proceedings, but has been given permission from the court to offer advice on certain aspects of the case in question.

¹⁸⁵ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

Constitution to rely on this international instrument as an interpretative tool. This may indicate that the differences between section 35(1) and section 231 of the 1993 Constitution, and section 39(1)(b) and section 231 of the 1996 Constitution, are not adequately understood. Consequently, while reliance on section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution promotes the framework dictum established in *Makwanyane*, courts prevent treaty obligations from having an influence on decision-making. Attending to the abovementioned factors may assist in alleviating the methodological misconceptions highlighted in this chapter and enhance the effectiveness of the courts' application of section 39(1)(b) of the 1996 Constitution and their consideration of international law.

Although embryonic and, on occasion, characterised by misconceptions, the Constitutional Court's methodological approach should still be applied, as it remains valuable and relevant to the Court's consideration of international law in the interpretation of fundamental rights. This discussion therefore lays the foundation for the following chapter, which will examine how the Constitutional Court has relied upon section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, and in particular, will evaluate how the methodological approach discussed above has been applied within the context of socio-economic rights entrenched in the 1993 and 1996 Constitutions.

Chapter 5

International Human Rights Law in the Constitutional Court's Socio-Economic Rights Jurisprudence

5 1 Introduction

The 1993 and 1996 South African Constitutions give express recognition to a variety of socio-economic rights and protect these rights as justiciable claims.¹ The language used in section 26² and section 27³ of the 1996 Constitution has led the Constitutional Court to adopt a model of reasonableness review to evaluate the State's fulfilment of the positive obligations imposed by these rights.⁴ Defining the State's obligations in respect of socio-economic rights is a complex task, the outcome of which has the potential to respond to the daily realities of poverty and socio-economic inequality in South Africa. However, the meaning that courts attribute to socio-economic rights will largely determine the extent to which they will contribute towards addressing these problems.

In light of the interpretative mandate entrenched in section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, I examine the relationship between the Constitutional Court's adjudication of socio-economic rights and the obligation placed upon the Court to consider international law when interpreting the

¹ See section 3 2 in chapter 3. As discussed, the 1993 Constitution contained only a limited number of socio-economic rights compared to that contained in the 1996 Constitution.

² Section 26 of the 1996 Constitution states the following:

- “(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.”

³ Section 27 of the 1996 Constitution states the following:

- “(1) Everyone has the right to have access to -
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.”

⁴ Reasonableness review is discussed in section 5 3 below.

Bill of Rights.⁵ This evaluation can provide valuable insight into the Court's application of the methodological approach it has thus far developed concerning its consideration of international law in the interpretation of the Bill of Rights.⁶ It will indicate the consistency with which the Court applies section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, and the extent to which the Court considers the generous selection of sources permitted by the framework dictum. This evaluation would therefore make it possible to identify possible strengths and weaknesses of the Court's approach to its interpretative mandate, within the context of socio-economic rights. In addition, this evaluation will assist in determining the relevance of international human rights law to the interpretation of socio-economic rights in South Africa, and provide a clearer indication of whether international human rights law is a neglected tool of interpretation or an irrelevant one, within this context.

My main objectives are firstly, to determine whether the Court has applied section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, and the methodological approach developed in this regard, in the interpretation of socio-economic rights. Secondly, I aim to determine whether international and regional human rights law is relevant to the Court's interpretation of socio-economic rights.

In this chapter, I consider four aspects of the Constitutional Court's consideration of international human rights law in its interpretation of socio-economic rights. Firstly, I examine, on a case-by-case basis, the Court's application of section 35(1) of the 1993 Constitution or section 39(1)(b) of the 1996 Constitution and its utilisation of the methodological approach it developed in terms of these provisions, in its interpretation of socio-economic rights. Where the Court has done so, I examine the manner in which it considered international human rights law. In terms of South Africa's eviction jurisprudence, I focus particularly on the Court's consideration of international law in the development of the concepts of meaningful engagement and alternative accommodation. Secondly, I trace the Court's adoption of the reasonableness model of review in its assessment of the positive duties imposed on the State by socio-economic rights. In this regard, I determine whether this model affords a meaningful role to international human rights law in the interpretation of

⁵ See section 3.3.1 in chapter 3.

⁶ See section 4.2 in chapter 4.

socio-economic rights. I also focus on the Constitutional Court's adoption of a model of review in respect of the negative duties placed upon the State by these rights.⁷ Furthermore, I examine decisions in which the Court has not applied the reasonableness model of review, specifically the Court's adjudication of the education rights entrenched in section 29(1)(a) of the 1996 Constitution.⁸

Thirdly, I consider relevant international and regional human rights standards that may have further contributed to the interpretation of the socio-economic rights in the cases discussed. This includes examining the relevance of the ICESCR, and the normative standards developed by the CESCR, to the Court's interpretive process. It will also include relevant human rights instruments and jurisprudence developed in the African, European and Inter-American human rights systems.⁹ Finally, I analyse the variety of international and regional human rights standards considered by the Constitutional Court with a view to determining which of these standards are considered the most, which of these standards remain neglected, and possible reasons for this distinction.

5 2 The Constitutional Court's Reliance on International Human Rights Law in the Interpretation of Socio-Economic Rights

5 2 1 The Constitutional Court's housing jurisprudence

5 2 1 1 The role of international law in the adjudication of the positive duties imposed by the right to have access to adequate housing

In October 2000, the Constitutional Court delivered judgment in *Grootboom*, wherein it interpreted the right to have access to adequate housing protected in section 26 of the 1996 Constitution and the right of children to shelter entrenched in section

⁷ The negative duties placed upon the State by socio-economic rights are also subject to a reasonableness model of review, but in terms of the general limitations clause entrenched in section 36 of the 1996 Constitution. See section 5 2 1 2 below.

⁸ Section 29 of the 1996 Constitution states the following:

“(1) Everyone has the right-
 (a) to a basic education, including adult basic education;
 ...”.

⁹ The relevance of these regional and international standards is determined according to their ability to provide substantive content to socio-economic rights, and their potential to assist the Constitutional Court in providing a clearer description of the obligations placed upon the State by these rights.

28(1)(c) of the 1996 Constitution.¹⁰ The *amici*¹¹ relied heavily upon international human rights law in their submissions to the Court and as a result, the case offered the Court one of its first opportunities to engage with the CESCR's General Comments, and determine their relevance to socio-economic rights in South Africa.

In their submissions, the *amici* submitted that article 11(1) of the ICESCR,¹² which entrenches the right to adequate housing, and article 2(1)¹³ of the ICESCR, which describes the nature of the obligations imposed on States parties to the ICESCR, were significant to understanding the positive obligations imposed on the State by socio-economic rights in the 1996 Constitution.¹⁴ The *amici* submitted

¹⁰ This discussion will only focus on the Constitutional Court's interpretation of the right to have access to adequate housing protected in section 26 of the 1996 Constitution.

¹¹ The Human Rights Commission and the Community Law Centre of the University of the Western Cape were admitted as *amici curiae*. The heads of argument submitted on behalf of the *amici curiae* can be found at ESCR-NET "Government of the Republic of South Africa & Ors v Grootboom & Ors 2000 (11) BCLR 1169 (CC)" (date unknown) *ESCR-NET* <<http://www.escr-net.org/docs/i/401409>> (accessed 29-10-2014).

¹² ICESCR article 11(1) provides the following:

"The States Parties to the present Covenant recognize 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

¹³ ICESCR article 2(1) provides the following:

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

¹⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 27. South Africa signed the ICESCR on 3 October 1994. Cabinet only approved the ratification of the ICESCR during an ordinary meeting held in Pretoria on 10 October 2012 and announced in a statement the following day that the ratification of the ICESCR is to be tabled before Parliament. See Government Communication and Information System ("GCIS") "Statement on Cabinet Meeting of 10 October 2012" (11-10-2012) *GCIS* <<http://www.gcis.gov.za/content/newsroom/media-releases/cabstatements/11Oct2012>> (accessed 29-10-2014). In March 2013, Deputy Minister of the Department of Justice and Constitutional Development, Mr Andries Nel, stated that the ICESCR was soon to be submitted to Parliament for ratification. See The Department of Justice and Constitutional Development "Address by the Deputy Minister of Justice and Constitutional Development, Mr Andries Nel, MP, during a Human Rights Day Debate in the National Council of Provinces on 19 March 2013" (date unknown) <http://www.justice.gov.za/m_speeches/2013/20130319-dm-hmrdebate.html> (accessed 29-10-2014). At 31 October 2014, this parliamentary process was still pending and the ICESCR could not be enforced in South Africa, as it had not yet been ratified by Parliament in accordance with section 231(2) of the 1996 Constitution. In addition, the ICESCR had not yet been legislatively incorporated into South Africa's municipal law in accordance with section 231(4) of the 1996 Constitution. This, however, did not detract from the usefulness of its provisions within the context of the interpretative mandate contained in section 39(1)(b) of the 1996 Constitution. However, it must be noted that South Africa ratified the ICESCR on 12 January 2015 and the instrument will enter into force in South Africa on 12 April 2015. See UN 'International Covenant on Economic, Social and Cultural Rights: South Africa: Ratification' (12 January 2015) C.N.23.2015.TREATIES-IV.3 (Depositary Notification). Civil society groups have strongly supported and promoted South Africa's ratification of the ICESCR. Unfortunately, South Africa has not yet signed or ratified the Optional Protocol to the ICESCR ("OP-ICESCR"). The ICESCR Ratification Campaign Driver Group

further that the CESCR's General Comment 3,¹⁵ in which the CESCR endorses the concept of minimum core obligations upon States parties, was relevant to the case and argued that the Court follow a similar approach in its interpretation of section 26.¹⁶ Furthermore, the *amici* argued that section 26 of the 1996 Constitution placed minimum core obligations upon the State that entitled all respondents to shelter.¹⁷

In response to these arguments, the Court invoked section 39(1)(b) of the 1996 Constitution and cited Chaskalson P's dicta as it appeared in *Makwanyane*.¹⁸ However, Yacoob J added to this and stated the following:

“[T]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”¹⁹

As discussed in chapter 4, the judgment illustrates a valuable engagement with the role of international law in the interpretation of the Constitution, which strengthens the Court's methodological approach to the consideration of international law.²⁰ However, the Court also made a valuable determination concerning the relevance of

has strongly promoted South Africa's ratification of the OP-ICESCR. This campaign comprises of the Black Sash, the University of the Western Cape's Community Law Centre (CLC), the Global Call to Action against Poverty South Africa (GCAPSA), National Welfare Forum (NWF), Peoples' Health Movement South Africa, Socio-Economic Rights Institute of South Africa (SERI), and Studies in Poverty and Inequality Institute (SPII).

¹⁵ CESCR 'General Comment 3' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 ("General Comment 3").

¹⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 29. General Comment 3 paragraph 10 states the following:

“[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care or basic shelter and housing, or the most basic form of education is, *prima facie*, failing to discharge its obligations under the Covenant ...”.

It must be noted that the CESCR's General Comment 3 is also relevant for its elaboration on States parties' obligation to “take steps ... by all appropriate means including particularly the adoption of legislative measures”, the concept of “progressive realization”, the CESCR's approach towards retrogressive measures, the concept of “to the maximum of its available resources”, the obligation on States parties in instances of resource constraints and lastly, the obligation on States parties “to take steps, individually and through international assistance and co-operation, especially economic and technical ...”.

¹⁷ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 18. This challenged the High Court order granted by Davis J whereby only the applicant children and their parents were “entitled to be provided with shelter by the appropriate organ or department of state”. See *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) 293.

¹⁸ *S v Makwanyane* 1995 3 SA 391 (CC) para 35. See section 4 2 1 in chapter 4.

¹⁹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 26.

²⁰ See section 4 2 3 in chapter 4.

article 11(1) and article 2(1) of the ICESCR and the CESCR's General Comment 3 to the interpretation of section 26 of the 1996 Constitution. Firstly, the Court attached weight to the textual differences between the provisions of the ICESCR and the 1996 Constitution.²¹ In particular, Yacoob J stated that section 26 of the 1996 Constitution referred to the "right of access to adequate housing", whereas article 11(1) of the ICESCR referred to the "right to housing".²² The Court held further that differences existed between article 2(1) of the ICESCR and section 26(2) of the 1996 Constitution. It stated that article 2(1) of the ICESCR referred to the obligation on States parties to take "appropriate steps", which must include legislation,²³ whereas the Court found that section 26(2) of the 1996 Constitution only obliged the State to "take reasonable legislative and other measures".²⁴

Secondly, in its consideration of the concept of minimum core obligations, the Court stated that General Comment 3, paragraph 10 did not specifically identify the meaning of a minimum core.²⁵ However, the Court was of the view that international law required that the minimum core obligation be determined by the needs of the most vulnerable group.²⁶ Furthermore, the Court stated that the needs and opportunities for the enjoyment of a right must first be identified before any minimum threshold can be determined in respect of the progressive realisation of the right.²⁷ The Court highlighted that the task of determining the minimum core is a complex one when insufficient information on the needs and opportunities for the enjoyment of a relevant right is available.²⁸ In this regard, the Court held that it did not have information at its disposal comparable to that garnered by the CESCR during its examination of States parties' reports in terms of sections 16 and 17 of the ICESCR.²⁹

²¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 28.

²² Para 28.

²³ Para 28.

²⁴ Para 28. At a later stage in the decision, Yacoob J also argued that the right of "access to adequate housing" as entrenched in the 1996 Constitution goes even further than the "right to adequate housing" as protected in the ICESCR. Concerning the former, Yacoob J held that housing "entails more than bricks and mortar" and stated further that housing

"requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions must be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing s 26."

²⁵ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 30.

²⁶ Para 31.

²⁷ Para 32.

²⁸ Para 32.

²⁹ Para 32.

The Court therefore concluded that, in the context of the current case, it did not have sufficient information to determine what would comprise the minimum core obligation of the right to have access to adequate housing.³⁰ The Court also found that, within the context of this right, the determination of a minimum core posed difficult questions as needs differ from case to case and questions arise as to whether a minimum core should be defined generally or for specific groups of people.³¹

The above reasoning underpinned the Court's decision that the concept of minimum core obligations, as found in the CESCR's General Comment 3, could not be applied to the case. However, Yacoob J did not completely reject the concept of a minimum core obligation. Rather, he stated that there might indeed be cases in which it is "possible and appropriate to have regard to the content of a minimum core to determine whether the measures taken by the State are reasonable."³² However, Yacoob J held that in the present case, too little information was presented before the Court to allow for its determination.³³ This aspect of the judgment creates, at least, a window of opportunity by which the concept of the minimum core may be used in a reasonableness review analysis in the future. However, in this case the Court deemed it unnecessary to decide whether it was appropriate to determine the minimum core of a right.³⁴

As I elaborate below, the Court chose instead to establish its use of the reasonableness model of review when adjudicating upon the right to have access to adequate housing.³⁵ According to this model of review, the Court limits its inquiry to whether the measures undertaken by the State are reasonable.³⁶ In this case, the Court applied the reasonableness model of review to the nation-wide housing programme adopted by the State and examined, in particular, whether a housing programme that

³⁰ Para 32.

³¹ Para 33.

³² Para 33.

³³ Para 33.

³⁴ Para 33.

³⁵ In the *Grootboom* judgment, the Constitutional Court laid down specific criteria that could assist in determining whether the State's action was indeed reasonable. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 39-44. Briefly, the Constitutional Court held that a reasonable Government programme must be capable of facilitating the realisation of a right, and it must be comprehensive, coherent, and co-ordinated. Furthermore, appropriate financial and human resources must be made available for the programme and the programme must be balanced, flexible, and provide for short-, medium- and long term needs. A reasonable Government programme should also be reasonably conceived and implemented and make short-term provision for those with urgent needs and living in desperate circumstances. These criteria will be discussed further in this study in section 5 3 below.

³⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 41.

did not cater for those in desperate need was reasonable in the circumstances.³⁷ The Court found that the nation-wide housing programme had to contain temporary measures to cater for those in desperate need and, as the programme did not provide such relief, it fell short of those obligations placed upon the State in terms of section 26(2) of the 1996 Constitution.³⁸

Although the Court did not invoke the CESCR's concept of the minimum core, it was assisted by the CESCR's concept of "progressive realisation", which was elaborated on in its General Comment 3.³⁹ However, the Court did not entirely adopt the same meaning of "progressive realisation" as that used by the CESCR.⁴⁰

Grootboom is an important addition to the Constitutional Court's socio-economic rights jurisprudence as it underscores the justiciability of socio-economic rights entrenched in the 1996 Constitution.⁴¹ Furthermore, the judgment establishes criteria that guide the application of the reasonableness model of review in the adjudication of socio-economic rights.

However, the judgment does not engage with the substantive content of the right to access to adequate housing entrenched in section 26(1) of the 1996 Constitution. Such an engagement may have been particularly useful in clarifying the Court's understanding of "people in desperate need" by identifying those conditions that must exist in order to classify an individual as such.⁴² Furthermore, by engaging with the content of the right to have access to adequate housing, the Court may have been able to assist the State in understanding its obligations, which pertain to satisfying "short term" and "immediate" needs. Yacoob J does refer to housing as "more than bricks and mortar" and comprising land, services and a dwelling.⁴³ To this limited extent, Yacoob J engages with some criteria relevant to the right to have access to adequate housing. Ultimately, however, it remained for the State to determine what comprises immediate and short term needs.

In this regard, an engagement with international human rights standards that further elaborate on the scope and content of the right to adequate housing may have

³⁷ Para 63.

³⁸ Para 65-66.

³⁹ General Comment 3, paragraph 9. *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45.

⁴⁰ See D Bilchitz "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance" (2002) 119 *SALJ* 484 494.

⁴¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 20.

⁴² Para 52.

⁴³ Para 35.

contributed towards developing the substantive content of section 26 of the 1996 Constitution and assisted the Court in identifying basic housing needs. In accordance with section 39(1)(b) of the 1996 Constitution, the Court could have considered the CESCR's General Comment 4.⁴⁴ As discussed in chapter 4, the CESCR's General Comments are not formally legally binding upon States parties to the ICESCR, and within the South African context, amount to soft law. Nevertheless, the CESCR's General Comments amount to highly persuasive authority in the interpretation of States parties' obligations under the ICESCR.⁴⁵ The CESCR states that its General Comments are designed specifically to assist States parties "in fulfilling their obligations under the Covenant."⁴⁶ In addition, Conway describes these as "normative elucidations" that began to explain the content of the rights protected in the ICESCR and are now tools of evaluation that form a concrete basis for evaluating State compliance with the ICESCR.⁴⁷

However, it should be noted that the CESCR's General Comments are not case or country specific, and are not made within the context of a contentious dispute amongst States parties. Accordingly, these are not adjudicative decisions designed to provide relief in complex and challenging factual circumstances. Therefore, it may be argued that the CESCR's General Comments are merely abstract normative standards

⁴⁴ CESCR 'General Comment 4' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 ("General Comment 4").

⁴⁵ See M Ssenyonjo *Economic, Social and Cultural Rights in International Law* (2009) 29. States bound to the ICESCR have also interpreted the provisions of the ICESCR and, consequently, a myriad of interpretations concerning the provisions of the ICESCR exist. However, Craven argues that the CESCR is best suited for developing a common understanding regarding the meaning of the ICESCR. See Craven *The International Covenant on Economic, Social and Cultural Rights* 4. The CESCR is one of several UN Treaty Bodies that adopt General Comments. Others who do so include the Committee on the Rights of the Child, the HRC, the Committee Against Torture, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Committee on the Rights of Persons with Disabilities. The Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of Racial Discrimination adopt General Recommendations. Although the terms "General Comment" and "General Recommendation" have been used interchangeably in practice, Conway highlights that important differences may exist between the two instruments in certain cases. See B Conway "Normative Instruments in International Human Rights Law: Locating the General Comment" (2008) *Centre for Human Rights and Global Justice Working Paper No 17* 1-38. For a historical discussion of the UN treaty bodies' adoption of General Comments, see Conway (2008) *Centre for Human Rights and Global Justice Working Paper No 17* 5-9.

⁴⁶ ECOSOC, 'Report on the forty sixth and forty seventh sessions' (2-20 May 2011 and 14 November-2 December 2011) E/2012/22-E/C.12/2011/3 15.

⁴⁷ Conway (2008) *Centre for Human Rights and Global Justice Working Paper No 17* 11. Similarly, Ssenyonjo argues that the General Comments function as instruments of "normative development" and highlights that the General Comments adopted by the CESCR have not received any formal objections from States, therefore indicating their wide acceptance by States parties to the ICESCR. Ssenyonjo *Economic, Social and Cultural Rights in International Law* 29.

that may be difficult to apply to a specific set of facts within an adjudicative context. Nevertheless, the CESCR's General Comments are deemed authoritative in their own right and can provide substantive, normative guidance on the content of relevant rights. General Comment 4 was adopted by the CESCR to provide clarity on article 11(1) of the ICESCR, a provision that entrenches the right to adequate housing. In particular, General Comment 4 applies the standard of "adequacy" to housing rights, which requires that certain elements must be present in order for housing to be "adequate" namely, legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. The General Comment elaborates on certain aspects pertaining to adequate housing that Yacoob J also refers to in his description of the right to have access to adequate housing. In particular, he states that "housing entails more than bricks and mortar"⁴⁸ and "requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself".⁴⁹ Thus, the General Comment could have been used to support a more substantive engagement with these aspects and afford added legitimacy to them, as well as to other dimensions of the right elaborated on in the General Comment when interpreting section 26 of the 1996 Constitution.

While section 39(1)(b) of the 1996 Constitution permits the consideration of the CESCR's General Comment 4, other aspects relating to the relevance of this source may further justify the Court's reference to it in the interpretation of section 26 of the 1996 Constitution. In particular, the CESCR undertook extensive investigations during the drafting of its General Comment 4 and relied on other international developments and instruments relevant at the time.⁵⁰ Furthermore, regional

⁴⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 35.

⁴⁹ Para 35.

⁵⁰ General Comment 4 is the product of much investigation and consultation. Not only did the CESCR and its predecessors examine seventy five reports concerned with the right to adequate housing since 1979, but a day of General Discussion was also dedicated to this right at the CESCR's third and fourth sessions. See General Comment 4, paragraph 2. At the CESCR's discretion, one day of a session may be designated to the discussion of either a specific right or an aspect of the ICESCR. Such discussions are aimed at deepening the CESCR's understanding of specific matters. Furthermore, it provides an opportunity for other interested parties to contribute to the CESCR's efforts on the subject as well as assist in establishing a foundation upon which to develop a General Comment. See ECOSOC, 'Report on the forty-sixth and forty-seventh sessions' (2012) (E/2012/22-E/C.12/2011/3) para 56. These Days of General Discussion have contributed significantly to the formulation of General Comments. Within the context of General Comment 4, the CESCR also considered information derived from the International Year of Shelter for the Homeless (1987), while the Global Strategy for Shelter to the Year 2000 was also consulted. In addition to this, reports and documentation adopted by the Commission on

adjudicative bodies have relied upon the CESCR's General Comment 4, signalling recognition of its relevance in the adjudication of socio-economic rights.⁵¹

The concept of "adequate" housing or an "adequate" standard of living, which includes housing, is referred to in the UDHR and the CEDAW.⁵² South Africa had already ratified the latter at the time of the *Grootboom* judgment and was therefore bound to this instrument.⁵³ This should have provided further impetus to at least engage with the standard of "adequacy" found in section 26(1) of the 1996 Constitution, as the CEDAW demands a similar standard in respect to housing.

The Habitat Agenda II may also have been relevant to the Court's interpretation of section 26 of the 1996 Constitution as it elaborates on the concept of "adequate housing".⁵⁴ South Africa indicated its commitment to Habitat II before the

Human Rights, as well as the Sub-Commission on Prevention of Discrimination and Protection of Minorities, were examined. See General Comment 4, paragraph 2.

⁵¹ For example, in *FEANSTA v France*, the European Committee on Social Rights ("ECSR") lauded the ICESCR as a "key source of interpretation" and highlighted the importance of the CESCR's General Comment 4 to article 11(1) of the ICESCR. See *FEANSTA v France* Complaint No. 39/2006 (Decision on the Merits, 4 February 2006) para 66-67. See also *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others*, Petition 65 of 2010 High Court at Nairobi (Nairobi Law Court) [2011] eKLR 9. In this case, the High Court of Nairobi adjudicated upon the private property rights of owners and the competing interests of petitioners that may be rendered homeless if evicted. In its adjudication of these rights, the High Court referred to the South African Constitutional Court judgment delivered in *Makwanyane* and the framework dictum established therein. The High Court then proceeded to refer to the CESCR's General Comment 4 and listed the numerous elements that form the criteria for "adequate housing".

⁵² Article 25(1) of the UDHR states the following:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Furthermore, article 14(h) of CEDAW states the following:

"To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."

⁵³ South Africa signed the CEDAW on 29 January 1993 and ratified it on 15 December 1995.

⁵⁴ Report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, 3-14 June 1996 A/CONF. 165/14. 171 countries adopted the report at the United Nations Conference on Human Settlements (Habitat II). As indicated in paragraph 1 of the Habitat Agenda, countries participating in the United Nations Conference on Human Settlements (Habitat II) committed themselves to the objectives, principles, and recommendations contained in the Habitat Agenda. The purpose of this conference was to address two important global themes namely, "Adequate shelter for all" and "Sustainable human settlements development in an urbanizing world". Furthermore, paragraph 25 of the Habitat Agenda indicates that participating States adopted "the goals and principles of adequate shelter for all and sustainable human settlements development in an urbanizing world." Paragraph 39 of the report states the following:

"We reaffirm our commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments ... we recognize our obligation by Governments to enable people to obtain shelter and to protect and improve dwellings and neighbourhoods. We commit ourselves to the goal of improving living and working conditions on an equitable and sustainable basis, so that everyone will have adequate shelter that is healthy, safe, secure, accessible and affordable and that includes basic services,

Grootboom judgment, and expresses this commitment in the Urban Development Framework.⁵⁵ Furthermore, Habitat Agenda II states that it

“is a global call to action at all levels. It offers, within a framework of goals and principles and commitments, a positive vision of sustainable human settlements.”⁵⁶

In addition, States participating in Habitat Agenda II declare that they “subscribe to the principles and goals set out below to guide us in our actions.”⁵⁷ As will be recalled,⁵⁸ Wallace and Martin-Ortega define soft law as “non-legally binding international instruments” that comprise of “norms, principles, commitments or standards expected to be complied with by states”.⁵⁹ The language and spirit of Habitat Agenda II indicates that this source of law falls within this description and is further characterised by those elements highlighted in part 4 2 1 of chapter 4 describing soft law, which may be considered as a source of interpretation for the purposes of section 39(1)(b) of the 1996 Constitution.

In addition to these sources, the Court may have consulted relevant reports of the Special Rapporteur on the right to adequate housing, appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁶⁰ The

facilities and amenities, and will enjoy freedom from discrimination in housing and legal security of tenure.”

⁵⁵ National Department of Housing *Urban Development Framework* (1997) 1.

⁵⁶ Report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, 3-14 June 1996 A/CONF. 165/14 para 20.

⁵⁷ Para 20.

⁵⁸ See section 4 2 1.

⁵⁹ Wallace & Martin-Ortega *International Law* 30.

⁶⁰ Mr Rajindar Sachar was appointed as Special Rapporteur on promoting the realisation of the right to adequate housing in August 1992 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This decision was endorsed by the Commission on Human Rights in 1993. See UNCHR ‘Promoting the Realization of the Right to Adequate Housing’ (4 March 1993) UN Doc E/CN.4/Dec/1993/103. This is not the only Special Rapporteur to address housing. In April 2000, the Commission on Human Rights established the mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. The Commission was replaced by the Human Rights Council in June 1996, which has supported and extended this mandate. Special Rapporteurs on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, appointed by the Human Rights Council, have included Mr Miloon Kothari, appointed from 2000 to 2008, and Ms Raquel Rolnik, appointed from 2008-2014. As of June 2014, Ms Leilani Farha holds this position. The Special Procedures of the Human Rights Council consist of independent human rights experts appointed by the Human Rights Council, and supported by the Office of the United Nations High Commissioner of Human Rights, to report on human rights issues in a specific country or in accordance with a specific theme. The Special Procedures are either individuals, known as “Special Rapporteurs” or “Independent Experts”, or consist of a working group. The Special Procedures report to the Human Rights Council on an annual basis. Many of the mandates also report to the General Assembly. Their tasks include, amongst others, undertaking country visits, drawing attention to alleged violations or abuses by sending

Office of the High Commissioner for Human Rights describes the Special Procedures as “the most directly accessible mechanism of the international human rights machinery”, which “interact regularly with human rights defenders and actual and potential victims of human rights violations.”⁶¹ These reports fit well within Cassese’s definition of soft law, which he defines as not legally binding, but manifesting a certain measure of agreement in the form of guidelines, statements reflecting common positions, or policies.⁶² One focus of the Special Rapporteur’s first progress report was to clarify States parties’ obligations in relation to the right to adequate housing.⁶³ This report largely endorses and confirms States parties’ obligations entrenched in the ICESCR and elaborated on in the CESCR’s General Comments 3 and 4. The report would therefore have served as a useful guide to understanding the nature and scope of the right to adequate housing under the ICESCR.⁶⁴

The South African Housing Code,⁶⁵ adopted by the National Department of Housing, and applicable at the time of the judgment, uses the ICESCR’s definition of “adequate housing” to explain “adequate” within the context of section 26(1) of the 1996 Constitution. McLean argues that in *Grootboom*, Yacoob J interpreted section

communications to States (and others), which address individual cases as well as issues of a structural nature, raising public awareness in respect of human rights violations and human rights standards, undertaking specific thematic studies and advising relevant parties in respect of technical cooperation.

⁶¹ Office of the United Nations High Commissioner for Human Rights *United Nations Special Procedures: Facts and Figures 2013* (2014) 1.

⁶² Cassese *International Law* 196

⁶³ UNCHR (Sub-Commission) ‘Report of the Special Rapporteur on: The Realization of Economic, Social and Cultural Rights’ (1993) UN Doc E/CN.4/Sub.2/1993/15.

⁶⁴ The report examines article 2(1) of the ICESCR and discusses the implications of the phrases “undertakes to take steps ... by all appropriate means”, “to the maximum of its available resources”, and “to achieve progressively”. The report also discusses the concept of the minimum core, as adopted by the CESCR in General Comment 3 and elaborates on States parties’ “layers of obligations”, which include the duty to recognise, respect, protect and fulfil, within the context of adequate housing. The report also covers aspects such as the obligations of the international community and reiterates the core entitlement of housing rights contained in paragraph 8 of the CESCR’s General Comment 4 namely, legal security of tenure, availability of services, materials, and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy. The report also considers various domestic legislation pertaining to housing rights, shortcomings of the legal approach to housing entitlements, the justiciability of housing rights and housing rights’ jurisprudence within both the domestic, regional and international context. Lastly, the report also looks at actions and omissions that constitute housing violations, and the role of NGO’s in the development of housing rights legislation and housing rights based indicators. The Special Rapporteur submitted two reports subsequent to this that further clarify the nature and scope of the right to adequate housing, see UNCHR (Sub-Commission), ‘Report of the Special Rapporteur on: The Realization of Economic, Social and Cultural Rights’ (1994) UN Doc E/CN.4/Sub.2/1994/20 and UNCHR (Sub-Commission), ‘Report of the Special Rapporteur on: The Realization of Economic, Social and Cultural Rights: The Right to Adequate Housing’ (1995) UN Doc E/CN.4/Sub.2/1995/12.

⁶⁵ National Department of Housing *National Housing Code* (2000) parts 1 and 7. The *National Housing Code* (2000) was substantially revised in 2009, under the auspices of the Department of Human Settlements, which replaced the Department of Housing.

26(1) of the 1996 Constitution more restrictively than that of the Housing Department, resulting in the creation of a constitutional standard that is lower than State policy.⁶⁶ She argues that while the Court may do so, this interpretation firstly, indicates that the Court has inadequately assessed the South African Housing Code and secondly, indicates the Court's reluctance to address the substantive content of section 26(1) of the 1996 Constitution.⁶⁷ Thus, McLean criticises the Court's restrictive reading of sections 26(1) and 26(2) of the 1996 Constitution in *Grootboom* as avoiding an interpretation that adopts a more "practical and progressive" approach to State obligations that finds support in national legislation and international law.⁶⁸ Kapindu criticises the judgment further and submits that the differences between the provision of the ICESCR and section 26 of the 1996 Constitution are not very significant, thus implying that undue weight was attached to the difference in wording between article 11(1) of the ICESCR and section 26 of the Constitution.⁶⁹

However, the Court applied and developed the framework dictum established in *Makwanyane* in an exemplary manner and its consideration of international human rights law in the form of soft law should be lauded. As discussed in chapter 4, the Court's reference to the CESCR's General Comments reaffirms the principles established in *Makwanyane* namely, that both binding and non-binding international law are tools to be used in the interpretation of the Bill of Rights.⁷⁰ Moreover, Yacoob J reaffirmed the important role played by international human rights law, specifically the ICESCR, in the drafting of the provisions protecting socio-economic rights. Furthermore, section 39(1)(b) of the 1996 Constitution does not oblige courts to apply relevant international human rights law in the interpretive process, but only consider it. Therefore, the rejection of the minimum core in this case cannot be seen as an unsuccessful application of section 39(1)(b) of the 1996 Constitution. However, this judgment challenges the relevance of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution in cases where the Constitutional Court does

⁶⁶ K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 140.

⁶⁷ 140.

⁶⁸ 143.

⁶⁹ RE Kapindu *From the Global to the Local: The Role of International Law in the Enforcement of Socio-Economic Rights in South Africa* (2009) 33.

⁷⁰ See section 4.2.1 in chapter 4.

not consider relevant international human rights law that may meaningfully contribute to the development of a more substantive jurisprudence.⁷¹

5 2 1 2 The role of international law in the adjudication of the negative duties imposed by the right to have access to adequate housing

In *Jaftha v Schoeman; Van Rooyen v Stoltz*,⁷² the Constitutional Court was required to decide on appeal whether certain provisions of the Magistrates Court Act 32 of 1944 were inconsistent with the negative duties imposed by the right to have access to adequate housing entrenched in section 26(1) of the 1996 Constitution. In particular, section 66(1)(a) of the Magistrate's Court Act regulated the process of recovering debts in the Magistrate's Court. If a debtor failed to pay a judgment debt, or failed to adhere to a court order that required the payment of money in instalments, the Act provided that the judgment or order was enforceable by way of execution against the debtor's moveable property. If the debtor's movable property was insufficient to satisfy the judgment debt or order, or if the court so ordered, the clerk of the court was obliged to issue a warrant of execution against the debtor's immovable property without judicial oversight.⁷³ In this case, these provisions permitted the sale of execution of the homes of individuals who failed to pay judgment debts.⁷⁴ In addition, while section 67 of the Magistrates Court Act lists those movables that are exempt from execution, the appellants argued that the provision was unconstitutional to the extent that the list did not include the home of a debtor, which is constitutionally protected.⁷⁵ Individuals were therefore placed in a very vulnerable position that could result in the loss of the security of tenure in their homes.⁷⁶

In its judgment, the Court confirmed the appellants' claim that the case concerned the negative duties imposed by the right to have access to adequate housing

⁷¹ The *Grootboom* judgment was delivered on 4 October 2000. While South Africa ratified the AfCHPR on 9 July 1996, this instrument did not expressly contain the right to housing. It was only in October 2001, that the African Commission on Human and Peoples' Rights ("ACommHPR") recognised the right to housing as implicitly entrenched in the right to property, family protection and the right to enjoy the best attainable state of mental health. See *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 60. Therefore, the AfCHPR is not relevant in this particular discussion as a standard that may assist in the normative development of section 26 of the 1996 Constitution.

⁷² 2005 2 SA 140 (CC) ("*Jaftha*").

⁷³ Para 16.

⁷⁴ It must be noted that in both cases, judgment was taken against the appellants in respect of trifling debts.

⁷⁵ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 18.

⁷⁶ Para 1-2.

protected in section 26 of the 1996 Constitution. Furthermore, it stated that within the context of the right to have access to adequate housing, at least “any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1).”⁷⁷ The Court added that such a limitation would however, be subject to a higher standard of scrutiny by means of section 36⁷⁸ of the Constitution.⁷⁹ In its decision, the Court invoked section 39(1)(b) of the 1996 Constitution to assist it with the concept of adequate housing, and sought guidance from article 11(1) of the ICESCR. In addition, the Court examined the CESCR’s General Comment 4 and highlighted that the CESCR requires that the right to housing should not be interpreted restrictively, but rather as “the right to live somewhere in security, peace and dignity.”⁸⁰ The Court viewed the CESCR’s interpretation as reflecting the same approach found in *Grootboom* namely, that human dignity and socio-economic rights are inherently linked to each other.⁸¹

The Court also relied strongly on the significant position given to the standard of “adequacy” within the context of the right to adequate housing in the CESCR’s General Comment 4 and highlighted certain aspects of the CESCR’s approach in this regard.⁸² Firstly, the concept of “adequacy” comprises important elements relevant to the right to adequate housing, one of which is security of tenure.⁸³ Secondly, security of tenure comprises many forms and is not only limited to ownership.⁸⁴ Lastly, everyone should hold a degree of security of tenure that provides legal protection against forced eviction, harassment and other threats.⁸⁵ Moreover, the Court emphasised that an approach that focuses on the importance of security of tenure is

⁷⁷ Para 34.

⁷⁸ Section 36 states the following:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

⁷⁹ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34.

⁸⁰ Para 24.

⁸¹ Para 24.

⁸² Para 25.

⁸³ Para 24.

⁸⁴ Para 24.

⁸⁵ Para 24.

important within the context of South Africa's history of forced removals and racist, arbitrary evictions.⁸⁶

The Court's willingness to engage with the ICESCR as well as with the CESCR's General Comment in this manner is commendable. The decision in *Jaftha* indicates that the Court affirms, and is willing to apply, the CESCR's approach towards security of tenure to reinforce its understanding of the negative duties imposed by section 26(1) of the 1996 Constitution.⁸⁷ Furthermore, by affirming the CESCR's approach as being particularly relevant in the wake of South Africa's past, the Court makes a valuable point that would endorse a more frequent use of international standards in South African jurisprudence. In this regard, the CESCR's concept of "adequacy" elaborated on in General Comment 4 provides protection to many aspects of the right to adequate housing that could be utilised to reinforce our understanding of section 26 "in the light of our particular history of forced removals and racist evictions in South Africa."⁸⁸

In *Gundwana v Steko Development*,⁸⁹ the Constitutional Court was requested to adjudicate a similar matter. In this case, the Court held that a High Court registrar was not competent to declare a mortgaged property, that is a person's home, specially executable in the course of ordering a default judgment under Rule 31(5)(b) of the Uniform Rules of the High Court.⁹⁰ As confirmed in *Jaftha*, the Court reaffirmed that section 26 of the 1996 Constitution does not prohibit a sale in execution of a home *per se*, unless there has been an abuse of court procedure or an execution order is enforced in bad faith.⁹¹ However, the Court emphasised that an agreement to a mortgage bond does not consist of forfeiting an individual's protection under section 26(1) and 26(3) of the 1996 Constitution and that the procedural and proportionality principles established in *Jaftha* still apply to mortgagors who willingly place their homes as security for a loan.⁹² In particular, the Court emphasised that judicial oversight was required in execution orders concerning a person's home. The Court added that in such an evaluation, the Court must take due regard of the facts of each case and the potential impact of such an execution on debtors who are poor and

⁸⁶ Para 26.

⁸⁷ Para 25.

⁸⁸ Para 25.

⁸⁹ 2011 3 SA 608 (CC) ("*Gundwana*").

⁹⁰ Para 65.

⁹¹ Para 47 and 48.

⁹² Para 46 and 49.

subject to the risk of losing their homes.⁹³ This would include undertaking a proportionality analysis between the means used in the execution process and other comparable means to exact payment.⁹⁴

Unlike *Jaftha*, the Court did not apply section 39(1)(b) of the 1996 Constitution in the determination of this case. As indicated above, the CESCR's General Comment 4 may have assisted in strengthening the importance of an individual's security of tenure within the context of adequate housing as it did in *Jaftha*, and therefore assist in supporting the need for judicial oversight in instances described above.

In both *Jaftha* and *Gundwana*, the Court may also have considered decisions delivered by the AfCommHPR that provide relevant support for, as well as reinforce, a State's negative duty in respect of the right of access to housing.⁹⁵ For example, in *SERAC v Nigeria*,⁹⁶ the AfCommHPR engaged with the concept of minimum core obligations and held that, within the context of the right to shelter, such an obligation obliges the Nigerian Government "not to destroy the houses of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes."⁹⁷ The AfCommHPR also held that the Nigerian Government's duty to respect housing rights obliges the Government, as well as its agents and organs, to:

⁹³ Para 41, 49 and 53.

⁹⁴ Para 54.

⁹⁵ Rule 3 of the Rules of Procedure of the African Commission on Human and Peoples' Rights defines the AfCommHPR as "an autonomous treaty body working within the framework of the African Union to promote human and peoples' rights and ensure their protection in Africa". See Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted by the AfCommHPR at its 47th Ordinary session, May 2010, and entered into force on 18 August 2010 ("Rules of Procedure"). The AfCommHPR has a three-fold mandate established in article 45 of the AfCHPR. In this regard, the AfCommHPR is mandated to promote and protect human and peoples' rights as well as interpret the provisions of the AfCHPR. For a description of the promotional mandate of the AfCommHPR, see Rules 69-72 of the Rules of Procedure. For a description of the AfCommHPR's protective mandate, see Rules 79-82 of the Rules of Procedure. In accordance with its mandate to promote and protect human rights, the AfCommHPR has helped strengthen the protection of socio-economic rights within Africa. For example, the AfCommHPR, together with the International Centre for Legal Protection on Human Rights, the Cairo Institute for Human Rights Studies and the Centre for Human Rights, University of Pretoria, organised a Seminar on Economic, Social and Cultural Rights that was held from 13-17 September 2004 in Pretoria. At this seminar, participants adopted the Statement on Economic, Social and Cultural Rights in Africa. This Statement was later adopted by the AfCommHPR as the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa by way of resolution in 2004. See ACHPR Res 73 (XXXVI) 04 (adopted by the AfCommHPR at its 36th Ordinary session held from 23 November to 7 December 2004). For a detailed discussion on the AfCommHPR's three-fold mandate, see M Baderin "The African Commission on Human and Peoples' Rights and the Implementation of Economic, Social and Cultural Rights in Africa" in M Baderin & R McCorquodale (eds) *Economic, Social and Cultural Rights in Action* (2007) 145-150.

⁹⁶ *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

⁹⁷ Para 61.

“[A]bstain 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.”⁹⁸

Furthermore, the AfCommHPR held that, in terms of the duty resting upon the State:

“Its obligations to protect oblige 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.”⁹⁹

Thus, the AfCommHPR highlighted the negative duty resting upon States parties to respect and protect the relevant socio-economic rights.¹⁰⁰ This concept of the minimum core differs from that applied by the CESCR and elaborated upon in the CESCR’s General Comment 3, which only refers to States parties’ positive obligations to prioritise the delivery of minimum essential levels of basic services in respect of the right to adequate housing. Furthermore, in *Media Rights Agenda and Others v Nigeria*,¹⁰¹ the AfCommHPR held that “[t]he right to property necessarily includes a right to have access to property of one’s own and the right not for one’s property to be removed.”¹⁰² These decisions could have provided additional support for the Court’s decision to uphold the State’s negative duty to respect the right to have access to adequate housing. As South Africa has signed and ratified the AfCHPR, reference to these decisions may have been more preferable than those made to the CESCR’s General Comment 4. However, the CESCR’s General Comment 4

⁹⁸ Para 61.

⁹⁹ Para 61.

¹⁰⁰ DM Chirwa “African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights” in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 326.

¹⁰¹ (2000) AHRLR 200 (ACHPR 1998) (“*Media Rights Agenda*”).

¹⁰² Para 77. However, it must be noted that in *Media Rights Agenda*, the AfCommHPR found that article 14 of the AfCHPR, which entrenches the right to property, was violated by measuring the decrees that directed a sealing up of premises against the standard of “appropriateness” and “the interest of the public or the community in general”. Furthermore, the AfCommHPR held that the seizure of magazines without the necessary explanation or justification based on public need or interest also constituted a violation of the right to property. These standards differ from that provided for in section 36 of the 1996 Constitution, which requires that a standard of reasonableness be applied when rights are subject to limitation. Section 36 of the 1996 Constitution requires further that the Bill of Rights

“may be limited only in terms of law of general application to the extent that the limitation is ... justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...”.

resonates more with section 26 of the 1996 Constitution, as it elaborates specifically on the concept of adequacy within the context of the right to adequate housing. Lastly, the Court may have sought guidance from the report of Mr Rajindar Sachar, the Special Rapporteur promoting the realisation of the right to adequate housing.¹⁰³ In his report, he elaborated on States parties' obligations in terms of the right to housing protected in the ICESCR, which includes a duty to respect the right.

5 2 1 3 The Constitutional Court's eviction jurisprudence

As discussed in chapter 2, the South African Government adopted many laws and policies before and during the period of apartheid, authorising the unequal and discriminatory distribution of housing and land in accordance with race classification. The forced removal of Black South Africans were a common occurrence during the apartheid era, while the State exerted tremendous effort in controlling the movement of Black South Africans to ensure their segregation from White areas. Under the new democratic dispensation, South Africa has constitutionalised housing rights and removed past discriminatory practices, policies and laws. However, apartheid has left an undeniable legacy of housing and land problems that the State must address today. This is particularly evident in the massive housing and land shortages in South Africa, which continue to leave many Black South Africans living in townships or informal settlements that are often characterised by deplorable conditions and a lack of security of tenure.

The State has adopted legislation to give effect to the constitutionally protected right to have access to adequate housing, which provides both substantive and procedural safeguards within the context of evictions. The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("PIE") provides one such example, which prohibits unlawful evictions and regulates the eviction of unlawful occupiers. Courts are therefore tasked with interpreting such enactments in light of the Constitution. The Constitutional Court has developed a substantial jurisprudence relating to evictions in South Africa in which it has developed the concepts of meaningful engagement and the provision of alternative accommodation in its adjudication of section 26 of the 1996 Constitution. In the following discussion,

¹⁰³ UNCHR (Sub-Commission) 'Report of the Special Rapporteur on: The Realization of Economic, Social and Cultural Rights' (1993) UN Doc E/CN.4/Sub.2/1993/13.

I will examine the Court's development of these concepts and determine whether international and regional standards, norms and jurisprudence have assisted the Court in this regard.¹⁰⁴

5 2 1 3 (a) The role of international law in the development of the concept of meaningful engagement

*In Port Elizabeth Municipality v Various Occupiers*¹⁰⁵ the Constitutional Court elaborated on the procedural safeguards provided for in PIE and detailed those considerations that a court must take into account when determining whether it is just and equitable to grant an eviction order. In particular, the Court stated that the extent to which serious negotiations had taken place between unlawful occupiers and landowners would constitute a relevant factor that must be taken into account.¹⁰⁶ Furthermore, the Court established that, in future cases that concern occupiers, courts

“should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution.”¹⁰⁷

In this case, Sachs J referred particularly to the United Nations Housing Rights Programme Report, which emphasised the significance and importance of housing, and its consequent recognition by the international community as a basic and fundamental right.¹⁰⁸ This was used to highlight the transformatory nature of section

¹⁰⁴ This discussion focuses particularly on the concepts of meaningful engagement and the provision of alternative accommodation within the context of the Constitutional Court's eviction jurisprudence as these concepts form the dominant themes throughout the cases discussed below.

¹⁰⁵ 2005 1 SA 217 (CC) (“*PE Municipality*”).

¹⁰⁶ Para 39-43. The Court also proposed mediation as a means of resolving disputes in cases of evictions. In this regard, the Court suggested that parties should be encouraged and required to engage in a proactive, honest and respectful manner either with each other or through a third party to produce mutually satisfying solutions. Thus, the Court established that mediation has an especially important role to play in South Africa as parties are in a position to relate to one another in sensible ways while promoting good neighbourliness for future cases.

¹⁰⁷ Para 45 and 61. The Court added that in appropriate cases, courts should request that mediation take place. Furthermore, the Court highlighted the particular responsibility placed upon municipalities to aim to resolve conflicts between occupiers and landowners. The Court added that further efforts should be made to resolve a dispute, even if this requires requesting a mediator to mediate between the parties if it cannot come to a solution.

¹⁰⁸ Para 17. UN Housing Rights Programme *Housing Rights Legislation: Review of International and National Legal Instruments* (2002) 1. In a footnote, Sachs J also refers to the Introduction of the UN Housing Rights Report that further emphasises that, despite the diversity of texts regarding housing rights, there remains one clear priority namely, “the imperative of consolidating promotional activities through an expanded focus on the global protection of housing rights”.

26(3) of the 1996 Constitution and its acknowledgment of the fact that “a home is more than just a shelter from the elements.”¹⁰⁹ However, the Constitutional Court did not consider any international or regional human rights law to support the use of negotiations between the unlawful occupiers and the landowner in the case of this eviction.

*Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*¹¹⁰ was a landmark judgment in which the concept of meaningful engagement was firmly placed within South African eviction jurisprudence. In *Olivia Road*, the appellants applied for leave to appeal against a decision of the Supreme Court of Appeal, which authorised the City of Johannesburg (the “City”) to evict occupiers residing in so-called “bad” buildings. The City based these eviction orders on section 12(4)(b) of the National Building Regulations and Building Structures Act 103 of 1977 (“NBRSA”), which was enacted to grant the City statutory powers to evict occupiers of certain buildings in order to prevent unsafe living conditions that fall within its jurisdiction. Subsequent to hearing the application for leave to appeal, the Court delivered an interim order in which it ordered the City and the occupiers to enter into meaningful engagement. In addition to this, the City and the occupiers were ordered to report back to the Court on the results of their engagement, which would be taken into consideration when preparing the judgment.¹¹¹

In this case, the Court established that municipalities are constitutionally obliged to engage meaningfully with people who may potentially become homeless as a result of the eviction proceedings instituted at the municipality’s insistence.¹¹² Furthermore, the Court held that in order to comply with section 26(3) of the 1996 Constitution, a court must take into account whether a municipality has engaged meaningfully, or at least made reasonable efforts towards such an engagement with the occupiers it wishes to evict, before an eviction order is granted that would leave occupiers homeless.¹¹³ The absence of such engagement, or an unreasonable response

¹⁰⁹ Para 17.

¹¹⁰ 2008 3 SA 208 (CC) (“*Olivia Road*”).

¹¹¹ Para 5.

¹¹² Para 18. The Court located the obligation to engage meaningfully within section 26 of the 1996 Constitution. For this discussion see *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 10, 16-17.

¹¹³ Para 18.

from the municipality, should be viewed as a “weighty consideration” against the granting of an eviction order at the instance of the municipality.¹¹⁴

The Constitutional Court’s decision in *Olivia Road* has substantively informed the procedure of meaningful engagement as it also elaborates on specific elements that should characterise the engagement process. In particular, engagement must be meaningful¹¹⁵ and there is an expectation, at least within the context of *Olivia Road* that the municipality will engage meaningfully with the occupiers both individually and collectively.¹¹⁶ The Court held that meaningful engagement must be a two-way process, aimed at discussing the circumstances in a meaningful way to achieve certain objectives, which do not comprise an exhaustive list.¹¹⁷ Furthermore, a municipality must make reasonable efforts to engage with occupiers, and it is only when such reasonable attempts fail, that a municipality may proceed without entering into meaningful engagement.¹¹⁸ The Court added that sensitive, careful individuals representing a municipality must manage the engagement process, especially when occupiers are vulnerable, poor or illiterate, to ensure that engagement will be meaningful.¹¹⁹ In addition, municipalities must respond within the context of meaningful engagement to those who may be rendered homeless by such an eviction, in a reasonable way.¹²⁰ Furthermore, the Court stated that the larger the groups that may be rendered homeless subject to eviction at the instance of the municipality, the greater the need for “structured, consistent and careful management.”¹²¹ The Court noted that *ad hoc* engagement is only appropriate in a small municipality and is not appropriate in cases such as *Olivia Road*.¹²² The Court also held that both parties must act reasonably and in good faith, while those occupiers that may be subject to eviction should not nullify the engagement process by requesting unreasonable, non-negotiable demands.¹²³ The Court emphasised that civil society organisations should preferably facilitate the engagement process and that secrecy is counter-productive.¹²⁴ Lastly, the Court held that a complete and accurate account of the engagement

¹¹⁴ Para 21.

¹¹⁵ Para 5.

¹¹⁶ Para 13.

¹¹⁷ Para 14.

¹¹⁸ Para 15.

¹¹⁹ Para 15.

¹²⁰ Para 18.

¹²¹ Para 19.

¹²² Para 19.

¹²³ Para 20.

¹²⁴ Para 30 and para 21.

process, which includes at least the reasonable efforts of the municipality to enter into the engagement process, is essential in any eviction proceeding conducted at the instance of the municipality.¹²⁵ While the Court has significantly broadened its understanding of the engagement process within the context of evictions in South Africa, it did not consider any international law in its development of the abovementioned principles.

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*¹²⁶ the Constitutional Court grappled with the implications of the N2 Gateway Project, a project that formed part of the Breaking New Ground policy aimed at eradicating informal housing across South Africa. The Joe Slovo settlement was to be upgraded under this policy to provide formal housing in the Joe Slovo area and involved the relocation of its residents to Delft to live in temporary residential units. All the members of the Court delivered judgment and agreed that the eviction and relocation of the applicants was just and equitable in this case. Consequently, the eviction order was unanimously agreed upon, while additional requirements were imposed in the order.¹²⁷

Ngcobo J was the only member of the Court to refer to international human rights law in his decision. In this regard, he relied upon the CESCR's General Comment 7¹²⁸ to highlight that international human rights law does in fact acknowledge that evictions may be necessary for the purposes of development.¹²⁹ Furthermore, Ngcobo J noted that General Comment 7 states that individuals subject to eviction should not be rendered homeless and that duties rest on the State in cases

¹²⁵ Para 21.

¹²⁶ 2010 3 SA 454 (CC) ("*Joe Slovo*").

¹²⁷ Para 400. The Court's order imposed additional requirements that included the requirement that 70% of the new homes built on the site of the settlement be allocated to certain residents. Therefore, specific appellants were entitled to a right of return. Furthermore, the Court's order required an ongoing process of meaningful engagement, subject to judicial supervision, between the residents and the respondents concerning the relocation process. The Court's order also required that the authorities provide detailed specifications regarding the temporary accommodation that was to be provided in Delft.

¹²⁸ General Comment 7, paragraph 13 states the following:

“State parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force...”

General Comment 7, paragraph 15 states the following:

“The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected ...”

¹²⁹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 232.

where such individuals cannot support themselves.¹³⁰ In his examination of the duty that rests upon the Government in instances of relocating individuals, Ngcobo J again relied upon General Comment 7 of the CDESCR. In particular, Ngcobo J focused on the procedural requirements described in the General Comment that must be met in the event of evictions. These include entering into “genuine consultation” with the individuals who will be affected by the eviction, the provision of adequate and reasonable notice before the eviction, and the provision of information to affected individuals indicating the purpose of the eviction. Furthermore, Ngcobo J held that the General Comment requires the presence of Government officials or their representatives at the instance of evictions concerning groups of people, the proper identification of those executing the eviction, and the request that evictions do not take place during bad weather or at night without the consent of the people affected by the eviction.¹³¹

In addition, Ngcobo J underscored the relevance of General Comment 7 and in particular, its request for “genuine consultation” in circumstances of eviction. In this regard, he stated that the General Comment provides useful guidance in cases where the State is responsible for the relocation of people, as it assists in determining the obligations that rest upon the State.¹³² Furthermore, Ngcobo J held that the demand for “genuine consultation” in General Comment 7 is consistent with the findings of South African courts requiring parties to engage with each other before evictions take place, as well as with the jurisprudence developed around PIE.¹³³ Lastly, Ngcobo J stated that in cases of relocations such as in the present case, General Comment 7 must be followed.¹³⁴

¹³⁰ Para 232. General Comment 7, paragraph 7 states that

“(e) evictions may be carried out in connection with ... development and infrastructure projects ... land acquisition measures associated with urban renewal, housing renovation, [and] city beautification programmes ...”.

However, Ngcobo J also relied upon General Comment 7, paragraph 16 and restated it in the following way:

“[T]he [government] must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”

Ngcobo J replaced “State party” with “government” in his citation of paragraph 16 of General Comment 7. However, the author submits that this is only an error and does not imply that the General Comments are binding upon South African municipal law.

¹³¹ *Residents of Joe Slovo Community v Thubelisha Homes* 2010 3 SA 454 (CC) para 236. See General Comment 7, paragraph 15.

¹³² *Residents of Joe Slovo Community v Thubelisha Homes* 2010 3 SA 454 (CC) para 237.

¹³³ Para 237.

¹³⁴ Para 237.

Ngcobo J's judgment also highlighted important aspects that assisted in substantively informing the engagement process. In this regard, Ngcobo J stated that engagement is a key requirement in the implementation of a programme.¹³⁵ In particular, he held that meaningful engagement must take place between both the Government and the residents and furthermore, that there is a duty on the Government to engage meaningfully with residents both individually and collectively.¹³⁶ Ngcobo J also confirmed the principle established in *Olivia Road* concerning evictions based on health and safety concerns. In this regard, he stated that while there is no closed list of objectives that engagement should aim to achieve, those identified in *Olivia Road* are equally applicable where the Government seeks to relocate people living in desperate conditions in accordance with a programme aimed at providing decent housing.¹³⁷

Furthermore, Ngcobo J stated that the needs of each household must be considered in order to assess the nature and extent of disruption caused by relocation as well as how such a disruption might be ameliorated.¹³⁸ In addition, he held that affected residents must be informed in advance of the location they will be sent to as well as the date of such relocation.¹³⁹ Ngcobo J also held that when implementing a programme to upgrade an informal settlement, engagement has the primary objective of providing affected residents with details of the programme, its purpose, and how it will be implemented.¹⁴⁰ Ngcobo J emphasised that the process of engagement does not require that the parties reach agreement on every issue.¹⁴¹ Rather, engagement requires that both parties engage each other in good faith and reasonableness, with the willingness to listen to, and understand, the other side. Furthermore, Ngcobo J held that meaningful engagement should aim to “find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide

¹³⁵ Para 238.

¹³⁶ Para 238. This was also established in *Olivia Road*.

¹³⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 240-241.

¹³⁸ Para 241.

¹³⁹ Para 241.

¹⁴⁰ Para 242. In particular, Ngcobo J stated that the following must be addressed and provided to the affected residents: the purpose of the programme, the purpose of the relocation, arrangements for temporary residential units where in-situ development is not possible, how and when relocations will take place, the amount of notice to be given before relocation actually takes place, the consequences of relocation, including the extent to which the lives of the residents will be disrupted, whether Government will help in alleviating any dire consequences, the criteria for determining who of the residents will be resettled in the area that has been developed and where those residents, who cannot be accommodated in the developed area, will be provided with permanent housing.

¹⁴¹ Para 244.

adequate housing.”¹⁴² Lastly, he stated that relocation must be individualised to ensure that it is conducted fairly, and in accordance with the Constitution. For this reason, Ngcobo J states that meaningful engagement is crucial.¹⁴³

Ngcobo J’s dictum exhibits a strong reliance on General Comment 7, which must be commended. It is unfortunate that this is the only reference to international law in light of the comprehensive references to international and regional human rights law made in the submissions of the *amici curiae* before the Court.¹⁴⁴ In fact, almost all the international and regional human rights instruments and regional human rights jurisprudence discussed in this study were presented to the Court by the *amici*, but reference was only made to General Comment 7 in the judgment.¹⁴⁵

¹⁴² Para 244.

¹⁴³ Para 261.

¹⁴⁴ See “Submissions of the Amici Curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE)” available at ESCR-NET “Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes and others 2010 (3) SA 454 (CC)” (date unknown) *ESCR-NET* <<http://www.escr-net.org/docs/i/1529385>> (accessed 30-10-2014). In terms of housing under international law, the *amici* referred to the *UN Basic Principles and Guidelines on Development-Based Evictions and Displacement* (UNCHR ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (2007) UN Doc A/HRC/4/18 annex 1), as well as to article 11(1) of the ICESCR, the CESCR’s General Comment 4 and General Comment 7, *FEANTSA v France* Complaint No. 39/2006 (Decision on the Merits, 4 February 2006), *European Roma Rights Centre (“ERRC”) v Greece* Complaint No. 15/2003 (Decision on the Merits, 8 December 2004); *ERRC v Bulgaria* Complaint No. 31/2005 (Decision on the Merits, 30 November 2006), *ERRC v Italy* Complaint No. 27/2004 (Decision on the Merits, 7 December 2005) and to *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001). The *amici* also referred to two resolutions adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights namely, UNCHR (Sub-Commission), ‘Tenth Anniversary of the Adoption of the Declaration on the Right to Development’ (25 November 1996) UN Doc E/CN.4/SUB.2/RES/1996/22 and UNCHR (Sub-Commission), ‘Forced Evictions’ (20 August 1998) UN Doc E/CN.4/SUB/RES/1998/9. Lastly, the *amici* referred to a statement made by UN Special Rapporteur, Miloon Kathari “UN Expert on Adequate Housing Concludes Visit to South Africa” Press Release, Geneva 7 May 2007. In terms of meaningful engagement under international law, the *amici* referred to the UNCHR (Sub-Commission), ‘Forced Evictions’ (22 August 1997) UN Doc E/CN.4/SUB.2/RES/1997/6, the CESCR’s General Comment 7, and to the *UN Basic Principles and Guidelines on Development-Based Evictions and Displacement* (UNCHR ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (2007) UN Doc A/HRC/4/18 annex 1). In addition, the *amici* referred to *Connors v UK* 2005 40 EHRR 9, *McCann v The United Kingdom* Application NO. 19009/04 (13 May 2008), *FEANTSA v France* Complaint No 39/2006 (Decision on the Merits, 4 February 2006) and to *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

¹⁴⁵ It is also unfortunate to note that despite the strong reliance on the CESCR’s General Comment 7, the engagement process undertaken by the parties only occurred at the remedial stage of the decision and has been criticised as inadequate and flawed for merely facilitating the parties’ involvement in implementing the eviction. See S Liebenberg “Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement” (2012) 12 *African Human Rights Journal* 1 22-23. This aspect stands in contrast to the General Comment quoted by Ngcobo J namely, General Comment 7, paragraph 13 which emphasises that *prior* to evicting individuals, State parties shall ensure “that all feasible alternatives are explored in consultation with the affected persons ...”.

In *Abahlali baseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal*,¹⁴⁶ the Court held that section 16 of the *KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007* was inconsistent with section 26(2) of the 1996 Constitution as it removed the discretion of owners and municipalities to institute eviction proceedings and exposed unlawful occupants to arbitrary eviction proceedings.¹⁴⁷ Furthermore, the Act in effect, permitted evictions without reasonable engagement and in cases where eviction was not the last resort.¹⁴⁸ In this judgment, Moseneke J elaborated on important aspects of meaningful engagement and stated the following:

“Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.”¹⁴⁹

In this case, the Court did not rely on international law while crafting its understanding of meaningful engagement.

In *Pheko v Ekurhuleni Metropolitan Municipality*,¹⁵⁰ the Court had to determine the lawfulness of the removal of people from, and the subsequent demolition of, their homes consequent to a decision that their place of residence constituted a disaster area in terms of the Disaster Management Act 57 of 2002 (“DMA”). In this case, the Court referred briefly to meaningful engagement in its order and in particular, ordered the Municipality to engage meaningfully with the applicants concerning the identification of the land for the purposes of relocating the

¹⁴⁶ *Abahlali baseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) (“*Abahlali*”).

¹⁴⁷ Para 111 and 112. Section 16(1) and (2) of the Act states the following:

“(1) An owner or person in charge of land or a building, which at the commencement of this Act is already occupied by unlawful occupiers must, within the period determined by the responsible Member of the Executive Council by notice in the *Gazette*, in a manner provided for in section 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, institute proceedings for the eviction of the unlawful occupiers concerned.

(2) In the event that the owner or person in charge of land or a building fails to comply with the notice issued by the responsible Member of the Executive Council in terms of subsection (1), a municipality within whose area of jurisdiction the land or building falls, must invoke the provisions of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.”

¹⁴⁸ *Abahlali baseMjondolo Movement of South Africa v Premier of the Province of KwaZulu-Natal* 2010 2 BCLR 99 (CC) para 113. However, this on its own does not render section 16 of the Act invalid.

¹⁴⁹ Para 114.

¹⁵⁰ 2012 2 SA 598 (CC).

applicants.¹⁵¹ No reference was made to the concept of meaningful engagement in the substantive judicial reasoning, and the Court had failed to consider any international human rights law in support of its order for meaningful engagement.

Lastly, in *Schubert Park Residents' Association v City of Tshwane Metropolitan Municipality*¹⁵² the residents approached the Court for an order granting the reoccupation of their homes after their removal during a situation of urgency. The Court held that although court supervision and engagement orders are usually required in cases of eviction orders and in particular, the provision of temporary accommodation pending a final eviction order, the exercise of meaningful engagement could also be extended to apply to situations beyond evictions. In particular, the process of meaningful engagement should be applied to situations concerning the restoration of occupation of property, as section 38 of the 1996 Constitution is broad enough to accommodate such an order.¹⁵³

Furthermore, the Court stated that constitutional provisions requiring substantive involvement and engagement, and the jurisprudence illustrating this, reveal the “interrelation between different rights and interests”.¹⁵⁴ In addition, these show that engagement between parties can resolve disputes involving competing interests and rights.¹⁵⁵ The Court also emphasised the importance of recognising that the engagement process should not be characterised by preconceptions about the dignity and worth of its participants.¹⁵⁶ In this regard, the Court stressed that this applied in particular to those who are constitutionally obliged to provide access to adequate housing under the Constitution.¹⁵⁷ Furthermore, the Court stated that the applicants’ inherent right to dignity, as well as their legal entitlement to return to their homes absent a court order for eviction, entitles them to be treated equally in the engagement process.¹⁵⁸

Finally, the Court affirmed that a proper order of engagement should not proceed from a “top down” premise whereby the City determines “when, for how

¹⁵¹ Para 53.

¹⁵² 2013 1 SA 323 (CC) (“*Schubert Park*”).

¹⁵³ Section 38 of the Constitution states that anyone listed in the section “has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and that the court may grant appropriate relief, including a declaration of rights.”

¹⁵⁴ *Schubert Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) para 44.

¹⁵⁵ Para 44.

¹⁵⁶ Para 46.

¹⁵⁷ Para 47.

¹⁵⁸ Para 49.

long, and ultimately whether at all, the applicants may return” to their homes.¹⁵⁹ Rather, an engagement part of a court order issued in terms of section 38 of the Constitution should provide for meaningful engagement with the applicants at every stage of the reoccupation process.¹⁶⁰ As indicated in many of the cases analysed above, the Court did not refer to any international law in its elaboration of the concept of meaningful engagement.

5 2 1 3 (b) Evaluation

The analysis above indicates that the Constitutional Court has developed the procedural requirement of meaningful engagement through its adjudication of section 26 of the 1996 Constitution. However, it has not applied section 39(1)(b) of the 1996 Constitution consistently, nor relied strongly on international or regional human rights law in its development of the concept. As illustrated above, *Joe Slovo* is the only Constitutional Court decision that refers to international human rights law in its development of the concept of meaningful engagement, despite the obligation placed upon courts to consider international law when interpreting the Bill of Rights.¹⁶¹

Both international and regional human rights instruments recognise the concept of meaningful engagement.¹⁶² In addition, the CESCR’s General Comment

¹⁵⁹ Para 50.

¹⁶⁰ Para 51.

¹⁶¹ It is important to note that, as discussed above, the Court did refer to international law in *PE Municipality*. However, this was not within the context of developing the scope and ambit of the concept of meaningful engagement.

¹⁶² References to meaningful engagement or participation are found in the following instruments: article 14(2)(a) of CEDAW states that:

“States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(a) To participate in the elaboration and implementation of development planning at all levels.”

Article 12(1) and (2) of the CRC state the following:

“(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

In addition, article (9)(1)(c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa states the following:

“(1) States parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:

...

4¹⁶³ and General Comment 7¹⁶⁴ refer to the concept, while both the UN Commission on Human Rights and the UN Sub-Commission on the Promotion and Protection of Human Rights have adopted resolutions that contain provisions that expressly require consultation or participation.¹⁶⁵ Furthermore, the AfCommHPR has stated that individuals must be given meaningful opportunities to be heard and to participate in decisions affecting the development of their communities.¹⁶⁶

(c) women are equal partners with men at all levels of development and implementation of state policies and development programmes.”

Furthermore, article 9(2) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa states that: “States parties shall ensure increased and effective representation and participation of women at all levels of decision-making.” See the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted on 11 July 2003, entered into force on 25 November 2005) (“African Women’s Protocol”). South Africa has signed and ratified all three of the above mentioned instruments and is therefore bound by them. South Africa signed the CRC on 29 January 1993 and ratified it on 16 June 1995, while the State signed the CEDAW on 29 January 1993 and ratified it on 15 December 1995. In addition, South Africa signed the African Women’s Protocol on 16 March 2004 and ratified it on 17 December 2004.

Lastly, article 79(v) of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (adopted 24 October 2011) (“Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights”) states that the right to housing imposes an obligation upon States parties to:

“Ensure that where planning and development processes include evictions all those likely to be affected should be actively consulted”. In addition, article 79(w)(e) states that the eviction process should include the

“holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.”.

¹⁶³ General Comment 4, paragraph 8(a) states the following:

“States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups ...”.

General Comment 4, paragraph 12 states the following:

“Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a [national housing] strategy should reflect extensive genuine consultation with, and participation by, all those affected, including the homeless, the inadequately housed and their representatives ...”.

¹⁶⁴ General Comment 7, paragraph 13 states the following:

“State parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force ...”.

General Comment 7, paragraph 15 states the following:

“The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected ...”.

¹⁶⁵ UNCHR (Sub-Commission), ‘Women and the Right to Adequate Housing and to Land and Property’ (27 August 1997) UN Doc E/CN.4/SUB.2/RES/1997/19, paragraph 14 and UNCHR, ‘Forced Evictions’ (10 March 1993) UN Doc E/CN.4/Res/1993/77, paragraph 3 and lastly, UNCHR, ‘Prohibition of Forced Evictions’ (16 April 2004) UN Doc E/CN.4/RES/2004/28 paragraph 3. These resolutions constitute non-binding soft law within the South African context.

¹⁶⁶ *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 53:

“Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ... providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.”

Considering the extent to which the Court has developed principles pertaining to meaningful engagement, it is arguable that the Court's principles extend beyond those referred to in international and regional human rights standards. This is particularly evident in the Court's decision in *Olivia Road*. However, it is submitted that South African jurisprudence is aligned with many of the basic norms found in these international and regional standards, so that the latter remain valuable and relevant as a means to enforce and affirm the Court's reasoning, as indicated by Ngcobo J in *Joe Slovo*. Furthermore, the Court's explicit reference to the CESCR's General Comments would demonstrate consistency with the CESCR's approach and may be a basis for informing future development under the ICESCR once South Africa has ratified the instrument.

In addition, the *UN Basic Principles and Guidelines on Development-Based Evictions and Displacement*¹⁶⁷ may have been of valuable assistance in the adjudication of development-based evictions. In effect, this circumstance triggered the eviction application in *Joe Slovo*. The Court chose to neglect this source of international law despite the *amici's* efforts to direct the Court's attention to this instrument in its submissions. In particular, this instrument emphasises specific ways in which States may initiate and facilitate the engagement process prior to eviction in instances of development-based evictions. For example, the *Basic Principles and Guidelines* require that any individual likely to be affected by urban or rural planning and development processes should be involved in these processes.¹⁶⁸ The instrument also requires the giving of appropriate notice, the granting of a reasonable time-period to allow for public discussion and the effective dissemination of relevant information in advance.¹⁶⁹ Furthermore, affected persons must be granted opportunities to receive legal, technical, or other advice concerning their rights and options.¹⁷⁰ In addition, public hearings must be held whereby affected parties and their advocates can challenge the decision to evict, propose an alternative, and express their demands and

¹⁶⁷ UNCHR, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (2007) UN Doc A/HRC/4/18 annex 1 ("*Basic Principles and Guidelines*"). Paragraph 10 of the *Basic Principles and Guidelines* states the purpose of this instrument namely, that these guidelines aim to guide States on the necessary measures and procedures to be followed to ensure that development-based evictions do not violate international human rights standards and result in "forced evictions".

¹⁶⁸ Para 37 and 38. The instrument emphasises the right of women, indigenous peoples and persons with disabilities, as well as those working on behalf of affected individuals, to "relevant information, full consultation and participation" during the entire process.

¹⁶⁹ Para 37.

¹⁷⁰ Para 37.

development priorities.¹⁷¹ Furthermore, the *Basic Principles and Guidelines* emphasise the need to present disputes concerning alternatives before an independent body that has constitutional authority, for mediation, arbitration, or adjudication in the event that an agreement cannot be reached.¹⁷²

The *Basic Principles and Guidelines* also emphasise that opportunities for dialogue and consultation must be effectively extended to “the full spectrum of affected persons” during planning processes.¹⁷³ In particular, the instrument highlights the need to include women, vulnerable and marginalised groups through the provision of special measures and procedures, when necessary.¹⁷⁴ Even if a decision is made to evict occupiers, the *Basic Principles and Guidelines* emphasise the need to grant women equal opportunity to participate in planning processes and require that sufficient information be given to affected persons in terms of State projects, planning and implementation processes concerning the resettlement, the purported use of the eviction dwelling and its proposed beneficiaries.¹⁷⁵ The entire resettlement process should ensure the full participation of affected persons, groups and communities and consideration must be given to alternative plans proposed by them.¹⁷⁶ Lastly, the *Basic Principles and Guidelines* emphasise that States must guarantee the “right of affected persons, groups and communities to full and prior informed consent regarding relocation ...”.¹⁷⁷ Therefore, the *Basic Principles and Guidelines* provide the relevant steps to guide the engagement process and ensure the inclusion of all relevant parties, paying particular attention to the inclusion of vulnerable groups, in cases of development-based evictions. The instrument also establishes a much higher standard of engagement in instances of development-based evictions by requiring that all parties affected by eviction grant consent to relocation.

Furthermore, a report drafted in 2004 by Miloon Kothari, the then Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, stresses the particular vulnerability of women subject to eviction and

¹⁷¹ Para 37 and para 38.

¹⁷² Para 38.

¹⁷³ Para 39.

¹⁷⁴ Para 39.

¹⁷⁵ Para 56(h). Particular emphasis is placed on the inclusion of indigenous peoples, minorities, the landless, women and children.

¹⁷⁶ Para 56(i).

¹⁷⁷ Para 56(e).

homelessness.¹⁷⁸ Within the context of evictions, he emphasises that to exercise their rights, women must be equipped with knowledge and information.¹⁷⁹ He adds that this may not only require that women be represented in meetings, but that even separate meetings be held with women, facilitated by women, with the aim of soliciting women's views particularly in respect of "sensitive issues such as toilets, sanitation, water and the house plan".¹⁸⁰ This source could have led the Court to highlight the particular vulnerability of women in the context of evictions, and the need for specific measures to ensure their participation in engagement processes. In addition, the report provides a rich source of information pertaining to the protection against forced evictions at an international, regional level, and national level, and contains a detailed analysis of the impact of forced evictions on various vulnerable groups. It also discusses the initiatives undertaken by various actors at various levels, including the work of treaty monitoring bodies. This report may assist the Court in identifying relevant standards, or provide an understanding of the impact of forced evictions that may assist it in developing its own standards of due process.

Lastly, Ms Raquel Rolink, the former Special Rapporteur on adequate housing, adopted a report focusing specifically on the realisation of the right to adequate housing within the context of post-disaster settings.¹⁸¹ In her report, she recommends that within the context of disasters, "[a]ll affected persons and groups should have access to information and be able to participate meaningfully in the planning and implementation of the various stages of the disaster response".¹⁸² Furthermore, she recommends that such persons participate specifically in the

"identification and determination of tenure rights; the choice over, planning and implementation of transitional shelter and permanent housing programmes, and of durable solutions (return, local integration, resettlement); and in decisions over land use and planning restrictions."¹⁸³

¹⁷⁸ UNCHR 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (2004) UN Doc E/CN.4/2004/48.

¹⁷⁹ Para 47.

¹⁸⁰ Para 47.

¹⁸¹ UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (2001) A/66/270.

¹⁸² 22.

¹⁸³ 23.

Lastly, she recommends that women's participation be ensured.¹⁸⁴ These recommendations may have assisted the Court in its development of the concept of meaningful engagement within the context of disaster situations as found in *Pheko* and *Shubert Park*.

5 2 1 3 (c) The role of international law in the development of the concept of alternative accommodation

In the analysis below, I examine the Constitutional Court's development of the State's obligation to provide temporary, alternative accommodation or land to those who have been, or may be, rendered homeless as a result of eviction. Furthermore, I evaluate the Court's application of section 39(1)(b) of the 1996 Constitution, and the extent to which international law was considered in this jurisprudence. Lastly, I determine whether existing international and regional human rights norms and standards may have assisted the Court in this regard.

In *PE Municipality*, the Constitutional Court elaborated on the State's duty to provide suitable, alternative accommodation in instances where unlawful occupiers resided on privately owned land and were subject to eviction proceedings at the instance of an organ of State namely, a municipality.¹⁸⁵ As noted above,¹⁸⁶ Sachs J developed the legislative framework found in section 6 of PIE¹⁸⁷ that sets out the

¹⁸⁴ 23.

¹⁸⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 1. The applicants consisted of 68 individuals of which 23 were children.

¹⁸⁶ See the discussion on *PE Municipality* within the context of meaningful engagement in section 5 2 1 3 (a) above.

¹⁸⁷ Section 6 of PIE states the following:

“(1) An organ of State may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if -

(a) the consent of that organ of State is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section, ‘public interest’ includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to -

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

procedural safeguards that must be undertaken in the instance of evictions. A central feature of this procedure is the discretion awarded to courts to grant an eviction order if it deems it just and equitable to do so, taking into account all the relevant circumstances.¹⁸⁸ In accordance with section 6(3)(c) of PIE, this includes, but is not limited to, the availability of suitable, alternative accommodation or land. The Court held that while regard must be had for the availability of suitable, alternative accommodation, this factor is not an “inflexible requirement”.¹⁸⁹ Furthermore, this factor does not place an unqualified constitutional duty upon local governments to ensure that alternative accommodation or land is always made available in all circumstances in which homes are demolished.¹⁹⁰ However, Sachs J stated that courts should be reluctant to grant eviction orders in cases where occupiers are relatively settled, unless courts are satisfied that reasonable alternatives are available, even if only as interim measures before occupiers are granted access to formal housing.¹⁹¹ Furthermore, the Court emphasised that the availability of suitable, alternative accommodation will differ within municipalities, and will be influenced by the amount of individuals facing eviction. In this regard, the Court pointed out that the “actual situation” of the individuals facing eviction must be taken into account when locating suitable, alternative accommodation and highlighted further that the State’s measures must respond to the needs of the most desperate.¹⁹² In this case, the Court did not engage with any international or regional human rights standards in its elaboration of the concept of suitable, alternative accommodation entrenched in PIE.¹⁹³

In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*,¹⁹⁴ the respondent, hereafter “Modderklip Boerdery”, was the owner of private property and was unable to execute an eviction

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.”

¹⁸⁸ Section 6(1) of PIE.

¹⁸⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 28.

¹⁹⁰ Para 28.

¹⁹¹ Para 28.

¹⁹² Para 29.

¹⁹³ While the concept of alternative accommodation is found in PIE, and not expressly stated in the 1996 Constitution, it is recalled that PIE was enacted to give effect to section 26 of the 1996 Constitution and to “guide the courts in determining the approach to eviction now required by s 26(3) of the Constitution.” See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 24. The Court therefore interprets PIE in light of the purposes of section 26(3) of the 1996 Constitution and the concept of alternative accommodation therefore forms an important substantive development of this right. See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 14 and 19.

¹⁹⁴ 2005 5 SA 3 (CC) (“*Modderklip*”).

order granted to him, in terms of section 4 of PIE, against an impoverished community that had unlawfully settled upon his land.¹⁹⁵ The Court had to determine the State's duty towards Modderklip Boerdery in this regard. In the Constitutional Court, Langa ACJ (as he then was) chose firstly, to rely on section 1(c) of the 1996 Constitution, which states that the Republic of South Africa is founded upon, amongst others, the value of supremacy and the rule of law. In terms of this section, the Court stated that an obligation rests upon the State to provide the necessary mechanisms whereby citizens can resolve disputes.¹⁹⁶ Furthermore, the Court relied upon section 34 of the 1996 Constitution, which protects the right of everyone to have their disputes decided in a fair, public hearing before a court, or where appropriate, before an independent and impartial tribunal.¹⁹⁷ The Court found the State's inaction to be unreasonable in light of the extent of the settlement on the property and the particular circumstances in which the occupiers found themselves.¹⁹⁸ Furthermore, the Court stated that the State's failure to provide an appropriate mechanism that would give effect to the eviction order granted by the Johannesburg High Court, had breached Modderklip Boerdery's right to an effective remedy, as required by the rule of law and section 34 of the 1996 Constitution.¹⁹⁹ Consequently, the Court ordered that Modderklip Boerdery be compensated for the unlawful occupation of its property.²⁰⁰

Although the Court avoided resolving this case within the context of the owner's property rights and the unlawful occupiers' right to have access to adequate housing, the Court still found that the State was obliged to assure the unlawful occupiers of continuous accommodation until suitable alternatives were found.²⁰¹ The judgment is significant in that it, in effect, placed a positive obligation upon the State and reaffirmed the principle established in *Grootboom* that the State must develop and implement a programme that "must include reasonable measures ... to provide relief

¹⁹⁵ At the time of judgment, the settlement consisted of approximately 40 000 unlawful occupants and although the settlement comprised of streets, erven, and shops, the community drew water from only one tap, while no other services existed except pit toilets. For a full description of the merits, see Liebenberg *Socio-Economic Rights* 281-285.

¹⁹⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 39.

¹⁹⁷ Para 39. Section 34 of the 1996 Constitution states the following:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

¹⁹⁸ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 48.

¹⁹⁹ Para 51 and 68.

²⁰⁰ Para 68.

²⁰¹ Para 68.

for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.”²⁰² Thus, the provision of immediate relief to the unlawful occupiers in this case must be lauded. However, the Constitutional Court did not engage with international and regional human rights law in its decision and in particular, in its statement on the State’s obligation to provide suitable, alternative accommodation to the unlawful occupiers in this case.

In *Joe Slovo*, the Constitutional Court granted an eviction order that obliged residents of the Joe Slovo informal settlement to vacate the settlement. However, the eviction order was subject to, amongst others, the condition that 70% of the new houses built at the Joe Slovo site would be allocated to residents of the Joe Slovo informal settlement that currently resided there or who moved away once the N2 Gateway Housing Project was launched.²⁰³ The order to vacate was also conditional upon the applicants being relocated to temporary residential units that met the required standards of quality established in the order.²⁰⁴ While this case was discussed above in relation to meaningful engagement,²⁰⁵ this case is also relevant for its strong affirmation of the principle that the provision of suitable, alternative accommodation is an essential requirement when determining whether the evictions of large communities by the State are just and equitable.²⁰⁶ In particular, Yacoob J emphasised that section 6(3)(1) of PIE is vital when evaluating whether it is just and equitable to grant an eviction order.²⁰⁷ In addition, Ngcobo J affirmed the Government’s obligation to provide landless people with access to adequate housing and emphasised that, for as long as this duty exists, the landless may not be evicted until alternative land is found.²⁰⁸ O’ Regan J also confirmed this principle by stating that an eviction

²⁰² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 99. Liebenberg *Socio-Economic Rights* 285.

²⁰³ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 5.

²⁰⁴ Para 5. The temporary residential unit had to be made available to each household that was relocated. Each temporary residential accommodation unit that already existed had to comply with the specifications set out in the order, while newly constructed units had to be of equivalent or superior quality. Each temporary residential unit had to be at least 24 m² in extent, be serviced with tarred roads, be individually numbered for purposes of identification, and have walls constructed with a substance called Nutec. Furthermore, the units were to have a galvanised iron roof, be supplied with electricity through a prepaid electricity meter, be situated within reasonable proximity of a communal ablution facility, make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage, and make reasonable provision (which may be communal) for fresh water.

²⁰⁵ See the discussion on *Joe Slovo*, and in particular Ngcobo J’s judgment concerning meaningful engagement, in section 5.2.1.3 (a) of this chapter.

²⁰⁶ Liebenberg *Socio-Economic Rights* 310-311.

²⁰⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 105(c).

²⁰⁸ Para 214 and 217.

order that does not provide for alternative accommodation is far less likely to be just and equitable than one that makes careful provision for such alternative accommodation.²⁰⁹ O’ Regan J added that the Court order clarified that an occupier may not be required to vacate the settlement unless the respondents had made temporary accommodation available to them.²¹⁰

Only one reference was made to international human rights law in support of this principle. In particular, Ngcobo J relied upon the CESCR’s General Comment 7, to illustrate that international law recognises that development may require evictions, but that such evictions should not render people homeless.²¹¹ The General Comment was also relied upon to emphasise that when individuals affected by eviction are unable to provide for themselves,

“the [government] must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”²¹²

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,²¹³ the Court considered whether the City is obliged to provide temporary, alternative accommodation in cases of evictions at the instance of private landowners and the extent of such an obligation, if one exists. Furthermore, the Court had to determine the reasonableness of the City’s current housing policy which, in the context of emergency housing, distinguished between occupiers relocated at the instance of the City and occupiers evicted by private land owners. The City relocated the former to temporary accommodation provided by the City, while the latter were not offered any temporary, alternative accommodation. The Court held that the City’s housing policy was unconstitutional and unreasonable to the extent that it excluded those occupiers evicted by private property owners from consideration for

²⁰⁹ Para 313.

²¹⁰ Para 318.

²¹¹ 232. Ngcobo J refers specifically to General Comment 7, paragraph 7, which states that:

“Evictions may be carried out in connection with ... development and infrastructure projects ... land acquisition measures associated with urban renewal, housing renovation, [and] city beautification programmes ...”.

²¹² *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 232. Paragraph 16 of General Comment 7 states that in cases where those individuals affected by evictions are not able to provide for themselves, the State has a duty to:

“[T]ake all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”

²¹³ 2012 2 SA 104 (CC) (“*Blue Moonlight*”).

temporary accommodation.²¹⁴ The Court affirmed that the State was obliged to provide temporary accommodation to those occupiers that had been rendered homeless by way of eviction, whether the eviction was instituted by the State or by private owners.²¹⁵ Furthermore, the Court held that while the private property owner could not be expected to provide housing for free for an indefinite period, the property rights of the owners must be interpreted in light of the requirement that evictions must be just and equitable.²¹⁶ The Court stated that an eviction would meet this requirement if the City provided temporary accommodation.²¹⁷ In this regard, the Court held that this obligation includes the duty to provide temporary accommodation as near as possible to where the unlawfully occupied property was located.²¹⁸ These two aspects of the order are commendable as the Court grants an order that caters, to a certain extent, for the specific needs of this particular group of vulnerable people, and results in “spatial justice” by reducing the adverse consequences of relocating individuals in instances of evictions.²¹⁹ However, the Court did not consider any international human rights law in its decision.

In *Pheko*,²²⁰ the Court held that the municipality’s engagement with the DMA, which led to the eviction of the residents of the informal settlement and the demolition of their homes without a court order, constituted action that fell outside the authority conferred upon it by the DMA. Consequently, the Court found that the municipality’s action was contrary to section 26(3) of the 1996 Constitution.²²¹ The availability of alternative land was an important factor in the Court’s determination of whether the removal of residents from their homes was lawful. As part of the relief awarded to the applicants, the Court reaffirmed the municipality’s obligation to provide the applicants with suitable, temporary accommodation.²²² Although the

²¹⁴ Para 95. According to the City’s housing policy, occupiers evicted and relocated from “bad buildings” at the City’s instance are provided with temporary accommodation, whereas occupiers evicted at the instance of private property owners are dealt with as an emergency situation as defined in Chapter 12 of the National Housing Code. Therefore, the latter are not considered under the City’s temporary housing programme for temporary accommodation.

²¹⁵ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 96.

²¹⁶ Para 97.

²¹⁷ Para 97.

²¹⁸ Para 104.

²¹⁹ M Strauss & S Liebenberg “Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa” (2014) 13 *Planning Theory* 428 436.

²²⁰ This case is also discussed within the context of meaningful engagement. See section 5 2 1 3 (a) of this chapter.

²²¹ *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC) para 45.

²²² Para 49.

municipality was not able to obtain the land identified by the applicants and contained in recommendations, the Court found that this did not absolve the municipality from its obligation “to identify and designate land for housing development for the applicants.”²²³ In terms of the applicant’s relocation, the Court ordered the municipality to furthermore identify land in the immediate vicinity of the applicant’s place of residence before the removal.²²⁴ Lastly, the Court ordered that the amenities provided to the applicants and people resettled by the municipality were to be “no less than the amenities and basic services provided to them as a result of the relocation in March 2011.”²²⁵ No international human rights law was considered in this judgment.

In *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries Pty (Ltd)*,²²⁶ the occupiers appealed against a High Court order that permitted the eviction of the occupiers from private land, irrespective of whether or not the municipality had complied with the court’s order to provide the occupiers with access to land at the time of the eviction.²²⁷ The applicants challenged the order on the ground that it was not just and equitable within the meaning of section 4(6) of PIE. In this case, Yacoob J referred to the Constitutional Court’s decision in *Blue Moonlight* in which it held that an owner’s right to property might be restricted when considering whether an eviction would be just and equitable within the context of PIE.²²⁸ Yacoob J applied a contextual approach to this case by inquiring into the landowner’s plans for the land in the foreseeable future as well the likelihood of the City responding quickly to the applicant’s need for alternative accommodation.²²⁹ The Court held that if the City provided alternative accommodation to the occupiers within a reasonable time, it would not be just or equitable for the occupiers to be left homeless for the intervening period before the City assisted them.²³⁰ In this regard, the Court referred to *Blue Moonlight* and its decision that there should be a link between the date upon which the occupiers are evicted and the date upon which the City is obliged to provide

²²³ Para 50.

²²⁴ Para 53.

²²⁵ Para 53.

²²⁶ 2012 4 BCLR 382 (CC) (“*Occupiers of Skurweplaas*”).

²²⁷ Para 4.

²²⁸ Para 11.

²²⁹ Para 12.

²³⁰ Para 13.

alternative accommodation to the occupiers.²³¹ The Court stated that, in this case, it would be just and equitable to require the City to provide access to alternative accommodation one month before the date of eviction.²³² The Constitutional Court did not consider any international or regional human rights law in this case.

In *Occupiers of Mooiplaats v Golden Thread Ltd*,²³³ the applicants, who had unlawfully occupied privately owned land, challenged an eviction order granted by the High Court as being inconsistent with the requirements of justice and equity within the meaning of section 4(6) of PIE.²³⁴ In this case, the Constitutional Court relied upon its decision in *Blue Moonlight* and reaffirmed that the City has both the power and the duty to make reasonable provision for emergency housing from its own resources.²³⁵ Furthermore, the Court distinguished between the circumstances of unlawful occupiers who have occupied land for a number of years and those who have occupied the land unlawfully for less than six months. This distinction is made in PIE and results in a difference concerning the relevant factors that must be considered in a court's justice and equity enquiry.²³⁶ The Court held that while the latter distinction was important, it was not decisive to the justice and equity enquiry.²³⁷ Furthermore, the Court held that in cases where occupiers have unlawfully occupied land for less than six months, courts are obliged to consider all the relevant circumstances in accordance with section 4(6) of PIE and should therefore determine what these relevant circumstances are.²³⁸

The Court confirmed that in certain cases, such as the present, the question whether the City is able to reasonably provide alternative land or housing is critically important.²³⁹ The decision also confirmed the High Court judgment to the effect that

²³¹ Para 13. See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 99 and 100. In *Blue Moonlight*, the Court ordered that alternative accommodation be provided 14 days before the eviction takes place.

²³² *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries Pty (Ltd)* 2012 4 BCLR 382 (CC) para 14 and 16.

²³³ 2012 2 SA 337 (CC) ("*Mooiplaats*").

²³⁴ Para 3.

²³⁵ Para 11.

²³⁶ Section 4(6) of PIE states the following:

"If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."

²³⁷ *Occupiers of Mooiplaats v Golden Thread Ltd* 2012 2 SA 337 (CC) para 16.

²³⁸ Para 16.

²³⁹ Para 16.

if a court is aware that the City owns vacant land which may be made available to the occupiers as alternative land, a court cannot find an eviction order to be just and equitable without investigating this factor.²⁴⁰ The Court emphasised that, as established in *Blue Moonlight*, an owner's right to property is restricted in cases involving the justice and equity enquiry mandated by PIE.²⁴¹ In the context of this case, the fact that the landowner had not put the land into any use, and that no evidence was available indicating that the land was intended for use in the foreseeable future, was significant.²⁴² Thus, the landowner would suffer little prejudice in the event of the court order permitting the unlawful occupiers to occupy the land for a longer period until alternative land was made available by the local authority.²⁴³

This case confirms that the availability of alternative accommodation remains an important factor for a court to consider in the justice and equity enquiry mandated in section 4 of PIE, even in instances where unlawful occupiers have occupied land for less than six months. However, again, no international or regional human rights law was considered in this case.

5 2 1 3 (d) Evaluation

The analysis above indicates that while the Constitutional Court has established a number of principles in relation to the State's provision of alternative accommodation or land within the context of evictions, it has only made one reference to international human rights law in its formulation of these, namely in its decision in *Joe Slovo*. International human rights law recognises the provision of alternative accommodation within the context of evictions.²⁴⁴ Reference to these may have strengthened the

²⁴⁰ Para 16.

²⁴¹ Para 17.

²⁴² Para 18.

²⁴³ Para 18.

²⁴⁴ The UN Commission on Human Rights has, for example, adopted a resolution that addresses alternative accommodation. See UNCHR 'Prohibition of Forced Evictions' (16 April 2004) UN Doc E/CN.4/RES/2004/28. In paragraph 4, the Commission recommends the following:

"[T]hat all Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups and consistent with their wishes, rights and needs, and recognizing the obligation to ensure such provision in the event of any forced eviction."

In addition, see UNCHR 'Forced Evictions' (10 March 1993) UN Doc E/CN.4/RES/1993/77. In paragraph 4, the UN Commission on Human Rights recommends that:

"[A]ll Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs, to

Court's emphasis on the importance of this factor in a court's justice and equity enquiry within the context of PIE. Furthermore, the recognition of the concept of alternative accommodation found in international law may have provided further justification for the Court's finding in *Modderklip* that the State must provide unlawful occupiers with continuous accommodation until suitable alternatives are found. This may have bolstered the Court's decision, particularly as it was not based on the owner's property rights, or the occupier's right to have access to adequate housing. Furthermore, an engagement with international standards in the Court's development of the abovementioned principles may have strengthened the latter in those cases where these overlap with international standards, and adding further support to the Court's findings and orders.

In addition, international standards may have alerted the Court to different dimensions of the concept of alternative accommodation. In particular, the Court does not engage the substantive aspects of "temporary, alternative accommodation" and the positive obligations resting upon the City in this regard.²⁴⁵ In this respect, the CESCR's General Comment 7 may be useful to the extent that it refers to the provision of "adequate" alternative housing, resettlement or access to productive land.²⁴⁶ The CESCR thus imposes a standard of "adequacy" on the alternative accommodation that must be provided by the State. In *PE Municipality*, the Court

persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups ...".

Lastly, article 79(ff) of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights states that States parties must

"Ensure sufficient alternative accommodation, or restitution when feasible, immediately upon the eviction."

²⁴⁵ However, it must be noted that the Constitutional Court has, for example, given detailed specifications concerning the nature and quality of temporary residential units to be provided to residents upon their relocation, as part of its order in *Joe Slovo*.

²⁴⁶ Paragraph 16 of General Comment 7 states the following:

"Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."

A similar standard of "adequacy" is also found in article 79(gg) of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, which states that States parties must:

"Ensure the right to resettlement, which includes the right to alternative land of better or equal quality and housing that must satisfy the following criteria of adequacy: accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education. This includes the obligation to ensure that resettled persons, groups and communities are not placed in conflict with their host communities".

refers to a “reasonable alternative”,²⁴⁷ while PIE refers to a “suitable alternative”. However, the standard of “adequacy” has been explored by the CDESCR in General Comment 4 and may provide guidance in developing the scope and content of reasonable or suitable, alternative accommodation. Lastly, the CDESCR has also referred to standards of adequacy in respect of alternative accommodation in its Concluding Observations.²⁴⁸ These are context specific, and of a more contentious nature than the CDESCR’s General Comments. These however, remain a non-binding source of international law for South Africa and are thus categorised as soft law. In addition, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights states that States parties must ensure “sufficient alternative accommodation, or restitution when feasible, immediately upon eviction.”²⁴⁹ This instrument requires that a minimum standard be met in this regard, which may have alerted the Court to different components that may comprise sufficient alternative accommodation.²⁵⁰

²⁴⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 28.

²⁴⁸ See, for example, the CDESCR’s Concluding Observations in respect of the Dominican Republic. In this regard, the CDESCR expressed its concern regarding the nature and magnitude of forced evictions taking place within the State and stated the following:

“[W]henver an inhabited dwelling is either demolished or its inhabitants evicted, the Government is under an obligation to ensure that adequate alternative housing is provided. In this context “adequacy” requires relocation within a reasonable distance from the original site, and in a setting which has access to essential services such as water, electricity, drainage and garbage removal. Similarly, persons who are housed in conditions which threaten their life and health should, to the maximum of available resources, be adequately rehoused.”

See UN Committee on Economic, Social and Cultural Rights, ‘Concluding Observations of the Committee on Economic, Social and Cultural Rights: Dominican Republic’ (7 December 1994) UN Doc E/C.12/1994/20 para 319. The CDESCR’s Concluding Observations are adopted in its final phase of examining State parties’ reports, which aim to assist States parties in their implementation of the ICDESCR. Sepúlveda argues that the CDESCR has increasingly undertaken a more adversarial and inquisitive approach in its examination of States parties’ reports. In particular, she argues that the CDESCR has more recently assessed a State party’s actual compliance with the CDESCR and is not merely making “suggestions and recommendations”. This is reflected in the language used in more recent Concluding Observations, which, Sepúlveda argues, further clarifies the normative content of the ICDESCR and strengthens the CDESCR’s interpretation of the content of a provision. Furthermore, the CDESCR’s Concluding Observations, and its interpretation of the content of the ICDESCR contained therein, are widely accepted by States parties. Moreover, the CDESCR’s Concluding Observations are also relevant considering that the CDESCR is influenced by the contributions made by NGO’s when considering State parties’ reports. See M Sepúlveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 37-40.

²⁴⁹ The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, article 79(ff).

²⁵⁰ Article 79(ff) states that:

“[R]egardless of the circumstances and without discrimination, competent authorities shall ensure that evicted persons or groups, especially those who are unable to provide for themselves, have safe and secure access to:

1. essential food, potable water and sanitation;
2. basic shelter and housing;
3. appropriate clothing;

Within the context of development-based evictions, which occurred in the case of *Joe Slovo*, the *Basic Principles and Guidelines* may also have been a valuable source to consider. This instrument applies a standard of “adequacy” to alternative land or housing and in this regard, the criteria that must be met includes accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education.²⁵¹ Furthermore, the *Basic Principles and Guidelines* may provide further assistance in that they confirm that the alternative housing provided to those who are subject to eviction should be located as close as possible to the original residence and source of livelihood.²⁵² In addition, the instrument emphasises that the provision of just compensation, sufficient alternative accommodation or restitution when feasible, must take place immediately after the eviction and requires that the resettlement measures be completed before eviction takes place.²⁵³ It must also be noted that the undertaking of resettlement measures in accordance with the *Basic Principles and Guidelines* go beyond the provision of only land or sites.²⁵⁴ They also require the undertaking of measures that ensure that individuals, especially those that are unable to provide for themselves and are subject to eviction, have safe and secure access to minimum, substantive relief. This includes the provision of essential food, potable water and sanitation, basic

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4. essential medical services;
 5. livelihood sources;
 6. fodder for livestock and access to common property resources previously depended upon; and
 7. education for children and childcare facilities”.

²⁵¹ UNCHR ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living’ (2007) UN Doc A/HRC/4/18 annex 1 para 16. The *Basic Principles and Guidelines* afford more detail to these elements in paragraph 55 and state that identified relocation sites must fulfill the criteria for adequate housing and include:

“(a) security of tenure; (b) services, materials, facilities and infrastructure such as potable water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and to natural and common resources, where appropriate; (c) affordable housing; (d) habitable housing providing inhabitants with adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors, and ensuring the physical safety of occupants; (e) accessibility for disadvantaged groups; (f) access to employment options, health-care services, schools, childcare centers and other social facilities, whether in urban or rural areas; and (g) culturally appropriate housing. In order to ensure security of the home, adequate housing should also include the following essential elements: privacy and security; participation in decision-making; freedom from violence; and access to remedies for any violations suffered.”

²⁵² Para 43.

²⁵³ Para 44 and para 52.

²⁵⁴ Para 44. The *Basic Principles and Guidelines* state that:

“All resettlement measures, such as construction of homes, provision of water, electricity, sanitation, schools, access roads and allocation of land and sites, must be consistent with the present guidelines and internationally recognized human rights principles ...”.

shelter and housing, appropriate clothing, essential medical services, livelihood sources, fodder for livestock, access to common property resources upon which individuals were formally dependent, and education for children as well as child care facilities.²⁵⁵ States must ensure that extended families or communities are not separated from one another and that the equal participation of women in the distribution of basic services and supplies occurs.²⁵⁶

Furthermore, the *Basic Principles and Guidelines* require the provision of medical care and access to psychological and social services. Particular emphasis is placed on the health and medical needs of women and children, the provision of ongoing medical treatment and the prevention of contagious and infectious diseases such as HIV/Aids.²⁵⁷ As can be seen, these standards elaborate on resettlement measures that are more specific than those developed by the Constitutional Court within the context of development-based evictions and may have assisted the Court in further developing the scope and content of alternative housing and resettlement measures in *Joe Slovo*. Reference to these standards may also add legitimacy and support to court orders that contain specific measures that have not necessarily been determined through the engagement process, but by the Court.

Jurisprudence from the ECSR²⁵⁸ may also have assisted in the development of the scope and content of the State's provision of alternative accommodation within the context of evictions and further informed the engagement process by delineating the State's positive obligation in this regard. For example, in *ERRC v Greece*,²⁵⁹ the ERRC relied upon article 16 of the ESC²⁶⁰ as well as its Preamble,²⁶¹ and claimed that

²⁵⁵ Para 52.

²⁵⁶ Para 52 and 53.

²⁵⁷ Para 54.

²⁵⁸ The ECSR is responsible for monitoring State compliance with the provisions of the European Social Charter, as well as with the 1988 Additional Protocol and the Revised European Social Charter.

²⁵⁹ Complaint No. 15/2003 (Decision on the Merits, 8 December 2004).

²⁶⁰ The European Social Charter (opened for signature 18 October 1961, entered into force 26 February 1965) CETS NO. 35 ("ESC"). The ESC was signed by 13 members of the Council of Europe in Turin. See O De Schutter "The European Social Charter" in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 ed (2012) 463-480.

Article 16 of the ESC states the following:

"With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means."

²⁶¹ The Preamble to the ESC states the following:

"...

certain legislation had a discriminatory effect on the Roma in regards to housing.²⁶² In its decision, the ECSR held that in order to satisfy article 16, States must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard.²⁶³ This must include essential services such as heating and electricity.²⁶⁴ Furthermore, the ECSR defined the term “adequate housing”, holding that it was not confined to a dwelling of an adequate standard and with essential amenities, but also that a dwelling must be of a suitable size considering the composition of the family in residence.²⁶⁵ The obligation to promote and provide housing was also held to extend to security from unlawful eviction.²⁶⁶ In addition, the ECSR noted that principles of equality and non-discrimination form an integral part of article 16.²⁶⁷

In *ERRC v Italy*²⁶⁸ an allegation was made by the ERRC on behalf of the Roma that their rights to housing entrenched in article 31 of the Revised Social Charter had been violated.²⁶⁹ It was alleged that there was a shortage of camping sites as well as inadequate living conditions within camping sites. Furthermore, the Roma were subjected to forced evictions and lacked access to any other form of accommodation outside of camping sites.²⁷⁰ In addition, it was alleged that segregationist policies and practices had resulted in racial discrimination that violated section 31 on its own or alternatively, section 31 read together with Article E²⁷¹ of the

Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin ...”.

²⁶² Ministerial Decision No A5/696/25.4.83 Official Gazette 243/B/11/5/83 “Sanitary Provision for the Organized Relocation of Itinerant Persons (Nomadic Travellers)” and the Joint Ministerial Decision No 23 641/3.7.2003 Official Gazette 973/B/15-07-2003 Amendment of the A5/696/25.4.83 “Sanitary Provision for the Organized Settlement of Itinerant Persons”.

²⁶³ *ERRC v Greece* Complaint no. 15/2003 (Decision on the Merits, 8 December 2004) para 24.

²⁶⁴ Para 24.

²⁶⁵ Para 24.

²⁶⁶ Para 24.

²⁶⁷ Para 26.

²⁶⁸ Complaint no 27/2004 (Decision on the Merits, 7 December 2005).

²⁶⁹ Article 31 states the following:

“With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- 1 to promote access to housing of an adequate standard;
- 2 to prevent and reduce homelessness with a view to its gradual elimination;
- 3 to make the price of housing accessible to those without adequate resources.”

²⁷⁰ *ERRC v Italy* Complaint no 27/2004 (Decision on the Merits, 7 December 2005) para 5.

²⁷¹ Article E of the Revised Social Charter states the following:

“The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

Revised Social Charter.²⁷² In terms of the alleged inefficiency and inadequacy of the camping sites, the ECSR held that access to adequate housing as guaranteed by article 31(1) of the Revised Social Charter means a dwelling that is structurally secure, and safe in terms of sanitation and health.²⁷³ The ECSR also stated that adequate housing should possess all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity, not result in overcrowding, and ensure legally protected security of tenure.²⁷⁴ Furthermore, the ECSR held that the temporary supply of shelter could not be considered as adequate and individuals should be provided with housing within a reasonable period.²⁷⁵ Furthermore, in terms of forced evictions and other sanctions, the ECSR stated that States parties were required to ensure that alternative accommodation is made available in instances of forced evictions and other sanctions.²⁷⁶ In addition, the ECSR held that in terms of the right to adequate housing, Italy had violated the ESC as a result of its failure to take into account the specific circumstances of the Roma or to take measures that were specifically aimed at improving the housing conditions of the Roma, which included possibly providing effective access to social housing.²⁷⁷

These decisions may have assisted the Constitutional Court in determining the scope and content of the right to have access to adequate housing as they engage with the content of “adequate” housing on a case-by-case basis and identify positive obligations that the State should fulfil. In addition, these cases highlight certain criteria that must be met before both temporary alternative accommodation and longer term housing programmes meet the standard of “adequate” housing. The criteria set by the ECSR are broad enough to allow the State to fulfil these in a manner it deems fit and with regard to specific national circumstances and needs. In essence, the jurisprudence of the ECSR is valuable as it illustrates the willingness of the ECSR to set criteria pertaining to the substantive dimensions of the right to housing, while respecting the discretion of States parties in selecting the precise means of fulfilling these.²⁷⁸

²⁷² *ERRC v Italy* Complaint no 27/2004 (7 December 2005) para 5.

²⁷³ Para 35.

²⁷⁴ Para 35.

²⁷⁵ Para 35.

²⁷⁶ Para 41.

²⁷⁷ Para 46.

²⁷⁸ Para 44 and para 55.

Jurisprudence from the Inter-American Court of Human Rights²⁷⁹ and in particular, the concept of the “life project”,²⁸⁰ may also have assisted the Constitutional Court in developing the substantive scope and content of alternative accommodation. For example, in *Yakye Axa Indigenous Community v Paraguay*²⁸¹ the IACtHR reaffirmed its understanding of article 4(1)²⁸² namely that:

“Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.”²⁸³

Furthermore, the IACtHR stated that within the context of the right to life, the State has an obligation to generate minimum living conditions that are compatible with human dignity. In addition, the IACtHR held that the State “has the duty to take positive, concrete measures geared toward fulfilment of the right to a decent life”. The

²⁷⁹ The Inter-American Court of Human Rights (“IACtHR”) came into being in 1979 and is responsible for applying and interpreting the AmCHR. See the Statute of the Inter-American Court on Human Rights OEA/Ser.L.V/II.82 doc.6 rev. 1 at 133 (1992). The IACtHR has both an adjudicatory and advisory function. The IACtHR’s adjudicative, or contentious, jurisdiction is established by way of article 61, article 62 and article 63 of the AmCHR, while article 64 of the AmCHR governs the IACtHR’s advisory function. As of December 2013, the States parties to the AmCHR that have recognised the contentious jurisdiction of the IACtHR include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela.

²⁸⁰ The IACtHR recognises basic rights such as the right to health, adequate housing, sanitation, food, and education under the right to life and in particular, the right to a “life project”. The concept of the “life project” is rooted in the right to life, entrenched in article 4 of the AmCHR and the right to personal integrity, which is entrenched in article 5 of the AmCHR. The IACtHR first gave recognition to the concept of the “life project” in the *Loayza Tamayo Case*. See *Loayza Tamayo Case*, Reparations, Judgment, Inter-Am.Ct.H.R. (Ser C) No 42 (27 November 1998). Thereafter, the concept was relied upon within the context of the right to life and special measures protecting children under articles 14 and 19 of the AmCHR. This was illustrated in cases such as *Case of the “Street Children” (Villagran Morales et al.) v. Guatemala*, Judgment, Inter-Am.Ct.H.R (Ser C) No 63 (19 November 1999) in which the IACtHR emphasised that the right to life includes having access to those conditions that are necessary for a dignified existence. The concept was also relied upon in *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002, Inter-Am.Ct.H.R (Ser. A) No 17 (28 August 2002), as well as in the *Case of Children’s Rehabilitation v Paraguay*, Judgment, Inter-Am. Ct. H.R (Ser C) No 112 (2 September 2004). In the case of *Yakye-Axa Indigenous Community v Paraguay*, Judgment, Inter-Am.Ct.H.R (Ser C) No 125 (17 June 2005), the court explicitly extended the concept of the right to life beyond custodial situations, and held that the failure by the State to take appropriate and positive measures to address those conditions necessary for a community to live a dignified life, constituted a violation under article 4 of the AmCHR. See T Melish “The Inter-American Court of Human Rights: Beyond Progressivity” in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372 388-391.

²⁸¹ *Yakye-Axa Indigenous Community v Paraguay*, Judgment, Inter-Am.Ct.H.R (Ser C) No 125 (17 June 2005) (“*Yakye Axa case*”). The Yakye Axa are an indigenous community that form part of the Southern Lengua Enxet people.

²⁸² Article 4(1) of the AmCHR states the following:

“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

²⁸³ *Yakye-Axa Indigenous Community v Paraguay*, Judgment, Inter-Am.Ct.H.R (Ser C) No 125 (17 June 2005) para 161.

IACtHR emphasised that alleged victims that are vulnerable or at risk, became a higher priority for States.²⁸⁴ The IACtHR found that Paraguay violated article 4(1) together with article 1(1) of the AmCHR for failing to take measures to address conditions that affected the possibility of living a decent life.²⁸⁵ The decision of the IACtHR is particularly valuable for the interim measures that were granted. In this regard the IACtHR ordered the State to supply immediately, on a regular basis and for as long as the community was landless, sufficient drinking water for consumption and personal hygiene. In addition, the State was ordered to provide regular medical care, and appropriate medicine (including medicine and adequate treatment for the deworming of all community members), so as to protect the health of the community, particularly that of children, the elderly, and pregnant women.²⁸⁶ Furthermore, sufficient food in quantity, variety and quality was to be provided to the extent that it would meet the minimum conditions of living a decent life.²⁸⁷ The State also had to supply latrines, or any other form of appropriate toilets, that would ensure the community's effective and healthy management of biological waste. Lastly, the State was ordered to provide sufficient bilingual material.²⁸⁸

This jurisprudence may be relevant as it provides evidence of an adjudicatory body that is willing to place positive obligations on the State to provide far-ranging immediate relief to those in desperate need. As illustrated, these obligations extended beyond the provision of only alternative or temporary accommodation, as an interim measure, while the affected individuals waited for access to land. Secondly, the case indicates that in its provision of interim relief, the IACtHR is willing to address the specific socio-economic needs of a destitute community in order to live a dignified life as it awaits access to its property. The *Yakye Axa* case is also valuable to the extent that it highlights the special gravity of the circumstances involving children

²⁸⁴ Para 162. The IACtHR considered the State's actions in light of the international protection afforded to indigenous communities. In addition, it considered article 4 of the AmCHR in combination with the general duty to respect rights entrenched in article 1(1) of the AmCHR. Furthermore, the IACtHR considered the duty of progressive development entrenched in article 26 of the AmCHR, as well as article 10 (right to health), article 11 (right to a healthy environment), article 12 (right to food), article 13 (right to education), and article 14 (right to the benefits of culture) of the Additional Protocol to the American Convention on Human Rights. The IACtHR also considered the provisions of ILO Convention No. 169.

²⁸⁵ *Yakye-Axa Indigenous Community v Paraguay*, Judgment, Inter-Am.Ct.H.R (Ser C) No 125 (17 June 2005) para 176.

²⁸⁶ Para 122.

²⁸⁷ Para 122.

²⁸⁸ Para 122.

and the elderly.²⁸⁹ In this regard, the IACtHR indicates that the State has additional obligations regarding the right to life of children and the elderly and special measures must be taken in this regard.²⁹⁰

5 2 1 3 (e) Conclusion

The analysis above illustrates that there are a range of international and regional standards that contain strong substantive dimensions that can support and further enhance the Constitutional Court's development of the concept of alternative accommodation. In addition, international and regional standards also recognise and protect the opportunity for participatory engagement within the context of evictions, which can provide valuable guidance to the Court in its development of the concept of meaningful engagement. Many of these standards were referred to the Court in *amicus curiae* briefs, particularly in *Joe Slovo* and the Court's failure to engage with these standards strongly suggests that the obligation entrenched in section 39(1)(b) of the 1996 Constitution is resorted to sporadically, and without a systematic methodology for considering relevant international law sources.

5 2 2 Health care

In *Soobramoney v Minister of Health, KwaZulu-Natal*²⁹¹ the appellant was denied life-prolonging renal dialysis by a State-funded hospital after failing to meet the prescribed admission criteria that determined the hospital's use of dialysis resources.²⁹² Before the Constitutional Court, the appellant requested that the hospital be ordered to provide him with renal dialysis at the State's expense based on his constitutionally protected right to life²⁹³ and the right not to be refused emergency medical treatment.²⁹⁴

²⁸⁹ Para 172-175.

²⁹⁰ Para 172 and 175. The IACtHR stated that it has additional obligations to foster the measures of protection entrenched in article 19 of the AmCHR.

²⁹¹ 1998 1 SA 765 (CC).

²⁹² Upon dismissal of his application before the High Court, the applicant obtained leave to appeal to the Constitutional Court. For a detailed description of the facts of this case see C Scott & P Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise" (2000) 16 *SAJHR* 206 233-234.

²⁹³ Section 11 of the 1996 Constitution states that: "Everyone has the right to life".

²⁹⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 7. Section 27(3) of the 1996 Constitution states that: "[n]o one may be refused emergency medical treatment".

In his decision, Chaskalson P acknowledged that sections 26 and 27 of the 1996 Constitution impose obligations on the State, but held that these obligations depend on the availability of resources and that insufficient resources limit these corresponding rights.²⁹⁵ Chaskalson P concluded that an unqualified obligation to fulfil these needs would not be possible in the present case due to a lack of resources and that this provided the context within which section 27(3) of the 1996 Constitution was to be understood.²⁹⁶

Furthermore, the Court addressed counsel's arguments that section 27(3) of the 1996 Constitution should be construed consistently with the right to life protected in section 11 of the 1996 Constitution, so that individuals unable to pay for life-saving treatment are entitled to receive such treatment at a State hospital free of charge.²⁹⁷ In this regard, Chaskalson P considered jurisprudence from the Indian Supreme Court, in which positive obligations were imposed on the State to address the basic needs of the society through the right to life.²⁹⁸ The Court emphasised that, unlike the Indian Constitution, the South African Constitution contains a Bill of Rights that expressly imposes specific positive obligations on the State through its various provisions.²⁹⁹ Furthermore, South African courts have a duty to apply the obligations entrenched in the Constitution and not draw inferences that would be inconsistent with these obligations.³⁰⁰

The Court proceeded to dismiss counsel's argument as being inappropriately based upon the right to life as the 1996 Constitution expressly provides for the right to have access to health care services in section 27.³⁰¹ In its interpretation of section

²⁹⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 11.

²⁹⁶ Para 11.

²⁹⁷ Para 14.

²⁹⁸ Para 15.

²⁹⁹ Para 15.

³⁰⁰ Para 15. At this juncture, it is not clear whether Counsel presented the Court with foreign law namely, jurisprudence from the Supreme Court of India, or whether the Court itself chose to rely upon it. However, international human rights law could just as easily have been used to exemplify an interpretation of the right to life that imposes positive obligations with socio-economic dimensions. For example, the HRC's General Comment 6. See UN Human Rights Committee 'General Comment 6' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I). It may have been more relevant to justify its reluctance to rely upon the right to life in this case in light of the HRC's General Comment 6, considering that it is an interpretation of an international treaty that South Africa has signed and ratified. Furthermore, the HRC's General Comments are regarded as authoritative interpretations of the ICCPR. In this regard see M Pieterse "Cases and Comments: A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa" (1999) 15 *SAJHR* 372-385.

³⁰¹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 19. The Court's approach to the applicability of the right to life in this case has been criticised. Ngwena and Cook argue

27(3), the Court explained that affording this provision with a broader scope would have negative consequences. Firstly, the State would have more difficulty in fulfilling its primary obligations under section 27(1) and (2) of the 1996 Constitution to “provide health care services to ‘everyone’ within its available resources.”³⁰² In addition, the Court stated that such an interpretation would lead to prioritisation of treatment for terminal illnesses over other medical care, thereby reducing the State’s available resources for medical care such as preventative health care and the medical treatment of illnesses or bodily infirmities that are not life threatening.³⁰³

Furthermore, the Court held that “emergency medical treatment” possibly includes the ongoing treatment of chronic illnesses so as to prolong life.³⁰⁴ However, it found that this was not the ordinary meaning of the phrase and if section 27(3) of the 1996 Constitution was to include such a broad construction, this should have been expressed more clearly, and in more positive terms.³⁰⁵ In addition, the Court confined the application of section 27(3) of the 1996 Constitution to emergency situations, such as sudden catastrophes or unexpected trauma, which necessitates immediate medical treatment.³⁰⁶ As section 27(3) of the 1996 Constitution is couched in negative terms, the Court interpreted this right as imposing a negative duty only on the State, stating that “[w]hat [section 27(3)] requires is that remedial treatment that is necessary and available be given immediately to avert that harm.”³⁰⁷ This limited assessment of the

that by following this approach, the Court labeled the provisions contained in the Bill of Rights as “atomistic elements” and not as interconnected provisions. Furthermore, these authors argue that the Court followed a legalistic approach to the interpretation of section 27(3) of the 1996 Constitution, as opposed to a purposive or contextual approach, in the interpretation of rights. See C Ngwena & R Cook “Rights concerning Health” in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 107 136. See also Pieterse (1999) *SAJHR* 372-385 in which Pieterse argues that the right to life entrenched in section 11 of the 1996 Constitution can be used to strengthen the protection of the socio-economic rights contained in the 1996 Constitution as well as widen their scope and ambit. If the Constitutional Court followed such an approach, international human rights law may have assisted in providing various interpretations of the right to life that indicate a positive duty to address certain socio-economic conditions, such as that found in the HRC’s General Comment 6, paragraph 5. Scott & Alston (2000) *SAJHR* 245. Drawing from the work of Judith Jarvis Thompson, Moellendorf supports the Court’s finding, and concludes that it is only when the right to life expressly includes the right to life sustaining medical care, that it should be interpreted to mean more than just imposing a duty of non-interference upon the State. D Moellendorf “Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims” (1998) 14 *SAJHR* 327 328.

³⁰² *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 19.

³⁰³ Para 19.

³⁰⁴ Para 13.

³⁰⁵ Para 13.

³⁰⁶ Para 20. Sachs J did add to this meaning in his concurring judgment by stating that section 27(3) of the 1996 Constitution reassures the public of the availability of accident and emergency departments to assist with unforeseeable catastrophes. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 51.

³⁰⁷ Para 20.

scope of section 27(3) of the 1996 Constitution has been criticised.³⁰⁸ As the applicant suffered from a chronic, incurable condition, the Court found that section 27(3) of the 1996 Constitution was not applicable and held instead that sections 27(1) and (2) of the 1996 Constitution were more appropriate to consider.³⁰⁹

Lastly, in its consideration of section 27(1) and section 27(2) of the 1996 Constitution, the Court held that due to the scarcity of resources in this situation, the State had not violated its obligations under section 27. This approach, however, has been challenged as implying that the availability of resources would both define and limit the right entrenched in section 27(1)(a), which in effect also results in a failure to engage with the content and scope of section 27 of the 1996 Constitution.³¹⁰

Liebenberg argues that the Court's analysis of the right in *Soobramoney* does not conform to the two-stage enquiry associated with the limitation clause entrenched in section 36³¹¹ of the 1996 Constitution. Under this section, the two-stage analysis consists of firstly, identifying the content and scope of a right and determining whether any violation of such right has taken place. The second stage provides the State with an opportunity to justify why such law or conduct constitutes a reasonable limitation. Liebenberg argues that *Soobramoney* therefore illustrates a conflation of these two stages, resulting in an unbalanced analysis that directs more attention to the States' justification for the limitation imposed namely, budget constraints, while neglecting any sufficient enquiry into the values and purposes of section 27(1)(a).³¹²

Furthermore, by avoiding a substantive engagement with the content of the right, the Court also obstructs the application of section 39(1)(b) of the 1996 Constitution, as a broader analysis and more substantive engagement with its content does not take place. The neglect of such an enquiry is evident in the decision of *Soobramoney*. While it has been argued that the outcome of the case is correct, the judicial reasoning employed by the Court in arriving at its decision has been criticised. In particular, Ngwenya and Cook submit that the Court did not make use of available international human rights instruments and jurisprudence to give content to the right to health or the right of access to health care.³¹³ Kapindu goes so far as to

³⁰⁸ Liebenberg *Socio-Economic Rights* 138.

³⁰⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 21-22.

³¹⁰ Liebenberg *Socio-Economic Rights* 139.

³¹¹ See footnote 78 of this chapter.

³¹² Liebenberg *Socio-Economic Rights* 141.

³¹³ Ngwenya & Cook "Rights Concerning Health" in *Socio-Economic Rights in South Africa* 138. The authors argue that the Court failed to consider the jurisprudence established by the CESC.

argue that the Court's failure to consider international law in this decision should render it as one made *per incuriam* and that the *ratio decidendi* of this decision has resulted in a weakening of its precedential value.³¹⁴

While it is not suggested that international human rights law would have led the Court to a different outcome, references to relevant international law on the right to health may have assisted the Court in developing the normative content of the right of access to health care services in section 27(1)(a). In particular, these sources may have provided some guidance into key elements of the right that the Court could have elaborated on further. At the time of the judgment, various instruments protected the right to health.³¹⁵ Although these instruments do not elaborate on the normative content of the right to health, they do indicate certain aspects of the right that have been prioritised. In addition, the Declaration of Alma-Ata defines the main characteristics of primary health care.³¹⁶ This may have assisted the Court in identifying some of the States' primary obligations in respect of section 27(1)(a). This would have strengthened the Court's decision by providing a more reasoned justification explaining why the appellant's condition did not fall within the scope of section 27(1)(a). Lastly, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights emphasise that economic, social and cultural rights impose

Furthermore, the authors highlighted the obligations placed on courts in terms of section 39(1)(b) and section 233 of the 1996 Constitution.

³¹⁴ Kapindu *From Global to Local* 40.

³¹⁵ At the time of the judgment, the following international human rights instruments protected the right to health: article 25(1) and (2) of the UDHR, article 12(1) of the ICESCR, article 16 of the AfCHPR, article 10 of the Additional Protocol to the American Convention on Human Rights, article 24(1) of the CRC, article 5(e) of the CERD, article 12(1) and 12(2) of the CEDAW, and lastly, paragraph 9 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (CESCR 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights' (2000) UN Doc. E/C.12/2000/13 ("Maastricht Guidelines")). The Maastricht Guidelines were compiled by more than thirty experts with the purpose of elaborating on the Limburg Principles and in particular, on the nature and scope of violations of economic, social and cultural rights. The Maastricht Guidelines also focus on appropriate responses and remedies. This meeting took place in Maastricht, the Netherlands, from 22-26 January 1997 under the auspices of the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the Centre for Human Rights of the Faculty of Law of Maastricht University. This is not a legally binding instrument but is an important source of guidance in respect of States' parties obligations under the ICESCR.

³¹⁶ WHO, Alma-Ata Declaration: Report of the International Conference on Primary Health Care (6-12 September 1978) WHO Health for All Series No. 1 1978, paragraph VI-VII. Paragraph VII(3) states that primary health care

"includes at least: education concerning prevailing health problems and the methods of preventing and controlling them, promotion of food supply and proper nutrition; an adequate supply of safe water and basic sanitation; maternal and child health care, including family planning; immunization against the major infectious diseases; prevention and control of locally endemic diseases; appropriate treatment of common diseases and injuries; and provision of essential drugs."

obligations on States to respect, protect and fulfil these rights. This instrument may have assisted the Court in identifying the positive and negative duties enshrined in the right to have access to health care services in the 1996 Constitution. This would have highlighted the various normative dimensions of the right and indicated that the right is not only defined by financial constraints.

In *Minister of Health v Treatment Action Campaign*,³¹⁷ the Constitutional Court considered whether the Government's limited distribution of Nevirapine³¹⁸ to a limited number of research sites only, violated section 28(1)(c),³¹⁹ as well as section 27(1)(a) read with section 27(2),³²⁰ of the 1996 Constitution. Furthermore, the Court had to decide whether the abovementioned rights obliged the Government to create and implement an "effective, comprehensive, and progressive programme" focusing on the prevention of mother-to-child transmission of HIV throughout the country.³²¹ In this case, the *amici* advanced a number of key arguments based upon international human rights law.³²² Relying on the concept of the minimum core developed in the CESCR's General Comment 3, paragraph 10, the *amici* contended that section 27(1) of the 1996 Constitution established an individual right that contained a minimum core to which every person was entitled.³²³ In support of this argument, the *amici* argued that the language of the Constitution supported this contention. Furthermore, the *amici* interpreted section 26 and section 27 as placing two obligations upon the State. Firstly, self-standing rights could be identified in sections 26(1) and 27(1) of the Constitution to which everyone is entitled and which the State must "respect,

³¹⁷ (No 2) 2002 5 SA 721 (CC) ("TAC").

³¹⁸ Nevirapine is an antiretroviral drug that significantly reduces the likelihood of mother-to-child transmissions of HIV at birth.

³¹⁹ Section 28(1) states that:

"Every child has the right -

...

to basic nutrition, shelter, basic health care services and social services."

³²⁰ Section 27 states that:

"(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care;

...

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

³²¹ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 5.

³²² The *amici curiae* consisted of the Institute for Democracy in South Africa (IDASA) and the Community Law Center (CLC). The heads of argument submitted on behalf of the *amici curiae* can be found at ESCR-NET "Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)" (date unknown) ESCR-NET <<http://www.escr-net.org/docs/i/403050>> (accessed 30 October 2014).

³²³ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 26. This differed from the *amici* arguments in *Grootboom*, to the extent that they argued that section 26(1), together with section 26(2) of the 1996 Constitution, contained a minimum core obligation.

protect, promote and fulfil” in accordance with section 7(2) of the Constitution. Secondly, section 26(2) and section 27(2) create an obligation upon the State that is limited to achieving these rights progressively, by way of “reasonable legislative and other measures, within available resources”.³²⁴ This implied that the content of the right differed from the content of the obligation.³²⁵

The Court relied on a statement initially made in *Soobramoney*, and later reiterated in *Grootboom*, in which it held that section 26(1) and 26(2) are “related and must be read together”.³²⁶ Drawing from these cases, the Court reasoned that in respect of the right to have access to housing, health care, food, water and social security for those who are unable to sustain themselves and their dependants, there was no obligation upon the State to go beyond its available resources or to realise these rights immediately.

The Court proceeded to address the relevance of the provisions of the ICESCR and in this regard, referred to the *Grootboom* judgment.³²⁷ The Court relied on Yacoob J’s dicta in *Grootboom* and its treatment of the concept of the minimum core as being possibly relevant to the determination of reasonableness in section 26(2), but not as a self-standing right in terms of section 26(1) of the 1996 Constitution.³²⁸ The Court held that all that could be possible and expected of the State was “that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.”³²⁹ The Court added that it was institutionally ill equipped to make the necessary enquiries needed to determine the minimum core standards requested by the *amici*. Furthermore, the Court held that it was ill equipped to make decisions concerning the most effective manner of spending public revenues.³³⁰

Ultimately, the Court found that the Government’s policy denied mothers and their new born children from acquiring Nevirapine at public hospitals and clinics that fell outside research and training sites. To this extent, the Court held that the Government’s policy was inconsistent with the State’s obligations under section 27(2)

³²⁴ Para 29. The *amici* compared the structure of section 26 and section 27 of the 1996 Constitution with sections 9(2), 24(b), 25(5), and 25(8) of the 1996 Constitution that illustrated that rights and corresponding duties were not stated separately.

³²⁵ Para 29.

³²⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 34.

³²⁷ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) Para 33-34.

³²⁸ Para 34.

³²⁹ Para 35.

³³⁰ Para 37.

read together with section 27(1)(a) of the 1996 Constitution.³³¹ In addition, the Court held that, by implication, it would also have been unreasonable for the State to delay making a decision on the use of Nevirapine outside the confines of research and training sites.³³²

The Court declared that the Government was obliged to devise and implement a comprehensive and co-ordinated programme to realise the rights of pregnant women and their new born children to have access to health care services, and that these must contain reasonable measures pertaining to counselling and testing.³³³ Furthermore, the Court granted mandatory orders pertaining to the availability and use of Nevirapine, when medically indicated, at public hospitals and clinics that fell outside the research and training sites.³³⁴ In addition, the Court made an order concerning the training of counsellors at public hospitals and clinics outside of the research and training sites as well as an order extending testing and counselling facilities throughout the public health sector to advance the use of Nevirapine.³³⁵ The Court did consider international human rights law in this case. However, this was limited to a consideration of the CESCR's General Comment 3, which deals exclusively with the obligations of States parties to the ICESCR.

The Court has been criticised for its failure to define or elaborate on the scope and content of section 27 of the 1996 Constitution (as well as its failure to elaborate on the scope and content of section 28).³³⁶ Bilchitz, for example, argues that the Court does not explain what the right to health-care actually entails.³³⁷ He maintains that any enquiry into the reasonableness of the measures adopted by the State necessitates that the content of the right be determined so as to conclude that everyone is entitled to receive Nevirapine by way of section 27(1)(a).³³⁸ In this regard, references to international law may have proved useful to the Court. Furthermore, Bilchitz criticises the Court for its focus on the State's negative obligations, as opposed to focusing on

³³¹ Para 80.

³³² Para 81.

³³³ Para 135 (2)(a) and (b).

³³⁴ Para 135(3)(a).

³³⁵ Para 135(c) and (d). Government was permitted to adapt its policy in the event that equal or better methods of the prevention of mother-to-child transmission of HIV became available. This was subject to the condition that the policy remained consistent with the 1996 Constitution.

³³⁶ Kapindu *From the Global to the Local* 41.

³³⁷ D Bilchitz *Poverty and Fundamental Rights* 156-157.

³³⁸ 156-157.

the positive obligations that rest upon the State.³³⁹ Kapindu argues that section 39(1)(b) of the 1996 Constitution required that the Court at least consider General Comment 14³⁴⁰ in the process of elaborating on the scope of section 27 of the 1996 Constitution.³⁴¹

General Comment 14 focuses specifically on article 12³⁴² of the ICESCR and elaborates very broadly on the highest attainable standard of health. The General Comment lists those elements that the CESCR believes to be “core obligations”. These include: the provision of health facilities, goods and services in a non-discriminatory manner; access to minimum essential food and ensuring freedom from hunger for everyone; ensuring access to basic shelter, housing and sanitation and an adequate supply of safe and potable water; the provision of essential drugs (as identified under the WHO Action Programme on Essential Drugs); and ensuring the equitable distribution of all health facilities, goods and services.³⁴³ Furthermore, it requires the adoption and implementation of a national public health strategy and plan of action that would address the health concerns of the entire population.³⁴⁴ The General Comment also lists obligations regarded as “of comparable priority” that include the obligation to ensure reproductive, maternal and child health care, the provision of immunisation against major infectious diseases, and taking measures that will prevent, treat and control certain diseases.³⁴⁵ These obligations include providing education and access to information concerning major health problems as well as the

³³⁹ 158.

³⁴⁰ CESCR, ‘General Comment 14’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) (“General Comment 14”).

³⁴¹ Kapindu *From the Global to the Local* 41.

³⁴² Article 12 of the ICESCR states the following:

- “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

³⁴³ General Comment 14, paragraph 43(a)-(e).

³⁴⁴ Para 43(f).

³⁴⁵ Para 44(a)-(c).

provision of training for health personnel on aspects such as health and human rights.³⁴⁶

Langford and King note that the CESCR's General Comments can be ambitious and state that CESCR's General Comment 14 in particular is burdened with detail that may cause States to be overwhelmed at the request to satisfy all that is required.³⁴⁷ Furthermore, apart from the hefty list of obligations created in paragraph 44 titled "core obligations", the additional list of "obligations of comparable priority" makes it unclear as to how these obligations should be prioritised against the "core obligations", as reference is made to the non-derogability of "core obligations".³⁴⁸ Furthermore, General Comment 14 states that the adoption of retrogressive measures that conflict with the "core obligations" amounts to a violation of the right to health.³⁴⁹ This may imply that a hierarchy exists between the two sets of obligations outlined in paragraphs 43 and 44. Furthermore, the "core obligations" entrenched in General Comment 14 require States parties to ensure access to other elements such as minimum essential food, basic shelter, housing, sanitation and the adequate supply of safe and potable water.³⁵⁰ In this regard, Pieterse argues that it may not be suitable to adopt the CESCR's General Comment 14 when interpreting section 27(1)(a) of the 1996 Constitution. Pieterse states that the broader right to health is protected by a variety of constitutional provisions which include section 27(1)(a), section 12(2), section 24(a), section 26, section 27(1)(b) and (c), section 27(3) and section 28(1)(c). Therefore, he submits that the adoption of a minimum core approach that contains a core that touches the broader underlying determinants of the right to health may unduly extend the ambit of section 27(1)(a).³⁵¹

However, I am not suggesting that the Constitutional Court adopt the CESCR's General Comment 14 wholesale. Rather, I submit that aspects of the General Comment may assist in identifying the content and scope of the right to have access to health care, and in this way, may have supported the judicial reasoning of

³⁴⁶ Para 44(e).

³⁴⁷ M Langford & JA King "Committee on Economic, Social and Cultural Rights: Past, Present and Future" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477 481.

³⁴⁸ General Comment 14, paragraph 47.

³⁴⁹ Para 48.

³⁵⁰ Para 43(b) and (c).

³⁵¹ M Pieterse "Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services" (2006) 22 *SAJHR* 473 491.

the Court in *TAC*.³⁵² Furthermore, as will be elaborated on below, certain aspects of the General Comment do contribute to its relevance as an interpretative tool. Firstly, the drafters of General Comment 14 have recognised the relevance of other international instruments namely, the Alma-Ata Declaration³⁵³ and used it to assist them in identifying these “core obligations”.³⁵⁴ Thus, the “core obligations” were not created in isolation from other international human rights developments. Secondly, the General Comment is based upon several years of experience that the CESCR has gained in its examination of various States parties’ reports.³⁵⁵ This goes a long way in maintaining the relevance of the CESCR’s General Comment 14 as a means of assisting in defining the scope and content of the right to have access to health care in South Africa.

Furthermore, the IACtHR³⁵⁶ and the AfCommHPR³⁵⁷ have relied upon the CESCR’s General Comment 14 in their jurisprudence. General Comment 14 has also been used in national jurisdictions, as illustrated in the Kenyan case of *PAO and Two*

³⁵² Certain core obligations contained in both paragraphs 43 and 44 are of relevance to *TAC*. The obligations relevant to the case include those in paragraph 43(a), namely: “To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for marginalised groups”. In addition, the obligations in paragraph 43(d) are relevant namely, “To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs”. This is of particular relevance considering that Nevirapine was on the WHO Model List of Essential Drugs in April 2002. Other relevant obligations include those in paragraph 43(e) namely, “To ensure equitable distribution of all health facilities, goods and services.” Furthermore, the obligations in paragraph 43(f) are relevant, namely:

“To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as the right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.”

The obligations “of comparable priority” are also relevant to *TAC*, namely: (a) “To ensure reproductive, maternal (pre-natal as well as post natal) and child health care”; and (c) “To take measures to prevent, treat and control epidemic and endemic diseases”. The applicants could have relied upon these obligations to substantiate their request that the State satisfy certain obligations. Furthermore, the Court could have considered these obligations in support of their judgment by way of section 39(1)(b) of the 1996 Constitution.

³⁵³ WHO, Alma-Ata Declaration: Report of the International Conference on Primary Health Care (6-12 September 1978) WHO Health for All Series No. 1 1978.

³⁵⁴ See General Comment 14, paragraph 43.

³⁵⁵ Para 6.

³⁵⁶ See *Yakye Axa Indigenous Community v Paraguay*, Judgment, Inter-Am.Ct.HR (Ser C) No 25 (17 June 2005).

³⁵⁷ In *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009), the AfCommHPR relied upon the CESCR’s General Comment 14 in which the CESCR stated that the right to health “extends not only to timely and appropriate health care but also to the underlying determinants of health ...”.

Others v Attorney General.³⁵⁸ This adds further weight to the relevance of General Comment 14 as a source of interpretative guidance. In conclusion, international standards on the right to health may assist the Court in constructing a stronger normative framework for section 27 of the 1996 Constitution.

5 2 3 Social security

In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*³⁵⁹ certain provisions of the Social Assistance Act 59 of 1992 were challenged as being inconsistent with section 27(1)(c)³⁶⁰ of the 1996 Constitution as they resulted in the exclusion of social assistance on the basis that the applicants were permanent residents, and not South African citizens.³⁶¹ The Court held that the exclusion of permanent residents infringed upon section 27 of the 1996 Constitution,³⁶² and also constituted unfair discrimination in terms of section 9(3) of the 1996 Constitution. Although the Court's decision favours the applicants, its judicial reasoning is disappointing in terms of its obligation created under section 39(1)(b) of the 1996 Constitution to at least consider international law when interpreting the Bill of Rights. In the Court's consideration of the purpose of providing access to social security to those in need, the Court noted the argument made by Mr Madonsela, the Director-General of the Department of Social Development. In highlighting the aims of the challenged legislation, he stated the following:

³⁵⁸ [2012] eKLR. Under Article 2 of the Kenyan Constitution, the court is bound to have regard to international treaties. In this case, the court considered General Comment 14 with article 12(1) and (2) of the ICESCR, CEDAW, and article 24(1) of the CRC to determine the State's positive obligations in respect of the right to health. This consideration contributed to the finding that legislation that renders the cost of essential drugs unaffordable to citizens is in violation of the State's constitutional obligations. *PAO and Two Others v Attorney General* [2012] eKLR para 66.

³⁵⁹ 2004 6 SA 505 (CC).

³⁶⁰ Section 27(1)(c) states that:

“(1) *Everyone* has the right to have access to-

...

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” (Emphasis added).

³⁶¹ For an analysis of the decision, see Liebenberg *Socio-Economic Rights* 158-161.

³⁶² *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 85.

“[T]he legislation is part of the government’s strategy to combat poverty...[and] that the legislation is directed at realizing the relevant objectives of the Constitution and the Reconstruction and Development Programme, and giving effect to South Africa’s international obligations.”³⁶³

This is unfortunately the only reference made to international law throughout the entire decision. It was not clear which international obligations the Director-General was referring to, nor was any reference made to other relevant international human rights instruments that may have offered interpretative guidance.

The Court could have engaged with international treaties that afford protection to social security rights, and which have been signed and ratified by South Africa, for interpretative guidance. Relevant treaties include the CRC, which affords protection to the social security rights of children.³⁶⁴ This convention has also been interpreted to provide for a range of social security rights such as the right to health care necessary for survival and to a standard of living that satisfies the need for food, clothing, shelter and education.³⁶⁵ The CERD, ratified by South Africa in 1998, also contains provisions concerning the protection of social security rights.³⁶⁶ Although South Africa has not yet ratified the ICESCR, article 9 of the ICESCR may also have been relevant as an interpretative source, as this provision recognises the right of everyone to social security, including social insurance. At the time of hearing this case, the CESCR had not yet issued General Comment 19 in which the CESCR focuses on elaborating on the right to have social security.³⁶⁷ Until then, it had been submitted that the right to social security could be derived from articles 9 and 11(1) of the ICESCR. The latter provision recognises “[t]he right of everyone to an adequate standard of living for himself and his family.” Van Rensburg and Lamarche argue that

³⁶³ Para 51.

³⁶⁴ Article 6(2) of the CRC states the following: “States Parties shall ensure to the maximum extent possible the survival and development of the child.”

Article 23 provides that every child has the right to benefit from social security, which shall include social insurance while the State must take all reasonable measures to achieve the full realisation of this right in terms of national law. South Africa signed the CRC on 29 January 1993 and ratified the instrument on 16 June 1995.

³⁶⁵ L Jansen van Rensburg & M Olivier “International Standards” in MP Olivier, N Smit, ER Kalula and GCZ Mhone (eds) *Introduction to Social Security* (2004) 163 166.

³⁶⁶ Article 2(1)(c) and (d) as well as article 5(e). South Africa signed the CERD on 3 October 1994 and ratified the instrument on 10 December 1998.

³⁶⁷ CESCR ‘General Comment 19’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev. 9 (Vol. I) (“General Comment 19”).

article 10(1) and (2) of the ICESCR could also have been interpreted to refer to social security and assistance in certain cases.³⁶⁸

Thus, references to international human rights instruments would have enriched and supported the Court's reasoning. While section 39(1)(b) of the 1996 Constitution obliges the Court to only consider international human rights in the interpretation of rights, the Court is not precluded from drawing from the available international human rights standards in developing the substantive, normative content of the right to social security entrenched in section 27 of the 1996 Constitution. Furthermore, references to those international treaties to which South Africa is a party may have added further support to the Court's reasoning and indicated the harmonious relationship between the Court's jurisprudence and South Africa's international treaty obligations.

5 2 4 Water

In *Mazibuko*, the Constitutional Court was presented with the first opportunity to interpret the right to have access to sufficient water, entrenched in section 27(1)(b) of the 1996 Constitution.³⁶⁹ The case concerned firstly, the City's Free Basic Water Policy and in particular, the City's decision to supply six kilolitres of free water per month to every account holder.³⁷⁰ Secondly, the Court had to determine the

³⁶⁸ Jansen van Rensburg & Lamarche "The Right to Social Security and Assistance" in *Socio-economic Rights* 214. Article 10(1) states the following:

"The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependant children."

Article 10(2) states the following:

"Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave with adequate social security benefits."

³⁶⁹ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC). The applicants sought leave to appeal in part the order made by the Supreme Court of Appeal. The Respondents did not oppose the application, but in the event that it was granted, they applied conditionally for leave to cross appeal. See the High Court judgment in *Mazibuko v City of Johannesburg (Centre on Housing Rights and Evictions as amicus curiae)* 2008 4 All SA 471 (W) and the Supreme Court judgment in *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA). Section 27(1)(b) states the following:

1. "Everyone has the right to have access to
 - (a) ...
 - (b) sufficient food and water;
 - (c) ...".

³⁷⁰ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 6. In accordance with section 9 of the Water services Act 108 of 1997, the Minister has published Regulation 3, which defines the minimum standard for basic water supply as "a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month."

lawfulness of the City's installation of pre-paid water meters in Phiri.³⁷¹ On appeal before the Constitutional Court, the applicants raised four arguments contesting the constitutionality of the City's Free Basic Water Policy,³⁷² which the Court dealt with individually.

The applicants submitted that the Court should determine a quantified amount of water as "sufficient water" within the meaning of section 27 of the 1996 Constitution and that this amount was 50 litres per person per day.³⁷³ This request required that the Court consider the proper relationship between section 27(1)(b) and section 27(2) of the 1996 Constitution.³⁷⁴ In order to respond to this and determine the reasonableness of the City's Free Basic Water Policy, the Court expounded on its role in the interpretation of socio-economic rights and in particular, the right to have access to sufficient water. In this regard, O' Regan J found that section 27(1)(b) and section 27(2) of the 1996 Constitution did not require the State to provide everyone with sufficient water immediately upon demand. Rather, the Court held that the State is only required "to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources."³⁷⁵

³⁷¹ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 6. The area of Phiri, Soweto, was chosen as the first area in which the new water system would be implemented. The area of Soweto was characterised by massive water losses, partly through leakages and, as many residents did not pay for water consumption, great financial losses were incurred. The respondents argued that Soweto had suffered far greater water losses than surrounding areas that were also supplied with water on a deemed consumption basis. The new policy replaced the previous system of deemed consumption flat rate charges, with a system that consisted of three levels of water provision. The residents of Phiri were afforded the choice between yard standpipes that supplied 6 kilolitres of water per month for free (level 2) and a pre-paid water meter (level 3).

³⁷² *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 44.

³⁷³ Section 9 of the Water Services Act allows the Minister from time to time to prescribe "compulsory national standards" relating, among others, to the provision of water services and the "effective and sustainable use of water resources for water services". The Minister has published a set of regulations in this regard and regulation 3 provides that:

"The minimum standard for basic water supply services is:

- (a) the provision of appropriate education in respect of effective water use; and
- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month
 - (i) at a minimum flow rate of not less than 10 litres per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year."

This regulation defines the content of a "basic water supply" as contemplated in the Act.

³⁷⁴ *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 44.

³⁷⁵ Para 50 and 57.

The Court proceeded to interpret the applicant's arguments as requiring it to determine a minimum core in terms of the right to have access to sufficient water, which the State must provide.³⁷⁶ In order to address this, the Court focused on the concept of the minimum core and in particular, referred to the CESCR's General Comment 3, paragraph 10.³⁷⁷ In addition, the Court referred to *Grootboom* and *TAC*, highlighting their rejection of the argument that socio-economic rights entrenched in the 1996 Constitution contains a minimum core that courts must determine.³⁷⁸ The Court stated that for the same reasons, the applicant's argument must fail and that these reasons are essentially two-fold.³⁷⁹ Firstly, the Court held that the right to have access to sufficient water does not place a positive obligation on the State to provide sufficient water immediately upon demand, as indicated by the concept of "progressive realisation" in section 27(2) of the 1996 Constitution.³⁸⁰ The Court also stated that to fix a quantified amount might be rigid, counter-productive and prevent a contextual analysis of the case.³⁸¹

Secondly, the Court emphasised that courts are institutionally and democratically ill suited to determine what constitutes "sufficient water" and the steps that should be taken by the State to achieve the progressive realisation of the right.³⁸² In addition, the Court noted that the positive obligations placed upon the State by section 27(2) of the 1996 Constitution require the State "to achieve the progressive realisation of the right".³⁸³ The Court stated that this obligation is applicable to most of the social rights protected in the Constitution and is also consistent with international law.³⁸⁴ In this regard, the Court referred to article 2(1) of the ICESCR as "a source of the conception of the progressive realisation of economic, social and cultural rights" as well as to the CESCR's General Comment 3, which also elaborates on the term "progressive realisation".³⁸⁵ Lastly, the Court held that the duty of progressive realisation requires the State to continually revise and review policy to

³⁷⁶ Para 52. Later, the Court stated that the applicant's argument went beyond requesting a minimum core. See paragraph 56.

³⁷⁷ Para 52. As will be discussed below, the Court's first reference to international law occurs in the preliminary issues discussed in the case and is made within the context of the concept of "progressive realisation".

³⁷⁸ Para 53-54.

³⁷⁹ Para 57.

³⁸⁰ Para 58.

³⁸¹ Para 61.

³⁸² Para 61-62.

³⁸³ Para 40.

³⁸⁴ Para 40.

³⁸⁵ Para 40, footnote 31.

ensure that the rights are achieved in a progressive manner.³⁸⁶ Thus, the Court found that the argument presented by the applicants namely, that the Court must set the content of the right entrenched in section 27(1)(b) to 50 litres per person per day, must fail.³⁸⁷

The applicants also argued that the allocation of six kilolitres of water per household per month was unreasonable as per household allocation discriminated against larger households.³⁸⁸ In this regard, the Court agreed with the City's claims that it would be too difficult to establish the amount of people living on a stand at any given time.³⁸⁹ The Court added that the continual movement of people throughout the City would place an enormous administrative burden upon the City to determine the amount of people on a stand at sufficiently regular intervals in order to provide a daily allowance for each person.³⁹⁰ Thus, the Court dismissed the plaintiff's claim and found the City's policy of allocating water per stand per month to be reasonable.³⁹¹

Furthermore, the plaintiffs argued that the installation of prepaid water-meters by the State in households in Phiri breached the State's negative duty to respect the right to access sufficient water.³⁹² In this regard, the Court held that a new system of water supply that provides six kilolitres of free water every month, followed by the payment of a subsidised tariff for water supply thereafter, does not result in an infringement of the State's negative duty to respect the right to have access to sufficient water.³⁹³ The Court held that this was the first time a free water allowance was provided to the residents as opposed to the previous system, which entailed the payment of a flat rate per month and which made no provision for a free water allowance.³⁹⁴ In sum, the Court held that neither the Free Basic Water Policy nor the introduction of pre-paid meters in Phiri constituted a breach of section 27 of the 1996 Constitution.³⁹⁵ The following discussion will consider each of the Court's findings and determine whether international human rights law may have contributed towards the Court's decision.

³⁸⁶ Para 67.

³⁸⁷ Para 68.

³⁸⁸ Para 84.

³⁸⁹ Para 84.

³⁹⁰ Para 84.

³⁹¹ Para 84.

³⁹² Para 135.

³⁹³ Para 136.

³⁹⁴ Para 136.

³⁹⁵ Para 169.

(a) The Court's engagement with the content of the right to have access to adequate water

The Court's response to the *amici's* argument indicates a misrepresentation of the applicant's argument in the following ways. Firstly, the applicants' argument has been misinterpreted by the Court as a request that a minimum core be determined in respect of the right to have access to sufficient water. The applicants had in fact argued that the Court should determine the content of section 27(1)(b) by quantifying an amount of water "sufficient for a dignified life".³⁹⁶ Furthermore, the applicants requested the Court to declare that the content comprises 50 litres per person per day, and argued that the Court should determine whether the State had acted reasonably in its achievement of the progressive realisation of the right to have access to sufficient water.³⁹⁷ Based upon this misinterpretation, the Court responded by reverting to the rejection of the arguments that favoured the adoption of a minimum core in *Grootboom* and *TAC*. Had the Court recognised that the applicant's request required an assessment of the content of the right to have access to water by way of the reasonableness standard, it may have engaged the content of the right more substantively.

Wesson argues that the Court was not requested to declare a minimum essential level that had to be provided by the State, but rather that the Court was requested to "specify the content of the right in its entirety".³⁹⁸ He states that the Court was correct in refusing to determine an exact content of the right to have access to sufficient water, and submits that it is doubtful whether the judiciary is the most appropriate institution to define a "sufficient" amount of water.³⁹⁹ However, he stresses that the content of socio-economic rights nevertheless raises justiciable issues.⁴⁰⁰

Liebenberg argues that the *Mazibuko* decision illustrates the avoidance of a particular responsibility placed on courts to interpret normative standards that support

³⁹⁶ Para 51.

³⁹⁷ Para 51.

³⁹⁸ M Wesson "Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*" (2011) 11 *Human Rights Law Review* 390 399.

³⁹⁹ 399.

⁴⁰⁰ 399.

socio-economic rights.⁴⁰¹ Furthermore, she argues that the judgment reflects the flaws of reasonableness review as the Court determined the case through the application of reasonableness in accordance with section 27(2) of the Constitution, as opposed to engaging with the right of access to sufficient water entrenched in section 27(1)(b).⁴⁰² The Court's decision to avoid engaging with the content of section 27(1)(b) of the 1996 Constitution consequently also narrows its opportunity to consider substantive dimensions of this right that are elaborated on in international human rights law.

International human rights law may have been able to assist the Court with identifying aspects related to the right to have access to sufficient water that may be subject to adjudication. In particular, the CESCR has adopted General Comment 15, which elaborates on the CESCR's interpretation of the right to water protected in the ICESCR and has given normative content to this right.⁴⁰³ The General Comment states that: "The elements of the right to water must be *adequate* for human dignity, life and health".⁴⁰⁴ Furthermore, the CESCR acknowledges that such adequacy "may vary according to different conditions", however, it states that certain factors apply in all cases namely, availability,⁴⁰⁵ quality⁴⁰⁶ and accessibility.⁴⁰⁷ Wesson highlights the valuable role to be played by the CESCR's General Comment 15 and states that

⁴⁰¹ Liebenberg *Socio-Economic Rights* 469.

⁴⁰² 467.

⁴⁰³ CESCR 'General Comment 15' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 ("General Comment 15"). General Comment 15 elaborates on the right to water derived from article 11(1) of the ICESCR, which protects the right to an adequate standard of living. Although the right to water is not expressly mentioned, the CESCR has understood the term "including" as intending that the rights protected by article 11(1) do not form an exhaustive list and can include the right to water. General Comment 15, paragraph 3.

⁴⁰⁴ General Comment 15, paragraph 11.

⁴⁰⁵ "Availability" is defined in the following way:

"The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines. Some individuals and groups may also require additional water due to health, climate, and work conditions".

The CESCR states that each person should have a quantity of water available that corresponds to the World Health Organization ("WHO") guidelines. See General Comment 15, paragraph 12(a).

⁴⁰⁶ In terms of "quality", the CESCR states that:

"The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use" (footnotes omitted).

See General Comment 15, paragraph 12(b).

⁴⁰⁷ General Comment 15, paragraph 12. Within this context, "accessibility" is furthermore comprised of the elements of physical accessibility, economic accessibility, non-discrimination and information accessibility.

courts should review both legislative and executive decisions concerning socio-economic rights in light of the principles established in therein.⁴⁰⁸

(b) The Court's interpretation of progressive realisation

The Court's first reference to international law occurs in its consideration of progressive realisation in the preliminary issues, and particularly in its discussion of the nature of States' obligations concerning social and economic rights.⁴⁰⁹ However, the Court does not engage with the full definition provided by the CESCR in General Comment 15 namely, that States parties "have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water."⁴¹⁰ Furthermore, General Comment 15 states that while rights entrenched in the ICESCR must be realised progressively, the steps taken to realise the right should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."⁴¹¹ Therefore, the Court's assessment of the City's Free Basic Water Policy may have been assisted by this definition of progressive realisation in determining the reasonableness of the State's measures. Lastly, General Comment 15 prohibits States from taking deliberately retrogressive measures and places on State parties the burden of proving that the most careful consideration of all alternatives had taken place and that such measures are duly justified. A consideration of this prohibition may have urged the Court to request a higher standard of justification from the State in its decision to employ its water policy.

Furthermore, the Court may have been assisted by the jurisprudence of regional human rights courts that have found that the steps taken by a State in its realisation of rights are insufficient. This is seen for example in the jurisprudence of

⁴⁰⁸ Wesson (2011) *Human Rights Law Review* 399. For discussions challenging the relevance of General Comment 15 and responses in favour of this, see S Tully "A Human Right to Access Water? A Critique of General Comment No. 15" (2005) 23 *Netherlands Quarterly of Human Rights* 35-63; M Langford "Ambition that Overleaps itself? A Response to Stephan Tully's Critique of the General Comment on the Right to Water" (2006) 24 *Netherlands Quarterly of Human Rights* 433-459, and S Tully "Flighty Purposes and Deeds: A Rejoinder to Malcolm Langford" (2006) 24 *Netherlands Quarterly of Human Rights* 461-472.

⁴⁰⁹ This was a significant discussion in the case as it assisted the Court in accepting new evidence submitted by the State at a very late stage based on the understanding that the progressive realisation of social rights requires States to renew and revise policies on a continuous basis. *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 40.

⁴¹⁰ General Comment 15, paragraph 18. This obligation is reiterated in General Comment 3, paragraph 9.

⁴¹¹ General Comment 3, paragraph 2.

the ECSR. In *International Association Autism-Europe v France*,⁴¹² the ECSR developed a test in which it scrutinises the progress made in respect of the realisation of rights entrenched in the ESC. In this regard, the ECSR stated that:

“The Committee recalls, as stated in its decision relative to Complaint No.1/1998 (International Commission of Jurist v. Portugal, § 32), that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.”⁴¹³

This “sufficiency” test has been applied in subsequent jurisprudence within the context of housing rights. For example in *ERRC v Bulgaria*, the ECSR stated that the effective enjoyment of certain fundamental rights requires that the State undertake positive intervention.⁴¹⁴ In this regard, the ECSR stated that “the state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question.”⁴¹⁵ The ECSR acknowledged that States enjoy a margin of appreciation in terms of which they may choose the manner in which they ensure compliance with the Charter. However, the ECSR referred to the test developed in *Autism-Europe v France*, stating that the measures that have been taken must nonetheless comply with the three criteria namely, a reasonable timeframe, measurable progress, and financing consistent with the maximum use of available resources.⁴¹⁶

The AfCommHPR has also engaged with the concept of progressive realisation in its decision in *SERAC*.⁴¹⁷ In this case, the AfCommHPR held that the duty to “fulfil all rights” was interpreted to mean “more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights” and should include “the direct provision of basic needs such as food or resources that

⁴¹² Complaint No. 13/2002 (Decision on the Merits, 4 November 2003).

⁴¹³ Para 53.

⁴¹⁴ *ERRC v Bulgaria* Complaint No. 31/2005 (Decision on the Merits, 30 November 2006) para 35.

⁴¹⁵ Para 35.

⁴¹⁶ Para 35 and 37. The sufficiency test was also applied in *FEANTSA v France* Complaint No. 39/2006 (Decision on the Merits, 5 December 2007) para 57 and 58.

⁴¹⁷ *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

can be used for food (direct food aid or social security).”⁴¹⁸ Furthermore, in *Purohit and Moore v The Gambia*⁴¹⁹ the AfCommHPR stated that:

“[The AfCommHPR] would like to read into article 16 the obligation on the part of the state party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.”⁴²⁰

Thus, the AfCommHPR indicates that the progressive realisation of rights entrenched in the AfCHPR requires the taking of concrete, targeted steps towards such realisation.

(c) The reasonableness of six kilolitres of water per household per month

In its determination of the reasonableness of six kilolitres of water per household per day, the Court limited its consideration to the difficulties of establishing the amount of people on each stand. In doing so, it neglected to acknowledge that many households consist of, or are headed by, vulnerable groups. These include women or child headed households, the elderly, or the disabled for example, which may have different needs or which may be unable to afford more water once the six kilolitres have been used. South Africa is party to international human rights treaties that require the State to ensure access to water for particularly vulnerable groups.⁴²¹ Thus, the Court should have investigated the State’s responsibilities in this regard and the necessity of identifying these groups, so as to ensure that they were not discriminated against merely for the sake of an enormous administrative burden.

(d) The installation of pre-paid water meters

⁴¹⁸ Para 47.

⁴¹⁹ *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (“*Purohit*”).

⁴²⁰ Para 84.

⁴²¹ For example, article 15(a) of the African Women’s Protocol states that:

“States parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to:

a) provide women with access to clean drinking water, ...”.

In addition, article 24 of the CRC requires, amongst others, that States parties recognise “the right of the child to the highest attainable standard of health”. Within this context, article 24(2)(c) requires States parties to take appropriate measures:

“To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water ...”.

The installation of pre-paid water meters affects individuals' direct access to water. The negative duty to respect the right to have access to water has been addressed in international human rights law. In particular, the CESCR's General Comment 15 places specific emphasis on the availability of water as a factor necessary for the adequate supply of water and underscores the requirement of continuous availability of a water supply for personal and domestic use.⁴²² Furthermore, the CESCR's General Comment 15 states that the obligation to respect requires that States parties do not directly or indirectly interfere with the enjoyment of the right to water. This includes refraining from "engaging in any practice or activity that denies or limits equal access to adequate water..."⁴²³ In addition to this, the *Draft Guidelines for the Realization of the Right to Drinking Water Supply and Sanitation* states that all levels of government should refrain:

"[F]rom interfering with the enjoyment of the right to water and sanitation or any other human rights, unless such interference is permitted by law and includes appropriate procedural protection. No one whose access to water and sanitation may be legally curtailed after the appropriate procedures have been followed should be deprived of the minimum essential amount of water or of minimum access to basic sanitation services..."⁴²⁴

In addition, the *Draft Guidelines* state that before a person's access to water and sanitation services are reduced because of non-payment, the State should ensure that the person's ability to pay is taken into account.⁴²⁵ These instruments challenge the State's policy by requiring that access to sufficient water not be interfered with

⁴²² General Comment 15, paragraph 12(a).

⁴²³ Para 21.

⁴²⁴ UNCHR (Sub-Commission), 'Report by Special Rapporteur El Hadji Guissé on the Realisation of the Right to Drinking Water and Sanitation' (2005) UN Doc E/CN.4/SUB.2/2005/25 para 2.3(d) ("*Draft Guidelines*"). The Sub-Commission on the Promotion and Protection of Human Rights requested Special Rapporteur Mr El Hadji Guissé to draft guidelines focusing specifically on the realisation of the right to drinking water supply and sanitation at its fifty-sixth session in 2004. These guidelines are meant to assist those working in the water and sanitation sector such as government policy-makers, international agencies and members of civil society, with the implementation of the right to drinking water and sanitation. Furthermore, the guidelines are intended to assist States in their formulation and implementation of human rights policies. These guidelines emphasise that they do not intend to provide an exhaustive definition of the right to water and sanitation, but rather aim to emphasise the central and most urgent aspects of the right to water and sanitation. For further aims of the *Draft Guidelines*, see UNCHR (Sub-Commission), 'Report by Special Rapporteur El Hadji Guissé on the Realisation of the Right to Drinking Water and Sanitation' (2005) UN Doc E/CN.4/SUB.2/2005/25 4. The Sub-Commission adopted these guidelines on 24 August 2006 and submitted the report containing the *Draft Guidelines* to the Human Rights Council for consideration and adoption. See HRC (Sub Commission) 'Promotion of the Realization of the right to Drinking Water and Sanitation' (24 August 2006) UN Doc A/HRC/Sub.1/58/L.11. 41.

⁴²⁵ Para 6.4.

lightly, despite the provision of a free water allowance. Consideration of these instruments may have assisted the Court in its judicial reasoning of the negative duty to respect the right to have access to water.

The discussion above illustrates that international and regional human rights standards have engaged with many aspects that the Court adjudicated upon in this case. Many of these standards challenge the Court's reasoning, and to this extent, an engagement with them would have indicated that the Court was at least evaluating its interpretative strategy against international norms and standards. The Court's refusal to engage with these sources, especially within the context of giving scope and content to the right to have access to water, illustrates that the Constitutional Court has not come any closer in determining a role for international human rights law in its application of reasonableness review in a manner that can impact upon the substantive interpretation of socio-economic rights.

5 2 5 Electricity and sanitation

Evidence for the support of the provision of electricity as an independent, substantive right does exist at an international and regional level. In particular, the CESCR's General Comment 4, which elaborates on the right to adequate housing as protected in article 11(1) of the ICESCR, states that adequate housing includes "the availability of services, materials, facilities and infrastructure."⁴²⁶ This has been interpreted by the CESCR to include "sustainable access to...energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services...".⁴²⁷ CEDAW also provides for the supply of electricity,⁴²⁸ while the AfCommHPR has held that the Government's failure "to provide basic services such as safe drinking water and electricity and the shortage of medicine as

⁴²⁶ General Comment 4, paragraph 8(b).

⁴²⁷ Para 8(b).

⁴²⁸ CEDAW article 14(2)(h) states that:

"States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

...

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."

alleged in Communication 100/93” constituted a violation of article 16 of the AfCHPR.⁴²⁹

The right to electricity is not expressly entrenched in the 1996 Constitution. However, the applicants in the case of *Joseph v City of Johannesburg*⁴³⁰ raised arguments supporting the recognition of the right to electricity as an implied right. The applicants argued that section 3 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) applied, and submitted that the termination of electricity supply had materially and adversely affected their right. The applicants relied primarily upon the right to adequate housing entrenched in section 26(1) of the 1996 Constitution and argued that the termination of the electricity supply amounted to a retrogressive measure which infringed the negative duty placed upon the State to respect the right to have access to adequate housing.⁴³¹ The applicants argued that, for the purposes of PAJA, this infringement affected the right to have access to adequate housing in a material and adverse manner.⁴³²

The Court however, did not find it necessary to decide upon this argument.⁴³³ Nor did it wish to determine the claim based on the right to human dignity entrenched in section 10 of the Constitution and the contractual right to electricity in terms of the contract of lease between the applicants and the landlord. Instead, Skweyiya J located the local Government’s obligation to provide basic municipal services, which included the supply of electricity, in the Constitution as well as in South African legislation.⁴³⁴ Furthermore, the Court held that the applicants held a corresponding public law right to receive these municipal services and were entitled to receive these.⁴³⁵ In sum, the Court declared the termination of electricity supply to be unlawful, and ordered the respondents to reconnect the electricity supply.

The Court did not refer to any international human rights law in arriving at its decision to afford the right to electricity. However, from the discussion above, the

⁴²⁹ *Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’ Homme, Les Témoins de Jehovah/Democratic Republic of Congo 25/89 - 47/90 - 56/91 - 100/93 (October 1995) (25/89, 47/90, 56/91, 100/93 (Joined), Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union interafricaine des droits de l’Homme, Les témoins de Jehovah / Zaire) (October 1995) para 47. Article 16 of the AfCHPR protects every individual’s right “to enjoy the best attainable state of physical and mental health.”*

⁴³⁰ 2010 4 SA 55 (CC).

⁴³¹ Para 32.

⁴³² Para 32.

⁴³³ Para 32.

⁴³⁴ Para 35-40.

⁴³⁵ Para 40.

right to electricity has been recognised in a number of international and regional human rights contexts and could have added significant support to the Court's judgment. As the right to electricity is not expressly provided for in the South African Constitution, the recognition of such a right is in harmony with international and regional developments and references to these could have added further legitimacy to the Court's decision.

In *Nokotyana v Ekurhuleni Metropolitan Municipality*,⁴³⁶ the applicants sought the provision of temporary, basic sanitation services as well as lighting by the municipality, pending a decision on whether the settlement they reside in would be upgraded into a formal settlement. In particular, the community requested that each household be provided with one "ventilated improved pit latrine" or "VIP" latrine with immediate effect. Alternatively, the applicants requested that one VIP latrine per two households be provided, as opposed to one chemical toilet per ten families offered to them to replace their existing pit latrines.⁴³⁷ Furthermore, the applicants insisted on high-mast lighting. Amongst other provisions, the applicants relied on section 26 of the 1996 Constitution and argued that the right of access to adequate housing must be interpreted to include basic sanitation and electricity. The applicants argued further that section 26 of the 1996 Constitution contained a minimum content in this regard.

In its consideration of this provision, the Constitutional Court held that it was not necessary to decide upon the interpretation of section 26 of the 1996 Constitution, as chapters 12⁴³⁸ and 13⁴³⁹ of the National Housing Code were adopted to give effect to the rights and that these do not purport to establish minimum standards.⁴⁴⁰ In this regard, the Court affirmed its previous subsidiarity doctrine to the effect that when legislation is enacted to give effect to a constitutional right, that legislation itself should be relied upon or challenged as inconsistent with the Constitution.⁴⁴¹ Therefore, the Court held that the applicants could not rely directly on section 26 of

⁴³⁶ 2010 4 BCLR 312 (CC).

⁴³⁷ Para 2.

⁴³⁸ Chapter 12 of the National Housing Code provides for housing assistance in emergency situations and in cases where individuals find themselves in emergency housing situations for reasons beyond their control and where the situation poses an immediate threat to their life, health, safety, or requires eviction or poses the threat of imminent eviction.

⁴³⁹ Chapter 13 of the National Housing Code provides for the upgrading of informal settlements in which case a municipality receives a grant to upgrade the settlement in a structured manner of phase-development.

⁴⁴⁰ *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) para 47.

⁴⁴¹ Para 48.

the 1996 Constitution. In addition, the Court stated that as the applicants had not sought to challenge either chapter of the National Housing Code, it would not make a finding for the applicant's claim.⁴⁴²

However, the Gauteng Provincial Government's delay in deciding whether or not the settlement would be upgraded in terms of Chapter 13 of the National Housing Code was declared by the Court as being unjustified and unacceptable.⁴⁴³ The Court emphasised that the Provincial Government should make the decisions it is constitutionally responsible for, and that a delay of this length does not comply with the requirement of reasonableness found within section 26(2) of the 1996 Constitution or within section 237 of the Constitution.⁴⁴⁴

Bilchitz criticises the Court in this case in that it avoided the task of interpreting and affording content to the rights that were at stake.⁴⁴⁵ The Court applied the principle of subsidiarity, which requires in this case that applicants should apply for relief in terms of relevant legislation, and not directly on the Constitution.⁴⁴⁶ However, had the Court endeavoured to interpret section 26 of the 1996 Constitution, international and regional human rights law may have assisted in developing a more substantive interpretation that could have provided support in recognising a right to electricity, and a right to sanitation. International instruments such as CEDAW recognise the right to sanitation,⁴⁴⁷ while the CEDAW Committee's General Recommendation 27 states the following:

“States parties should provide affordable water, electricity and other utilities to older women. Policies to increase access to safe water and adequate sanitation should ensure that related technologies are designed so that they are accessible and do not require undue physical strength.”⁴⁴⁸

⁴⁴² Para 48.

⁴⁴³ Para 55.

⁴⁴⁴ Para 55.

⁴⁴⁵ D Bilchitz “Is the Constitutional Court Wasting Away the Rights of the Poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*” (2010) 127 *SALJ* 591 594.

⁴⁴⁶ 595.

⁴⁴⁷ CEDAW article 14(2) states that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

South Africa has signed and ratified this instrument and therefore has an important role to play in delineating the State's obligations.

⁴⁴⁸ UN Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No. 27’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9(Vol. II) para 49.

In addition, the CESCR's General Comment 15 affirms that access to adequate sanitation is fundamental to human dignity, privacy and is a principle mechanism for protecting the quality of water and drinking supplies.⁴⁴⁹ These instruments therefore affirm the recognition of the right to sanitation at an international level, which could have provided support for the recognition of this right within the South African context.

Furthermore, the *Draft Guidelines* may have provided assistance in developing the content of the right to sanitation. The *Draft Guidelines* confirm that “[e]veryone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment.”⁴⁵⁰ These *Draft Guidelines* also emphasise that the right to sanitation includes service that is physically accessible within, or in the immediate vicinity of, amongst others, the household.⁴⁵¹ In addition, the *Draft Guidelines* state that States should give particular attention to the needs of those who are vulnerable or who traditionally face difficulties, and that water and sanitation facilities should be designed to take into account the needs of women and children.⁴⁵²

Although the abovementioned elements contained in the *Draft Guidelines* may not specifically justify the provision of VIP latrines, as requested by the applicants in *Nokotyana*, they do constitute elements of the right to sanitation that are recognised in international law. A consideration of these sources may have assisted the Court in developing a more substantive judicial reasoning, in which the Court is able to more fully justify its decision within the context of these considerations.

5 2 6 Education

The right to education is protected in section 29⁴⁵³ of the 1996 Constitution. Section 29(1)(a) is phrased in a manner that is distinguishable from the socio-economic rights

⁴⁴⁹ General Comment 15, paragraph 29.

⁴⁵⁰ UNCHR (Sub-Commission), ‘Report by Special Rapporteur El Hadji Guissé on the Realisation of the Right to Drinking Water and Sanitation’ (2005) UN Doc E/CN.4/SUB.2/2005/25 (*Draft Guidelines*) para 1.2.

⁴⁵¹ Para 1.3.

⁴⁵² Para 3.2 and 5.3.

⁴⁵³ Section 29(1) and (b) state the following:

“(1) Everyone has the right –
(a) to a basic education, including adult basic education; and

protected in section 26 and section 27, and is also distinct from the right protected in section 29(1)(b) of the 1996 Constitution.⁴⁵⁴ The internal qualifications found within these sections do not form part of this particular socio-economic right.⁴⁵⁵ Furthermore, the right to a “basic education, including adult basic education” described in section 29(1)(a) of the 1996 Constitution is immediately realisable.⁴⁵⁶ However, this right may be subject to limitation in accordance with section 36 of the Constitution.⁴⁵⁷

Only a handful of cases have contributed to developing the scope and content of the right to education.⁴⁵⁸ In *Ex Parte Gauteng Provincial Legislature*, the Constitutional Court was requested to determine the constitutionality of the Gauteng

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

- (a) equity;
- (b) practicability; and
- (c) the need to address the results of past racially discriminating laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Sub-section (3) does not preclude state subsidies for independent educational institutions.”

⁴⁵⁴ For the advantages and challenges such an unqualified right presents to litigants, see C McConnachie & C McConnachie “Concretising the Right to a Basic Education” (2012) 129 *SALJ* 554 577.

⁴⁵⁵ These include the terms “progressive realisation”, “within available resources” and the need for “reasonable legislative and other measures”.

⁴⁵⁶ This was recently confirmed in *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC).

⁴⁵⁷ Para 37. This approach was also recently affirmed in *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 21.

⁴⁵⁸ It must be noted that cases have addressed the rights contained in section 32(c) of the 1993 Constitution as well as section 29(2) of the 1996 Constitution. These included *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T) in which a state aided, dual-medium school was charged with denying children admittance into English medium classes because of their race. *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) concerned an application for the setting aside of a decision made by the Head of Department, Mpumalanga Department of Education, and its functionaries to convert a single-medium Afrikaans primary school into a dual-medium primary school. *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA) also addressed a dispute concerning the language policy of a public, single-medium, Afrikaans speaking school in light of their refusal to admit English learners and convert to a dual medium school upon the request of the Western Cape Education Department. This also included *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC). The courts did not consider international human rights law, as mandated by section 39(1)(b) of the 1996 Constitution, in these cases.

School Education Bill 1995.⁴⁵⁹ In order to solve the dispute, it was imperative that the Court determined whether section 32(c)⁴⁶⁰ of the 1993 Constitution placed a positive obligation on the State “to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the grounds of race.”

The Court found that section 32(c) of the 1993 Constitution did not place such a positive obligation on the State and did not grant everyone the right to demand that the State establish such educational institutions.⁴⁶¹ Instead, the Court stated that section 32(c) of the 1993 Constitution was a defensive right that allowed everyone to establish such institutions while providing protection from the State.⁴⁶² However, in support of this contention, Sachs J made a laudable analysis of principles of international law relating to the protection of minority rights that was aimed at determining whether international law supported the Court’s interpretation.⁴⁶³ Based on his investigation of the status of minority protection under international law, Sachs

⁴⁵⁹ *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC). At the time of the hearing, the Bill had been passed and enacted as the School Education Act 6 of 1995. However, the disputed sections had not yet become operational and the Act was referred to by the Court as the “Bill”. The dispute concerned the constitutionality of section 19(1) that prohibited the use of language competency testing for the purposes of admitting learners into schools. Furthermore, the applicants also challenged section 21(2). This provision required that the religious policy of public schools be developed according to a specific framework. Section 21(3) was also challenged, which allowed the Member of the Executive Council, after consultation with the governing body, to reformulate the religious policy of a public school. Lastly, the constitutional validity of section 22(3) was challenged. This section prohibited the compulsory attendance by learners of religious practices and education classes.

⁴⁶⁰ Section 32 of the 1993 Constitution states that:

“Every person shall have the right -
 (a) to basic education and to equal access to educational institutions;
 (b) to instruction in the language of his or her choice where this is reasonably practicable; and
 (c) to establish, where practicable, educational institutions based on a common culture, language or religion provided that there shall be no discrimination on the ground of race.”

⁴⁶¹ *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 7.

⁴⁶² Para 7-9. This case is argued to be one of the only cases, prior to *Juma Masjid*, to contribute to identifying the scope of section 32(a) of the 1993 Constitution. In this case, Mohamed J stated that:

“Section 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education. Section 32(b), recognising the diversity of languages in our country, again creates a positive right for every person to instruction in the language of his or her choice, where this is reasonably practicable, not merely a negative right to prevent any obstruction if such person seeks instruction in the language of his or her choice. Section 32(c), by contrast, guarantees a freedom - a freedom to establish educational institutions based on a common culture, language, or religion. It is that freedom which is protected by s 32(c).”

⁴⁶³ Para 44. See footnote 37 on pages 104-105 for the comprehensive list of international and regional sources Sachs’J relied upon in this case.

J concluded that very little international human rights law could support a general claim to State resources for the purpose of promoting cultural, linguistic and religious diversity.⁴⁶⁴ Furthermore, he found that none existed to support a legal claim to the establishment of a separate State-funded school.⁴⁶⁵ Sachs J also affirmed Mohamed J's interpretation of section 32(c) of the 1993 Constitution and found it to be reinforced by many international instruments.⁴⁶⁶

Sachs J's analysis of international human rights and the status of minority protection under international law have been criticised. De Wet argues that Sachs submission that the Framework Convention is the most recent and advanced instrument concerning international minority rights indicates a "lack of awareness" of other important developments that had taken place within the context of minority rights in Europe.⁴⁶⁷ Furthermore, she submits that Sachs J should have also considered the European Charter for Regional or Minority Languages, adopted by the Council of Europe in 2002.⁴⁶⁸ In addition, De Wet argues that the Court neglected to take into consideration the Document of the Copenhagen Meeting of the CSCE Conference on the Human Dimension of 1990.⁴⁶⁹ To this extent, De Wet argues that if European regional instruments are to be relied upon by the Court, it should be done in a consistent and comprehensive manner.⁴⁷⁰ Sach J's analysis is also criticised for neglecting to consider the AfCHPR, which South Africa had already signed and ratified at the time of the decision.⁴⁷¹ In particular, De Wet argues that section 17(3), which protects the right to education in the AfCHPR, should have been considered.⁴⁷² However, De Wet does admit that it is unlikely that this provision would have provided for a positive claim against the State.⁴⁷³

⁴⁶⁴ Para 83.

⁴⁶⁵ Para 83.

⁴⁶⁶ Para 92.

⁴⁶⁷ De Wet (2004) *Fordham International Law Journal* 1529 1542.

⁴⁶⁸ European Charter for Regional or Minority Languages (opened for signature 5 November 1992, entered into force 1 March 1998) CETS No. 148.

⁴⁶⁹ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 29 ILM 1305 (1990). However, it must be noted that the Framework Convention that Sachs J referred to does take into account the commitments made in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of 1990.

⁴⁷⁰ De Wet (2004) *Fordham International Law Journal* 1543.

⁴⁷¹ 1543.

⁴⁷² 1543.

⁴⁷³ 1543.

De Wet submits that this judgment illustrates that a special status is afforded to European human rights instruments in South Africa jurisprudence.⁴⁷⁴ Furthermore, she argues that this case illustrates that a *de facto* hierarchy has been created whereby non-binding international instruments have been relied upon at the expense of binding international and regional human rights instruments.⁴⁷⁵ To this extent, De Wet argues that non-binding international and regional human rights instruments should be considered as secondary to those international and regional instruments to which South Africa is a party, such as the AfCHPR.⁴⁷⁶

However, in addition to surveying European regional instruments, Sachs J also undertook a comprehensive survey of available UN instruments and publications. Moreover, South Africa was a member of the CEDAW at the time of this decision, the provisions of which were included in Sachs J's analysis. Therefore, Sachs J's consideration of international law contains references to both binding and non-binding international law instruments. Furthermore, considering the date upon which this judgment was delivered, South Africa was not party to any of the instruments at the time that could provide evidence of an international obligation that supported Sachs J's decision, except for the CEDAW and South Africa's membership to the League of Nations. Although it was unfortunate to exclude at least an inquiry into the AfCHPR's potential to assist the decision, a strong reliance on non-binding international and regional sources was inevitable. Ultimately, this judgment is laudable for its consideration of international law sources. The decision underscores the relevance of the framework dictum established in *Makwanyane* and the significance of the generous breadth of international and regional human rights sources that may be considered by the Court, particularly at a period when South Africa had both signed and ratified only a handful of human rights instruments.

In *Governing Body of the Juma Masjid Primary School v Essay NO*⁴⁷⁷ the applicants challenged a high court decision authorising the eviction of a public school from private property belonging to a trust. The Constitutional Court was called upon to balance the learners' rights to basic education against the right to property as enshrined in sections 29(1)(a) and section 25(1) of the 1996 Constitution respectively.

⁴⁷⁴ 1543.

⁴⁷⁵ 1543.

⁴⁷⁶ 1543.

⁴⁷⁷ *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC).

Nkabinde J referred to both international⁴⁷⁸ and regional⁴⁷⁹ instruments that afford recognition and protection to the right to education.⁴⁸⁰ Furthermore, Nkabinde J drew particular attention to General Comment 13, paragraph 1 of the CESCR, in which the CESCR stresses the significance and aims of the right to basic education.⁴⁸¹

The Court found that the MEC had failed to discharge her positive constitutional obligations to “respect, protect, promote and fulfil” the learners’ right to basic education and had fallen below the standard required by the obligations established in the relevant statutory provisions.⁴⁸² The Court also found that while the Trust did not give up its right to ownership in relation to its property, the trustees did in fact have a negative constitutional obligation not to impair the right to basic education of the learners.⁴⁸³ The content of the MEC’s and trustee’s obligations were determined in accordance with the statute and the Constitution. Furthermore, the judgment is important as it establishes basic education as an immediate right,⁴⁸⁴ and affirms the negative duties of non-interference with the right.

However, international law played no role in underscoring the positive obligations placed upon the State to provide public schools and ensure that a

⁴⁷⁸ The Court referred to article 26 of the UDHR as well as to article 13(1) and article 14 of the ICESCR for their unqualified recognition of the right to education. The Court also referred to articles 28(1)(a) and (b) of the CRC and to General Comment 3 on the national implementation of the ICCPR in which the HRC places specific obligations upon States parties in terms of the ICCPR. See UNCHR ‘General Comment 3’ in ‘Note by the Secretariat, Compilation of General Comments and Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev 9 (Vo. I) at 4.

⁴⁷⁹ The Court referred particularly to article 17 of the AfCHPR that protects every individual’s right to education. Furthermore, the Court referred to the positive obligations resting upon States parties in terms of article 1 of the AfCHPR namely, to adopt legislative or other measures to give effect to the rights contained in the AfCHPR. The Court also referred to articles 11(2) and (3) of the African Children’s Charter that respectively state the purposes and objectives of a child’s education as well the positive obligation upon States parties to take specific measures aimed at achieving the full realisation of the right, in particular to provide free and compulsory basic education.

⁴⁸⁰ *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761 (CC)* para 40-41.

⁴⁸¹ General Comment 13, paragraph 1 states the following:

“Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”

⁴⁸² *Governing Body of the Juma Masjid Primary School v Essay NO 2011 8 BCLR 761 (CC)* para 51-52. Statutory obligations were located in the South African Schools Act 84 of 1996 .

⁴⁸³ Para 60-62.

⁴⁸⁴ Para 37.

sufficient number of places were made available to learners in affected areas. This obligation is entrenched in the CRC to which South Africa is already a party,⁴⁸⁵ while General Comment 13 may also have provided further support in this regard.⁴⁸⁶

Furthermore, Nkabinde J elaborated on the negative duty placed upon third parties to refrain from interference with the right to education. Regional human rights law could have been used to support such a finding.⁴⁸⁷ For example, in *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Government of Kenya*,⁴⁸⁸ the African Committee of Experts on the Rights and Welfare of the Child found that a violation had occurred in respect to the right to education protected in article 11(3) of the Children's Charter. In particular, Nubian children had received less access to educational facilities compared to other communities, fewer schools had been provided to them and they had received a disproportionately lower share of available resources.⁴⁸⁹ This decision could have assisted the Court in supporting its finding that third parties are to refrain from interfering with the right to education.

One of the main aims of the above investigation was to analyse the manner in which the Constitutional Court engages with international human rights law in the adjudication of socio-economic rights. The purpose of this analysis was to determine how the Court relies upon international and regional human rights law as well as to determine which international and regional human rights standards are relied upon. The discussion below critically evaluates the jurisprudence reviewed above.

⁴⁸⁵ Article 1(a) of the CRC requires States to make primary education available to every child while article 1(b) requires States to make secondary education available and accessible to every child.

⁴⁸⁶ General Comment 13, paragraph 6(a) states that the requirement of "availability" obliges States to provide functioning educational institutions and programmes that must be available in sufficient quantity.

⁴⁸⁷ General Comment 13, paragraph 47 states that: "The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education." As already discussed above, a State's negative responsibility to protect the rights of its citizens from damaging acts of third parties as part of its minimum core obligations was also highlighted in a decision of the AfCommHPR namely, *SERAC v Nigeria* para 57.

⁴⁸⁸ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Government of Kenya* no 002/com/002/2009.

⁴⁸⁹ Para 65.

5 3 An Evaluation of the Constitutional Court's Reliance on International Human Rights Law in its Adjudication of Socio-Economic Rights

Section 39(1)(b) of the 1996 Constitution states that “when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.” While the mandate to consider international law is clear, no direction is given as to the meaning of “consider” and the extent to which such a consideration should take place.⁴⁹⁰ From the cases canvassed in this study, the consideration of international human rights law in the interpretation of socio-economic rights has taken place in various forms and to various degrees. As stated in chapter 1, international law is a vast and complex field that requires both the skill and knowledge to engage with it successfully. Within the context of socio-economic rights, the Court’s task is further complicated by the Constitutional Court’s adoption of a reasonableness model of review, used to adjudicate claims based upon the positive obligations arising from socio-economic rights entrenched in the Constitution.⁴⁹¹ *Soobramoney* displays the initial emergence of a standard of rationality review in socio-economic rights jurisprudence.⁴⁹² However, the Constitutional Court’s subsequent decision in *Grootboom* was the first significant contribution towards the development of the reasonableness model of review in South Africa’s socio-economic rights jurisprudence. As discussed in section 5 2, in *Grootboom*, the Court refrained from adopting the CESCR’s concept of minimum core obligations in its interpretation of section 26 of the 1996 Constitution.⁴⁹³ The Court chose instead to apply a model of reasonableness review whereby the Court investigated into whether the measures taken by the State, in their endeavour to realise the right to have access to adequate housing, were reasonable. Thus, the Court applied a reasonableness test to the relevant Government policies adopted to give effect to these rights.⁴⁹⁴ In *Grootboom*, the Court indicated that its enquiry into the reasonableness of State actions would not be aimed at whether more

⁴⁹⁰ See chapter 4.

⁴⁹¹ The standard of reasonableness is expressly stated in these provisions. In particular, section 26(2) and section 27(2) of the 1996 Constitution state that: “The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”

⁴⁹² 1998 1 SA 765 (CC).

⁴⁹³ In its General Comment 3, the CESCR elaborated on the nature of States parties’ obligations as entrenched in article 2(1) of the ICESCR, in which the concept of minimum core obligations was established.

⁴⁹⁴ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 33.

appropriate alternatives, or more “correct” measures, could have been taken by the State.⁴⁹⁵ Instead, the focus of the investigation was to determine whether the measures taken by the State were reasonable.⁴⁹⁶ This approach therefore affords the legislative and executive branches of Government a margin of appreciation whereby they may decide how to fulfil their obligations in terms of the right.

The *Grootboom* judgment also establishes certain criteria by which courts can assess the reasonableness of Government programmes.⁴⁹⁷ In this regard, the Court stated that a reasonable Government programme must be a co-ordinated, comprehensive programme determined by all three spheres of Government in consultation with each other.⁴⁹⁸ A reasonable programme will be one that ensures that the appropriate financial and human resources are available.⁴⁹⁹ Furthermore, the measures taken by the State must establish a coherent housing programme directed towards the progressive realisation of the right of access to adequate housing within the State’s available means.⁵⁰⁰ The programme must be balanced and flexible, and must make appropriate provision for any housing crises as well as for short, medium and long-term needs.⁵⁰¹ In addition, reasonable policies are those policies that are reasonable in both their conception and their implementation.⁵⁰² Finally, a reasonable Government programme is one that makes short-term provision for those whose needs are urgent and are living in intolerable conditions.⁵⁰³ The *Grootboom* judgment also underscores the significant value of human dignity in determining the reasonableness of State measures and establishes that Government engagement with affected parties and civil society must also be taken into account.⁵⁰⁴ In *TAC*,⁵⁰⁵ the Court added that measures must be transparent and their contents must be made known effectively to the public.⁵⁰⁶ Lastly, the language used in section 26 and section 27 of the 1996 Constitution has further qualified an assessment of reasonableness review. These

⁴⁹⁵ Para 41.

⁴⁹⁶ Para 41.

⁴⁹⁷ Liebenberg *Socio-Economic Rights* 152-153.

⁴⁹⁸ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 40.

⁴⁹⁹ Para 39.

⁵⁰⁰ Para 41.

⁵⁰¹ Para 43.

⁵⁰² Para 42.

⁵⁰³ Para 44.

⁵⁰⁴ See Liebenberg *Socio-Economic Rights* 153. This criteria is derived from references made to the Court’s expectation that community engagement would have taken place between the municipality and the affected community once occupation of the land had occurred. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 87.

⁵⁰⁵ *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

⁵⁰⁶ Para 123.

provisions subject reasonable and other measures to “progressive realisation”, “within available resources” of the State.

This approach to adjudicating the positive obligations resting upon States within the context of socio-economic rights has received academic support, and is perceived to be a means to realise the transformative potential latent in the interpretation of socio-economic rights.⁵⁰⁷ In this regard, Steinberg states that a reasonableness approach facilitates the type of judicial minimalism that results in an incremental evolution of the constitutional standards that may bring about lasting social reform.⁵⁰⁸ However, the Constitutional Court has been criticised for adopting a deferential approach to the adjudication of socio-economic rights. Brand argues that judicial deference has affected the Court’s adjudication of socio-economic rights in various ways. Brand submits that it has been used to justify the Court’s refusal to engage with claims on the basis of their complexity and the Court’s technical incapacity, as seen in *TAC* and in *Mazibuko*.⁵⁰⁹ Moreover, the Court has also followed a deferential approach when it has engaged with a claim, but applied a reasonableness test formulated in procedural or structural terms that avoids a substantive engagement with the matter.⁵¹⁰

The Court’s particular reluctance to engage with the scope and content of socio-economic rights has frustrated the application of section 39(1)(b) of the 1996 Constitution and the consideration of international law as an interpretative tool. As illustrated in *Mazibuko*, international law is not provided with an opportunity to engage substantively with the scope and content of the right, and is devoid of its purpose as an interpretative tool. However, the Court’s approach has not paralysed the application of section 39(1)(b) of the 1996 Constitution completely.

In this regard, the case analysis in section 5.2 of this study has revealed that the Constitutional Court has firstly, on occasion, relied upon international human rights law to emphasise the importance and international recognition of a right. To this extent, the Court usually invoked a list of international and regional human rights instruments that recognise a specific right, in a rather superficial manner. This

⁵⁰⁷ C Steinberg “Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-Economic Rights Jurisprudence” (2006) 123 *SALJ* 264 264.

⁵⁰⁸ 269 and 272.

⁵⁰⁹ D Brand “Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa” in S Liebenberg & G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 172 177.

⁵¹⁰ 177.

consideration of international law did not play a central role in influencing the Court's interpretation of the actual content of the right, as illustrated in *Juma Masjid*.⁵¹¹ Similarly, in *PE Municipality*,⁵¹² soft law was relied upon to affirm the many attributes of "adequate housing". However, it did not play a role in elaborating on the content of the right, or on the procedural safeguards that are associated with evictions that have been developed at an international or regional level. Although appearing superficial, such consideration plays an important role as these instruments highlight the manner in which the right is protected at an international level and the reasons why it receives international recognition. Furthermore, locating the right at an international level reinforces the importance of the right and the relevance of its recognition.

Secondly, the Court has undertaken an evaluative consideration of international and regional human rights law. This is characterised by a deeper engagement with, and evaluation of, international and regional human rights standards that do not necessarily result in their adoption. However, the engagement does evaluate the relevance of the international standards to the South African context, and the Court has, on occasion, provided a justification concerning the rejection or acceptance of the international approach. This is illustrated in *Grootboom*,⁵¹³ and, to a lesser extent, *TAC*.⁵¹⁴

Lastly, the case law indicated that, on occasion, the Court also endeavored to align its approach with international human rights standards or adopt a concept established at an international level in certain cases. This goes beyond mere consideration of international human rights law. This was seen for example, in *Grootboom*,⁵¹⁵ where the Constitutional Court accepted the CESCR's understanding of "progressive realization" as found in the CESCR's General Comment 3, to be in harmony and bear the same meaning as in the South African context.⁵¹⁶ Furthermore, the Court has relied strongly on international standards in this way when elaborating on the negative duty to respect the right to have access to adequate housing, as seen in

⁵¹¹ *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 8 BCLR 761 (CC).

⁵¹² 2005 1 SA 217 (CC).

⁵¹³ 2001 1 SA 46 (CC).

⁵¹⁴ (No 2) 2002 5 SA 721 (CC).

⁵¹⁵ 2001 1 SA 46 (CC).

⁵¹⁶ However, it must be noted that the Court did not correctly understand the concept of progressive realisation. Bilchitz argues that the Court's understanding was predicated upon an acceptance of the minimum core obligation. Bilchitz D "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance" (2002) 119 *SALJ* 484-501.

Jaftha.⁵¹⁷ The Constitutional Court relied strongly upon the concept of “adequacy” and in particular, the inclusion of security of tenure as an element of “adequacy” in the CESCR’s General Comment 4. In this case, the Court applied this in its decision to reinforce the scope of section 26 of the 1996 Constitution in this regard. Furthermore, in *Joe Slovo*⁵¹⁸ the Constitutional Court established that General Comment 7 must be followed in cases of relocation. In addition, in *Ex Parte Gauteng Provincial Legislature*,⁵¹⁹ the Court engaged with international human rights law and followed the approach concerning the protection of minorities as found in international human rights law.

However, the South African jurisprudence discussed in section 5.2 also indicates that the Constitutional Court did not apply section 39(1)(b) of the 1996 Constitution in most of the cases pertaining to evictions. In particular, the Court made minimal reference to international and regional standards in its development of the concepts of meaningful engagement and alternative accommodation. This trend is illustrated in *Olivia Road, PE Municipality, Modderklip, Gundwana, Pheko, Abahlali, Occupiers of Skurweplaas, Blue Moonlight, Schubert Park* and *Joe Slovo*.

Furthermore, the case law discussed in this study indicates that the CESCR’s General Comments, are by far the most cited sources of international human rights law.⁵²⁰ This may be attributed to a number of factors. As discussed in chapter 2, the ICESCR as well as the General Comments adopted by the CESCR played a very influential role in drafting the provisions that entrenched certain socio-economic rights. Thus, the Court may be more inclined to draw from these sources when interpreting these provisions. Furthermore, the CESCR’s General Comments are significantly more detailed and comprehensive when compared with the resolutions adopted by the AfCommHPR. In addition to this, the ICESCR has been in force since 1966, and the CESCR has adopted General Comments in respect of the rights contained in the ICESCR since 1991.⁵²¹ Thus, information on the ICESCR, as well as

⁵¹⁷ 2005 2 SA 140 (CC).

⁵¹⁸ 2010 3 SA 454 (CC).

⁵¹⁹ 1996 3 SA 165 (CC).

⁵²⁰ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC), *Joe Slovo Community v Thubelisha Homes* 2010 3 SA 454 (CC), *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC), *Ex Parte Gauteng Provincial Legislature* 1996 3 SA 165 (CC), *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 8 BCLR 761 (CC).

⁵²¹ For example, General Comment 4 on the right to adequate housing was adopted in 1991, General Comment 7, which elaborates on forced evictions was adopted in 1996 while General Comment 14 on

the CESCR's General Comments, has been disseminated over a longer period than communications and resolutions adopted by the AfCommHPR. Therefore, the Court's familiarity with the ICESCR and the CESCR's General Comments may have an impact on how often they have been considered.

Furthermore, the case analyses above indicate that the AfCHPR and the jurisprudence of the AfCommHPR were cited significantly less.⁵²² Unfortunately, the Constitutional Court has not relied as heavily on the AfCommHPR's jurisprudence on socio-economic rights as would have been expected.⁵²³ Several reasons have been offered as an explanation for this, which focus largely on the effectiveness of the AfCommHPR. Mbazira argues that during the first years of its operation, many factors contributed to the ineffectiveness and weakness of the AfCommHPR. Mbazira defines this as the "redundancy" period, in which the AfCommHPR seemed neither capable, nor willing, to interpret the rights protected in the AfCHPR in their broadest possible meaning.⁵²⁴ Furthermore, doubts existed concerning the impartiality and independence of the AfCommHPR's members, which stemmed from employees in the public service of a country, such as attorney generals, ambassadors, or cabinet ministers, holding posts as commissioners.⁵²⁵ This not only affected the independence of the AfCommHPR, but also created opportunity for commissioners to resist reprimanding their own governments.⁵²⁶ Article 59(1) of the AfCHPR states that

"[a]ll measures taken within the provisions of ch III shall remain confidential until such time as the Assembly of Heads of State and Government shall otherwise decide."

This degree of confidentiality had raised concerns regarding the accountability of the proceedings and Mbazira argues that this lack of accountability and public criticism may explain why, at least initially, the decisions of the AfCommHPR were regarded as slipshod.⁵²⁷ The effects of insufficient resources (usually in the form of insufficient

the right to the highest attainable standard of health was adopted in 2000. The AfCHPR only entered into force 20 years later in 1986.

⁵²² *Governing Body of the Juma Masjid Primary School v Essay NO* 2011 8 BCLR 761 (CC), *Joe Slovo Community v Thubelisha Homes* 2010 3 SA 454 (CC).

⁵²³ See section 4.4 in chapter 4.

⁵²⁴ C Mbazira "Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides" (2006) 6 *African Human Rights Law Journal* 333-342.

⁵²⁵ 343.

⁵²⁶ 343.

⁵²⁷ 343.

funding from the OAU, and later, from the AU), were also visible in the AfCommHPR's inadequate research and the frequency of badly formulated opinions.⁵²⁸ There are however, indications that the effectiveness of the AfCommHPR is improving. In 1994, the principle of confidentiality was no longer used in terms of the AfCommHPR's decisions, activity reports and resolutions, thus increasing the transparency and trust in the work of the AfCommHPR.⁵²⁹

In light of the case analyses above, references to the ECHR and the ECtHR were minimal.⁵³⁰ The ESCR was referred to by the *amici* in their heads of argument presented to the Court in *Joe Slovo*.⁵³¹ The Constitutional Court however, did not address the reference and it did not appear in the Court's judgment. Furthermore, no references were made to the Inter-American human rights system in the cases discussed above.

5 4 Future Developments: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Women's Protocol, and their Relevance to South African Socio-Economic Rights Jurisprudence

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has recently come into force.⁵³² As discussed above, South Africa has signed and ratified the ICESCR. However, the State has not yet signed, nor made any indication of an explicit intention to ratify the OP-ICESCR. This international instrument establishes three complaints procedures namely, an individual complaints

⁵²⁸ 343.

⁵²⁹ 335.

⁵³⁰ *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC).

⁵³¹ 2010 3 SA 454 (CC).

⁵³² The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the General Assembly by way of resolution A/RES/63/117 on 10 December 2008 (opened for signature and ratification on 24 September 2009, came into force 5 May 2013) ("OP-ICESCR"). As of January 2014, the OP-ICESCR has 45 signatories and 12 States parties. For a discussion concerning the evolution of the OP-ICESCR and the process of drafting the provisions entrenched therein, see M Langford "Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2009) 27 *Special Issue of Nordisk Tidsskrift for Menneskerettigheter /Nordic Journal of Human Rights Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 1-28.

procedure, an inter-State communications procedure⁵³³ and lastly, an inquiry procedure whereby the CESCR is able to inquire into urgent and serious violations.⁵³⁴ The individual complaints procedure allows individuals or groups of individuals to submit a communication of complaint to the CESCR in the event of an alleged violation of their socio-economic rights protected under the ICESCR.⁵³⁵ To this extent, CESCR is authorised to adjudicate claims based on State parties obligations in terms of the ICESCR and will assess a State's compliance with the rights protected in the ICESCR in accordance with the standard of reasonableness.⁵³⁶ Article (8)4 of the OP-ICESCR states the following:

“When examining communications under the present Protocol, the Committee shall consider the *reasonableness* of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible measures for the implementation of the rights set forth in the Covenant.” (Emphasis mine).

Porter submits that while article 8(4) of the OP-ICESCR permits the CESCR to adjudicate social claims, this reasonableness standard will not permit the CESCR to force policy choices upon respondent States in its assessment of State compliance with the obligations entrenched in the ICESCR, but will respect the availability, as well as the State's preference, for other means of compliance.⁵³⁷ The concept of minimum core obligations, as elaborated on in the CESCR's General Comment 3, is not explicitly referred to in the OP-ICESCR and it is not yet clear how these two

⁵³³ Art 10. In accordance with article 10, a State party must declare that it recognises the competency of the CESCR to receive and consider such a communication in order to both submit such a communication to the CESCR as well as be subjected to this complaints mechanism.

⁵³⁴ OP-ICESCR art 11. In accordance with article 11, State parties must declare that they recognise the competency of the CESCR in its execution of such an inquiry. See also LM Chenwi *Claiming Economic, Social and Cultural rights at the International Level* (2009) 7.

⁵³⁵ OP-ICESCR art 2. In accordance with article 1 of the OP-ICESCR, only State parties to the ICESCR who have also become State parties to the OP-ICESCR, are subject to the individual complaints mechanism. This complaints mechanism is equivalent to the complaints mechanism that exists under the ICCPR. Article 6 and 7 of the OP-ICESCR govern the procedure followed by the CESCR and relevant States parties after a claim has been submitted to it.

⁵³⁶ Porter submits that the drafters of the OP-ICESCR drew from South African socio-economic rights jurisprudence to formulate this provision. In particular, the *Grootboom* judgment delivered by the Constitutional Court offered much assistance. See B Porter “The Reasonableness of Article 8(4)-Adjudicating Claims from the Margins” (2009) 27 *Special Issue of Nordisk Tidsskrift for Menneskerettigheter/ Nordic Journal of Human Rights: Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 39 49-50.

⁵³⁷ 41.

standards will be reconciled by the CESCR in the context of considering individual communications of complaint under the OP-ICESCR.

In an analytical paper adopted by the CESCR, the CESCR provided reasons in support of adopting a complaints procedure.⁵³⁸ Firstly, the CESCR notes that a complaints procedure will bring “concrete and tangible issues into relief”.⁵³⁹ This is in contrast to the abstract manner in which discussions concerning State party reports take place.⁵⁴⁰ Secondly, the information that would be presented to it in the evaluation of a complaint would provide a framework of inquiry that is absent in the consideration of State party reports.⁵⁴¹ This would allow the CESCR to deal with complex issues concerning the provisions of the ICESCR.⁵⁴² Thirdly, the CESCR submits that the potential to be brought before an international forum should encourage governments to provide effective domestic remedies in respect of social and economic rights.⁵⁴³ Furthermore, the CESCR states that when claimants present their claims at an international level, they may be encouraged to formulate their claims “in more precise terms and in relation to the specific provisions of the Covenant”.⁵⁴⁴ The CESCR also submits that the threat of a negative finding by an international forum may impact upon governments at a political level, thus providing economic and social rights with an important feature that it lacks at present.⁵⁴⁵ Lastly, the CESCR states that a complaints procedure will provide a “tangible result”, which may also invite interest in the ICESCR generally as well as in the specific issues surrounding it.⁵⁴⁶ The CESCR’s adjudication of an individual communication has the

⁵³⁸ CESCR ‘Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ UN Doc. A/CONF. 157/PC/62/Add.5 (26 March 1993). The document is also significant as it, amongst others, highlights various aspects considered by the CESCR in its support of adopting a complaints procedure, contains background information concerning the CESCR’s consideration of a complaints procedure and details the CESCR’s treatment of counter arguments to the adoption of a complaints procedure.

⁵³⁹ Para 33.

⁵⁴⁰ Para 33. The CESCR has highlighted the limitations of existing methods for developing the Covenant’s jurisprudence namely, its consideration of State Parties reports, adopting General Comments and the CESCR’s Days of General Discussion. See CESCR ‘Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ UN Doc. A/CONF. 157/PC/62/Add.5 (26 March 1993) para 26 -28.

⁵⁴¹ Para 34.

⁵⁴² Para 34.

⁵⁴³ Para 35.

⁵⁴⁴ Para 36.

⁵⁴⁵ Para 37. For the advantages of finding a violation in terms of State compliance with the ICESCR see Ssenyonjo *Economic, Social and Cultural Rights in International Law* 29.

⁵⁴⁶ CESCR ‘Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ UN Doc. A/CONF. 157/PC/62/Add.5 (26 March 1993) para 38.

potential to evolve substantively through reference to international and regional standards and relevant aspects of the local context of the State.

Furthermore, the International Network for Economic, Social and Cultural Rights⁵⁴⁷ suggests that as the CESCR will be able to receive and consider communications on a case-by-case basis, the CESCR will be able provide a more nuanced interpretation of the provisions of the ICESCR than it would by way of a General Comment.⁵⁴⁸ South Africa has currently ratified the ICESCR and has not yet become party to the OP-ICESCR. However, the jurisprudence can be considered by South African courts in accordance with section 39(1)(b) of the South African Constitution and may have the potential to inform and provide assistance in the Court's application of the reasonableness model of review and the role of the minimum core obligation.⁵⁴⁹

In addition to this, it is important to highlight the African Women's Protocol and its potential to inform South Africa's reasonableness model of review. Article 10(3) of the Protocol states that:

“States parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.”⁵⁵⁰

Thus, the African Women's Protocol requires States parties to take steps to allocate financial resources towards social development generally, and the promotion of women in particular. Viljoen states that article 10(3) should be understood as providing the AfCommHPR, or the African Human Rights Court, with a basis for

⁵⁴⁷ The International Network for Economic, Social and Cultural Rights (ESCR-NET) is an organisation based on the global collaboration of individuals and groups dedicated to strengthening the realisation of economic, social, and cultural rights.

⁵⁴⁸ ESCR-NET “Section 6: Benefits of an OP-ICESCR” (3-08-2012) *ESCR-NET* <http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=426659> (accessed 20-05-2013).

⁵⁴⁹ Porter (2009) *Special Issue of Nordisk Tidsskrift for Menneskerettigheter/ Nordic Journal of Human Rights: Perspectives on a New Complaint and Inquiry Procedure: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* 40. The reasonableness standard of review in the adjudication of socio-economic rights claims is relied upon by the South African Constitutional Court and has been included as a standard of review in the International Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (adopted on 13 December 2006, entered into force 3 May 2008).

⁵⁵⁰ This is very similar to article 26(3) of the African Women's Protocol, which states that:

“States parties undertake to adopt all necessary measures and in particular shall provide budgetary and other sources for the full and effective implementation of the rights herein recognized.”

reviewing States' parties' budgetary allocations.⁵⁵¹ However, Viljoen adds that this article does not provide these Charter-based institutions with an opportunity to force their views concerning how their budgets should be allocated. Rather, it permits the reviewing of those allocations already made, specifically, those allocations made within a period of two or more years.⁵⁵² Therefore, this "hierarchy of budgetary priorities"⁵⁵³ creates an important mechanism of review, which allows these Charter-based institutions to evaluate how States' parties have financially prioritised "social development generally, and the promotion of women in particular."⁵⁵⁴ Article 10(3) of the African Women's Protocol can potentially inform the Constitutional Court's reasonableness assessment in a far-reaching way. In particular, it would allow the Court to review the States' budgetary spending, and evaluate how social development generally, and the promotion of women in particular, are being prioritised and furthered. The inclusion of this element into the Court's reasonableness model of review would assist the Court in potentially holding the State accountable for its budgetary spending, which may require a higher standard of justification by the State for its budgetary decisions and a greater transparency in respect of the State's prioritisation of social development. Such a standard of accountability may thus also affect the way the State allocates resources towards social development in the future. Lastly, the use of article 10(3) to inform the Court's reasonableness assessment would assist in aligning the Court's reasonableness standard of review with the State's international obligations entrenched in the African Women's Protocol.

5 5 Conclusion

In this chapter, I commenced with an analysis of the Constitutional Court's engagement with international human rights law in accordance with section 39(1)(b) of the 1996 Constitution in the adjudication of socio-economic rights. This has revealed that the Constitutional Court has considered international and regional human rights standards to various degrees. However, section 39(1)(b) of the 1996 Constitution has been applied inconsistently, suggesting that the Court has in some

⁵⁵¹ F Viljoen "An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 31.

⁵⁵² 31.

⁵⁵³ 31.

⁵⁵⁴ Article 10(3) of the African Women's Protocol.

cases neglected the mandate entrenched in section 39(1)(b) of the Constitution and has consequently missed opportunities to gain valuable insight from international and regional human rights standards.

Secondly, the analysis aimed to determine which international and regional human rights instruments and standards the Court relies upon when adjudicating upon socio-economic rights entrenched in the Constitution. The case analysis has indicated that the Constitutional Court does not always consider the breadth of sources permitted in accordance with Chaskalson's framework dictum, established in *Makwanyane*. Rather, the Court has often only considered a limited range of sources. In this regard, section 5.3 demonstrated that the General Comments adopted by the CESCR are predominantly relied upon by the Court in instances where international human rights law is considered. The jurisprudence developed by the AfCommHPR is considered to a much lesser extent, while jurisprudence from the ECtHR and ECSR is minimal, as are references to sources emanating from the UN, such as reports adopted by Special Rapporteurs or resolutions adopted by the UN Commission on Human Rights. The jurisprudence of the Inter-American human rights system is not considered at all in cases discussed above.

Lastly, I analysed the impact of the reasonableness model of review on the Court's consideration of international human rights law in the adjudication of socio-economic rights. This revealed that the Court's application of the reasonableness model of review has influenced the extent to which the Constitutional Court engages with the scope and content of socio-economic rights. In this regard, the Court does not engage substantively with the scope and content of the rights and consequently, it has narrowed the scope for international law to influence the normative development of the relevant rights. This in turn has also reduced the scope for international and regional human rights standards to play a meaningful role in the evaluation of South Africa's socio-economic rights jurisprudence and in the substantive development of socio-economic rights. However, the analysis reveals that a variety of international and regional human rights standards exist that can support and enrich the Court's reasoning as well as assist in developing the scope and content of socio-economic rights entrenched in the 1996 Constitution without necessarily applying a minimum core standard.

While there are Constitutional Court decisions that can be lauded for their consideration of international human rights law, the Court has not been consistent in

its application of the interpretative mandate entrenched in section 39(1)(b). Not only does this diminish the obligation entrenched in section 39(1)(b) of the 1996 Constitution, but the process of considering international law when interpreting the Bill of Rights is never fully developed into an established methodology.

As discussed in chapter 4, the Constitutional Court has confirmed the obligatory nature of section 39(1)(b) of the 1996 Constitution in *Glenister*. In this judgment the Court also stated that section 39(1)(b) is invoked to assist in answering “in-part”, which reasonable measures our Constitution requires the State to take in order to protect and fulfil the rights in the Bill of Rights.⁵⁵⁵ Thus, the Court has confirmed the important role of international and regional human rights standards when assessing the reasonableness of State measures to give effect to constitutional rights and it is regrettable that the potential of the approach laid down in *Glenister* has not been realised in the realm of the Court’s socio-economic rights jurisprudence.

⁵⁵⁵ *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 192.

Chapter 6

Conclusion

6 1 The Primary Findings of this Dissertation

6 1 1 The methodological approaches of colonial and apartheid courts to international human rights law

In chapter 2, I illustrated that the State introduced legislation and policies discriminating against the Black majority in South Africa on the basis of race prior to the apartheid era.¹ However, under the rule of the National Party, elected into power in 1948, a system of institutionalised racism gained momentum, which accelerated the enactment of discriminatory laws and policies that firmly established the apartheid legal order. Furthermore, I indicated that these laws and policies enforced the classification and segregation of the South African population into racial groups. According to these laws, Black South Africans had an inferior social, economic, and political status. In addition, I concluded that through racially discriminatory legislation, Black South Africans endured socio-economic deprivation during apartheid. Furthermore, I concluded that Black South Africans had very limited opportunities to obtain redress for these violations. During colonial times, and later during the apartheid era, the State did not recognise socio-economic rights as justiciable or enforceable rights, therefore, there were no constitutionally protected standards that could be used to challenge the abovementioned infringements. Furthermore, the judiciary interpreted racially discriminatory legislation in a formalistic manner, which frequently upheld the validity of such statutes. In this regard, I illustrated that the judiciary was limited to examining the intention of the legislature, leaving discriminatory policies and legislation substantively unchallenged.² Consequently, the court's interpretative strategy severely restricted any possibility of relying on the common law values of freedom and equality, or internationally recognised human rights, which may have provided grounds to challenge racially discriminating legislation. This evaluation thus created an important historical context that highlighted the legacy of socio-economic deprivation

¹ See section 2 2 in chapter 2.

² See section 2 2 in chapter 2.

of Black South Africans as a result of apartheid. It is clear that this inequality had to be addressed in the new democratic South Africa.

As indicated in chapter 2, I observed that a relationship existed between international law generally and South African municipal law, as early as the mid-1600's.³ The South African legal system instituted international law as a direct result of the Dutch occupation of the Cape, which brought with it the works of Roman-Dutch scholars who dealt with municipal law and international law as part of the same universal legal order.⁴ Thus, these scholars blended municipal and international law when addressing municipal matters. During colonial times, South African courts relied upon international treaties, as well as these scholarly works on international law, to address matters concerning South African municipal law. They did so without requiring any legislative incorporation of international law into the municipal legal order.

In chapter 2, I also observed that during the period of apartheid, South African courts adopted a particular methodological approach to international law generally, in the form of treaties and international customary law. With regard to international treaties, courts accepted that these international instruments were adopted into municipal law by way of a dualist approach. In addition, courts accepted that international customary law formed part of municipal law in accordance with a monist approach. Through this evaluation, I concluded that South African courts were familiar with the practice of invoking international law in their decision-making process. However, international human rights law did not feature prominently in the courts' decision-making processes. Through this chapter, I found that various factors contributed towards the courts' restricted use of international human rights law in adjudication during apartheid.

Although South Africa became a party to the UN Charter in 1945, the South African Government refused to become party to any human rights treaties thereafter. This severely restricted the application of international human rights law in the municipal legal order. Furthermore, the incorporation of customary international law into municipal law was subject to a number of qualifications that restricted the application of customary international law in the South African municipal legal order. In addition, South Africa's racial policies were so deeply entrenched in legislation

³ See section 2.3 in chapter 2.

⁴ See section 2.3 in chapter 2.

that very little room remained for the protection of human rights by way of customary international law.⁵ Although the UDHR contains provisions that prohibit discrimination and protect socio-economic rights,⁶ the court in *S v Petane*⁷ deemed the UDHR as only declaratory in nature, and consequently not a reflection of customary international law.⁸ Furthermore, the prevailing doctrine of parliamentary sovereignty restricted the courts' review of discriminatory legislation. In particular, courts could only give effect to the intention of the legislature, even if this meant infringing on human rights that had gained prominence at an international level. Therefore, the courts had very little scope to employ the principles of common law that may well have protected human rights.

Nevertheless, I illustrated how the courts did have some room to manoeuvre in respect of the common law presumption that was applicable to the court's process of interpreting legislation. In particular, the presumption stated that when a statute was ambiguous or unclear, courts should not interpret the statute in a manner that violated a rule of international law. According to this presumption, Parliament did not intend to derogate from, or legislate in conflict with, the principles of international law when enacting a statute. Therefore, during the apartheid era, South African courts could have sought guidance from international treaties not yet incorporated into municipal law, and treaties not yet signed. This presumption, however, was qualified to the extent that it was only applicable in cases where a statute was ambiguous and where such a statute was enacted with the intention of giving effect to the obligations under a specific treaty. In light of the above, I concluded that, while South African courts adopted a specific methodological approach to the application of international treaties and international customary law, the courts did not follow this approach in respect of international human rights treaties or international customary law reflecting human rights standards.

The results of the abovementioned evaluation provide insight into the legal culture that existed in South Africa before the adoption of the 1993 Constitution. The evaluation highlights that, as international human rights law was not recognised as a relevant source of law in adjudication during the apartheid era, judges did not develop the necessary skill or knowledge required to engage with it. In fact, international

⁵ See section 2 5 4 in chapter 2.

⁶ Articles 22-26. Similar norms also exist in the UN Charter namely, in articles 1(3), 55 and 56.

⁷ 1988 3 SA 51 (C) 56.

⁸ Para 58-61.

human rights law was a neglected, unfamiliar source of law in South Africa until the adoption of the 1993 Constitution. This undoubtedly influenced the future engagement with international human rights law in the interpretation of socio-economic rights. Furthermore, this historical account shows that if international human rights law was going to play a relevant role in South Africa in the future, the State would have to take deliberate steps to firstly, include it as a relevant source in municipal law, and secondly, rejoin the international community. Therefore, this evaluation of the history of international law in South Africa set the scene for the significant changes ushered in by the 1993 and 1996 Constitutions, discussed in the following chapter.

6 1 2 International human rights law and the 1993 and 1996 South African Constitutions

In chapter 3, I highlighted firstly, the changes that were brought about by the adoption of the 1993 Constitution and the transition from parliamentary sovereignty to constitutional supremacy. In particular, the inclusion of justiciable and enforceable rights in the 1993 Bill of Rights established a new culture of human rights in South Africa. Although socio-economic rights formed part of the 1993 Constitution, the decision to include these was preceded by much debate. In addition, discussions concerning the selection of fundamental rights to be included in the constitutional text were fraught with disagreement, which played a determinative role in the limited selection of socio-economic rights included in the 1993 Constitution.⁹

In this chapter, I highlighted further that the drafters of the 1993 Constitution relied upon international human rights instruments and draft proposals submitted by various political parties, interest groups, and organisations. International human rights law inspired many provisions contained in these draft proposals in various respects, and thereby indirectly influenced the work of the Technical Committee, which provided the background research and drafting proposals for the various provisions.¹⁰

In relation to the drafting of the 1996 Bill of Rights, I showed that Constitutional Principle II played a pivotal role in the determination of rights to be entrenched in the constitutional text. This principle required that all rights, including

⁹ See section 3 2 1 in chapter 3.

¹⁰ See section 3 2 1 in chapter 3.

socio-economic rights, had to adhere to the criteria of “universal acceptance”.¹¹ I demonstrated how the Technical Committee examined every right that was considered for inclusion in the 1996 Bill of Rights in accordance with the criteria of “universal acceptance”. The Technical Committee undertook a comprehensive investigation into international and regional human rights instruments, comparative jurisprudence, and jurisprudence from international courts and tribunals, to confirm the universal acceptance of socio-economic rights considered for inclusion in the 1996 Bill of Rights. Consequently, I indicated that these international and regional standards played a determinative role in the Technical Committee’s selection of rights to be included in the 1996 Bill of Rights. Furthermore, I highlighted that the Technical Committee’s comprehensive investigation into international and regional human rights treaties and declarations confirmed international human rights law as a legitimate and vital source in this undertaking. This reliance on international standards helped ensure that the rights protected in the 1996 Bill of Rights were aligned with international and regional human rights law.

In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*,¹² the Constitutional Court found that the meaning of “universal acceptance” differed from that given by the Technical Committee. However, the Constitutional Court held that this definition of “universal acceptance” did not prevent the inclusion of provisions in the Draft Bill of Rights that were not “universally accepted”. This proved to be particularly important in the face of arguments challenging the universal acceptance of socio-economic rights during the certification process.

Furthermore, I illustrated how international and regional human rights law influenced the Technical Committee’s formulation of those provisions that entrenched the right to housing, social security, and the right to education.¹³ Many of these provisions were formulated to give effect to South Africa’s international legal obligations, or were guided by international and regional human rights law. I therefore argued that since many of the provisions in the 1996 Bill of Rights are genetically connected to international and regional human rights treaties and

¹¹ See section 3 2 2 in chapter 3.

¹² 1996 (4) SA 744 (CC).

¹³ See section 3 2 3 in chapter 3.

declarations, courts should refer to these instruments when interpreting the meaning and content of the rights entrenched in the Bill of Rights.

Moreover, I focused on the changes brought about by the adoption of the 1993 and 1996 Constitutions in respect of the relationship between municipal law and international law. In terms of the 1993 Constitution, I highlighted that the inclusion of section 35(1) of the 1993 Constitution ensured that international law, which included those international human rights instruments that inspired the drafting of provisions in the 1993 Bill of Rights, would not be neglected during the interpretation process. It also reflected, to a certain extent, the fact that South Africa prioritised a commitment to international human rights law. However, it is important to highlight that this obligation only required adjudicative bodies to consider this source of law in the interpretation of the Bill of Rights.

I further analysed the status of international treaties in the municipal legal order which section 231 of the 1993 Constitution governs. In this regard, I observed that this provision provided for a nuanced process of incorporation that affirmed the dualist approach relied upon before the new constitutional dispensation. Furthermore, I addressed the adoption of customary international law in municipal law, governed by section 231(4) of the 1993 Constitution. This provision maintained the monist approach previously utilised, but removed the uncertainties that plagued the adoption of customary international law in the municipal legal order before 1993. Against the historical background discussed in chapter 2, an analysis of the abovementioned provisions served to clarify the various ways in which South African municipal law could interact with international law under the 1993 Constitution. Not only did this evaluation delineate the differences between these provisions, but highlighted section 35(1) of the 1993 Constitution as a powerful means of ensuring the courts' interaction with international law in the interpretation of the 1993 Bill of Rights.

In chapter 3, I also focused on the manner in which the 1996 Constitution governed the interaction between municipal law and international law. In particular, section 35(1) of the 1993 Constitution was replaced by section 39(1)(b) of the 1996 Constitution with minor changes. Furthermore, section 231 of the 1996 Constitution governs the status of international treaties and continues to confirm the dualist approach to incorporating treaties into domestic law. The Constitutional Court

elaborated greatly on this in *Glenister*¹⁴ by describing the specific status of international treaties in municipal law during every step of the nuanced process set out in section 231 of the 1996 Constitution. Furthermore, section 232 of the 1996 Constitution has maintained a monistic approach to the incorporation of customary international law in municipal law. This is also subject to the qualification that customary international law is not inconsistent with the Constitution or an Act of Parliament. Thus, I emphasised the differences between the provisions regulating international treaties and customary international law in the 1996 Constitution and the prominent role that was, once again, accorded to international human rights law as an interpretative tool.

I proceeded to analyse the relevance of international human rights law, and international mechanisms, to the problem of poverty. In this regard, there is support for the view that international law and international mechanisms provide an important means of appropriately addressing problems, such as human suffering and poverty, that occur on a global scale.¹⁵ In this respect, I argued that international human rights law in particular, aims to address concerns regarding the welfare and protection of individuals. Furthermore, international human rights instruments recognise individuals as bearers of universal, fundamental human rights, applicable to all human beings, and ground their claim to universality in the concept of human dignity.

In addition, I provided evidence that international law is increasingly acknowledged as a relevant source of law in the interpretation of fundamental rights. Many domestic constitutions contain provisions that protect fundamental human rights and values. In this regard, I illustrated that in many of these instances, these constitutions contain provisions that permit the use of international human rights law in constitutional interpretation.¹⁶ Furthermore, the Bangalore Principles¹⁷ constitutes an important instrument that affirms and acknowledges crucial aspects concerning the use of international human rights law in constitutional interpretation. Moreover, the emergence of the concept of “creeping monism” reflects the increased tendency among common law courts to rely on unincorporated treaties when interpreting constitutional provisions. Slaughter’s concept of “judicial globalisation” offers one explanation for the courts’ engagement with international human rights law as an

¹⁴ 2011 3 SA 347 (CC).

¹⁵ Bryde “International Democratic Constitutionalism” in *Towards World Constitutionalism* 104.

¹⁶ See section 3.4 in chapter 3, footnote 191-196.

¹⁷ Commonwealth (1988) *Commonwealth Law Bulletin* 1196-1211.

interpretative tool in constitutional interpretation.¹⁸ She argues that by engaging in judicial globalisation, actors recognise their participation in a “common global enterprise”.¹⁹ Drawing from this argument, I concluded that a court’s engagement with international human rights law in constitutional interpretation signals acknowledgement of its participation in a broader, international community that promotes the protection of universal, fundamental human rights.

I noted that the South African courts have acknowledged the importance of international human rights law as a means of entering into a broader dialogue with the international community.²⁰ In this regard, the courts have alluded to the valuable insights that may be gained from international human rights law. In addition, courts have underscored the importance of locating themselves in mainstream democratic practice. Based on this need for international and democratic legitimacy, I identified the benefits that may be derived from international human rights law in constitutional interpretation. When we view the South African Constitution as a “living instrument”, which serves a society undergoing change and reformation, international human rights law may be particularly relevant in providing valuable guidance as to the nature and scope of fundamental rights. Moreover, a domestic court can obtain a certain degree of legitimacy when international law embeds its decision. Within the context of section 39(1)(b) of the 1996 Constitution, courts can use this source of law as a source of inspiration, perspective, and as a means to strengthen support for a decision. However, I argued that a consideration of international human rights law must take place within the context of the values inherent in the Constitution. In this regard, I indicated that there is support for the view that recourse to global standards may allow courts to determine what a society, based on such values, may require, thereby informing the interpretation of the values entrenched in a Constitution.

Through chapter 3, I reinforce the argument that international law is recognised in both literature and within South African case law, as a valuable source of law that can contribute to the interpretation of the 1996 Bill of Rights. Drawing from these arguments, I submitted that international human rights law may assist courts in developing the scope and content of socio-economic rights in South Africa.

¹⁸ Slaughter (2000) *Virginia Journal of International Law* 1109.

¹⁹ 1104.

²⁰ See section 3 4 in chapter 3.

6 1 3 A critical evaluation of the South African Court's jurisprudence concerning the use of international law in constitutional interpretation

In chapter 4, I sought to determine whether the Constitutional Court developed any methodological guidelines to assist it in fulfilling its mandate to consider international law when interpreting the Bill of Rights. I demonstrated that in *Makwanyane*,²¹ Chaskalson P introduced a methodological approach to the consideration of international law when interpreting the Bill of Rights.²² In his decision, Chaskalson P regarded article 38(1) of the Statute of the ICJ as a sufficient statement of the international sources of law for the purposes of section 35(1) of the 1993 Constitution.²³ In addition, he established that both binding and non-binding international law may be relied upon. In this regard, non-binding treaties include treaties that South Africa cannot be a party to, such as the ECHR and the AmCHR, as well as soft law.²⁴

However, the Constitutional Court changed its approach in the subsequent decision delivered *AZAPO*.²⁵ In particular, I argued that the *AZAPO* judgment is significant for its failure to acknowledge the obligation placed upon courts to consider international human rights law when interpreting the Bill of Rights. In addition, the Court should have justified more fully why relevant international humanitarian law was not considered in the circumstances. Instead, it merely declared that an enquiry into international law is irrelevant when determining whether section 20(7) of the Promotion of National Unity and Reconciliation Act is inconsistent with the Constitution.²⁶ The strong criticisms levelled at the Court for its restrictive treatment of the framework dictum in the *AZAPO* judgment indicates that, although the application of the framework dictum, as set out in *Makwanyane*, is not always consistent, it is nevertheless preferable to neglecting the interpretative mandate. The framework dictum has therefore become a yardstick with which to measure a court's consideration of international law in the interpretation of the Bill of Rights.

²¹ *S v Makwanyane* 1995 3 SA 391 (CC).

²² Para 35.

²³ See section 4 2 1 in respect of the debates that surrounded the adequacy of article 38(1) of the Statute of the ICJ as a means of determining the status of the sources of international law.

²⁴ See section 4 2 1 in chapter 4 for the definition of international soft law.

²⁵ 1996 4 SA 671 (CC).

²⁶ 1996 4 SA 671 (CC) para 26.

Despite the restricted role granted to section 35(1) of the 1993 Constitution in *AZAPO*, the Constitutional Court in *Grootboom* affirmed the pronouncements made in *Makwanyane* and supplemented these. In this case, I indicated that the Court's engagement with the CESCR's General Comments had a three-fold effect on the Court's methodological approach to international law within the context of interpreting the Bill of Rights. Firstly, it reaffirmed that international law included both binding and non-binding international law and that both could be used as interpretative tools in the interpretation of the Bill of Rights. Secondly, the Court engaged with relevant international law without requiring such law to be prescriptive. Lastly, the judgment emphasised the distinction between international law as an interpretative tool to be used within the context of section 39(1)(b) of the Constitution, and international law binding upon the Republic in terms of section 231 and 232 of the 1996 Constitution.

Furthermore, I argued that the Constitutional Court's decision in *Glenister* added to what was already established in the abovementioned decision. In this case, the Constitutional Court clearly identified the status of international law agreements at every step of the nuanced process entrenched in section 231 of the 1996 Constitution. In particular, the Court emphasised that international treaties binding upon the State in terms of section 231(1) and (2) were binding upon the State in the international sphere, unless they were agreements governed by section 231(3) of the 1996 Constitution. The judgment explained that while such treaties were not yet incorporated into municipal law, they remained of significant interpretative value. This established another guideline that could form part of the framework dictum. In addition, the Court held that these unincorporated treaties could assist in determining whether the State's obligations in accordance with section 7(2) of the Constitution have been fulfilled. Lastly, the judgment confirmed the obligatory nature of section 39(1)(b) of the 1996 Constitution.

The evaluation undertaken in chapter 4 demonstrated that the framework dictum, and its subsequent development in *Grootboom* and *Glenister*, provides methodological guidelines pertaining to the consideration of international law. South African courts can utilise this framework and simultaneously strive to develop it. The use of a carefully crafted method will ensure that the practice of considering international law in the interpretation of the Bill of Rights not only maintains a high standard of critical scrutiny and research, but also remains relevant to the Court's task

of giving meaning to the provisions of the Bill of Rights. This discussion formed the foundation of chapter 5, wherein I examined the Court's application of the framework dictum within the context of socio-economic rights.

Furthermore, I showed that the South African court's use of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution has not been without its challenges. As I illustrated in chapter 4, international law and foreign law are two different sources of law that contribute to the interpretation of rights under different terms. In particular, courts are obliged to consider international law, while courts may consider foreign law. In this chapter, I demonstrated that various decisions delivered by South African courts revealed a tendency to conflate the obligation to consider international law and the permission to consider foreign law when interpreting the Bill of Rights. In addition, these cases revealed that an over-reliance on foreign law has occurred, while the courts have made minimal references to international law. Neglecting to consider international law either entirely, or by way of superficial and minimal reference, deprives courts of the benefits of relying on international standards and interpretations. I explained that the apparent neglect of international law, illustrated in chapter 4, may in part, be attributed to the first mentioned tendency. Therefore, the fact that courts, on occasion, equated the manner in which international law and foreign law should be considered, has resulted in adjudicative bodies misconstruing their responsibility to consider international law. Furthermore, such conflation also allows courts to draw from the case law of more familiar foreign jurisdictions as opposed to less familiar international law.

In chapter 4, I identified possible factors that promote this predisposition to draw more frequently from foreign law as opposed to international law in the interpretation of the Bill of Rights. For example, there is support for the argument that academic training has neglected the field of public international law. This has largely been ascribed to the minimal role international law, and particularly international human rights law, played under the apartheid regime. As a logical consequence courts, lawyers, and (most) judges initially faced an unfamiliar area of law that may have influenced their reluctance to rely on international law.²⁷ The treatment of international law, and specifically international human rights law, in tertiary institutions, has changed dramatically over the last decade. Despite this, Heyns and

²⁷ Botha (1996) *SAYIL* 179. See also Booysen (1996) *SAYIL* 147-154 and Heyns & Viljoen "South Africa" in *The Impact of the United Nations Human Rights Treaties* 551.

Viljoen argue that most lawyers do not come into frequent contact with treaties in judicial proceedings with the exception of those lawyers who specialise in constitutional litigation.²⁸ They suggest that this judicial resistance of the use of international law in judicial proceedings is not only caused by the novelty of international law in the South African legal order, but also insensitivity towards the value of international law.²⁹ To remedy these deficiencies, students should be exposed more frequently to international instruments, how they are applied, as well as receive more in-depth training on developing legal arguments based on international law.

The amount of assistance made available to judges in researching international law may also play a significant role in whether a judge will rely on international law. The availability of, and access to, information regarding international law can also play an important role in determining whether international human rights law will be relied upon in judicial decisions. Furthermore, *amici curiae* have played an important part in drawing the court's attention to relevant international human rights law.

In addition, it was argued that, on occasion, South African Courts tend to invoke international law as an interpretative tool rather than referring to binding treaty obligations arising from section 231. Thus, while the State has signed and ratified a number of international instruments, the courts tend to rely on these instruments by way of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution. Moreover, the courts have, on occasion, exhibited an apparent conflation with the status of international law as an interpretative tool and international law that gives rise to binding obligations within the Republic in terms of section 231 of the Constitution. This may be attributed, once again, to unfamiliarity with international law. Although South Africa initially signed and ratified only a handful of international human rights treaties with the coming into force of the 1993 Constitution, this number has increased substantially. As I demonstrated, there are illustrations of legal representatives as well as judges who have acknowledged that South Africa is a party to a treaty, and yet they proceed to invoke section 39(1)(b) to rely on this international instrument as an interpretative tool. This may indicate that the differences between section 35(1) and section 231 of the 1993 Constitution, and section 39(1)(b) and section 231 of the 1996 Constitution, are not adequately understood. Attending to the abovementioned factors may alleviate the occurrence of

²⁸ Heyns & Viljoen "South Africa" in *The Impact of the United Nations Human Rights Treaties* 551.

²⁹ 551.

conflation between the status of international law as an interpretative tool and international law that gives rise to binding obligations within the Republic in terms of section 231 of the Constitution. Addressing these factors may also curb an over-reliance on foreign law and the negation of public international law which courts are bound to follow in terms of section 231.

By highlighting the abovementioned methodological misconceptions, I demonstrated that the application of section 35(1) of the 1993 Constitution and section 39(1)(b) of the 1996 Constitution, as well as the process of considering international human rights law in constitutional interpretation has, understandably, not yet been perfected by South African courts. This implies that the consideration of relevant human rights standards may be jeopardised by the challenges I raised, thereby impeding a more optimal application of section 39(1)(b) of the 1996 Constitution in the interpretation of the rights in the Bill of Rights. It is imperative that the courts address the challenges that currently permeate the process of considering international human rights law in the interpretation of the Bill of Rights to ensure that relevant international human rights norms and standards are taken into account in a consistent and effective manner.

6 1 4 International human rights law in the socio-economic rights jurisprudence of South African Courts

The Constitutional Court has, on occasion, applied section 39(1)(b) of the 1996 Constitution and engaged with international human rights law when interpreting socio-economic rights. However, this has not been a consistent and predictable practice. In this regard, I provided evidence that the Court, in some cases, neglected the mandate entrenched in section 39(1)(b) of the 1996 Constitution and consequently, missed opportunities to gain valuable insight from international and regional human rights standards.³⁰ However, the analysis of the Constitutional Court's socio-economic rights jurisprudence revealed that in those instances where the Constitutional Court considered international and regional human rights standards, this occurred in various degrees. In particular, I demonstrated that international human rights law has been considered in three different ways. Firstly, the Constitutional Court has, on occasion, considered international human rights law in a

³⁰ See section 5 3 in chapter 5.

superficial manner as a tool to reinforce the international recognition or importance of the right. Secondly, the Constitutional Court has, at times, undertaken an evaluative consideration of international human rights, engaging with international human rights law in its judicial reasoning, without necessarily adopting the relevant international standards. Lastly, the Court has, on rare occasions, adopted the standards or concepts found in international human rights law.

This analysis makes a significant contribution to the study of socio-economic rights jurisprudence in South Africa as it establishes that, within the context of socio-economic rights, the Constitutional Court has undertaken the consideration of international law in various forms and degrees, each serving a particular function.

Furthermore, I illustrated that the Constitutional Court's application of the reasonableness model of review has influenced the extent to which it engages substantively with the scope and content of socio-economic rights. Firstly, that the Court has severely limited the application of the CESCR's concept of minimum core obligations in its application of the reasonableness standard of review. Secondly, through its application of the reasonableness standard of review, the Court has not engaged substantively with the scope and content of socio-economic rights. Consequently, I argued that the Court has narrowed the scope for international law influences. Thus, opportunities to engage substantively with international and regional human rights standards for the purposes of developing the nature and scope of socio-economic rights are restricted.

I also argued that there are important international and regional human rights standards that exist, apart from the CESCR's concept of the minimum core. In this regard, I argued that these sources can support and enrich the Court's reasoning as well as assist in developing the scope and content of socio-economic rights entrenched in the South African Constitution, without necessarily requiring the adoption of a minimum core standard. This was clarified in the analysis of the right to access to adequate housing, the right to education, the right to social security as well as the right to water, electricity and sanitation. Moreover, I showed that South African eviction jurisprudence has, to a certain extent, developed beyond international and regional standards. However, to this extent I argued that this does not diminish the value of international and regional standards that confirm the principles established by the Court and add additional legitimacy to the Court's findings.

Lastly, I argued that the Constitutional Court does not always consider the breadth of sources permitted by Chaskalson P's framework dictum as established in *Makwanyane*. Rather, the Constitutional Court often only considered a limited range of sources. In this regard, I illustrated that the Constitutional Court relied predominantly on the CESCR's General Comments in instances where international human rights law has been considered. Furthermore, I indicated that the jurisprudence developed by the AfCommHPR is considered to a much lesser extent in South African socio-economic rights jurisprudence, than jurisprudence from the ECtHR, while references to the ECSR are minimal. The jurisprudence of the Inter-American human rights system is not found in South Africa's socio-economic rights jurisprudence.

6 2 Concluding Remarks and Recommendations

In conclusion, I do not consider international human rights law to be the panacea to the challenges facing socio-economic rights interpretation in South Africa. In addition, I do not propose that a consideration of international human rights law provides the only means by which the substantive development of the nature and scope of socio-economic rights can take place. In fact, every suggested source of international human rights law relied upon in chapter 5 may be legitimately challenged on the grounds that the interpretation of a Bill of Rights is a complex task, requiring regard for the values and purposes underpinning the constitutional text, relevant national history and context, as well as political theory and philosophy. Furthermore, arguments can be levelled at the appropriateness of international and regional sources, which challenge their relevance to the South African context. These may include, for example, arguments emphasising that these sources are created outside of the South African context and are the product of decision-making processes in which South Africa played no part.

The primary argument advanced is that the consideration of international human rights law should form one significant part of the Court's interpretative strategy and be recognised as a means of testing, comparing, and evaluating South African jurisprudence against international norms and standards. Furthermore, the Court's consideration of international and regional human rights standards can play a significant role in both promoting substantive judicial reasoning, and in justifying and

strengthening the Court's decisions. In addition, an evaluative consideration of international and regional human rights standards in judicial decision-making enhances the transparency and accountability of judicial reasoning. However, I argue further that in order to form a significant part of the Court's interpretative strategy, the Court must engage and further develop its methodological approach to the consideration of international sources of law. This will provide courts with more concrete and structured guidance that can assist them in navigating, and considering, these sources in an effective and relevant manner.

Furthermore, the Court's involvement in this process of "judicial globalization" gives recognition to the fact that South Africa is embedded in a broader, international community that recognises and protects fundamental human rights. As expressed in the Preamble to the UDHR, "a common understanding of these rights and freedoms is of the greatest importance" for the achievement of the "promotion of universal respect for and observance of human rights and fundamental freedoms".³¹ Thus, the Court's engagement with international human rights law in the interpretation of the Bill of Rights is a means of aligning South African municipal law with these international and regional standards of protection.

In light of the above, I recommend firstly, that the judiciary observe the mandate entrenched in section 39(1)(b) of the 1996 Constitution and remain attentive to the purposes that this provision was meant to serve. It remains important to recollect that section 35(1) of the 1993 Constitution was not merely inserted into the 1993 Bill of Rights as a means to assist in the development of the meaning and scope of fundamental rights during the transition to the "final text". Rather, drafters of the 1996 Bill of Rights were prompted to include this interpretative mandate in the final constitutional text to ensure it remains a permanent feature in the interpretation of the Bill of Rights. While drafting the provision that dealt with the interpretation of the 1996 Bill of Rights, the Technical Committee reflected on the purposes of section 35 of the 1993 Constitution as a whole, and stated that:

"Section 35 is unique in human rights law. It seeks to redress the agony of our past and to commit our law and its institutions to a future in which discrimination and repression have no place."³²

³¹ Preamble to the UDHR.

³² Constitutional Assembly *Theme Committee Four* Draft Bill of Rights 280.

Therefore, section 35 of the 1993 Constitution and section 39 of the 1996 Constitution, as a whole, have important roles to play in ensuring that the interpretation of South Africa's Bill of Rights follows a transformative course away from the narrow, value-neutral interpretative methods that characterised the past. From this perspective, the consideration of international law is included in the interpretation clause as a tool to guide and assist in the development of a transformative interpretation of the Bill of Rights by requiring courts to regard "values that are generally accepted as fundamental features of an open and democratic society."³³

Additionally, I recommend that South African courts be more consistent in their application of section 39(1)(b) of the 1996 Constitution and should provide reasoned justifications for their decision not to follow a relevant international law standard.

Secondly, I recommend that courts continue to develop a clear and transparent methodology for considering international law in the interpretation of the Bill of Rights that builds on *Makwanyane's* framework dictum. As stated above, this development will promote the Court's consistent application of section 39(1)(b) of the 1996 Constitution, and help ensure that courts consider the full breadth of relevant international sources.

Thirdly, I recommend that South African courts must respect the distinction created in section 39(1)(b) of the 1996 Constitution. In particular, courts must distinguish between the obligation placed upon them to consider international law in the interpretation of the Bill of Rights, and the permission afforded them to consider foreign law. Maintaining this distinction will decrease the tendency to conflate the manner in which these two sources are considered, and promote a more consistent approach to the application of section 39(1)(b) of the 1996 Constitution.

Fourthly, I recommend that courts develop a substantive model of reasonableness review to expand the scope for international human rights law to have a meaningful impact on the interpretation of the relevant socio-economic rights. I argue that it is only within the application of a substantive model of review that courts will have an opportunity to engage substantively with the scope and content of the right and thus be able to engage with relevant international human rights standards.

³³ 280.

While debates concerning the application and relevance of the CESCR's concept of the minimum core are important, I recommend that courts engage in a greater breadth of international law sources and seek guidance beyond the minimum core concept for the purposes of developing the scope and content of socio-economic rights.

Fifthly, although the Constitutional Court's evictions jurisprudence has developed principles beyond international and regional human rights standards, the Court should nevertheless acknowledge how these principles converge with those created at the international and regional level. This would highlight the harmonious development between South Africa's eviction jurisprudence and international human rights law as well as strengthen and underscore the legitimacy of Court decisions.

6 3 The Future of International Human Rights Law in the Interpretation of Socio-Economic Rights in South Africa

Socio-economic rights have been described as vital to the Constitution's transformative agenda.³⁴ These rights give legal protection to the basic social and economic needs of individuals, and consequently offer a significant means of redressing both violations infringing upon socio-economic interests and the persistent legacy of poverty and inequality in South Africa. The Constitutional Court has adopted a reasonableness model of review to adjudicate socio-economic rights and in particular, claims based upon the positive obligations resting upon the State. However, scholars have argued that the Court should adopt a more substantive, interest-based approach in the application of the reasonableness model of review.³⁵ This approach would take into account the normative commitments and values underpinning socio-economic rights, and determine the obligations these impose upon the State and private actors.³⁶ Furthermore, such an approach would engage with the specific needs of individuals and therefore be more responsive to their lived experience of socio-economic deprivation.³⁷ It is within such an approach that section 39(1)(b) of the 1996 Constitution, which obliges courts to consider international

³⁴ Wesson (2011) *Human Rights Law Review* 1.

³⁵ S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" in S Liebenberg and G Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012).

³⁶ Liebenberg *Socio-Economic Rights*.

³⁷ Wilson & Dugard "Taking Poverty Seriously" in *Law and Poverty: Perspectives from South Africa and Beyond* 222 223.

human rights law in the interpretation of the Bill of Rights, may find resonance. In particular, the Court may be able to gain valuable insight from international and regional human rights law when developing the scope and content of socio-economic rights. In this way, these standards have the potential to assist in deepening our understanding of socio-economic rights and guide the Court's response towards violations of these rights.

However, in an attempt to predict the future of international human rights law in the interpretation of socio-economic rights in South Africa, it is important to highlight the challenges that face the Court's application of section 39(1)(b) of the 1996 Constitution in socio-economic rights adjudication. The first challenge concerns the Court's attitude towards section 39(1)(b) of the 1996 Constitution and in particular, its approach to the purposes and relevance of this provision. As I illustrated in chapter 4, methodological inconsistencies permeate the consideration of international law in the interpretation of the Bill of Rights. Furthermore, the methodological approach introduced in *Makwanyane*, and subsequently developed in *Grootboom* and *Glenister*, has remained largely embryonic. The Court's failure to address these problems calls into question whether the Court views section 39(1)(b) of the 1996 Constitution as significant, or relevant, to the interpretation of the Bill of Rights and whether international law is recognised as a valuable source in the interpretative exercise.

The second challenge concerns the Court's application of the reasonableness standard of review. The case analysis presented in chapter 5 highlights that the Constitutional Court's initial engagement with international human rights was markedly substantial,³⁸ despite the application of the reasonableness standard of review. However, subsequent practice has paid lip service to section 39(1)(b) of the 1996 Constitution, or to international human rights standards themselves, while very little indication exists that the Court envisions a prominent role for the application of section 39(1)(b) in the application of the reasonable standard of review. Furthermore, the more recent approach to the interpretation of socio-economic rights reflected in *Mazibuko* paints a bleak outlook for the future application of section 39(1)(b) of the 1996 Constitution. In particular, the Court's approach is highly deferential and does not envisage a more substantive approach to the interpretation of socio-economic

³⁸ For example in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), *Minister of Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC).

rights, therefore narrowing the opportunity for the application of section 39(1)(b) of the 1996 Constitution. Thus, the relevance of the interpretative mandate in the substantive interpretation of socio-economic rights in South Africa appears to be under threat.

Homelessness, poverty, and hunger are only a few of the challenges that many South Africans face today. Violations of socio-economic rights impact on our very means of survival and affect not only our quality of life, but erode the opportunity to live a life of dignity. The Constitutional Court has a vital role to play in determining the relevance of our constitutionally protected socio-economic rights to these struggles. In this regard, section 39(1)(b) of the 1996 Constitution can assist the Court in this undertaking. The analysis above indicates that the Court has considered international law within the context of socio-economic rights in a variety of ways. However, international human law has the potential to infuse the scope and content of our socio-economic rights in a way that can broaden and deepen our understanding of them. This in turn can transform the way socio-economic rights contribute to changing the lives of the impoverished. However, international law will only be able to play a relevant part in shaping socio-economic rights if the Court undertakes a more serious approach to giving effect to the purposes of section 39(1)(b) of the 1996 Constitution, and makes a determined effort to acknowledge the mandate entrenched in this provision. Courts must endeavour to acquaint themselves with the substance of international and regional human rights law, in order to adequately determine, and appreciate, its relevance to the interpretation of socio-economic rights. In doing so, section 39(1)(b) will be able to contribute to realising the transformative purposes of socio-economic rights in our Constitution.

Abbreviations

AfCHPR	African Charter on Human and Peoples' Rights
AfCommHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
AmCHR	American Convention on Human Rights
ANC	African National Congress
AZAPO	Azanian Peoples Organisation
CAT	Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment
CEDAW	Convention on the Elimination of All Forms of Racial Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CLC	University of the Western Cape's Community Law Centre
CODESA	Convention for a Democratic South Africa
CODESA II	Second Convention for a Democratic South Africa
CRC	Convention on the Rights of the Child
DMA	Disaster Management Act 57 of 2002
DPCI	Directorate for Priority Crime Investigation
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECSR	European Committee on Social Rights
ECtHR	European Court of Human Rights
ERRC	European Roma Rights Centre
ESC	European Social Charter
FEANTSA	European Federation of National Organisations Working with the Homeless
GCAPSA	Global Call to Action against Poverty South Africa
GCIS	Government Communication and Information System
HRC	Human Rights Committee
IACCommHR	Inter-American Commission on Human Rights

IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
MEC	Minister of the Executive Council
MPNP	Multi-Party Negotiating Process
NBRSA	National Building Regulations and Building Structures Act 103 of 1977
NWF	National Welfare Forum
OP-ICESCR	Optional Protocol to the ICESCR
PAJA	Promotion of Administrative Justice Act 3 of 2000
PIE	Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998
SAJHR	South African Journal on Human Rights
SANGOCO	South African National NGO Coalition
SAYIL	South African Yearbook of International Law
SERAC	Social Economic Rights Action Center and the Center for Economic and Social Rights
SERI	Socio-Economic Rights Institute of South Africa
SPII	Studies in Poverty and Inequality Institute
TAC	Treatment Action Campaign
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
VIP	Ventilated Improved Pit Latrine

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