ESR REVIEW

Economic and Social Rights in South Africa

Ensuring rights make real change

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Editorial

This is the second issue of the *ESR Review* for 2008.

Poverty remains a major challenge in South Africa and in the African continent. One way of addressing this problem is through social assistance programmes that prioritise the needs of people without any incomes, with insufficient incomes or engaged in informal activities.

Though the South African government is committed to providing a comprehensive social security system, access to social security by self-employed people is currently limited. There is therefore a need for ways to extend social security coverage to this group.

George Mpedi analyses the South African social security system, with particular reference to the self-employed. He identifies the existing deficiencies and makes proposals on how to extend the system to these persons. Mpedi also recommends a prior in-depth study to ensure that the extension of social security to address the plight of the self-employed is carried out meaningfully. He also warns that the extension of social security coverage must be gradual.

Though the full realisation of socio-economic rights takes place over time, to ensure that these rights have an impact on the lives of the most vulnerable groups in society, there are certain minimum essential levels of realisation that have to be provided immediately. This is what has been termed the "minimum core content" of the rights. The minimum essential levels will, however, vary in different national settings and depend on the socio-economic rights in question.

Katharine Young examines the minimum core concept, focusing on the "essence", "consensus" and "obligations" approaches to the concept. Young observes that disaggregating these approaches helps to delimit the practical ambitions of the concept and determine its practical operation in international human rights and South African law. Young concludes that none of these approaches satisfactorily concludes the search for the content of the minimum core.

The minimum core concept is taken up again in a recent decision by the South African

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High Court (Witwatersrand Local Division) on the right to have access to water, reviewed in this issue by Ashfaq Khalfan and Sonkita Conteh. In this regard, they note the Court's finding that it is possible to determine the core minimum if sufficient information is placed before a court. Commenting on the Court's decision in general, Khalfan and Conteh state that the decision demonstrates that the introduction of prepayment meters, particularly in poor communities, can inhibit the right of access to water, as they do not take into account inability to pay or the specific needs of users.

Continuing with the discussion on the right to have access to water, Claude Cahn examines international action to strengthen the right to water and sanitation. Cahn observes that access to water and the removal of waste are increasingly occupying attention as priorities in efforts to secure human dignity through the human rights framework. He concludes that the recent United Nations Human Rights Council resolution establishing an independent expert on the right to water and sanitation is an important breakthrough in strengthening this right and advancing human rights law in this area.

This issue also includes a statement that was recently adopted by the United Nations Committee on Economic, Social and Cultural Rights on the world food crisis.

We further provide updates on recent international developments relating to socio-economic rights: first, where the optional protocol to the International Covenant on Economic, Social and Cultural Rights process is at the moment and its content; and second, the entry into force of the Convention on the Rights of Persons with Disabilities and the rights protected in the Convention. An update is also provided on the recommendations made by the United Nations Special Rapporteur on Adequate Housing following his mission to South Africa.

In this issue, we also publish a press release that was jointly issued by some human rights groups calling on the South African government to immediately ratify the International Covenant on Economic, Social and Cultural Rights.

Finally, Mianko Ramaroson reviews two recent books on the state of laws and policies on HIV and AIDS in Southern African countries. Ramaroson notes that the books serve as tools to assist those involved in advocacy around HIV and AIDS to campaign for adequate legislation and policies aimed at increased human rights protection, and also serve to warn that "short cuts" in addressing the HIV pandemic are counterproductive and harmful.

We acknowledge and thank all the guest contributors to this issue. We trust that readers will find this issue stimulating and useful in the advancement of socio-economic rights, especially the rights of the poor and most vulnerable groups of society.

Lilian Chenwi is the editor of the *ESR Review.*

Addressing the social security needs of the self-employed in South Africa: Prospects and challenges

George Mpedi

Self-employed people in South Africa are generally excluded from the country's social security system. The reasons for the exclusion are diverse. Chief among them is the fact that access to most social insurance schemes (eg unemployment insurance) is often dependent on the existence of an employer-employee relationship. In other words, one needs to be an "employee" as defined in the labour laws of the country. Furthermore, the current social assistance scheme guarantees access to its benefits only to certain categories of people (eg the aged and people with disabilities) who comply with certain predetermined conditions (eg a means test).

The effect of this approach is that the self-employed, who do not fall within the specified categories of persons (assuming that they comply with other eligibility conditions), are easy prey to poverty. This result is undesirable, particularly when one considers the fact that section 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996, and various international instruments (eg the Income Security Recommendation, 1944; the Universal Declaration of Human Rights, 1948; and the International Covenant on Economic, Social and Cultural Rights, 1966) recognise social security as a fundamental right which should be enjoyed by everyone, including the self-employed.

This contribution seeks to analyse the South African social security system so as to identify the deficiencies in its coverage of self-employed people and to develop proposals on how to extend the system to these people, with particular emphasis on the challenges involved.

The concept of self-employment

A self-employed person is, generally speaking, someone who is engaged in work for a reward, but is not under an obligation to report to or be accountable to another person (ie a superior). Such a person is in full control of the essential elements of the work he/she is engaged in, such as the hours of work, and is responsible for his/her own remuneration (which is derived from the profits of his or her business or work activity).

Self-employed people are diverse. For instance, they cover a wide array of economic activities in both formal self-employment and informal self-employment. Medical practitioners and accountants in private practice as well as lawyers fall into the category of formal self-employment. Street vendors, taxi drivers, shopkeepers, artists, fishermen and farmers are informally self-employed.

Furthermore, the financial resources available to the self-employed are varied. For example, "[s]ome are in very well-paid trades or professions and have been able to accumulate capital through real estate or other investments that will prevent their going short if they are forced to stop working by disability or old age" (Bernier, 2006). On the other hand, other self-employed people live from hand to mouth.

Social security framework

There is a variety of mechanisms in South Africa through which individuals may protect themselves and their dependents against social risks (eg old age, invalidity and unemployment). These mechanisms comprise mainly social assistance, social insurance and private measures.

Social assistance

Social assistance benefits (the child support grant, the care dependency grant, the foster child grant, the older person's grant, the war veteran's grant and the disability grant) are available to South African citizens and permanent residents [see *Khosa and Others v Minister*

of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) BCLR 569 (CC)], irrespective of whether they are self-employed, employees or unemployed. However, they must comply with the prescribed eligibility conditions such as the means test. Accordingly, needy self-employed persons and their dependents may apply for social assistance benefits.

The means test, if not properly administered, can dissuade people from accessing the benefits, discourage individuals from saving and serve as a disincentive to work. Thus, the policy proposed by the Department of Social Development that the "old age grant should be reconstituted from a means-tested social assistance programme to a universal non-contributory benefit available to all citizens and qualifying residents" is to be welcomed (Department of Social Development, 2007: 12). This is so because a universal non-contributory scheme covers people "regardless of their employment status and work history" (International Labour Office, 2001: 65).

In addition to passing the means test, self-employed persons must be either young enough (a child must be under the age of 14 to qualify for the child support grant), old enough (female applicants must be 60 or older to qualify for the old age grant) or disabled (it must be certified that an applicant for the disability grant is unable to enter the labour market as a result of the disability). Otherwise, they are left at the mercy of poverty.

Social insurance

Social insurance is based on risk or contingency. This means it is oriented towards protecting individuals and their families against risks or contingencies that impair their capacity to earn income temporarily or permanently.

South Africa has, in comparison with many developing countries, a fairly well-developed social insurance system. Nevertheless, its scope of coverage is limited for various reasons. Chief among them is the fact that access to most social insurance schemes (eg unemployment insurance) is often dependent on the existence of an employer-employee relationship. As a result, self-employed persons are not covered by most social insurance schemes.

Private measures

Self-employed persons (and their dependants) are, in principle, at liberty to use private insurance, private savings and informal social security measures to provide for social risks. However, these are inaccessible to many people and do not provide adequately for the needs of the poor.

- *Private insurance:* There are many commercial insurance products on the market in South Africa. These products cater for social risks ranging from invalidity to old age and are usually available on a voluntary basis to all who can afford the monthly premiums. Nevertheless, private insurance is a luxury that not all self-employed persons can afford. Firstly, some self-employed persons have unreliable and, at times, irregular incomes. For this reason, the probability of private insurance policy lapses due to non-payment of premiums is high among the self-employed – particularly those in informal self-employment. Apart from commercial insurance products, there are employer-based private insurance schemes (eg medical aid schemes and retirement funds). Participation in these schemes is, as a rule, restricted to the employees of a particular employer. In addition, employees' contributions to these schemes are largely subsidised by their employers.
- *Private savings:* "Saving for a rainy day" is what every (self-employed) person should strive for. However, this is easier said than done. The ability to save depends on a variety of factors which include the means and the desire to save. A self-employed person may have the desire to save, but if the resources to do so are lacking, saving will be impossible. A short-sighted self-employed person, on the other hand, may fail to save despite having the resources to do so. Even if saving is possible, there is no guarantee that social risks will not occur until the necessary savings have been accumulated.
- *Informal social security:* This includes informal measures (burial societies, stokvels, etc) organised by individuals, families and community members to cushion the effects and consequences of social risks. These measures do play a role in shielding those who rely on them, including the self-employed, against social risks. Nonetheless, their protection

is insufficient, unreliable, inconsistent, unstable and susceptible to external shocks. Accordingly, ways and means need to be investigated and introduced to preserve and strengthen these strategies.

Options for extending social security to the self-employed

Access to social security in South Africa is generally limited. As a result, it may be difficult to justify the call for the extension of social security to the self-employed, given that there are already many people (eg the unemployed) who are currently unable to access social grants. Even so, this call should be viewed as part of the ongoing efforts to extend social security progressively.

There are several options that South Africa could consider in its quest to extend social security to self-employed people. These options include the establishment of special social insurance schemes for the self-employed and the incorporation of self-employed people into existing social security schemes.

Creating special schemes for the self-employed

Such schemes could include the following:

- *Social insurance-type schemes for the self-employed*. These should, however, be preceded by proper research on the types of benefits (eg long-term or short-term benefits) to be covered and the administration and financing of such a scheme. Some developing countries have introduced similar schemes (eg Egypt, Gabon and Tunisia).
- *Commercial insurance products targeted at a specific category of self-employed people*. These products should be tailored to suit the social needs and the economic situation of the self-employed to ensure the full participation of the targeted group.
- *Welfare funds*. This is an innovative way of extending social security to excluded and marginalised categories of people (such as the unorganised sector) which evolved in India. These funds are largely financed by means of cess (earmarked tax) levied on the production, sale or export of specified goods. The fund is set up to cater for the needs of those engaged in informal-sector employment (eg self-employed artists). The welfare funds model bypasses, to some extent, the difficulties associated with the extension of "contribution-oriented" or "employer-liability-oriented" social security schemes to the excluded and marginalised categories of people. This is so mainly because the scheme of welfare funds operates outside the employer-employee relationship.

Commercial insurance products should be tailored to suit the social needs and the economic situation of the self-employed to ensure the full participation of the targeted group.

Incorporating self-employed people into existing schemes

The self-employed may be incorporated into existing social assistance and insurance schemes gradually. There are plans to extend social assistance by equalising the age of eligibility for the older person's grant, currently 60 for women and 65 for men, at 60 for both men and women. This will be done progressively by lowering the eligibility age for men from 65 to 63 in 2008, to 61 in 2009 and to 60 in 2010 [see the Social Assistance Amendment Bill (B 17-2008) tabled before the South African Parliament in March 2008]. However, it remains to be seen how the High Court, in the case of *Christian Roberts and Others v Minister for Social Development and Others* 32838/05 (TPD) now before it, will view this plan in its consideration of the constitutionality of the current eligibility requirements for the old age grant.

As regards social insurance, one way of integrating the self-employed into existing social insurance schemes is by voluntary participation (as has been done in such developing countries as Belize and Seychelles). However, the meagre income of many self-employed persons may make it impossible for them to contribute to voluntary social insurance schemes. In addition, such schemes should not overlook the fact that employers share the burden of social security contributions with their employees. One way of dealing with this may be to require voluntary (self-employed) contributors to contribute a portion of the employee's monthly income (eg 1% of the self-employed person's income

in the case of the unemployment insurance scheme). Alternatively, voluntary contributors may be obliged to contribute the employee's and employer's portions of the premium: for instance, in the case of unemployment insurance schemes, 2% of the self-employed person's income may be declared the premium. This option may not appeal to self-employed people with very low incomes.

Self-employed people in South Africa have limited access to social security. Somehow social security needs to be extended to them.

Conclusion

Self-employed people in South Africa have limited access to social security. Somehow social security needs to be extended to them. However, the fact that self-employed people are a heterogeneous group leads one to conclude that there can be no standard formula for them. Thus, the extension of social security coverage to them must be gradual and priorities must be fixed. Most importantly, a prior in-depth study would be needed to investigate the current gaps and the ways in which the existing problems can be addressed so that the self-employed are guaranteed social security in South Africa.

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Conceptualising minimalism in socio-economic rights

Katharine Young

By recognising the "minimum essential levels" of the rights to food, health, housing and education, the concept of the "minimum core" seeks to establish a minimum legal content for socio-economic rights.

In international law and South African constitutional law, the concept purports to address the inherent relativism of a "progressive realisation" standard of obligation [see article 2(1) of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and sections 26(2) and 27(2) of the South African Constitution Act 108 of 1996 (the Constitution)] by providing a common baseline for monitoring and enforcement. Such a baseline helps to dispel the criticisms that socio-economic rights are uniquely unquantifiable in any system of rights; that negative obligations are the only area in which socio-economic rights gain judicial traction; or that courts act illegitimately if they deal with the enforcement of socio-economic rights separately from the issue of practicable remedies. When the Constitutional Court rejected, or at least deferred, the opportunity to articulate the minimum core concept for the right to housing in *Government of Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (Grootboom case) and the right to health in *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (TAC case), many socio-economic rights advocates were disappointed.

Yet, the minimum core concept is not without its critics, even among those committed to socio-economic rights. When examining the concept's use by the United

Nations (UN) Committee on Economic, Social and Cultural Rights (the Committee), Craven (1995: 143–4, 152) was concerned that it directed international attention only to the realisation of rights in developing countries. In the South African context, Lehmann (2006) has suggested that the concept tends to rank different claimants of rights, while ignoring the more salient assessment of rights versus macroeconomic growth or defence policies. And one of South Africa's most forthright proponents of the minimum core has provided an equivocal endorsement, by advocating a "principled" and "pragmatic" use of the concept, depending upon the right at stake (Bilchitz, 2007: 220–5).

Even the primary conceptual questions remain unanswered. A 2002 publication, *Exploring the Core Content of Economic and Social Rights*, contained quite opposing views on whether the minimum core was country-specific or absolute, and otherwise context-specific or context-blind (Brand & Russell, 2002). This conceptual puzzle is reflected in practice. The Committee itself, for instance, appears divided: it has sometimes equated the minimum core with a presumptive legal entitlement [see eg General Comment No 3 on the nature of states parties' obligations, UN doc. E/1991/23 (1991)] and on other occasions considered it a non-derogable obligation [see eg General Comment No 14 on the right to health, UN doc. E/C.12/2004 (2004)].

If conceptual confusion is the problem, conceptual analysis may be the solution. This article suggests that many of the proposals for the minimum core concept rest on several rationales. In this article, we focus on three main ones, which are based on the following approaches to the minimum core: the essence approach, the consensus approach and the obligations approach (Young, 2008). Disaggregating these approaches helps to delimit the practical ambitions of the concept and determine its practical operation in international human rights and domestic law.

Disaggregating these approaches helps to delimit the practical ambitions of the concept and determine its practical operation in international human rights and domestic law.

The essence approach

The first approach locates the minimum core in the "essential" minimum and is commonly used by those seeking an absolute or non-derogable foundation for socio-economic rights. This approach prescribes a moral foundation or justification to the minimum core, such as how the liberal values of human dignity, equality and freedom or the more technical measure of basic needs is minimally sustained within core formulations of rights.

Coomans (2002: 166–7) regards the minimum core content as the embodiment of "the intrinsic value of each human right ... [containing] elements ... essential for the very existence of that right as a human right." While the normative argument is, of course, central to rights, supporters of this approach adopt a more strident and yet more compromising viewpoint. It is more strident because it dispenses with general, broad and accommodating descriptions of rights, preferring a pointed focus on the "hierarchy within the hierarchy" of the material interests protected by socio-economic rights. Yet it is paradoxically more compromising, because it recognises – and encourages – the limits to rights at their periphery, discarding the view of rights as substantive trumps. This compromising viewpoint sits easily with the limitations clause in section 36 of the Constitution, if not with the Constitutional Court's view that sections 26(1) and 27(1) do not protect self-standing rights decoupled from sections 26(2) and 27(2) [see *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (Khosa case) and the amici's argument in the TAC case].

Nevertheless, disagreement persists over what makes up the normative minimum. For example, the Committee's original formulation in General Comment No 3 – that the "minimum essential levels of each of the rights" require the provision "of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education" – suggests a categorical (or more flatly instrumental) formula of "basic needs" amounting to survival and

life. This focus is useful because it directs attention to the most urgent steps necessary for the satisfaction of rights as a precondition for the exercise of all rights (Shue, 1996). Such an emphasis is able to transcend the prioritisation of civil and political rights over socio-economic rights by drawing attention to the moral equivalence of subsistence rights and security rights because of their mutual relation to survival.

As Bilchitz (2007) has indicated, the survival-based core has the additional advantage of pointing to the requirements for rights protections that are apparently self-evident, rather than requiring a more controversial examination of what is needed for the satisfaction of more elaborate aims and of a "thicker" understanding of the good life. For proponents of the survival-based view, the boundaries drawn around the minimum core are neater and more cognisable than those around the more ambitious formulations. Yet a focus on survival and needs may disclose little about what basic functioning deserves priority and how broader values such as human flourishing are protected.

The need for additional values was made clear by the difficulties encountered in deciding the appropriate limits to the right to emergency medical treatment for people who are chronically or terminally ill in *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC). A value-based core provides an emphasis on higher aims, such as human dignity, which go beyond mere survival. Indeed, dignity-based values have been used by the Constitutional Court to supplement survival-based inquiries when interpreting socio-economic rights [eg in the *Khosa* case and in *Mashavha v President of the Republic of South Africa and Others* 2004 (12) BCLR 1243]. This focus has carried the interpretation of socio-economic rights in a more expansive direction, which is at the same time more focused on vulnerable or disadvantaged claimants (Liebenberg, 2005: 1, 18). Nevertheless, dignity cannot comprehensively settle the issue, at least in its subjective sense, because of the problem of low expectations in vulnerable groups and that of anti-constitutional attitudes. Other values, like equality and freedom, are also to be considered. Dignity itself cannot settle the issue, especially if "the issue" is understood as setting the absolute content of rights.

Dignity itself cannot settle the issue, especially if "the issue" is understood as setting the absolute content of rights.

Due to the fact that the normative foundations are open to disagreement, the minimum core will look different to an advocate of human flourishing in comparison with an advocate of basic survival. For this reason, the use of a normatively freighted "reasonableness" inquiry, rather than the minimum core, would seem more appropriate in determining the content of socio-economic rights (Wesson, 2004: 284). This explains the course taken by the Constitutional Court in Grootboom and TAC. The vehicle of reasonableness is substantively different from inquiry into a minimum essential core of a right, in that it is more normatively open and sociologically framed.

The consensus approach

The second approach situates the minimum core in the minimum consensus surrounding socio-economic rights. Under this theory, the fledgling concept of the minimum core gains universal credibility by tying its fortunes to the basic – and not hypothetical – consensus reached within the communities constituting each field. Such an approach unites the themes of legitimacy and self-government common to both international and constitutional law and is consistent with the practice-bound determinations of the Committee, which originally relied largely on state reports to formulate the minimum core (General Comment No 3). Applying this consensual scale to socio-economic rights has advantages in ascertaining the settled meaning of each right's "core", while allowing pluralist disagreement at its fringes.

At international law, the search for the minimum consensus looks to the breadth of the ratification of the ICESCR and the measures taken by its states parties towards compliance. It also looks at additional treaties with overlapping content or more

specific obligations with respect to socio-economic rights, such as those under the Convention on the Rights of the Child, 1989 (Van Bueren, 2002: 183–4). The decisions of supranational bodies also become relevant to giving content to a minimum core (Marcus, 2006: 53, 63). Moreover, the approach goes beyond explicit international agreement to refer to national measures for protecting socio-economic rights, such as federal and state constitutional texts, stable and long-lasting legislative regimes and judicial precedent.

The consensus approach tracks the voluntarist structure of treaty-based and customary international law and the basis of the social contract in liberal constitutional theory.

The consensus approach tracks the voluntarist structure of treaty-based and customary international law and the basis of the social contract in liberal constitutional theory. Additionally, consensus serves as an operational guide for determining normative principles. Consensus is important because it reveals the normative standards that evolve with reason (Waldron, 2006: 128).

Whether necessary for sovereignty and self-government on the one hand, or for principled legality on the other hand, the consensus approach to the minimum core is nevertheless beset by limitations. In brief, the approach fails because it makes legitimate only the lowest common denominator of international protection; a problem exacerbated by the scarcity of explicit pronouncements on what the minimum formulations of socio-economic rights are and what they should be. Moreover, this approach fails in its inability to give appropriate guidance on how to determine consensus. In other words, it is difficult to determine the source of norms which count as the most legitimate basis for formulating minimum core obligations: judicial consensus as a special place for unfolding reason; governmental and intergovernmental declarations as a more appropriate test for legitimate law (captured at a particular, normatively charged moment or subject to ongoing development); or the consensus established between special experts in policy areas influencing socio-economic rights (such as public health, education, housing or land reform), who are more familiar with the institutions and organisations that deliver the services aimed at realising rights. Moreover, it is not clear whether aspects of international economic consensus, like that held between influential neoliberal economists on economic growth, must be evaluated as instances of consensus or short-term deviations.

These practical questions suggest an important insight: namely, that focusing on consensus alone thwarts the definition of a minimum core. There is therefore good reason to explore other rationales for the minimum core concept, both because consensus pulls the content too broadly and thinly, and because its theoretical promise of self-governing pluralism in both international and constitutional law proves elusive.

The obligations approach

The problems predicted by the essence and consensus approaches point to a third, somewhat different approach. This approach investigates whether a minimum obligation (or obligations) can correlate to the minimum core. Of course, this approach is not a true alternative to the normative and consensus-driven approaches as it relies on and incorporates these justifications within its assessment of obligation. That is, the more normatively convincing and empirically accepted the definition of the essential protections, the easier it is to demarcate the attendant minimum obligations. However, that pragmatic connection between sound norms and effective duties can obscure a different set of influences on the definition of the core, which take the institutional competences and remedial opportunities as the paramount guide in setting the minimum core. This shift tracks two institutional concerns: that of jurisdiction for the Committee and that of justiciability for a court.

In recent years, the Committee has produced a template of "core obligations" that straddle different rights, duties of positive provision and wider institutional strategies. Chapman and Russell (2002: 1, 9) suggest that in focusing on obligations rather than content, one need not take a position on the hierarchy of the

elements of each right, but must concentrate on the more practical issue of timing. For example, "core obligations" encompass both obligations of conduct, which require a specific course of conduct (whether an act or omission), and obligations of result, which are fulfilled by a course of conduct left to the state's discretion. As a result, the general comments of the Committee have developed an extensive template of core obligations.

Nonetheless, the Committee's list of core obligations is far from coherent. The first attempt to enumerate core obligations leaned heavily on the "organising principles" that would be necessary to substantiate the content of each right in more concrete terms. In General Comment No 12 on the right to adequate food [UN doc. E/C.12/1999/5 (1999)], the Committee gave priority to principles of availability, accessibility and quality of food-related services. Since General Comment No 14 on the right to health, however, the Committee has listed "core obligations" as those which require immediate performance. It is difficult to determine whether the Committee designated these obligations as core because of their immediate practicability or their greater moral salience. Nevertheless, the core obligations are subject to criticism on both grounds (Pillay, 2002: 61, 66-8; Meier, 2006, 735-36).

The essence approach asks the right question: why, after all, should we respect socio-economic rights if we do not attach great importance to norms like survival or dignity?

To address the practicability of the core obligations (and by implication, their affordability) the Committee has proposed the duty of assistance and cooperation on the state parties and non-state actors who are "in a position to assist". Yet such an extraterritorial obligation of assistance is, as yet, critically underdeveloped. Without it, core obligations remain uncertain.

One explanation for this disjuncture is institutional. This explanation points to the jurisdictional turf wars between different international organisations and their increasingly fragmented international regimes, rather than to the paramount obligations which correlate with the minimum core of any right. It helps to explain, for instance, why the Committee's core obligations in relation to the right to work are so markedly different from those prioritised by the International Labour Organization [General Comment No 18 on the right to work, UN doc. E/C.12/GC/18 (2006)].

Institutional concerns are also at the root of efforts to align the minimum core with justiciability. Tushnet (2004: 1 895, 1 903-5), for example, has suggested that the minimum core concept coincides with a strong model of judicial review – requiring a large measure of scrutiny and a high level of justification in reviewing the acts of government that result in any deprivations of a strongly formulated substantive right. The approach that equates the minimum core with justiciability points to the over- and under-enforcement problems of rights that make it difficult to speculate about their shape and meaning outside of the judicial context. In its most exaggerated sense, the minimum core of each socio-economic right is whatever is left for a court to rule on after the institutional questions – of standing, mootness, the political question doctrine and remedies – have curtailed its ability to give expression to the right.

Not surprisingly, what is left of the minimum core may be minimal indeed. Without reconceiving the limits of the judicial role, this room is reserved mainly for the less controversial formulations, which do not risk costly remedies or intrusive demands. Equating the minimum core content with justiciability favours the negative articulation of socio-economic rights rather than holding the positive obligations to scrutiny, notwithstanding their equivalent effect on enjoyment. Even with an expanded recognition of justiciability, as we are seeing in South Africa, the alignment of the minimum core with judicial decision rules reduces the normative force of the concept.

Conclusion

Neither the essence, the consensus nor the obligations approach

satisfactorily resolves the problem of searching for the content of the minimum core. The essence approach asks the right question: why, after all, should we respect socio-economic rights if we do not attach great importance to norms like survival or dignity? Yet it precludes a pluralist interpretative frame. Moreover, merely pointing to normative goals does not by itself resolve problems of validity and application. The consensus approach commends itself by focusing on both agreement and validity, and yet the resulting core is likewise impeded by uncertainty as to whose agreement counts. Finally, the correlation between "core" rights and "core" duties addressed in the obligations approach is defeated by the problems of identifying the duty-holders and grounding obligations, given present institutional strictures.

Questions remain as to whether we can defer much of the supervisory and enforcement work to benchmarks and indicators, much of the obligations analysis to the assessment of causality and balancing, and much of the normative and political work to more open and substantive articulations of socio-economic rights. For each of these questions, the long-standing requirements of the concept of "rights" – that they be universal, predictable and of special importance – assists. As an additional concept, the minimum core provides little in the way of additional answers.

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Big leap forward for the right of access to water in South Africa

Ashfaq Khalfan and Sonkita Conteh

On 30 April 2008, the High Court (Witwatersrand Local Division) of South Africa handed down judgment in the *Mazibuko* case, which concerned the right of access to sufficient water and the right to human dignity, guaranteed under sections 27 and 10 of the Constitution of South Africa Act 108 of 1996 (the Constitution) respectively.

Lindiwe Mazibuko and Others v The City of Johannesburg and Others
Case No 06/13865 (W)
(*Mazibuko* case)

Issues before the Court

The application was brought by five residents of Phiri (the applicants), a township in Soweto that falls within the authority of the City of Johannesburg. The applicants were supported by the Centre for Applied Legal Studies and the Coalition Against Water Privatisation. They challenged the legality and constitutionality of the City's policy of imposing prepayment water meters as well as regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (the National Standards Regulations), which define basic water supply as 25 litres per person per day or 6 000 litres per household per month (paras 9–11).

The applicants asked the City to provide them and other similarly placed persons with 50 litres of free water per person per day and the option of water credit already available to the wealthier and mostly white residents of Johannesburg.

The Centre on Housing Rights and Evictions (COHRE) was admitted as *amicus curiae* in the case (para 13). COHRE's submission was primarily based on international and comparative law, which supports the position that the imposition of prepayment water meters is discriminatory and retrogressive and hence violates international law.

The decision

The Court held that the City of Johannesburg's practice of forced installation of prepayment water meters in Phiri, Soweto, was unconstitutional and unlawful. It ordered the City to provide residents of Phiri with a basic 50 litres of free water per person per day, setting aside the City's decision to limit free water to 25 litres per person per day. The City was also directed to provide residents of Phiri with the option of a metered water supply.

Forced installation of prepayment meters unconstitutional and unlawful

The Court observed that prepayment meters result in an automatic shut-off when the free basic water allocation is exceeded and poor households are left without water. In the case of the applicants, this meant that they went without water for 15 days of each month. Thus the policy also contravened national standards, which required that consumers should not be left without water for more than seven full days in a year (para 84). The Court further held that the implementation of prepayment meters with an automatic shut-off mechanism was unlawful and unreasonable and violated the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (which guarantees the right to lawful, reasonable and procedurally fair administrative action) as it did not give reasonable notice to the affected persons and allow an opportunity for them to make representations before cutting off water supply (paras 93–95, 112).

The forcible imposition of prepayment meters was also found by the Court to be in contravention of the right to equality. It noted that residents in wealthy and historically white areas obtained water on credit from the City. In addition, they were entitled to notice before any cut-off of water supply and had the opportunity to make arrangements to settle arrears, including an opportunity to make representations to the City. Conversely, residents of poor and predominantly black areas did not

have these opportunities. Not only was this disparity of treatment, in the view of the Court, unreasonable, unfair and inequitable, but it also discriminated solely on the basis of colour (paras 94, 153).

In addition, as domestic chores in poor black communities were mostly performed by women, prepayment meters within this context, the Court held, discriminated against women unfairly because of their sex (para 159).

The Court rejected the City's argument that prepayment systems had been widely accepted by residents (para 122). It examined the process by which these systems had been introduced and concluded that the process was procedurally unfair because it did not entail consultations with the affected communities. Moreover, the affected individuals were not given adequate notice let alone advised of their legal rights or given information as to the available remedies. The Court also rejected the City's argument that prepayment meters were beneficial for users in Phiri who could not afford water on credit. It described such an attitude as deeply patronising and discriminatory, noting that bad payers could not be described in terms of colour or geographical areas, as the City's policy implied (para 154).

Twenty-five litres per person per day insufficient

Taking into account international guidelines stating that 25 litres of water per person per day, though insufficient, catered for the essential needs of individuals, the Court stated that the figure at which the national minimum amount of free basic water had been set was understandable given the scarcity of resources in the country. However, it noted that this amount must be viewed "as a floor and not as a ceiling" (paras 48, 53). As water services authorities were obliged to realise the right of access to water progressively, they had the obligation to increase the minimum amount of free water gradually, as exemplified by the local authorities of Volksrust in KwaZulu-Natal, which provided 9 000 litres per household per month, and Mogale, which provided 10 000 litres per household per month (paras 19-50). Furthermore, the Court added that these authorities were, in terms of section 27(2) of the Constitution, obliged to provide more than the minimum amount of free basic water prescribed by national water policies. They were enjoined to supply as much water as met the demand and needs of the people under their jurisdiction (para 126).

The policy of 25 litres of water per person per day is based on a household of eight persons, which equals 200 litres per household per day. However, as observed by the Court, most households in Phiri accommodate more than eight people. The average household in Phiri contains a minimum of 16 persons. In addition, many water connections are shared by neighbours (paras 168-9). Thus the 6 000 litre allocation per month meant that many persons would receive far less than was intended by the free water policy, if anything.

The Court took note of the City's policies, including the Indigent Persons Policy of October 2005 and the mayoral committee decision of December 2006, which increased the amount of free water to 10 000 litres per month (para 145). However, it determined that these policies were insufficient, as they applied to the benefit of individual account holders, and not multiple households sharing one water supply point as in Phiri. In addition, the Court stated that people were reluctant to register as indigents in need of more free water because of the social stigma involved. It also held that the scheme was inflexible as it did not permit representations for further allocations of free water (para 146). Finally, these policies required applicants to agree to the installation of prepayment meters as a condition for an increased allocation. The Court therefore found the policies to be irrational and unreasonable because of their inflexibility (para 148).

In this particular case, the Court noted that 25 litres per person per day was woefully insufficient for the residents of Phiri. The question, then, was whether the City had the resources to increase the amount of free basic water to 50 litres per person per day (para 180). As it was not contested that the City had the financial resources to support the increase, the Court held that it was unreasonable to limit the free water supply to 25 litres per person per day (para 181). The Court therefore ordered the City to provide the applicants and other similarly placed residents of Phiri with a free basic water supply of 50 litres per person per day (para 183).

Free basic water for the poor a constitutional requirement

The Court rejected the argument by the Ministry of Water Affairs

and Forestry (which was also a respondent in the case) that it was not legally obliged to provide free basic water (para 41). Relying on section 27(2) of the Constitution, which requires the state to realise the right of access to sufficient water progressively, section 7(2) of the Constitution, which recognises the obligations to respect, protect, promote and fulfil the rights, and international law, it held that the state was obliged to provide free basic water to the poor. Consequently, it found the respondent's argument denying that it had the obligation to provide free basic water to the poor to be unhelpful (para 42).

Implications of the judgment in South Africa and elsewhere

This decision is a warning against attempts to impose prepayment water systems on the poor without their consent in South Africa and elsewhere. Such a practice is procedurally unfair and arbitrary and violates the right of access to water. The decision will no doubt embolden opponents of these systems in their efforts to make water available to the poor.

The judgment raised awareness about the social and economic hardships that poor communities in South Africa face. It demonstrated that socio-economic rights could be used to force the government to change policies for the betterment of those communities. It extensively used international law and comparative jurisprudence in interpreting domestic provisions pertaining to the right of access to water. These included articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, 1966; General Comment 15 on the right to water [UN doc. E/C.12/2002/11 (2003)] of the United Nations Committee on Economic, Social and Cultural Rights; article 24 of the Convention on the Rights of the Child, 1989; article 14 of the African Charter on the Rights and Welfare of the Child 1990; and article 16 of the African Charter on Human and Peoples' Rights, 1981 (paras 32-40).

Significantly, the judgment reignited the debate about the concept of minimum core obligations. Referring to two landmark decisions, *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC), the Court maintained that it was possible to determine the minimum core of the right to have access to water provided sufficient information was placed before a court.

In addition, by carefully assessing the City's Indigent Persons Policy, the Court showed that aiming to target the poor through individual means-testing has its limits. The Court's remedy therefore applied to all residents of Phiri, not just those whom the City considered indigent. This is a significant decision, given that examples from other countries show that geographically based subsidies – particularly for poor neighbourhoods – can help remedy the under-inclusion that is prevalent in individual means testing (see the *Manual on the Right to Water and Sanitation* produced in 2007 by COHRE, AAAS, SDC and UN-HABITAT, available at http://www.cohre.org/manualrtws).

The Court's decision that free basic water for the poor is a constitutional requirement is significant even though the national government has a free basic water policy. This is so because, even going by government figures, a significant proportion of low-income South Africans do not yet have access to free basic water, and this decision will put pressure on municipalities to extend the provision of free basic water. In addition, the decision will help protect poor users against disconnection from water supply when they cannot afford to pay.

Finally, by anchoring the quantity of basic water to the principle of need and resources and, in this case, raising the threshold of free basic water from 25 to 50 litres in appropriate situations, the Court showed that the obligation to realise social and economic rights progressively creates real and unequivocal duties for which government bodies can be held accountable.

Conclusion

Although the City will most likely appeal against it, this judgment has confirmed, at least for the time being, what activists have long argued: that the introduction of prepayment meters, particularly in poor communities, inhibits access to water, as it does not take into account the specific needs and the financial ability of users. Nevertheless, the work of promoting the right of access to water in Johannesburg and

elsewhere in South Africa must continue through the courts and advocacy to ensure that the real changes desired on the ground are realised.

Ashfaq Khalfan is the coordinator and **Sonkita Conteh** a legal officer in the Right to Water Programme of COHRE.

References in this case review to the "City" also apply to Johannesburg Water (Pty) Ltd, a water company in which the City of Johannesburg is the sole shareholder and one of the respondents in the case.

COHRE was assisted in its *amicus* intervention in this case by the International Human Rights Clinic of the New York University School of Law and the Legal Resources Centre of South Africa.

The *amicus* brief and the court's judgment are available at http://www.cohre.org/watersa. The submissions of the applicants and respondents are available at: http://www.law.wits.ac.za/cals/phiri/index.htm.

International action to strengthen the right to water and sanitation

Claude Cahn

Recent actions by the United Nations (UN) human rights organs suggest a trend towards strengthening the international protection of the right to water and sanitation. These efforts have also met with vociferous opposition. Nevertheless, although regional approaches have varied, it is evident that access to water and sanitation is increasingly attracting international attention, after several decades of persistent agitation, advocacy and negotiation by various international and municipal actors.

Recognition of the right to water and sanitation

The right to water has been recognised explicitly in a number of international treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 [article 14(2)(h)]; the Convention on the Rights of the Child, 1989 [article 24(2)(c)]; and the African Charter on the Rights and Welfare of the Child, 1990 [article 14(2)(c)]. This right is also implicit in article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). The UN Committee on Economic, Social and Cultural Rights has stated that "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living [General Comment 15 on the right to water, UN doc. E/C.12/2002/11 (2003)].

The Plan of Action of the 1977 Mar del Plata UN Water Conference recognises that "all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs" [Report of the UN Water Conference, Mar del Plata, 14-25 March 1977, UN doc. E/Conf.70/29 (1977) 66-7]. In addition, at two UN world conferences, states have unanimously adopted international declarations affirming that the right to an adequate standard of living includes water and sanitation, in addition to food, clothing and housing (the 1994 International Conference on Population and Development, Cairo, in which 177 states participated, and the 1996 Second UN Conference on Human Settlements [Habitat II] Istanbul, in which 171 states participated). The 43 members of the Council of Europe and the 118 members of the Non-Aligned Movement also recognised the right to water in 2001 and 2006 respectively. The Asia-Pacific Water Forum, composed of 37 Asian countries, did likewise in 2007.

Furthermore, the UN Commission on Human Rights, precursor to the UN Human Rights Council (HRC), adopted two resolutions in 2004 and 2005 on the adverse effects of the illicit movement and dumping of toxic waste and dangerous products and wastes on the enjoyment of human rights [Resolution 2004/17, UN doc.

E/2004/23 - E/CN.4/2004/127; Resolution 2005/15, UN doc. E/CN.4/2005/L.10/Add.10 (2005)].

In 2006, the now-defunct UN Sub-Commission on the Promotion and Protection of Human Rights adopted draft guidelines for the realisation of the right to drinking water and sanitation [Report of the Special Rapporteur, El Hadji Guissé, on realisation of drinking water and sanitation, UN doc. E/CN.4/Sub.2/2005/25 (2005)]. The guidelines are intended to assist policymakers, international agencies and members of civil society working in the water and sanitation sector in the implementation of the right to drinking water and sanitation.

A special procedure on the right to water and sanitation

At the end of 2006, the HRC requested the Office of the UN High Commissioner for Human Rights (OHCHR) to carry out a study on human rights obligations related to equitable access to safe drinking water and sanitation. The OHCHR study was released in September 2007. According to the OHCHR study:

> Diarrhoeal dehydration claims the lives of nearly 2 million children every year and has killed more children in the last 10 years than all the people lost to armed conflict since the Second World War. Each and every day, some 3 900 children die because of dirty water, poor hygiene and lack of basic sanitation while 1.6 million deaths per year can be attributed to the same causes [Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments, UN doc. A/HRC/6/3, 2007: 8-9].

In the wake of the release of this study, the German and Spanish governments launched a joint undertaking to press for a resolution by the HRC on the right to water and sanitation during the first half of the sixth session of the HRC in September 2007. The aim of this effort is to establish a special procedure, such as a special rapporteur or other mechanism, on the right to water and sanitation. The establishment of such a special procedure would ensure that the right to water and sanitation is discussed regularly in the HRC. Consideration of this proposal was deferred to March 2008, when the seventh session of the HRC was held, because there was insufficient time for states to review the OHCHR report before the sixth session.

Informal discussions on the resolution began in January 2008. Several options were suggested:

- the establishment of a special rapporteur, independent expert or other special procedure to look into issues implicating the right to water and sanitation;
- the establishment of a new advisory committee as an adjunct body to the HRC with a mandate on the right to water and sanitation;
- the establishment of a UN Secretary-General special representative on the right to water and sanitation, with a mandate similar to that of John Ruggie, special representative of the UN Secretary-General on business and human rights (meaning that the special representative would have no powers to assess the situation of the right to water and sanitation in any country, but could only focus on the "clarification of the relevant norms"); or
- an assignment to the OHCHR to produce a report.

The fourth option was dismissed out of hand, while the rest were presented for discussion during the seventh session.

After open informal meetings held by the German and Spanish governments, a draft resolution was tabled on 20 March 2008. The resolution was jointly sponsored by Andorra, Belgium, Bolivia, Bulgaria, Burkina Faso, Cameroon, Chile, Colombia, Costa Rica, Cyprus, Denmark, El Salvador, Ecuador, Estonia, Finland, France, Germany, Greece, Guatemala, Guinea, Ireland, Italy, Kazakhstan, Croatia, Cuba, Luxembourg, the Maldives, Mali, Morocco, Monaco, Montenegro, the Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Serbia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Timor-Leste, Ukraine and Uruguay.

Although there was opposition from some states such as India, the HRC adopted the resolution by consensus on 28 March 2008 [UN doc. A/HRC/7/L.16 (2008)]. The resolution established an independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation. The appointment is for a period of three years, during which the independent expert is mandated to:

- develop a dialogue with governments, the relevant UN bodies, the private sector, local authorities, national human rights institutions, civil society organisations and academic institutions to identify, promote and exchange views on best practices related to access to safe

drinking water and sanitation, and, in that regard, to prepare a compendium of best practices;
- advance the work by undertaking a study, in cooperation with and reflecting the views of governments and relevant UN bodies, and in further cooperation with the private sector, local authorities, national human rights institutions, civil society organisations and academic institutions, on the further clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation;
- make recommendations that could help the realisation of the Millennium Development Goals, particularly Goal 7;
- apply a gender perspective, including through the identification of gender-specific vulnerabilities;
- work in close coordination, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the HRC, relevant UN bodies and the treaty bodies, taking into account the views of other stakeholders, including relevant regional human rights mechanisms, national human rights institutions, civil society organisations and academic institutions; and
- submit a report, including conclusions and recommendations, to the HRC at its tenth session (para 2).

Since its establishment in 2006, the HRC has generally not been keen on establishing new special procedures. It had only established one new mandate before its seventh session, and it has steadily eliminated a number of them, especially country-specific mandates. Early indications that a number of governments were uncomfortable with the establishment of a new special procedure led the initiating governments to prioritise "the promotion and exchange of best practices" as a mode of garnering consensus on the proposed special procedure for the right to water and sanitation.

Despite this effort, explicit provisions allowing country visits, which would facilitate the promotion and exchange of best practices, were deleted from the final resolution. Country visits are now only implicit in the provision calling upon all governments to "cooperate with the independent expert and ... share best practices with the independent expert, and to provide him/her with all the necessary information related to the mandate to enable him/her to fulfil the mandate" (para 4).

The major lightning rod of the resolution was the description of the mandate, in the title of the resolution and elsewhere. To secure support for the resolution – and thus the establishment of a special procedure – references to the "right to water and sanitation" were deleted, under the weight of unbending objections primarily from Canada, the United States of America and other countries which, though expressing their support for the right to water, did not support the right to sanitation. The "right to water and sanitation" was thus replaced with "human rights and access to safe drinking water and sanitation". It should be noted, however, that these countries had earlier endorsed the declarations of the 1994 International Conference on Population and Development and the 1996 UN Conference on Human Settlements, which explicitly stated that the right to an adequate standard of living included water and sanitation.

These setbacks were, to a certain extent, ameliorated by the inclusion in the preamble to the resolution of the following:

> Emphasizing that international human rights law instruments, including the Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, entail obligations in relation to access to safe drinking water and sanitation, ...

This provision established both the link between water and sanitation on one hand and that between these issues and international human rights law on the other. By extension, it also implied that the right to water and sanitation entailed positive obligations for the state. This is particularly important for sanitation, the less developed of the two components of the right.

The process for adopting the resolution establishing the independent expert on the right to water and sanitation has thus been the latest battleground for the international debate on the justiciability of economic, social and cultural rights. The dissenting governments – now in a minority in the HRC – undermined the resolution, but could not ultimately block it. However, the perceived need to adopt the resolution by consensus

dictated that the adopted measure was significantly weaker than it might otherwise have been, particularly in the area of the normative description of the right at issue. Nonetheless, the resolution is an important breakthrough and will reinforce the protection of the right to water and sanitation in international law.

Conclusion

The recognition of real human rights concerns in the area of water and sanitation has advanced the protection of the right to water and sanitation. Between 2002 and 2007, the number of countries formally recognising the right to water in their legal or policy frameworks increased from six to 24, at least six of which have, in addition, recognised the right to sanitation. In some countries, such as Kenya, governments have begun to adopt policies that explicitly recognise the right to water and sanitation and take measures to expand access to this right. And in the developed North, traditionally conservative bodies such as the European Court of Human Rights have, within the confines of the applicable treaties, which primarily focus on civil and political rights, handed down decisions vindicating the right to water in such areas as the arbitrary denial of water provision (see, eg, *Butan and Dragomir v Romania*, Application No. 40067/06, European Court of Human Rights, judgment of 14 February 2008).

The HRC will address this issue again at its tenth session in 2009. It is important for non-governmental organisations and other stakeholders to advocate for an explicit reference in subsequent resolutions to the "right to water and sanitation" as an independent right contained within the ICESCR.

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The world food crisis

Statement adopted by the United Nations Committee on Economic, Social and Cultural Rights on 16 May 2008 during its fortieth session (UN doc E/C.12/2008/1 [2008])

1. The CESCR is alarmed at the rapid worldwide rise in food prices and the soaring energy prices that have precipitated a global food crisis and are adversely affecting the right to adequate food and freedom from hunger as well as other human rights of more than 100 million people.

2. The world has lived for too many years with a chronic crisis of 854 million people suffering from food insecurity and two billion people suffering from malnutrition and undernutrition.

3. Prices of basic staple foods (including rice, maize, wheat etc) have risen by up to 60 per cent around the world. The poorest people in the world are the most severely affected as they already spend up to 60-80 per cent of their income on food, compared with 20 per cent in the developed world.

4. The food crisis underscores the interdependence of all human rights, as the enjoyment of the human right to adequate food and freedom from hunger is of paramount importance for the enjoyment of all other rights, including the right to life.

5. The Committee calls upon all States to revisit their obligations under article 25 of the Universal Declaration of Human Rights, and article 11 of the ICESCR. Under article 11(1) of the Covenant, States parties 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".

6. In its General Comment No 12 (1999) on the right to adequate food, the Committee affirms that "the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights (See General Comment 12, para. 4).

7. All State parties are obliged to ensure for everyone within their jurisdiction physical and economic access to the minimum essential food, which is sufficient, nutritionally adequate and safe, to ensure freedom from hunger (General Comment 12, paras. 15 and 36).

8. Under article 11(2) of the Covenant, States parties recognize the "fundamental right of everyone to be free from hunger". In its General Comment No. 12, the Committee underlines the fact that "States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters" (General Comment 12, para. 6), and that the core content or the minimum essential levels of the right to adequate food and freedom from hunger implies "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture, and the accessibility of food in ways that are sustainable and do not interfere with the enjoyment of other human rights" (General Comment 12, para. 8).

9. The current food crisis represents a failure to meet the obligations to ensure an equitable distribution of world food supplies in relation to need. The food crisis also reflects failure of national and international policies to ensure physical and economic access to food for all.

10. The Committee calls upon all States to address the immediate causes of the food crisis, individually through national measures, as well as internationally through international cooperation and assistance to ensure the right to adequate food and freedom from hunger. The Committee notes that many of the measures undertaken to help States and persons affected by the crisis are of a humanitarian nature and supports their immediate implementation.

11. The Committee therefore urges States to take urgent action, including by:

- Taking immediate action, individually and through international assistance, to ensure freedom from hunger through, inter alia, the provision and distribution of emergency humanitarian aid without discrimination (General Comment 12, para. 18). Humanitarian aid should be provided in cash resources wherever possible.
- Where food aid is provided, care should be taken to ensure that food is purchased locally wherever possible and that it does not become a disincentive for local production. Donor countries should prioritize assistance to States most affected by the food crisis;
- Limiting the rapid rise in food prices by, inter alia, encouraging production of local staple food products for local consumption instead of diverting prime arable land suitable for food crops for the production of agrofuels, as well as the use of food crops for the production of fuel, and introducing measures to combat speculation in food commodities;
- Establishing an international mechanism of coordination to oversee and coordinate responses to the food crisis and to ensure the equitable distribution of food supplies according to need, and that the policy measures adopted will respect, protect and fulfill the realization of the right to adequate food and freedom from hunger.

12. The Committee also calls upon States to pay attention to the longer-term structural causes of the crisis and to focus attention on the gravity of the underlying causes of food insecurity, malnutrition and undernutrition, that have persisted for so long.

13. The Committee urges States parties to address the structural causes at the national and international levels, including by:

- Revising the global trade regime under the WTO to ensure that global agricultural trade rules promote, rather than undermine, the right to adequate food and freedom from hunger, especially in developing and net food-importing countries;
- Implementing strategies to combat global climate change that do not negatively affect the right to adequate food and freedom from hunger, but rather promote sustainable agriculture, as required by article 2 of the United Nations Framework Convention on Climate Change;
- Investing in small-scale agriculture, small-scale irrigation and other appropriate technologies to promote the right to adequate food and freedom from hunger for all, including implementing the recommendations of the International Assessment of Agricultural Science and Technology for Development (IAASTD) of 2008 (See www.agassessment.org).
- Introducing and applying human rights principles, especially those relating to the right to adequate food and freedom from hunger, by undertaking ex ante impact assessments of financial, trade and development policies at both the national and international levels, to ensure that their bilateral and multilateral financial, trade and development commitments do not conflict with their international human rights obligations, particularly under the Covenant.
- Applying and reinforcing the FAO's "Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security", in the light of the present food crisis.

14. In conclusion, the Committee emphasizes that the world food crisis severely affects the full realization of the human right to adequate food and to be free from hunger, and therefore calls upon all States to fulfill their basic human rights obligations under the Covenant.

The statement is available on http://www2.ohchr.org/english/bodies/cescr/docs/cescr40/E.C.12.2008.1AEV.doc

Towards the adoption of the international complaints mechanism for enforcing socio-economic rights under the ICESCR

Over the years, there has been increasing support for an international complaints mechanism for socio-economic rights.

The optional protocol to the ICESCR process has been discussed in previous issues of the *ESR Review:* 7(1), 8(4) and 9(1).

The discussion on an optional protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) to create such a mechanism started as early as 1990. In 2003, an Open-Ended Working Group (OEWG) on an optional protocol to the ICESCR was established. Its mandate was subsequently extended in 2006, to facilitate the drafting of the optional protocol. The OEWG has held five sessions (in 2004, 2005, 2006, 2007 and 2008) during which it discussed various drafts. The second part of its fifth session, held from 31 March to 4 April 2008 in Geneva, marked the completion of the OEWG's mandate.

At the end of the second part of the fifth session, on 4 April 2008, states approved by consensus the draft optional protocol to the ICESCR and transmitted it to the Human Rights Council (HRC) for further consideration.

On 18 June 2008, at the end of its eighth session, the HRC adopted by consensus the optional protocol (UN doc.A/HRC/8/L.2/Rev.1/corr.1 (2008). The HRC recommended that the UN General Assembly adopts and opens for signature, ratification and accession the optional protocol, at a signing ceremony in Geneva in March 2009.

Selected provisions of the optional protocol

Scope and standing

Article 2 sets out who can submit communications and the scope of the optional protocol. Communications can be submitted by individuals, groups of individuals or other persons on their behalf. Such a communication must relate to a violation of any of the economic, social and cultural rights set forth in the ICESCR.

Admissibility

Under article 3, the Committee on Economic, Social and Cultural Rights (the Committee) can only consider a communication after all available domestic remedies have been exhausted, except where the application of such remedies is unreasonably prolonged. The exception to the exhaustion of local remedies rule that a communication may be declared admissible if local remedies are "unlikely to bring effective relief" has been deleted. Communications have to be submitted within one year after the exhaustion of such remedies, unless the author of the communication can show that it was not possible for him or her to submit the communication within this time frame [article 3(2)(a)]. Article 3 elaborates other grounds on which a communication may be declared inadmissible.

Communications not revealing a clear disadvantage

A novel addition is article 4, which gives the Committee discretion to, if necessary, "decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance". The inclusion of this provision was proposed by the United Kingdom (UK), supported by Australia, Canada, Denmark, Ireland, Japan, New Zealand, Norway, Poland, Sweden and the United States (US).

Interim measures

Under article 5, the Committee may ask a state party to a communication to give "urgent consideration" to a request to take interim measures "as may be necessary in exceptional circumstances" to avoid possible irreparable harm to the victim(s) of the alleged violation. This has to be done at any time after the receipt of a communication and before the final determination on the merits.

At the second part of the fifth session of the OEWG, a proposal by Norway and Sweden that the obligation of states parties to provide interim measures should be voluntary was rejected and not incorporated in the optional protocol.

Transmission of a communication

Article 6 deals with the transmission of a communication to the attention of the state party concerned, unless the communication is considered

inadmissible without reference to the state party. The receiving state party has to respond in writing within six months [article 6(2)].

Friendly settlement

Article 7 deals with friendly settlement. It requires the Committee to "make available its good offices to the parties concerned with a view to reaching a friendly settlement of the matter on the basis of the respect for the obligations set forth in the Covenant". A friendly settlement agreement closes consideration of a communication under the protocol [article 7(2)].

Examination of communications

Article 8 deals with the examination of communications. The relevant documentation that the Committee may consult when examining a communication are those emanating from other United Nations (UN) bodies, specialised agencies, funds, programmes and mechanisms, and other international organisations, including regional human rights systems, and any observations or comments by the state party concerned [article 8(3)]. In addition, the standard of review in socio-economic rights cases is that of reasonableness. Article 8(4) reads:

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

Follow-up of the views of the Committee

Article 9 requires a state party to submit to the Committee, within six months, a written response to its views and recommendations, including information on any action taken in the light of the views and recommendations. The Committee may invite the state party to submit further information on any measures taken in response to its views or recommendations in its subsequent state party report under the ICESCR [article 9(3)].

Interstate communications

Under article 10, the Committee is mandated to receive and consider communications from states parties. It should be noted that the interstate procedure is an "opt-in" one, as states parties have to declare that they recognise the competence of the Committee in this regard before the procedure can be applied against them.

Inquiry procedure

Articles 11 and 12 make provision for an inquiry procedure. Similar to the interstate procedure, the inquiry procedure is an "opt-in" one. Like the state complaints procedure, a state party has to declare that it recognises the inquiry procedure before it can be applied against the state concerned [article 11(1)]. This procedure will enable the Committee to respond to "grave or systematic violations" of the economic, social and cultural rights set forth in the ICESCR.

Protection measures

Article 13 requires a state party to "take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee".

International assistance and cooperation and the fund

Initially, the provision on international cooperation and assistance and the provision on the fund were dealt with in separate articles, but the draft protocol has now merged them, notwithstanding objections from Australia, Algeria, Belgium, Canada, Denmark, Egypt (on behalf of the Africa group), Japan, Sweden, the UK and the US.

Article 14 requires the Committee to transmit, when appropriate, to UN specialised agencies, funds and programmes and other competent bodies its views and recommendations concerning communications and inquiries that indicate a need for technical advice or assistance. However, this can only be done with the consent of the state party concerned [article 14(1)].

At the second part of the fifth session of the OEWG, the creation of the fund continued to be one of the most controversial issues. Australia, Canada, Sweden and the UK stated that the fund should not be created by means of the optional protocol. However, article 14(3) makes provision for the establishment of a fund to provide

> expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights in the context of the present Protocol.

In terms of this provision, states are the direct beneficiaries of the fund. In earlier drafts, victims were also beneficiaries.

Historical milestones of the optional protocol process

1990 – The Committee on Economic, Social and Cultural Rights started discussing the possibility of drafting an optional protocol to the ICESCR.

1993 – The World Conference on Human Rights adopted the Vienna Declaration and Programme of Action (UN doc. A/Conf.157/23). The declaration affirmed that "all human rights are universal, indivisible and interdependent and interrelated" and went on to declare that "the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis". It encouraged "the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights".

1996 – The Committee on Economic, Social and Cultural Rights finalised a draft optional protocol that was presented for consideration to the Commission on Human Rights (CHR) in 1997 (UN doc. E/CN.4/1997/105). In its decision 1997/104 of 3 April 1997, the CHR requested the Secretary-General to transmit the text of the draft optional protocol to states and intergovernmental and non-governmental organisations for their comments for submission to the CHR. Only a handful of states submitted comments.

2001 – The UN High Commissioner for Human Rights organised, in cooperation with the International Commission of Jurists, a two-day workshop on the justiciability of economic, social and cultural rights, with particular reference to an optional protocol to the ICESCR. (The report on the workshop is contained in UN document E/CN.4/2001/62/Add.2.) The same year, the CHR decided to nominate an independent expert on the question of a draft optional protocol to the ICESCR (CHR Resolution 2001/30).

2002 – Mr Hatem Kotrane, the independent expert, submitted his first report recommending the adoption of an optional protocol to the ICESCR (UN document E/CN.4/2002/57). The CHR renewed his mandate to allow him to study in greater depth the nature and the scope of states parties' obligations under the ICESCR, the question of the justiciability of economic, social and cultural rights, and finally the question of the benefits and practicability of a complaint mechanism under the ICESCR and the issue of complementarity between different mechanisms (CHR Resolution 2002/24). The Commission also decided that a working group "with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights" would be established.

2004 – First session of the Open-Ended Working Group.

2005 – Second session of the Open-Ended Working Group.

2006 – Third session of the Open-Ended Working Group. In addition, the mandate of the working group was renewed by consensus during the first session of the Human Rights Council (HRC) for a further two years so that it could draft the optional protocol to the ICESCR.

2007 – Fourth session of the Open-Ended Working Group. Presentation and discussion of the first draft optional protocol to the ICESCR prepared by the chairperson-rapporteur.

2008 – Fifth session of the Open-Ended Working Group, held in two parts. Presentation and discussion of subsequent drafts. At the end of the second part, the working group agreed by consensus to transmit the draft optional protocol to the HRC for its consideration.

– HRC adopts by consensus the optional protocol; and recommends that the General Assembly adopts it as well, and open it for signature, ratification and accession at a signing ceremony in Geneva in March 2009.

Source: http://www.escr-net.org (with amendments)

Conclusion

Once formally adopted by the UN General Assembly, the optional protocol will offer victims of socio-economic rights violations a new avenue for claiming these rights at the international level. In a nutshell, it will promote the better implementation of socio-economic rights. However, its full potential will not be realised unless states display the political will to implement the views and recommendations of the Committee.

This summary was prepared by **Lilian Chenwi**, the coordinator of, and senior researcher in, the Socio-Economic Rights Project.

For more information on the optional protocol see http:/www.opicescr-coalition.org.

Entry into force of the Disability Convention

The Convention on the Rights of Persons with Disabilities came into force on 3 May 2008, having received the 20th ratification instrument from Ecuador on 3 April 2008. South Africa ratified the Convention on 30 November 2007.

The Convention aims to elaborate in detail the rights of persons with disabilities and set out a code of implementation. According to article 1, persons with disabilities "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". The Convention does not explicitly define "disability", but recognises that it is "an evolving concept", which "results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" (preamble).

The principles of the Convention are laid down in article 3 as follows:

a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
b. Non-discrimination;
c. Full and effective participation and inclusion in society;
d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
e. Equality of opportunity;
f. Accessibility;
g. Equality between men and women; and
h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

By ratifying the Convention, states undertake to adopt appropriate laws, policies and other measures to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities, without discrimination of any kind on the basis of disability, and to abolish laws, regulations, customs and practices that constitute discrimination (article 4). They also commit themselves to combating stereotypes and prejudice and to promoting awareness of the capabilities of persons with disabilities (article 8).

Summary of rights

The Convention enshrines the following rights:

- equality and non-discrimination (article 5);
- freedom of expression and access to information (articles 7 and 21);
- life, liberty and security of the person (articles 10 & 14);
- equal recognition before the law and legal capacity (article 12);
- effective access to justice on an equal basis with others (article 13);
- freedom from torture or cruel, inhuman and degrading treatment or punishment (article 15);
- freedom from exploitation, violence and abuse (article 16);
- physical and mental integrity (article 17);
- freedom of movement and nationality (article 18)
- living independently and in the community (article 19);
- privacy (article 22);
- respect for the home and the family (article 23);
- education (article 24);
- health (article 25);
- work (article 27);
- an adequate standard of living (article 28);
- public participation (article 29); and
- cultural rights (article 30).

This Convention is relevant to South Africa because people with disabilities remain marginalised in the country. It is also relevant globally, as over 650 million people around the world live with disabilities. Statistics also show that an estimated 20% of the world's poorest people are those with disabilities; 90% of children with disabilities in developing countries do not attend school; an estimated 30% of the world's street children live with disabilities; and the literacy rate for adults with disabilities is as low as 3% (SAHRC, 2007).

This summary was prepared by **Siyambonga Heleba**, a researcher in the Socio-Economic Rights Project.

The Convention on the Rights of Persons with Disabilities is available on http://www.un.org/disabilities/convention/conventionfull.shtml.

Reference

SAHRC 2007. *Workshop on UN Convention on the Rights of Persons with Disabilities and consultation of the SAHRC Disability Convention Toolkit for Awareness Raising and Training.* Media release. South African Human Rights Commission, 3 December. Available at: http://www.sahrc.org.za/sahrc_cms/publish/article_293.shtml [accessed 25 May 2005].

Recommendations of the United Nations Special Rapporteur on Adequate Housing following his mission to South Africa

The United Nations (UN) Special Rapporteur on Adequate Housing, Mr Miloon Kothari, visited South Africa from 12 to 24 April 2007, with the aim of examining the status of the realisation of the right to adequate housing in the country. During his visit, he met with government representatives at state, provincial and municipal level, civil society organisations, social movements, academics and women's groups.

A press statement issued by the Special Rapporteur following his visit to South Africa was published in a previous issue of the *ESR Review:* 8(2).

He has now produced a report on this mission (UN doc. A/HRC/7/16/Add.3 of 29 February 2008). In the report, he acknowledges that the South African Constitution and legislation adequately recognise and protect the right of access to adequate housing and that the government has made significant progress in realising this right since the end of apartheid. The Special Rapporteur recommends that other states should draw on South Africa's experience in this field.

However, he notes that the government's approach to the implementation of housing laws has been fragmented, hampering the full realisation of the right to adequate housing.

Recommendations of the Special Rapporteur

The Special Rapporteur made the following recommendations:

Coordination among government departments

- South Africa should improve co-ordination among all government departments in charge of service delivery, such as water, sanitation and electricity, and institutions in charge of implementing housing, land, health and social services policies. This would ensure an integrated approach to housing that recognises the indivisibility of all human rights.

Implementation of housing policies

- A clear implementation strategy backed by rigorous monitoring and evaluation, and involving affected communities, should be formulated at each level of government and support organisations to implement housing policies.

Urban renewal

- The renewal of urban areas must take place in a way that genuinely promotes a socially and economically inclusive society.
- The redevelopment of urban areas must not be left only to market forces, as that could result in the exclusion of poor people from accessing housing and livelihoods, including essential public services.

Legal aid

- The government should provide sufficient legal aid funding for civil and administrative law proceedings so as to ensure that people whose economic, social and cultural rights have been breached have access to affordable and quality legal representation to enforce their rights and seek redress, where appropriate, as provided for in the South African Constitution.

Implementation of court judgments

- There is a need to monitor the implementation of court judgments that protect the right to housing.
- Given its mandate, the South African Human Rights Commission (SAHRC) should be provided with the necessary resources to monitor the implementation of court judgments related to the realisation of economic, social and cultural rights. This would accelerate progress in the fulfilment of these rights.
- The SAHRC should increase its monitoring and investigative work on the realisation and violations of economic, social and cultural rights.

Evictions

- The government should stop the introduction of new provincial Bills that seek to authorise evictions and the eradication of slums until all national, provincial and local legislation, policies and administrative actions have been brought into line with constitutional provisions, local judgments and international human rights standards that protect the human right to adequate housing and freedom from forced eviction.

- The authorities are urged to implement court judgments on the right to adequate housing and on forced evictions and to seek guidance from these judgments when formulating national, provincial and local housing law and policies.
- The authorities should prosecute all farmers who illegally evict farm workers. Human rights education is necessary to ensure that all citizens know about their right to housing and to protection against eviction.

Land

- The government should adopt, without delay, the recommendations of the 2005 Land Summit in order to facilitate the achievement of agreed land reform goals.
- The government should work with social movements, landless people, farming communities and other actors towards holistic agrarian reform.

Impact of mining projects

- The authorities should ensure that mining projects are in line with national regulations, and assess the impact of mining activity on local populations so as to avoid the forcible relocation of communities.
- Lease agreements for mining projects (like those in Limpopo province) that have been implicated in serious irregularities and human rights violations such as the contamination of water, forced displacements or evictions and the destruction of the livelihoods of people should be reviewed.

Consultation and participation

- There must be commitment across all levels of government to adequate consultation and participation by civil society in planning. This may require the provision of national and local funding for civil society organisations.
- The government should consider creating a mediation service, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and the Extension of Security of Tenure Act 62 of 1997, which would also carry out research into evictions that would be helpful to courts and those seeking advice on housing issues.

Basic services

- The government should consider allocating a greater share of the central budget to local municipalities, as part of its quest to extend the provision of municipal services.

Access to water

- The government should reconsider its policy on prepayment meters and associated financing arrangements, in the light of its obligation to improve equitable access to water.
- The government should consider developing a national water strategy, including the establishment of a national water regulator.

Equal opportunities in access to housing

- All possible measures should be taken to ensure equal opportunities in access to housing.
- There is an urgent need to restructure the availability of rental housing for low-income groups, to guarantee security of tenure for tenants and to formulate a specific national policy for groups with specific housing requirements (special housing needs).

Ratification of the ICESCR

- The government is encouraged to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR), so as to reflect in its international legal obligations the same progressive approach enshrined in its Constitution.

Observations and recommendations of UN bodies and special procedures

- The government should consider carefully the implementation of concluding observations formulated by the UN human rights treaty bodies, as well as the recommendations made by special procedures of the UN Human Rights Council.

This summary was prepared by **Lilian Chenwi**, the coordinator of, and a senior researcher in, the Socio-Economic Rights Project.

The Special Rapporteur's report on his mission to South Africa was presented at the seventh session of the Human Rights Council on 12 March 2007. The full report is available on http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm or http://daccessdds.un.org/doc/UNDOC/GEN/G08/110/55/PDF/G0811055.pdf?OpenElement.

Human rights groups call on South African government to immediately ratify socio-economic rights covenant

22 April 2008: The South African government has been urged to ratify the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), without delay by the Geneva-based Centre on Housing Rights and Evictions (COHRE), the Community Law Centre (CLC) at the University of the Western Cape and the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand.

Jean du Plessis, deputy director of COHRE, said:

> More than 13 years have passed since South Africa signed this essential international human rights treaty, yet South Africa still has not formally ratified it. In spite of repeated calls from domestic and international quarters, there appears to be no progress other than repeated empty promises by the relevant South African authorities. South Africa is facing criticism for inadequate delivery on socio-economic rights at home, and for not taking sufficient action to promote protection of those rights in neighbouring countries such as Zimbabwe. In this context there is no legitimate excuse for further delay; hence our urgent call for immediate ratification.

The ICESCR, together with the International Covenant on Civil and Political Rights, 1966 (ICCPR), and the Universal Declaration on Human Rights, constitute the "International Bill of Rights". The two covenants are binding on states parties and together constitute the cornerstone of international human rights law. South Africa has both signed and ratified the ICCPR, bringing into the South African legal order one of these two fundamental international human rights law elements. Yet for over 13 years there has been no visible progress towards ratification of the ICESCR by South Africa. During a recent review under the new United Nations Universal Periodic Review (UPR) mechanism, South Africa's failure to date to ratify the ICESCR was a source of considerable embarrassment for the government. A number of countries commented on this, and recommended speedy ratification.

Dr Jackie Dugard, acting director and senior researcher at CALS, said:

> For South Africa to have only ratified the one covenant and repeatedly failed to provide any credible explanation for its non-ratification of the second, reflects negatively on the country's reputation as a progressive force in the realisation of economic, social and cultural rights both locally and internationally.

South Africa is renowned for its protection of a broad range of economic, social and cultural rights in its Bill of Rights in the Constitution, and for the development of a nuanced, sophisticated jurisprudence on these rights. However, in practice, South Africa has on a number of fronts fallen short of effective, large-scale implementation of economic, social and cultural rights.

Du Plessis said:

> By ratifying the ICESCR, South Africa will unambiguously state its commitment to international human rights law and the effective realisation of socio-economic rights at home and abroad. Ratification can also provide further impetus to the government and to communities to tackle the persistent challenges of inequality and poverty.

COHRE and CLC sent a letter to the President of South Africa and several other high-ranking government officials in June 2007 highlighting the importance of ratifying the ICESCR. However, in spite of the letter and further queries, they have received no explanation as to the continued delay.

Dr Lilian Chenwi of the CLC said:

> The repeated lack of a public explanation by the government as to its failure to ratify the ICESCR is wholly unacceptable, especially considering that South Africa has been active in the drafting process of the optional protocol to the ICESCR. We urge the government to show that it is serious about economic, social and cultural rights in South Africa and internationally, by immediately ratifying the ICESCR.

Recent books on laws and policies on HIV and AIDS in Southern African countries

Mianko Ramaroson

AIDS and Human Rights Research Unit 2007. *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law.* Pretoria University Law Press.
and
F Viljoen and S Precious (eds) 2007. *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa*. Pretoria University Law Press.

Two books have been published recently that review and analyse the state of laws and policies on HIV/AIDS in nine Southern African countries. These are: (1) AIDS and Human Rights Research Unit 2007. *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law.* Pretoria University Law Press; and (2) F Viljoen and S Precious (eds) 2007. *Human rights under threat: Four perspectives on HIV, AIDS and the law in Southern Africa.* Pretoria University Law Press.

The first book focuses on the legal and policy framework pertaining to HIV/AIDS in Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. It covers a wide range of people (sex workers, women, children, prisoners and men who have sex with men), rights (privacy, equality and non-discrimination, labour rights and access to health care), sources of law (international law, regional law, statutory law, case law, customary law and policy documents) and issues (including medical experimentation, access to condoms, disclosure of one's HIV status, immigration, and government support for persons living with and families affected by HIV/AIDS) in each country under review.

The lack of coordination of the legal measures and policies addressing HIV/AIDS issues is identified as a common problem in all countries under review.

Although the information relied on is partly outdated and the quality of the chapters is uneven, the book provides a comprehensive snapshot of the state of laws and policies in the nine countries under review. It indicates the areas where these countries have made substantial progress in creating an adequate legal and policy framework to address HIV/AIDS, and areas that require further interventions. The lack of coordination of the legal measures and policies addressing HIV/AIDS issues is identified as a common problem in all countries under review. The book also points to the inadequate protection of women as a common problem. While most of the countries under review have adopted legislation and policies to enhance women's position in society as required by international law, they have not repealed those laws and policies that increase women's vulnerability to HIV infections (eg several harmful traditional practices).

Furthermore, the book notes that even in areas where adequate laws and policies have been adopted, implementation remains problematic. However, it does not systematically analyse the obstacles to effective implementation of the existing laws and policies.

The areas of concern highlighted in the book include:

- inadequate access to condoms, especially in prisons;
- the unsatisfactory use by the states concerned of the

flexibilities afforded to poor countries under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);

- the slow movement towards recognising the compulsory disclosure of one's HIV status to sexual partners;
- the continued reliance on non-binding policies rather than legislation in areas such as employment;
- the practice of routine HIV testing of individuals attending public health facilities;
- the insufficient legal protection of women;
- the growing number of child-headed households; and
- the practice of compulsory pre-employment testing in the army.

Four of the issues highlighted in the first book are analysed in greater detail in the second, leaving the others open for further research. These are:

- the criminalisation of the wilful transmission of HIV;
- the practice of routine HIV testing of individuals attending public health facilities;
- prisoners' access to HIV prevention and treatment; and
- the regulations on intellectual property and their potential effects on access to treatment.

The aim of Viljoen and Precious, as they point out in the introductory chapter, is to stimulate the debate on these issues within the Southern African Development Community (SADC) and inform the drafting of model legislation and other legal responses by SADC and individual member states.

Both books are highly recommended for any person working in the field of HIV/AIDS in Southern Africa. They are useful tools for HIV/AIDS advocates and campaigners.

Patrick Eba, in the chapter on the criminalisation of the wilful transmission of HIV, notes that all criminal laws adopted for this purpose have raised more difficulties than provided solutions. Criminal sanctions "disproportionately affect members of vulnerable and marginalised groups, fuel stigma and discrimination, threaten public health messages and create the potential for human rights violations" (p 51). However, he notes that criminal law can be an effective tool in addressing the pandemic in Southern Africa if it "successfully incapacitates and deters" those who spread HIV (p 51).

Nyasha Chingore, in the chapter on the routine testing of individuals attending public health facilities, argues that although routine testing for HIV is practised in many Southern African countries, the environment is not conducive to treatment and therefore does not warrant the restrictions on human rights occasioned by such routine testing. She further observes that there are no clear guidelines on the implementation of routine testing for HIV in Southern Africa.

Babafemi Odunsi, in the chapter on prisoners' access to HIV prevention and treatment, observes that many prisoners in Southern Africa do not have access to condoms or antiretroviral treatment. He argues that such lack of access constitutes a threat to public health. He identifies the criminalisation of sodomy in the majority of Southern African countries as the main obstacle to accessing condoms and antiretroviral medicines in prisons. However, the chapter fails to consider the role of the scarcity of resources in this problem.

Dorothy Mushayavanhu, in the final chapter on access to HIV/AIDS-related medicines, observes that high drug-pricing has restricted access to HIV/AIDS treatment in developing countries, including Southern African countries. She provides some useful insights into how TRIPS and the Doha Declaration can be used to assist poor countries in making antiretroviral treatment available to their people.

Both books are highly recommended for any person working in the field of HIV/AIDS in Southern Africa. They are useful tools for HIV/AIDS advocates and campaigners. They highlight the importance of protecting and respecting human rights when designing and implementing HIV-related measures and caution against "short cuts" in addressing the pandemic.

Mianko Ramaroson is a doctoral candidate at the Centre for Human Rights, University of Pretoria.