ESR REVIEW
Vol 3, No. 3 November 2002

TABLE OF CONTENTS:
Editorial
Feature Articles
Non-state actors' responsibility for socio-economic rights
Legislation And Policy
Reforming communal land tenure in South Africa
International Developments
The World Summit on Sustainable Development
The UN General Assembly Special Session on Children
Cases
The applicability of the Prevention of Illegal Eviction Act: Ndlovu v Ngcobo and Bekker & Bosch v Jika
Events
An individual complaints procedure under the International Covenant on Economic, Social and Cultural Rights
Workshop on HIV/Aids and the infant's right to nutrition
Book Review
Exploring the core content of socio-economic rights: South African and international perspectives

Non-state actors' responsibility for socio-economic rights:

The nature of their obligations under the South African Constitution

Danwood Mzikenge Chirwa

The concept of human rights has traditionally been applied to relations in the public sphere. The dominant view has been that the state/individual relationship involves unequal power dynamics between parties. A state's potential to abuse its position of authority to the detriment of an individual's interests was the basis for human rights to insulate the latter against state interference.

By contrast, relationships in the private sphere have been regarded as being based on a degree of parity between free and autonomous parties. This reasoning has been largely responsible for the failure to apply human rights in relationships between private parties.

However, it is being increasingly acknowledged that limiting the application of human rights to vertical relationships is no longer sufficient to ensure their protection. Non-state actors such as multi-national corporations and insurgents have committed, and continue to commit, massive violations of human rights. The rights of women and children have also suffered serious infringements within the context of private relations. More recently, the increasing privatisation of basic services is also concerning.

These developments, among others, provide a basis for the extension of the application of human rights to private actors.

The concept of human rights is a tool of emancipation. It has evolved over time through the struggles of people against certain forms of domination in specific geopolitical, social and economic circumstances. It is a concept that is not static but dynamic and responsive to changing circumstances. In modern times, to inoculate private actors against human rights responsibility would only serve to ridicule the human rights idea itself.

The 1996 Constitution of South Africa has been at the forefront of recognising the human rights obligations of private actors. Other African constitutions that have done similarly include those of Malawi (1994), the Gambia (1996), Cape Verde

(1990), Ghana (1992) and Mali (1992). In addition to explicit constitutional provisions, obligations may also be imposed on non-state actors indirectly through legislation.

However, a serious constraint to the effective horizontal application of human rights has been the failure to establish the precise nature of the obligations of non-state actors, particularly in the realm of socio-economic rights. This brief contribution seeks to use the South African Constitution as a case study to investigate the nature of obligations that non-state actors have in relation to socio-economic rights.

The international framework

Although international law is chiefly aimed at regulating inter-state relations, emerging trends point to an increasing recognition of the socio-economic rights obligations of non-state actors. The preamble to the Universal Declaration of Human Rights establishes the basis of such responsibilities by providing that 'every individual and every organ of state?shall strive?to secure' the universal and effective recognition and observance of all human rights. This statement excludes neither judicial persons, nor natural persons. Significantly, it implies that private actors may shoulder more than the negative obligation engendered by human rights.

Several human rights instruments, including the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, and the African Convention on the Rights and Welfare of the Child, impose duties directly on private actors such as individuals, children, parents and communities. Some of these duties relate to socio-economic rights and entail both positive and negative aspects.

The International Covenant on Economic, Social and Cultural Rights expressly declares that the individual is 'under responsibility to strive for the promotion and observance of the rights' recognised under it. The Committee on Economic, Social and Cultural Rights (CESCR), which is entrusted with the supervision of this Covenant, has stated unambiguously in General Comment No. 12 (the right to food) that 'all members of society - individuals, families, local communities, non-governmental organisations, civil society organisations, as well as the business sector - have responsibilities in the realisation of the right to adequate food'. The CESCR has made similar comments on the right to health.

The International Labour Organisation (ILO) has perhaps broken more ground than any other international human rights body in imposing direct obligations on non-state actors, especially in relation to labour rights. Some of the instruments adopted under the auspices of the ILO call upon multinational companies to:

- create employment opportunities;
- promote equality;
- ensure security of employment;
- provide favourable conditions and work place safety; and
- protect freedom of association and the right to organise in host countries.

Although not always wholly explicit, these instruments and many others not specifically mentioned here recognise that private actors have both negative and positive obligations in relation to socio-economic rights.

The international framework has significant implications for the horizontal application of socio-economic rights in the South African Constitution. Section 39(1)(b) of the Constitution obliges the courts to consider international law in interpreting the Bill of Rights.

The South African constitutional framework

The 1993 South African Constitution, the forerunner to the 1996 Constitution, did not contain clear provisions on the application of the Bill of Rights to horizontal relationships. Section 7(1) provided that the Bill of Rights binds 'all legislative and executive organs of the state at all levels of government'. The omission of the judiciary from this section generated mixed judicial pronouncements on whether the Bill of Rights had horizontal effect.

This scuffle was laid to rest by the Constitutional Court in Du Plessis v De Klerk 1996 (3) SA 850 (CC). The majority view of the Court in this case was that the interim Bill of Rights did not lend itself to direct horizontal application. Rather, it was relevant only indirectly as regards private parties. The implication of the judgment was that the interim Bill of Rights was only relevant in the development and application of the common law.

Section 8 of the 1996 Constitution is markedly different from its predecessor. Section 8(1) expressly states that the Bill of Rights binds 'the legislature, the executive, the judiciary and all organs of state'. More explicitly, subsection 2 provides that a provision in the Bill of Rights binds both 'natural and juristic' persons if, and to the extent that, it is applicable. Interestingly, subsection 4 gives express recognition to the possibility of juristic persons having rights if the nature of the juristic person and the nature of the right are such that the juristic person can claim the right.

In terms of section 8(3), when a right has horizontal effect courts are enjoined to apply or, if necessary, to develop common law to the extent that legislation does not give effect to the right in question. Courts are further obliged by section 39(2) to promote the spirit, purport and objects of the Bill of Rights when developing common law or customary law or when interpreting the Constitution.

In addition to sections 8 and 39(2), several other specific provisions favour a horizontal application. For example, section 9(4) expressly provides that, 'No person may unfairly discriminate directly or indirectly against anyone' on any ground listed in subsection 2. The horizontal application of the equality provision was given further credence in the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000. Section 24(2) of the Act provides that 'All persons have a duty and responsibility to promote equality'. Thus, both the Constitution and the Act prohibit private actors from discriminating unfairly and specifically oblige them to promote equality. It is clear that the horizontal application of these provisions is a useful tool in protecting and advancing access to socio-economic rights.

Section 32(1)(b) explicitly applies to private relations only. It provides that everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights. This right is critical to the advancement of socio-economic rights. For example, individuals are entitled to ask a manufacturing company to provide relevant information in respect of pollution in the local community within the vicinity of the company's operations.

Last, but not least, section 29(3) specifically places an obligation on any person who establishes an independent educational institution to maintain standards of education that are not inferior to those of comparable public education institutions.

Horizontal application of socio-economic rights in the Constitution

According to section 8(2), the determination as to whether a given provision is applicable to a non-state actor turns on the nature of the right and the nature of the duty imposed by the right.

Suggestions that this section permits the application of socio-economic rights to private actors have elicited spirited resistance from leading South African scholars such as Dennis Davis, Halton Cheadle, Stuart Woolman and Alfred Cockrell. The basis of their objection lies in the broad characterisation of socio-economic rights as entitlements that flow from a social democratic vision of the role of the state. This vision, they argue, views the state as the sole provider of basic services and goods necessary to facilitate basic equality of the citizenry, which, in turn, is essential to achieving equal and fair participation in democratic processes. This duty is generally considered extremely onerous. Thus, they argue, the state is better placed to realise these rights on a progressive basis.

However, the fact that socio-economic rights generally serve as a vehicle for facilitating social equality and that the state is the key player in securing that goal cannot be used to downplay the responsibility of other actors in the attainment of this vision.

Various socio-economic rights embodying different kinds of duties contribute to this ultimate objective in different ways. Thus, each right must be examined on its own in the light of the obligations it generates. This conclusion is consistent with section 8(2) which intimates that 'a provision in the Bill of Rights' may apply to private actors.

Furthermore, the full enjoyment of certain rights requires that actors discharge various levels of duty. For example, children's socio-economic rights can be realised better by the concerted efforts of parents/caregivers and the state. The combination of efforts of various duty holders in the realisation of socio-economic rights does not diminish the state's overall responsibility to ensure that there is respect for the inherent dignity of all and that society becomes more egalitarian. On this basis, the argument that socio-economic rights are generally incapable of horizontal application is wrong in principle. Each right must be assessed on its own in the light of the duties it embodies to determine whether it has horizontal reach.

Implications of the socio-economic rights jurisprudence

Section 26(1) of the Constitution entrenches the right of access to adequate housing while section 27(1) guarantees the right of access to health care services, sufficient food and water and social security. Subsection 2 of both these sections enjoins the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

In both Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC) (Grootboom) and Minister of Health and

Others v Treatment Action Campaign and Others 2002 10 BCLR 1033 (CC) (TAC), the Constitutional Court refused to hold that subsection 1 of either section 26 or section 27 created self-standing rights. The Court reasoned, on both occasions, that the qualifications contained in subsection 2 - 'progressive realisation', and 'within available resources' - could not be separated from the rights provided for in the first subsection.

This interpretation could be broadly construed to imply that it is the state alone that has obligations in respect of these rights since subsection 2 of both sections singles out the state as the sole duty holder. This construction does not sit well with the emerging trend in international human rights law discussed above, nor with other specific pronouncements in the judgment.

A restrictive construction of both judgments would lead to the opposite conclusion. As shown above, international law has cogently established that the negative duty to respect socio-economic rights is sacrosanct. This obligation exists independently from the internal qualifiers of socio-economic rights. In South Africa, this negative obligation was explicitly recognised by the Constitutional Court in Re Certification of the Republic of South African Constitution 1996 1996 (4) SA 744 (CC).

Significantly, it was held in Grootboom that, in the context of the right of access to adequate housing, there exists 'at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right to access to adequate housing'. In the same case, the Constitutional Court surmised that the right of access to housing suggested that 'it is not only the state that is responsible for the provision of houses'.

These dicta confirm the position that private actors have both negative and positive obligations relating to socio-economic rights. However, these duties do not emanate from subsection 2. On this basis, it is arguable that subsections 1 of both section 26 and section 27 are self-standing, at least as regards private actors. This interpretation is distinguishable from state obligations in respect of which, as the Constitutional Court recognised, subsection 1 and 2 must be read together.

The interpretation proposed would also accord with a horizontal application of trade union rights and labour rights, entrenched in section 23, and environmental rights, recognised under section 25 of the Constitution.

The socio-economic rights obligations of the state

It is settled that human rights generate four levels of duties: to respect, protect, promote and fulfil. The South African Constitution has expressly acknowledged these duties in section 7(2). For the most part, these duties have been defined in relation to the state.

Thus, the duty to respect obliges the state to refrain from interfering in the enjoyment of all fundamental rights. The duty to protect requires the state to protect right holders against other subjects through measures such as the adoption of legislation and the provision of effective remedies. Furthermore, this obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic, and social interferences.

The duty to promote enjoins the state to ensure that individuals are able to exercise their rights and freedoms through promoting tolerance, raising awareness and building an appropriate infrastructure. The duty to fulfil is intricately connected with the duty to promote, although the former requires more positive action by the state to ensure the actual realisation of a right.

Thus, the duty to respect is negative in nature while the other three duties require positive action (though varying in degree). These duties apply to civil and political rights as they do to socio-economic rights. It is submitted that these obligations, with certain modifications, are capable of application to private actors as well.

Duties of non-state actors

Section 8(2) states that a provision in the Bill of Rights might apply to natural and juristic persons 'to the extent' that it is applicable, depending on, among other things, the nature of any duty embodied in the right. This provision does not mean that a private actor is responsible for all the layers of duty in order for a right to apply to it. Instead, it recognises that rights might need concerted action by several actors for them to be fully realised. It also implies that some actors should bear greater obligations than others.

It is submitted that the 'state action' paradigm could serve as a useful basis for distinguishing the level of responsibility of non-state actors for socio-economic rights. Strictly speaking, this standard has conventionally been used to determine whether a given private actor should be held liable for human rights violations. Thus, a plaintiff would not succeed in suing a non-state actor unless he or she has established that the conduct of the non-state actor amounted to state action or was linked to the state.

Thus, private actors exercising the functions of the state would be held liable for human rights violations. Non-state actors wielding particularly oppressive power, although not linked to the state, would likewise be liable for human rights violations under this paradigm.

This benchmark could be used to differentiate the positive obligations of various private actors, depending on the right and the nature of the obligations involved. Thus, a private actor carrying out the functions of the state would bear the latter's responsibilities. Similarly, a private actor not linked to the state but exercising power akin to or greater than that of the state should be bound by the same standard as the state would. The 'state action' test could be extended to bind private actors who, however small, hold positions that can result in serious denials or violations of socio-economic rights.

Conclusion

Times have changed. We certainly live in the world that was lived in some two centuries ago, but the circumstances are different. People now face different challenges in their day-to-day lives. As with time, the concept of human rights is not static. It has historically played the role of liberator from oppression. It certainly cannot resist emancipating the masses from the new forms of domination and oppression that have emerged in the globalised world.

Private actors have obligations to discharge in order to ensure meaningful enjoyment of socio-economic rights. International law is moving in the direction

of imposing enforceable obligations in this regard. The South African Constitution offers a useful opportunity for holding private actors accountable for socio-economic rights.

Although still rudimentary, international law and the South African Constitution suggest that the obligations of non-state actors for socio-economic rights have both negative and positive aspects. In principle, there is no socio-economic right that can be said to bind the state only. All private actors are enjoined, at the very minimum, to respect socio-economic rights.

The difficulty, however, lies in distinguishing the levels of positive obligations among private actors given that these duty holders are different in character and nature. This contribution has suggested the adoption of the 'state action' benchmark in this regard.

With litigation and further research on the subject, it is hoped that the precise obligations of non-state actors relating to socio-economic rights will emerge.

Danwood Chirwa is a research fellow in the Socio-Economic Rights Project, Community Law Centre, UWC.

RELEVANT INFORMATION
This article is an abridged version of the Community Law Centre's research paper on 'Constitutional obligations of non-state actors in the realisation of socio-economic rights in South Africa'. The full version of the paper can be accessed on the website at: www.communitylawcentre.org.za.

Reforming communal land tenure in South Africa:

Why the draft Communal Land Rights Bill is not the answer

Ben Cousins

The long-awaited draft Communal Land Rights Bill (the draft Bill) sets out the government's proposals for resolving urgent land tenure problems in the former 'homeland' areas. The draft Bill has special significance for rural South Africans, most of whom still live in homeland areas, where land is registered in the name of the state.

Land tenure problems derive from a lack of adequate legal recognition of communal tenure systems, abuse by powerful elites, the breakdown of the old permit-based system and gender inequalities. They often result in conflicting claims to land and bitter disputes over authority. Development efforts are severely constrained by a lack of clarity on land rights and the resultant tensions.

Does the draft Bill provide appropriate solutions?

The answer is 'no'. On the contrary, it will most probably exacerbate them. Despite some real improvements on earlier versions, the draft Bill adopts a wholly inappropriate approach to communal land tenure reform by placing undue emphasis on the issuing of land titles, either to groups or to individuals, after transfer of ownership from the state. The consequences of this policy could be disastrous.

However, the draft Bill does contain a few useful provisions such as those for resolving problems of forced overcrowding and conflicting rights through acquiring additional or alternative land. Through these provisions, government would be able to discharge, in part, its constitutional obligations to provide either security of tenure or 'comparable redress'. They also give tenure reform a welcome redistributive thrust.

The published draft Bill is also much less overtly pro-chief than earlier versions, with a maximum of 25% of positions on local administrative bodies to be occupied by traditional leaders, in an ex-officio capacity. Perhaps in response to widespread public criticism, the transfer of state land to 'tribes', effectively under the control of traditional authorities, is no longer explicitly provided for. However, the danger of land grabbing by elites remains.

Learning from the African experience

The most extensive land titling programme has been attempted in Kenya. Beginning in the 1950s and continuing after independence, communal land was registered in the names of individuals and title deeds were issued. However, the anticipated consequences of land titling have not been achieved to date.

A free market in land has not materialised. The availability of credit to small farmers has not increased and land registers have increasingly become outdated. On the contrary, land concentration, inequalities in agricultural income, landlessness and rural-urban migrations have all increased, with local elites reaping lucrative benefits from the titling policy at the expense of the poor. Increases in agricultural production have occurred in some areas, but these are not linked to the holding of individual title.

An ambitious attempt to replace the indigenous tenure system with Western-style property rights has therefore failed dismally. Community-based patterns of allocation and inheritance have persisted even where all land is nominally held under individual freehold.

Where titles to ranches were issued to groups of pastoralists, the result was boundary disputes over seasonal grazing, fragmentation of communities and growing inequality following elite manipulation of titling processes. The costs of both individual and group titling programmes have been enormous, but the net benefits have been minimal.

Learning from the South African experience

In South Africa, group titles have been issued to over 500 Communal Property Associations (CPAs) and community trusts since 1996, but many of these are now dysfunctional. Constitutions were poorly drafted and misunderstood by members, and rights of individual members were poorly defined. These inadequacies have resulted in endemic infighting. In some cases, traditional leaders have contested the authority of elected trustees. In others, elites have captured the benefits of ownership. There are notable exceptions, of course, but the overall experience has been disillusionment for many in the land reform sector.

The cause of these problems is not the fact that CPAs are a form of shared land holding. Many people desire a system of group tenure. This system has proved resilient and persistent in Africa and elsewhere. The real reasons are twofold.

First, as in Kenya, there is a fundamental mismatch between the titling model and the realities of African land tenure.

Second, the support provided to these groups by government, both in the initial stages of establishment and subsequently, has been completely inadequate.

There are a few situations where titling and the formation of CPAs may be appropriate. In the past, some groups bought farms but were never allowed to own them because of discriminatory laws. If such groups now desire full title, then this option should be open to them. They may be prepared to bear the costs and undergo the arduous process of obtaining a title deed. However, these are a minority of cases of tenure insecurity. Solutions that are relevant to them should not form the main thrust of tenure reform policy.

Why titling is generally inappropriate and ineffective

Titling is based on Western notions of ownership, which assume that property rights are absolute and exclusive. Surveyed boundaries demarcate where land rights begin and end. Title deeds are held in a central registry, are updated when ownership changes hands and provide certainty in case of disputes, which are resolved through the courts.

In contrast, African systems of land tenure are based on the principle that everyone within the community of origin has rights to land, but that individual rights are balanced against their obligations to the social group. Rights are thus shared and relative. Systems tend to be inclusive, not exclusive, and rights and obligations are held at a number of levels of social organisation, from the neighbourhood to the village and to the larger community.

Rights in community-based land tenure systems can be very secure. Significantly, these systems ensure that access to land is available as a vital safety net for the poor. They are not necessarily a barrier to investment and development, nor to land transactions such as sharecropping, leasing or sale. They tend to evolve over time, adapting to changing social and economic conditions. The key to their resilience in Africa is people's preference for socially regulated access to resources.

Unintended consequences of titling programmes

Private ownership of land, whether for the individual or the group, undermines the principles underlying African tenure. In particular, it assumes that clear and exclusive boundaries can be defined, both socially and physically. The nesting of rights at different levels of social organisation is denied. This means that the inevitable result of titling is to create massive boundary disputes, both between adjacent communities and within levels of social and political organisation such as villages and wards.

Private ownership is dominant in South Africa's economy, and private ownership of land by groups conveys significant advantages to those who wield much power within the group. As shown in Kenya and elsewhere, land titling creates very high stakes and tends to generate power plays within groups. It thus creates the danger that powerful interest groups, including chiefs, will hijack tenure reform.

Why the draft Bill will not be effectively implemented

Titling programmes in Africa have proved ineffective because they are costly, time-consuming and make huge capacity demands on government. The draft Bill is no exception. It sets out a complex process, involving some thirty administrative steps, before land can be transferred from the state to a community or to individuals. These involve rights inquiries, consultations, mediation, rule making, appointment of administrative structures and survey and registration.

Given its experience in relation to CPAs, it is unlikely that the Department of Land Affairs, already suffering from a severe staff shortage, will be able to process more than a hundred transfers per year. At that rate, it will take 200 years to transfer land to the estimated 20 000 rural communities in the ex-homeland areas. In the meantime, the majority will continue to enjoy only the minimum recognition and protection of land rights afforded by the interim legislation passed in 1996, which the draft Bill seeks to make permanent.

Even these estimates of delivery time are over-optimistic. It is more likely that the debilitating boundary disputes and power plays for authority over land will overwhelm the capacity of an already weak and understaffed department battling to meet its targets for land redistribution and restitution.

A policy of transferring title from the state to its rightful owners seems attractive at first sight. It appears to close the gap between the 'first world system' of private ownership enjoyed by the rich and the middle class and the 'second class' system of communal tenure forced upon poor Black South Africans in the past.

However, experience indicates that titling would be expensive, time consuming, dominated by land grabbing elites, and will not create tenure security. The results would be unlikely to 'stick', creating a new gap between the law and realities on the ground. As with Rural Development Programme houses, transactions in land would continue to take place outside the deeds registry system.

The alternative to titling

New land tenure laws in Mozambique and Tanzania, in both cases adopted after lengthy and painstaking processes of public consultation, demonstrate the way forward. They recognise and protect existing occupation and use of communal land, and give them the status of property rights, without requiring their conversion to Western, exclusive notions of private ownership. Rights are vested in the people who occupy the land, and the law enables the rights holders to further define and record these rights at the local level.

Security of tenure in legal terms is not created on a case-by-case basis, as the draft Bill requires. Rather, it is established everywhere at once, after enactment of the law. To become a reality on the ground, however, support must be provided to local processes of defining, negotiating and administering rights and obligations. Officials have to be available to assist local bodies and group members to define and record their rights and to resolve disputes. This is costly, but not as expensive as titling.

Would such an approach reproduce the two-tier and discriminatory tenure systems of apartheid? If all land vested in the state, as in Mozambique and Tanzania, this would not be an issue, since one system would govern all citizens. Nationalisation of land may not be a feasible option in South Africa, but neither is

the draft Bill's proposal to extend the model of exclusive ownership to the whole country.

Recognising existing rights and providing institutional support for community-based systems should be one of the options available to South Africans within a unified but diverse system of property rights. Alternatives to exclusive ownership already exist, such as sectional title and share-blocks, which allow forms of shared property rights. Legislation protects tenants and occupiers from the arbitrary actions of owners, as demonstrated in Ndlovu v Ngcobo and Bekker & Bosch v Jika, Case No. 136/2002 (unreported at the time of writing). (For a discussion of this case see pages 14-17 in this edition.)

All these tenure options need to be placed on an equal footing, supported by the law, government and an array of service providers.

Major shifts in understandings of property rights are now taking place in Western societies. Environmental law, in particular, increasingly places property owners under a variety of obligations to society at large, as our shared interests in the commons begin to be acknowledged. Notions of exclusive and absolute ownership are giving way to ideas about shared and relative rights, socially regulated by institutions of democratic governance. Community-based systems and locally held records, rather than titling, need not be seen as second-rate - but the state needs to provide these with appropriate legal recognition and dedicated institutional support.

The draft Bill does not do this. Instead, it promotes a land titling approach that has failed throughout Africa and will definitely do so here as well.

Ben Cousins is the Director of the Programme for Land and Agrarian Studies, School of Government, UWC.

RELEVANT INFORMATION
The Communal Land Rights Bill can be accessed at:
www.gov.za/bills/index.htm#drafts

The World Summit on Sustainable Development:

Implications for socio-economic rights in South Africa

Collette Herzenberg

The World Summit on Sustainable Development (WSSD) took place from 26 August-4 September 2002 in Johannesburg, South Africa. The resultant Plan of Implementation (the Plan) has placed socio-economic rights high on the global development agenda. The Plan affirms that sustainable development is not an end in itself but a means of realising human rights. Sustainable development relies on the integration of three interdependent and mutually reinforcing components: economic development, social security and environmental protection.

Recognising linkages between social security and economic development offers a platform for tackling poverty. Similarly, appreciating the connection between poverty and environmental degradation ensures that any plan to sustain

environmental protection has the protection of socio-economic rights at its centre.

Global and local policy-makers need to embrace these three aspects if sustainable development is to be achieved. This new approach to policy formulation has great potential for the effective realisation of socio-economic rights. However, as with all global initiatives, broad commitments in the Plan might not be sufficient to ensure the realisation of socio-economic rights.

What does the Implementation Plan offer to socio-economic rights?

The Plan is the main document emanating from the WSSD. It emphasises several conceptual areas that drive the global sustainable development programme, all of which are committed to the realisation of socio-economic rights. These include:

- poverty eradication;
- changing unsustainable patterns of consumption and production;
- protecting and managing the natural resource base of economic and social development; and
- health and sustainable development.

Section VIII of the Plan addresses issues of sustainable development specifically for Africa. It deals with challenges such as poverty, globalisation, insufficient investments, conflict, HIV/Aids and debt burdens. Targets are set which, if met, will have a direct impact on the economics and security of the continent. These targets include:

- halving the numbers of people with an income of less than $1 a day by 2015;
- halving the proportion of people living in poverty by 2015;
- improving the lives of 100 million slum dwellers by 2020;
- halving the proportion of the world's population suffering from hunger and ensuring a standard of living adequate for health by 2015;
- reducing the HIV/Aids prevalence among people aged 15-24 years by 25% in the most affected countries by 2005, and globally by 2010;
- achieving universal primary edu-cation for children by 2015; and
- achieving gender equality in primary and secondary education by 2005.

These aspirations are laudable, particularly in view of their quantifiable character. The specific goals will also contribute to the effective monitoring of their implementation. The Plan outlines an institutional framework incorporating bodies at the international, regional and national levels, tasked with implementing the goals of the Summit. They are obliged to integrate the outcomes and principles of sustainable development in all policies, legislation, work programmes, operational guidelines and activities.

Implementation at the international level

The Plan urges the United Nations (UN), international financial institutions and the World Trade Organisation to strengthen collaboration and assimilate sustainable development goals into programmes and policies with a special focus on social issues. The final responsibility for, and supervision of, implementation at the international level lies with the UN.

The General Assembly and the UN Social and Economic Council are singled out as co-ordinating bodies. An enhanced role is envisaged for the Commission on Sustainable Development. It is responsible for reviewing and monitoring activities.

The Plan outlines a stronger and more coherent international system to govern sustainable development. It reaffirms the role of the UN in this regard and proposes institutional reform within the UN structure to streamline the issues into policy objectives. However, the mechanism for holding these international institutions accountable is unsatisfactory given that implementation will rely chiefly on UN recommendations and the goodwill of other institutions.

Implementation at regional and national level

The Plan stresses that implementation goals should be actively pursued at the regional level through relevant commissions and bodies. Consequently, resolutions taken at the WSSD oblige African states and regional organisations to focus on a set of new priorities. The African Union (AU), for example, will need to focus not only on conflict resolution, but also on developmental and technological issues pertaining to the provision of basic services such as electricity, water, food and education.

The Plan also places enormous responsibilities on individual states to promote institutional frameworks for sustainable development through policy-making and law enforcement. It stipulates a timeframe for the implementation of national strategies, beginning in 2005. Emphasis is placed on poverty reduction strategies that integrate/incorporate economic, social and environmental aspects of sustainable development.

Consequently, each country is responsible for its own sustainable development framework, thereby emphasising national policies and development strategies as major vehicles for development. Empowering local level decision-makers is a crucial feature of the Plan. Governments are required to establish councils in local government and ensure capacity to provide a high-level focus on sustainable development policies.

For effective delivery, government institutions must be strengthened to promote transparency and accountability. Systemic political malpractice, such as corruption and a lack of transparency, result in misallocation of resources, frustrate funded projects and disrupt projects from realising their intended objectives. Measures to counteract such malpractices will depend largely on the political will of African governments to promote meaningful public participation and access to information on legislation and policies. However, governments also need to introduce appropriate governance mechanisms to hold decision-makers accountable for sustainable socio-economic delivery at the local and national levels.

The role of Nepad

The WSSD also reached agreement on supporting concrete actions for the implementation of the New Partnership for Africa's Development (Nepad). The AU introduced Nepad as the main vehicle to address socio-economic inequalities in the region. It is difficult to discuss socio-economic rights without examining the political and economic context within which they must be realised. Close attention must accordingly be given to the implementation of Nepad to ensure it has

positive ramifications for realising socio-economic rights in South Africa and other countries in the region.

Nepad presents a challenge to the enjoyment of socio-economic rights. The overarching question is whether the state should intervene in socio-economic issues and if so, to what extent this should be done, or whether it should be left to the impersonal pressures of the market. Nepad ascribes to economic policies that require less state intervention and further privatisation. It invites private capital as a means of meeting the developmental needs of a country. The unrestrictive pursuit of these policies might undermine socio-economic rights to regrettable levels.

To ensure real progress towards poverty eradication, Nepad has the enormous task of establishing ground rules, gaining global consensus and ultimately addressing the relevant issues. Major challenges include securing fair trade agreements, facilitating access to international markets by developing countries and debt relief. South African policy-makers need to analyse the social impact of national and international policies and change spending patterns to reflect developmental as opposed to political or commercial priorities.

Implications for socio-economic rights in South Africa

The realisation of socio-economic rights in South Africa presents a challenge not only in terms of WSSD outcomes but also in terms of the South African Constitution. The socio-economic rights included in the Constitution have been recognised as justiciable rights.

In particular, the cases of Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC), and Minister of Health and Others v Treatment Action Campaign and Others (10) BCLR 1033 (CC), helped to define state obligations in respect of socio-economic rights. The emphasis given by the WSSD documentation to the role of the state in socio-economic delivery is consistent with these obligations.

The question is whether the government will be willing and prepared to implement its constitutional obligations in respect of socio-economic rights in instances where they might undermine the interests of private investors. Massive unemployment, poverty and gender inequality potentially make the business sector the most influential actor in South African policy making, often to the detriment of sustainable development policies and socio-economic rights.

Solutions for managing the dilemma include legislative measures and stiff regulations to curb potential investment abuses.

National budget processes also present an important opportunity to reconcile the directives of the WSSD with state obligations in respect of socio-economic rights. Presently, the budget process is de-linked from poverty reduction strategies in South Africa. Instead, it is critical that human rights concerns infiltrate and inform the budgetary process at its initial stages. Civil society can play a fundamental role in this regard by monitoring the budgetary process to ensure that it is responsive to the goal of poverty eradication.

The South African context requires government to more actively assume responsibility in the realisation of socio-economic rights. The targets stipulated in the Implementation Plan are specific enough to allow for meaningful

implementation and evaluation. Civil society has a crucial role to play in monitoring policy, legislation and programmes through a socio-economic rights lens.

Collette Herzenberg is a Researcher at Chapter 2 Network, IDASA.

The UN General Assembly Special Session on Children:

Its implications for children's socio-economic rights

Jacqueline Gallinetti

The World Summit on Children took place in September 1990, shortly after the adoption of the United Nations (UN) Convention on the Rights of the Child (CRC) in 1989. It produced the World Declaration on the Survival, Protection and Development of Children, and the Plan of Action for implementing the summit declaration.

In 1996, the mid-decade review following the 1990 summit stressed that the UN General Assembly should consider holding a special session to examine the extent to which the world's nations had managed to fulfil their promises to children and had implemented the summit's Declaration and Plan of Action.

Planning and objectives of the Special Session

The Special Session did not take place until 8-10 May 2002 because it entailed enormous preparatory work for both governments and NGOs. It had the following two objectives:

- to review the achievements in the implementation of the Declaration and Plan of Action adopted at the World Summit; and
- to renew a commitment to, and the pledge of the international community for, action for children in the next decade.

Three preparatory committee meetings were held where government officials discussed and drafted the proposed outcomes document of the Special Session, entitled A world fit for children. However, it was not finalised because of a number of unresolved controversial issues, which muddied the waters at the Special Session. The result was that the outcomes document was not as proactive and holistic as hoped. Some of the controversial issues included the following:

- Resource mobilisation: there was disagreement over generating more resources for the fulfilment of states' commitment to children. It is estimated that an amount of $50 billion of developmental assistance over and above the resources generated nationally by governments themselves is needed to double development aid and halve poverty by 2015 as intimated at the UN Monterey conference. UNICEF argued that if the session was to have a meaningful impact on children, states had to turn the rhetoric of the Monterey Consensus into specific programmes and plans for children. It was argued that Western governments should commit themselves to giving 0.7% of their GDP in developmental aid. This was resisted by the Western governments, who contended that the burden of raising the money should rest with national governments.

- The status of the CRC: the outcomes document referred to 'set international legal standards for the promotion and protection of the rights of children'. The European Union (EU) wanted the CRC to be referred to as the 'sole normative framework' - the sole legal international instrument for children's rights. The US, on the other hand, argued that the well-being of children could be achieved by means other than children's rights.
- Juvenile justice: the major debate related to capital punishment, the imposition of which is still permissible in certain States of the US.
- Whether or not to include stronger language on rights.
- Reproductive health rights: the US, Poland and the Holy See insisted that any reference to reproductive health rights or services be omitted from the outcomes document. Reference to reproductive rights, they argued, could threaten existing laws and policies by legalising termination of pregnancy in countries where it is illegal.
- Child labour: Canada, the US and India insisted that children should not be discouraged from working as long as the work is not abusive or does not keep children out of school. African and other countries from the EU argued that this would weaken the progress they had made in countering child labour in their countries.
- The definition of a family.

A world fit for children

The outcomes document, A world fit for children ultimately agreed on ten principles and objectives:

- put children first - the 'best interests' principle;
- eradicate poverty and invest in children;
- leave no child behind - equality and non-discrimination;
- care for every child - survival, protection, growth and development;
- educate every child;
- protect children from harm and exploitation;
- protect children from war;
- combat HIV/Aids;
- listen to children and ensure their participation; and
- protect the earth for children.

Children's socio-economic rights

Two of the ten principles stipulated in the final text of the outcomes document are directly applicable to children's socio-economic rights. There was little disagreement that children should enjoy these rights:

- Eradicate poverty and invest in children: The document notes that chronic poverty remains the greatest obstacle to meeting children's needs as well as protecting and promoting their rights. It accordingly recommends that the eradication of poverty and reduction of disparities must be the key objectives of development efforts.
- Care for every child - survival, protection, growth and development: The document notes that the health and well-being of children is, among other factors, dependent on countries addressing problems such as global warming, air pollution, inadequate sanitation and housing and unsafe drinking water.

Some of the goals set by the outcomes document also have direct application to socio-economic rights.

Since South Africa was a signatory to the document, the government has committed itself to and assumed the responsibility of achieving these goals.

In examining the promotion of healthy lives, it was noted that, due to poverty and lack of access to basic social services, more than 10 million children under the age of five die every year of preventable diseases and malnutrition. The countries accordingly set a number of goals, including:

- reducing the infant and under five mortality rate by at least a third, in pursuit of the goal of reducing it by two-thirds by 2015;
- reducing the proportion of households that do not have access to hygienic sanitation facilities and affordable and safe drinking water, by at least a third; and
- developing and implementing national health policies and programmes for adolescents.

To achieve these goals a number of specific strategies and actions were adopted. These include:

- the protection, promotion and support of exclusive breastfeeding of infants for six months and continued breastfeeding with safe, appropriate and adequate complementary feeding up to two years of age or beyond;
- full immunisation of children under one year of age at 90% nationally; and
- strengthening health and education systems, and expanding social security systems to increase access to integrated and effective health, nutrition and childcare in families, communities, schools, and primary health care facilities.

In the context of HIV/Aids, the outcomes document agreed on certain goals and commitments, including:

- reducing the proportion of infants infected with HIV by 20% by 2005 and by 50% by 2010;
- developing (by 2003) and implementing (by 2005) national policies and strategies aimed at building and strengthening governmental, family and community capacities to provide a supportive environment for orphans and girls and boys infected with, and affected by, HIV/Aids; and
- ensuring that by 2005, at least 90%, and by 2010, at least 95% of young men and women aged 15-24 have access to information, education and services necessary to develop the life skills required to reduce their vulnerability to HIV infection.

Finally, as far as resource mobilisation is concerned and despite it being a controversial area, the Session urged all developed countries that had not yet met the internationally agreed target of 0.7% of their gross national product (GNP) for overall overseas development aid to do so as soon as possible.

Furthermore, they committed themselves to reversing the declining trends of overseas development aid and to meet expeditiously the targets of 0.15% to 0.20% of GNP as overseas development aid to least developed countries. However, the wording of the document in this regard is particularly weak and lacks any serious commitment beyond emotive statements.

Ultimately, children are promised much in relation to socio-economic rights by the outcomes document. However, what remains to be seen is whether the participating states will make sustainable efforts to achieve their undertakings or whether the Special Session will merely result in a range of empty promises.

Jacqueline Gallinetti is Co-ordinator and Senior Researcher in the Children's Rights Project, Community Law Centre, UWC.

RELEVANT INFORMATION
A world fit for children, the outcomes document of the Special Session, can be accessed on www.crin.org

The applicability of the Prevention of Illegal Eviction Act:

Ndlovu v Ngcobo and Bekker & Bosch v Jika

Mahendra R Chetty

Ndlovu v Ngcobo and Bekker & Bosch v Jika Supreme Court of Appeal, Cases No. 240/2001 and 136/2002 respectively, 30 August 2002 (unreported at date of writing)

This review focuses on the joint decision of the Supreme Court of Appeal (Supreme Court) in the cases of Ndlovu v Ngcobo and Bekker & Bosch v Jika (later referred to separately as Ndlovu and Bekker respectively). In this decision, the Supreme Court upheld the appeal against the decision of the Natal Provincial Division of the High Court in Ndlovu and dismissed the appeal against the decision of the Full Bench of the Eastern Cape Division of the High Court in Bekker. Essentially, it upheld the contention that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (PIE), applies not only to people who unlawfully took possession of land (commonly referred to as squatters), but also to people who once had lawful possession that subsequently became unlawful.

The facts

Mr. Ngcobo was the holder of a certificate of occupation, which accorded him certain rights and duties as a statutory tenant of a house in KwaNdengezi Township, Pinetown, Durban. In 1990 he sublet the house to a Mr. Ndlovu. In July 1998, Mr. Ngcobo gave a one-month notice of termination of the lease to Mr. Ndlovu. Upon the latter's refusal to vacate the house, Mr. Ngcobo instituted action in a Magistrate's Court for eviction under common law and, alternatively, in terms of section 4(1) of the PIE. Mr. Ndlovu filed affidavits in opposition. However, the Magistrate found that Mr. Ndlovu was not an 'unlawful occupier' for the purposes of PIE and therefore not entitled to its protection. The appeal to the Full Bench of the Natal Provincial Division of the High Court was dismissed.

In Bekker, Mr. Jika owned a property in Kabega Park, Port Elizabeth, which was encumbered by a mortgage bond with a bank. As he failed to comply with the requirements of the bond, the bank issued summons, obtained a default judgment and sold the property to Messrs Bekker and Bosch. When Mr. Jika refused to vacate the property, the new owners approached the Eastern Cape High Court for an eviction order. Plasket AJ found that PIE was applicable to this case and that, since the new owners had not complied with its requirements, the

application was dismissed. The appeal to the Full Bench of the Eastern Cape Division of the High Court was also dismissed.

Issues before the Supreme Court of Appeal

There was no appearance for either respondent in both appeals. However, the appeals were heard concurrently since the appellants were to argue the same issue from different perspectives.

In both appeals, the applicants for eviction did not comply with the procedural requirements of PIE. The single issue on appeal was therefore whether they were obliged to do so. The answer to this question turned on the determination of whether an 'unlawful occupier' under PIE refers only those who unlawfully took possession of land (squatters) or whether the term includes persons who lawfully took occupation of land but whose possession subsequently became unlawful.

Section 1 of PIE defines an 'unlawful occupier' as:

a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).

It was argued on behalf of the appellant in Ndlovu that PIE affords unlawful occupiers limited protection in eviction proceedings. At best, it affords a tenant in eviction proceedings an opportunity to put their case before the court. In terms of the Act, a court may only grant an order for eviction if it is 'just and equitable to do so' after considering 'relevant circumstances' including the rights and needs of the elderly, children, disabled persons and households headed by women. It was therefore argued that PIE exists to ensure that the common law relating to evictions does not result in an unjust and inequitable outcome.

Counsel for the appellants in Bekker argued that PIE was not intended to apply to holding over cases. The rights of such tenants, it was submitted, were governed by, among other Acts, the Rental Housing Act, No. 50 of 1999, and not PIE.

The judgment

The Court delivered a split judgment. Harms JA (with whom Mpati JA and Mthiyane JA concurred) delivered the majority judgment. Nienaber JA and Olivier JA delivered dissenting opinions.

Holding over as 'unlawful occupation'

The majority noted that PIE has its origins in section 26(3) of the Constitution, which prohibits evictions from one's home without a court order. It noted further that the definition of 'unlawful occupier' was couched in the present tense. Consequently, both occupiers in Ndlovu and Bekker were holding over without the owners' consent. They therefore fell within PIE's definition of 'unlawful occupier'. The majority held that to exclude persons who hold over from the definition would require more than a mere change in tense. One would have to amend the definition to apply to 'a person who occupied and still occupies land without the

express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'.

However, it was held that the Act does not apply to a person who at the time of the application is a lawful occupier although he had formerly been in unlawful possession.

The mortgagor as an 'unlawful occupier'

The appellant in Ndlovu argued that sections 6(1) and 4(7) of the PIE support the position that an ex-mortgagor still in possession of the mortgaged property is an 'unlawful occupier' for purposes of the Act.

Section 6(1) gives organs of state legal standing to apply for the eviction of unlawful occupiers from land belonging to others. It has an exception, italicised in the following quote:

An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances?

The argument was therefore made that, since this section regards a mortgagor as an 'unlawful occupier', the definition of the latter should not be limited to squatters or those who took possession unlawfully. Accordingly, mortgagors would qualify as 'unlawful occupiers'.

The Supreme Court found that, on a literal interpretation, the exception 'makes no sense at all' given that a mortgagor, being an owner of property, cannot be an unlawful occupier. However, only when the property is sold in execution and transferred to a third party can the possession of the erstwhile mortgagor/owner become unlawful. It was therefore held that section 6(1) could not be used in the interpretation of 'unlawful occupiers'.

Counsel for the appellant in Ndlovu advanced a similar argument in respect of section 4(7). This section empowers courts to consider relevant circumstances when granting an order for eviction in respect of an occupier who has been in occupation for more than six months. '[E]xcept where the land is sold in a sale of execution pursuant to a mortgage,' such circumstances include 'whether land has been made available or can reasonably be made available by a municipality?for the relocation of the unlawful occupier'. They also include 'the rights and needs of the elderly, children, disabled persons and households headed by women'.

The majority decision held that this section meant that if land were sold in a sale by execution, the court would not consider the circumstances mentioned above. The section, it was held, had nothing to do with the question of holding over by a mortgagor and could therefore not be of assistance in defining an 'unlawful occupier'.

The rationale of PIE

The Court stated that PIE had some roots in the Prevention of Illegal Squatting Act, No. 52 of 1951 (PISA). The latter was enacted to control the population shift from rural areas to urban areas, which constituted a threat to the policy of racial

segregation. PISA served to prevent squatting by criminalising it and by providing for a simplified eviction process. By contrast, PIE not only repealed PISA but also decriminalised squatting (subject to the Trespass Act, No. 6 of 1959) and further, subjected the eviction process to constitutional safeguards, especially those contained in sections 26(3) and 34 of the Constitution.

Thus, the Supreme Court overruled Absa Bank Ltd v Amod [1999] All SA 423 (W), which held that PIE did not apply to cases of holding over on the ground that PISA had applied to squatters only. It took the view that PISA did not only deal with persons who unlawfully took posession of land but also dealt with those whose possession was lawful but subsequently became unlawful.

Construed in the light of the Bill of Rights, especially section 26(3), and 'the general social and historical context of the country', the Supreme Court reasoned that PIE was intended to offer protection to a 'substantial class of persons' who were poor and vulnerable to evictions.

In conclusion, the Supreme Court held that the protection of PIE extended to 'cases of holding over of dwellings and the like'. The appeal in Ndlovu therefore succeeded while that in Bekker failed.

In the aftermath of the judgment

The Supreme Court's judgment has triggered mixed reaction from various quarters, including the Law Society of South Africa, the South African Commercial Property Association, the Banking Council, and the Estate Agents Affairs Board. Various bodies have expressed serious concern that tenants who fail to pay rent and buyers who default on their bond payments will have the same protection against eviction as illegal squatters.

Fear has also been expressed that the judgment would have the effect of 'discriminating against the very people it was intended to protect: women, children, the disabled and the elderly'.

It is submitted that these fears have no basis. The Court carefully considered such concerns before it made the decision. This is evident in the majority decision, which states explicitly that the fact that the Bekker appeal fails 'does not imply that the owners concerned would not be entitled to apply for and obtain eviction orders. It only means that the procedures of PIE have to be followed'.

The contention that affluent tenants may benefit from PIE is equally untenable. The Supreme Court observed that the landlord can rely on section 4(6) to obtain an order of eviction as long as the application is brought within six months. A court will grant the order if it considers it just and equitable to do so.

If the landlord makes the application after six months, an eviction order can be sought under section 4(7) referred to above. Unlike under section 4(6), the rights and needs of the elderly, children, disabled persons and households headed by women cannot be considered in favour of the persons holding over in the application under section 4(7).

In either case, the Supreme Court held that PIE only delays or suspends the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and if so,

under what conditions. It does not have the effect of expropriating the property of the landowner.

In conclusion, the majority judgment is a landmark in ensuring that poor people are protected from arbitrary evictions without necessarily undermining the interests of property owners.

Mahendra R Chetty is an attorney and Director of the Legal Resources Centre, Durban.

ACKNOWLEDGEMENT
The author wishes to thank Adv. Trengove, who appeared for the appellant in Ndlovu, for providing the author with his Heads of Argument.

Towards the light of day: An individual complaints procedure under the International Covenant on Economic, Social and Cultural Rights

Sandra Liebenberg

In 1993 the Vienna World Conference on Human Rights resolved that it was time to redress the unequal enforcement mechanisms for human rights under international law. Since 1966 a procedure has existed under the International Covenant on Civil and Political Rights, which allows individuals who claim to be victims of violations of the rights in this covenant to submit a complaint to the United Nations (UN) Human Rights Committee. No similar procedure exists under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which only provides for a periodic reporting system through which state parties' obligations under the Covenant are supervised. The body responsible for receiving and considering state parties' reports is the UN Committee on Economic, Social and Cultural Rights (CESCR).

Progress has been slow in implementing the commitment of states at the Vienna Conference on Human Rights. In 1996 a draft Optional Protocol was prepared by the CESCR, which would allow individuals and groups to complain to it against violations of their socio-economic rights. During its 2001 session, the UN Commission on Human Rights appointed an independent expert to examine the question of a draft Optional Protocol to the ICESCR and to report to it. The independent expert has prepared a report, which was considered at the 2002 session of the Commission. He will present a second report to the Commission in 2003. It is hoped that at this session, the Commission will appoint a working group to facilitate the process towards adopting the protocol.

On 26 and 27 September 2002, the International Commission of Jurists (ICJ), one of the leading international NGOs advocating the adoption of the Optional Protocol, convened an experts' roundtable discussion focussing on a number of issues relevant to the adoption of the Optional Protocol. A central focus was on the justiciability of socio-economic rights with particular reference to the experience of other international and regional human rights bodies, and national courts as well as the benefits and practicability of a complaints procedure.

I was one of the participants in this meeting. There was a great deal of interest in the South African Constitutional Court's jurisprudence on socio-economic rights - especially the cases of Republic of South Africa and Others v Grootboom and

Others 2000 (11) BCLR 1169 (CC) and Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC). The participants agreed that this jurisprudence was a good example of how the courts could practically enforce even the positive duties imposed by socio-economic rights. It is interesting to see how national and international law can mutually influence each other. In drafting the socio-economic rights provisions in our Bill of Rights, we were strongly influenced by the provisions of the ICESCR. Now our jurisprudence is assisting in the process of the Optional Protocol to the ICESCR. Given these developments, it is astonishing that South Africa has still not ratified the Covenant.

The ICJ will compile a report on the roundtable meeting, which will be forwarded to the independent expert and used to inform advocacy initiatives towards the adoption of the protocol. Without a concerted advocacy strategy by both international and national NGOs, it is doubtful that this Optional Protocol will see the light of day.

Sandra Liebenberg is a Senior Researcher and Co-ordinator of the Socio-Economic Rights Project, Community Law Centre, UWC.

Workshop on HIV/Aids and the infant's right to nutrition

Lynn Boezak

The Socio-Economic Rights Project held a workshop on HIV/Aids and the infant's right to nutrition on 15 October 2002 in Cape Town. The workshop drew participants from the Department of Health, social workers, medical practitioners, human rights activists and other role-players in the field of HIV/Aids. It aimed to provide a platform for debate and information sharing among the various role-players with a view to creating opportunities for collaborative efforts in tackling the many complex and challenging issues involved.

The workshop dealt with the medical and scientific perspectives on issues arising from the mother-to-child transmission (MTCT) of HIV/Aids. This entailed a detailed discussion of the nutritional needs of infants. Participants were alerted to the advantages and disadvantages of formula feeding, mixed feeding and breastfeeding. The impact of these feeding methods on MTCT of HIV/Aids was highlighted.

Emphasis was placed on the mothers' right to make an informed choice on the feeding method as long as the 'best interests of the child' principle was not undermined. The state's responsibility in ensuring that mothers are able to make informed choices was highlighted, as was the critical role of accurate and accessible information.

The workshop also addressed some of the legal issues that arise in the context of MTCT of HIV. The implications of the right of access to health care services, and children's rights to basic health care services and food in influencing policy decisions relating to MTCT of HIV/Aids, were discussed at length. In particular, the implications of Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC) were explored.

Participants discussed both legal and medical perspectives in a broader socio-economic context. The impact of social inequality on the spread of HIV/Aids was

highlighted. Discrimination, poverty, racism, and historical and global inequalities were identified as key factors that contribute to the HIV/Aids pandemic.

The workshop concluded by encouraging the various role-players to share information and initiate collaborative efforts to deal with the challenges identified in the workshop. The participants expressed an urgent need for more studies on the nutritional needs of HIV-positive mothers and their babies in diverse areas in South Africa that could inform policy decisions on these important issues.

Lynn Boezak was a part-time Project Administrator in the Socio-Economic Rights Project, Community Law Centre, UWC.

Book Review

Exploring the core content of socio-economic rights: South African and international perspectives

D Brand and S Russell (eds.)
Pretoria: Protea Book House, 2002

This book consists of a collection of papers and responses presented at a conference entitled 'The minimum core content of socio-economic rights' held in Pretoria, South Africa in August 2000.

The title of the publication might give rise to a misconception that the book has been overtaken by events in South Afria. This misconception might derive from the Constitutional Court's consideration of the concept of minimum core obligations engendered by socio-economic rights. In Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC), the argument was advanced that section 26 of the Constitution imposed a minimum core obligation on the state to satisfy minimum essential levels of socio-economic rights, including the right to housing. Reliance was placed on the 'minimum core' concept developed by the UN Committee on Economic Social and Cultural Rights. The Court rejected this contention. Instead, it held that the test to be satisfied is that of reasonableness and that the minimum core concept was of relevance only to the criterion of reasonableness. This position was reaffirmed in Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC).

However, in spite of these developments in South African jurisprudence, the book has made a remarkable contribution to the development of the content of socio-economic rights such as adequate housing, health, adequate food, social security, education, work and trade union rights.

In doing so, it has dispelled a critique often levelled against the justiciability of socio-economic rights, namely that they are inherently vague and lack specificity. The authors converge on the point that these rights have content, which can form the basis for their judicial enforcement.

The book provides a useful framework for South African policy-makers. It provides them with important principles to guide policy formulation. In addition, it provides the courts with insight into considerations that are relevant to the test of reasonableness.

Activists, practitioners, academics and all other interested parties also stand to gain a deeper understanding of the specifics of socio-economic rights.

Those interested in international human rights will benefit considerably from the book's coverage of the fledgling international and regional jurisprudence on the subject. Overall, this publication makes an important contribution to the ultimate realisation of socio-economic rights.