

## COMMENT

### PROGRESSIVE REALIZATION WITHOUT THE ICESCR: THE VIABILITY OF SOUTH AFRICA'S SOCIOECONOMIC RIGHTS FRAMEWORK, AND ITS SUCCESS IN THE RIGHT TO ACCESS HEALTH CARE

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## I. INTRODUCTION

The inequality entrenched in Apartheid<sup>1</sup> policies manifested itself in the way South Africa financed its health-care system prior to 1994.<sup>2</sup> The public health-care system was inefficient and fragmented. The private health sector absorbed all of the health care resources, while a majority of the population lacked access to basic essentials.<sup>3</sup> Thus, as soon as the African Nation Congress (ANC) took control over the South African Government in 1994, reforming the health-care system became one of its top priorities.<sup>4</sup>

ANC leaders debated the most suitable health care model for South Africa, how to make the private and public health sectors complement each other, and how to provide maximum benefits for the population.<sup>5</sup> Proposals by three different committees between 1994 and 1997 resulted in the Medical Schemes Act of 1998,<sup>6</sup> which focused on regulating the private health sector.<sup>7</sup> In 2002, a second set of committees was established to discuss how to implement social health insurance, but they ultimately failed to receive sufficient broad support.<sup>8</sup> Finally, in 2009, the Department of Health established the Ministerial Advisory Committee on National Health Insurance in response to a resolution passed during the 2007 ANC Conference calling for the establishment of National Health Insurance (NHI).<sup>9</sup>

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1. Apartheid was a system of racial segregation implemented in South Africa in the mid-1900s, which gave “blacks” substantially fewer rights. Tamara Rice Lave, *A Nation at Prayer, a Nation in Hate: Apartheid in South Africa*, 30 STAN. J. INT’L L. 483, 484 (1994).

2. Stephen Thomas & Lucy Gilson, *Actor Management in the Development of the Health Financing Reform: Health Insurance in South Africa, 1994-1999*, 19 HEALTH POL’Y & PLAN. 279, 281 (2004).

3. REPUBLIC OF S. AFR. DEP’T HEALTH, NATIONAL HEALTH INSURANCE IN SOUTH AFRICA, POLICY PAPER 4-5 (2011) [hereinafter GREEN PAPER], available at <http://www.info.gov.za/view/DownloadFileAction?id=148470>.

4. Thomas & Gilson, *supra* note 2, at 281.

5. *Id.* at 281-82.

6. See Medical Schemes Act 131 of 1998 (S. Afr.).

7. Thomas & Gilson, *supra* note 2, at 282.

8. GREEN PAPER, *supra* note 3, at 14-15.

9. *Id.* at 15.

Many believed that another important piece of the health-care system occurred when Nelson Mandela, as President of the Republic, signed the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1994, during his first visit to the United States.<sup>10</sup> However, South Africa has not ratified the ICESCR despite the government's promises to do so as soon as possible.<sup>11</sup> Consequently, in 2007, several human rights groups in South Africa came together to launch the ICESCR Ratification Campaign to urge the government to ratify the ICESCR.<sup>12</sup> The campaign's overall purpose is to advocate for the ratification of the ICESCR and to ensure the promotion, protection, and progressive realization of socioeconomic rights in South Africa.<sup>13</sup> Black Sash, one participating human rights group, explained that while South Africa receives recognition for its commitment to socioeconomic rights, "this was a difficult objective to realize, and [one] which we all continue to strive towards."<sup>14</sup> The

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10. Sandra Liebenberg, *The International Covenant of Economic, Social and Cultural Rights and its Implications for South Africa*, 11 SAJHR 359, 359 (1995). Under international law, when a country signs a treaty it is signaling to the international community its intention to later ratify the treaty. Vienna Convention on the Law of Treaties art. 12, May 23, 1969, 1155 U.N.T.S. 331. A signature does not legally bind the country to a declaration, but a country is expected to comport with the objects and purposes of the declaration. See Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Within International Law*, 10 NW. U.J. INT'L HUM. RTS. 54, 57 (2011).

11. See, e.g., *Government Statements Versus Government Action on the Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR)*, COMTY. L. CTR., 2 (2010), available at <http://peopletoparliament.org.za/focus-areas/socio-economic-rights/campaigns/Statements-20on-20ratification-20of-20ICESCR-20by-20SA-20-2031.08.2010-1.PDF>.

12. COMTY. L. CTR., ICESCR CAMPAIGN ADVOCACY REPORT 2 (2010) [hereinafter ICESCR REPORT], available at [http://www.peopletoparliament.org.za/focus-areas/socio-economic-rights/resources/icescr-ratification\\_campaign/ICESCR\\_Campaign\\_Report.pdf/view](http://www.peopletoparliament.org.za/focus-areas/socio-economic-rights/resources/icescr-ratification_campaign/ICESCR_Campaign_Report.pdf/view). The campaign is led by the Community Law Centre (CLC), Black Sash, People's Health Movement of South Africa (PHMSA), Social Service and Development Forum (NWF), and Global Call to Action Against Poverty of South Africa (GCAP SA). See *id.* The South African Human Rights Commission supports the campaign, along with dozens of other human rights organizations. *Id.*

13. *Id.*

14. ELROY PAULUS & LINDA MASHINGAIDZE, THE ICESCR SOUTH AFRICA

campaign advocates for ratification by writing letters to the South African President, holding seminars, and releasing reports.<sup>15</sup>

This comment will argue that South Africa should not, and need not, ratify the ICESCR despite domestic and international pressure to do so. South Africa made significant strides in health care despite its failure to ratify the ICESCR. While important similarities can be found between South Africa and the ICESCR's framework, several tensions exist as well, and ratification would only hinder further socioeconomic development. Through its own natural progression as a country, South Africa has created a framework to suit its own constitutional goals and unique history.

The case of South Africa and the ICESCR invokes the larger academic debate regarding the efficacy of human rights treaties.<sup>16</sup> Scholars are in wide disagreement about the ways in which a country's ratification of a human rights treaty can increase or decrease government adherence to human rights principles. The purpose of this comment is to assess the consequences of ratifying the ICESCR in South Africa by comparing its framework to the framework suggested in the ICESCR. It will focus specifically on socioeconomic rights, particularly the right to health care.

Part II will discuss the constitutional provisions and case law that constitute South Africa's socioeconomic framework. Part III will briefly discuss the provisions in the ICESCR and outline the framework adopted in the ICESCR. Part IV will compare the two frameworks and highlight the existing tensions. Part V will show how the development of NHI has proven South Africa's current framework is viable by analyzing the downfalls of the ICESCR Ratification Campaign's rationale.

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ENGAGED BUT NOT MARRIED?—A TEST OF OUR COMMITMENT TO INTERNATIONAL COVENANTS 4 (2009), *available at* <http://www.blacksash.org.za/files/icescropsinion.pdf>.

15. *See id.*

16. *See* MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 426 (4th ed. 2010) (discussing the efficacy of human rights treaties).

## II. ICESCR'S SOCIOECONOMIC RIGHTS FRAMEWORK

The ICESCR entered into force in 1976, along with its companion treaty, the International Covenant on Civil and Political Rights (ICCPR).<sup>17</sup> The purpose of the two covenants was to create a list of fundamental rights essential to the dignity of human beings.<sup>18</sup> The covenants each address two distinct human rights groups.<sup>19</sup> The ICCPR focuses on civil and political rights, such as the right to vote, freedom of peaceful assembly, and freedom of association.<sup>20</sup> The

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17. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, FACT SHEET NO. 2 (REV. 1), THE INTERNATIONAL BILL OF HUMAN RIGHTS (1996), *available at* <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>. The ICESCR and ICCPR go together with the Universal Declaration of Human Rights to form an "International Bill of Human Rights." *Id.* Leaders debated the form that the Bill of Human Rights should take. *Id.* They decided to create a general declaration and include two conventions, hence the Universal Declaration and the two supplementing covenants. *Id.* The United Nations Commission on Human Rights prepared the covenants on request of the United Nations General Assembly. *Id.* South Africa has ratified the ICCPR. *Treaty Status: International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Sept. 26, 2012) [hereinafter *ICCPR Treaty Status*].

18. Liebenberg, *supra* note 10.

19. Civil and political rights are more widely accepted by the international community, while the legitimacy of socioeconomic rights still sparks debate among nations' leaders. See Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 608 (1986); see also Ilias Tispiotis, *Socio-economic Rights: Legally Enforceable or Just Aspirational?*, 8 OPTICON 1826 43, 43 (2010). However, this is not apparent based on the numbers alone. Both the ICCPR and the ICESCR have comparable numbers of parties and signatories. As of today, there are 167 parties and seventy-four signatories of the ICCPR. *ICCPR Treaty Status*, *supra* note 17. There are 160 parties and seventy signatories of the ICESCR. *Treaty Status: International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en) (last visited Sept. 26, 2012) [hereinafter *ICESCR Treaty Status*]. The United States has ratified the ICCPR but not the ICESCR. *Id.*; *ICCPR Treaty Status*, *supra* note 17.

20. International Covenant on Civil and Political Rights arts. 21, 22, 25, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force on Mar. 23, 1976) [hereinafter ICCPR], *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

ICESCR focuses on socioeconomic and cultural rights, such as the right to adequate food and the right to health.<sup>21</sup> South Africa ratified the ICCPR, but not the ICESCR.<sup>22</sup>

The ICESCR encompasses a wide range of socioeconomic and cultural rights including, *inter alia*, the right to work, social security, and an adequate standard of living.<sup>23</sup> The core provision outlining the State Parties' obligations under the ICESCR is found in Article 2, which states, "Each State Party to the present [ICESCR] undertakes to take steps . . . to achieving progressively the full realization of the rights in the present ICESCR by all appropriate means, including particularly the adoption of legislative measures."<sup>24</sup> Several mechanisms are currently in place to supervise State Parties' adherence to the treaty.<sup>25</sup> State Parties are required to report periodically to the Committee on Economic, Social, and Cultural Rights ("Committee") on the progress made in implementing the rights in the treaty.<sup>26</sup> The Committee reviews the State Parties' reports, and it may send a report to the United Nations General Assembly ("General Assembly") for review.<sup>27</sup> The General Assembly has the power to assign specialized assistance to State Parties, if necessary.<sup>28</sup> From time to time, the Committee will also release

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21. International Covenant on Economic, Social and Cultural Rights arts. 11-12, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en).

22. Compare ICCPR Treaty Status, *supra* note 17, with ICESCR Treaty Status, *supra* note 19.

23. ICESCR, *supra* note 21, arts. 6, 10-11.

24. *Id.* art. 2.

25. See generally Liebenberg, *supra* note 10, at 369. But see Audrey R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 23-24 (1996) (arguing that enforcement mechanisms within the ICESCR are inadequate, and that a better approach would be to take a "violations approach"). Chapman views the progressive realization approach as problematic and hard to measure. *Id.* The violations approach she proposes divides state actions into three different types of violations. See *id.*

26. Liebenberg, *supra* note 10, at 369.

27. *Id.*

28. *Id.* For example, the Assembly can send issues concerning right to health

general comments to clarify or interpret certain provisions in the treaty and provide guidance on what actions are expected of the State Parties.<sup>29</sup> The Committee has also invited individuals and non-governmental organizations to submit reports on State Parties concerning their compliance with the treaty.<sup>30</sup>

The Committee announced the concept of “minimum core” obligations in General Comment No. 3.<sup>31</sup> According to the Committee, a State Party must provide “minimum essential levels” of each right to satisfy the minimum core.<sup>32</sup> In other words, there is a minimum threshold for each right that a State Party must satisfy immediately.<sup>33</sup> The Committee provides several examples of a minimum core for these rights—essential foodstuffs, primary health care, and basic shelter.<sup>34</sup> A State Party’s failure to provide the minimum core level of any of those rights is “prima facie, failing to discharge its obligations under the [ICESCR].”<sup>35</sup> Perhaps sensing its rigidity in General Comment No. 3, the Committee attempted to clarify its statements in a later comment.<sup>36</sup> In General Comment No. 9, the Committee alleges that its approach remains “broad and flexible,” leaving the legal and administrative particularities to each state.<sup>37</sup>

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to the World Health Organization, or refer nutrition matters to the Food and Agriculture Organization (FAO). *Id.* It can also send matters to the United Educational, Scientific and Cultural Organization. *Id.* All of these organizations are a part of the United Nations system. *See id.*

29. *Id.* at 370.

30. *Id.*

31. U.N. Comm. Econ., Soc. & Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations, 5th Sess., ¶ 10, UN Doc. E/1991/23 (1990) [hereinafter General Comment No. 3].

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. U.N. Comm. Econ., Soc. & Cultural Rights, General Comment No. 9: The Domestic Application of the Covenant, 19th Sess., ¶ 1 UN Doc. E/C.12/1998/24 (1998).

37. *Id.*

### III. SOUTH AFRICA'S CURRENT SOCIOECONOMIC RIGHTS FRAMEWORK

The Constitutional Court of South Africa certified South Africa's final Constitution ("Constitution") in 1996,<sup>38</sup> replacing the South African Interim Constitution of 1994.<sup>39</sup> The constitutional assembly was given the task of completing the final constitution.<sup>40</sup> The drafters of the new Constitution dedicated an entire chapter to the South African Bill of Rights, granting not only civil and political rights, but cultural, social, and economic rights.<sup>41</sup>

#### *A. South Africa's Constitution Specifically Provides a Right to Access Health Care*

The right to health care appears in Section 27 of the Constitution, along with other key economic rights, including the right to food, water and social security.<sup>42</sup> This section grants everyone "the right to have access to . . . health care services, including reproductive health care,"<sup>43</sup> and also states that "[n]o one may be refused emergency medical treatment."<sup>44</sup> Additionally, the Constitution specifically allocates a separate section for the rights of every child, which granted children supplemental right to health care.<sup>45</sup> Among several other rights, Section 28 grants every child the right to "basic nutrition, shelter, basic health care services and social services."<sup>46</sup>

Unlike Section 28, Section 27 provides important guidelines on how the state shall fulfill these rights. Specifically, Section 27(2)

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38. S. AFR. CONST., 1996.

39. S. AFR. (INTERIM) CONST., 1993.

40. Interestingly, the public was also involved in the development of the Constitution by means of an advertising campaign launched in June of 1995, which elicited public opinion on what should be included in the Constitution. *The History of the Constitution*, CONST. CT. S. AFR., <http://www.constitutionalcourt.org.za/site/theconstitution/history.htm> (last visited Jan. 12, 2013).

41. *See* S. AFR. CONST., 1996, ch. 2.

42. *See id.* § 27.

43. *Id.* § 27(1)(a).

44. *Id.* § 27(3).

45. *Id.* § 28.

46. *Id.* § 28(1)(c).



provides that “[t]he state must take *reasonable* legislative and other measures, *within its available resources*, to achieve the *progressive realisation* of each of these rights.”<sup>47</sup> Section 27(2) also establishes two important concepts: progressive realization and the reasonableness standard.<sup>48</sup> These provisions have proven invaluable and decisive in the Constitutional Court’s socioeconomic rights jurisprudence. The fate of almost every socioeconomic rights case brought before the Constitutional Court hinged on how it applied progressive realization and the reasonableness standard to the conduct of a government constantly hard-pressed for resources.<sup>49</sup>

The Constitution went so far as to grant the rights, but it ultimately allowed the Constitutional Court to measure the fulfillment of these rights against the state’s economic realities using malleable doctrines of “reasonableness” and “progressive realization.”<sup>50</sup> Nevertheless, South Africa’s inclusion of the right to access health care in its Constitution turns the health care debate into an important constitutional issue, rather than a mere social issue. In other words, the starting point of the conversation is not *whether* health care in South Africa should be mandatory—the Constitution makes clear that it is—but *how* health care in South Africa should be implemented in a way that fulfills constitutional obligations. South Africa’s ability to skip the debate over whether health care is a human right puts it ahead of many countries that have not provided health care as a basic human right.

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47. *Id.* § 27(2) (emphasis added).

48. *See id.*

49. *See Landmark Cases*, CONST. CT. S. AFR., <http://www.constitutionalcourt.org.za/site/thecourt/history.htm#cases> (last visited Sept. 26, 2012). For example, in *Mazibuko v. City of Johannesburg*, the court examined the lawfulness of pre-paid water meters under the right to access water in Section 27 of the 1996 South African Constitution. *Mazibuko v. City of Johannesburg* 2010 (3) BCLR 239 (CC) at 242 para. 6 (S. Afr.). Using progressive realization principles and the reasonableness test, the court held that the water meters were reasonable and deferred to the legislature on what constituted sufficient water. *Id.* para. 9.

50. *See, e.g.*, S. AFR. CONST., 1996, §§ 26(2), 27(2).

*B. South Africa's Constitution Mandates Certain  
International Obligations*

The Constitution expressly acknowledges the role of international law in South Africa and in South African courts.<sup>51</sup> Section 232 of the Constitution explicitly adopts customary international law as domestic law, unless it is inconsistent with the Constitution or an Act of Parliament.<sup>52</sup> Section 233 of the Constitution obligates the courts to give preference to any reasonable interpretation of a law that is consistent with international law over an alternative, inconsistent interpretation.<sup>53</sup> Courts are also obligated to “consider” international law when interpreting the South African Bill of Rights.<sup>54</sup>

From these sections, the Constitution clearly encourages alignment with international law by favoring adherence to international principles whenever possible.<sup>55</sup> Yet, the absence of an

51. *Id.* ch. 14. In South Africa, the South African President is responsible for negotiating and signing all international agreements. *Id.* § 231. Generally, formal treaties require parliamentary ratification, while less formal treaties do not. *Id.* “[T]reaties that expressly or by necessary implication require ratification will have to be approved by Parliament after signature.” JOHN DUGARD, DANIEL L. BETHLEHEM & MAX DU PLESSIS, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 60 (3d ed. 2005). However, agreements that are technical, administrative or executive in nature are automatically binding, as are agreements containing self-executing provisions. S. AFR. CONST., 1996, § 231. Self-executing provisions automatically give the document legal effect without any additional action by the legislature. *Id.*

52. S. AFR. CONST., 1996, § 232. Customary international law is “[i]nternational law that derives from the practice of states and is accepted by them as legally binding.” BLACK’S LAW DICTIONARY 892 (9th ed. 2009).

53. S. AFR. CONST., 1996, § 233.

54. *Id.* § 39(1)(b).

55. South Africa has ratified several human rights treaties since 1994, such as (1) the International Covenant on Civil and Political Rights, Optional Protocol to the International Covenant on Civil and Political Rights, dealing with claims by individuals that they are victims of human rights violations; (2) the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty; and (3) the Convention Against Torture and Convention on the Elimination of All Forms of Discrimination Against Women. *International Human Rights, Treaties and Conventions*, S. AFR. DEP’T JUST. & CONST. DEV., <http://www.justice.gov.za/docs/hrmtreaties.htm> (last visited Jan. 13, 2013). South Africa has also been a party to the African Charter on Human and

international agreement concerning socioeconomic rights has not gone unnoticed.<sup>56</sup> The difference between the Constitution's mandates and an international agreement is flexibility—in terms of content and enforcement. Provisions in international agreements are meant to universally bind each ratifying party equally, without regard to the parties' diverse history and particular circumstance.<sup>57</sup> On the other hand, South Africa's approach is flexible, as it allows the country to develop its socioeconomic principles by adapting international standards to its own unique needs and circumstances.

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Peoples' Rights since 1981. *Id.*

56. While no single treaty ratified by South Africa solely addresses socioeconomic issues, the right to health appears in the African Charter as well as in the Convention on Rights of a Child. U.N. Convention on the Rights of the Child art. 24, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); African (Banjul) Charter on Human and Peoples' Rights art. 16, *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter Banjul]. The African Charter on Human and Peoples' Rights is a multilateral regional agreement among the members of the African Union. Banjul, *supra*. It created the African Commission on Human and People's Rights, which was established in 1987. *Id.* art. 30. In 1988, a protocol to the Charter created the African Court on Human and Peoples' Rights, but did not come into being until 2005. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights art. 1, *adopted* June 10, 1998 (entered into force Jan. 25, 2004), *available at* <http://www.achpr.org/instruments/court-establishment>; *see also* GEORGE MUKUNDI WACHIRA, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TEN YEARS ON AND STILL NO JUSTICE 3 (2008), *available at* <http://www.unhcr.org/refworld/docid/48e4763c2.html>. Included among the rights in the Charter is the right of every person to "enjoy the best attainable state of physical and mental health" and the State Party's duty to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." Banjul, *supra* art. 16. Unfortunately, several scholars have criticized the Commission for being unable to satisfactorily protect the rights in the Charter because it lacks the power to grant a remedy, and lacks the jurisdiction to make binding decisions against State Parties who violate the Charter. *See* Nelson Enonchong, *The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?*, 46 J. AFR. L. 197, 197 (2002). Thus, the obligations in the African Charter are unlikely to be enforced against the South African government.

57. *See, e.g.*, ICCPR, *supra* note 20, art. 2 (discussing the responsibilities of each State Party under the covenant).

In South Africa, the highest court of appeal on constitutional issues is South Africa's Constitutional Court rather than its Supreme Court, which is the highest court in all other issues.<sup>58</sup> Initially, the Constitutional Court shied away from its constitutional responsibility to uphold health care. For example, in 1997, the court decided *Soobramoney v. Minister of Health*.<sup>59</sup> There, the court denied a man with chronic renal failure access to dialysis treatment that would have prolonged his life; the court rejected his constitutional right to life and right to emergency services claims.<sup>60</sup> Additionally, the court refused to apply these rights broadly in fear that it would hinder the state's ability to carry out its primary obligations to provide access to health care, food, water, and social security.<sup>61</sup> Thus, the court emphasized that the state's fulfillment of these rights is "dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by the lack of resources."<sup>62</sup>

### *1. Republic of South Africa v. Grootboom*

The court's cautious approach caused many scholars to worry that the courts were not prepared to vigorously protect these rights.<sup>63</sup> As a result, the decision prevented individuals from obtaining relief and made the state less likely to make decisions based on the public's best interests.<sup>64</sup> However, a few years later the court received two

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58. See S. AFR. CONST., 1996, ch. 2.

59. *Soobramoney v. Minister of Health* 1997 (12) SA 1696 (CC) (S. Afr.).

60. *Id.* paras. 1, 19 & 37

61. *Id.* para. 11.

62. *Id.* Not surprisingly, several scholars criticized the court for its narrow decision, contending that the decision was wrongly decided because the analysis was flawed. Jeremy Sarkin, *Health*, 8 S. AFR. HUM. RTS. Y.B. 97, 101 (1997). These critics argue that the court failed to examine whether the state had too few machines or whether the budget was spent in the best possible manner. *Id.* Instead, the court deferred to the good faith decisions of the appropriate government entities and medical professionals without review. See *id.*

63. See Iain Byrne, *Making the Right to Health a Reality: Legal Strategies for Effective Implementation* 11 (Commonwealth Law Conference Paper 2005), available at <http://www.escri-net.org/docs/i/401242>.

64. Sarkin, *supra* note 62, at 101. Sarkin adds that the biggest ramification of the decision was that the court had essentially announced that it was going to take a

important opportunities to develop socioeconomic jurisprudence. The court used these opportunities to interpret the reasonableness standard and progressive realization principles in the Constitution.

In 2000, the court decided *Republic of South Africa v. Grootboom*.<sup>65</sup> In *Grootboom*, the court applied the reasonableness standard and progressive realization principles to a claim challenging the government's housing program under the constitutional right to access housing.<sup>66</sup> The court acknowledged at the outset that socioeconomic rights in the Constitution were clearly justiciable and must be interpreted in the context of the Constitution as a whole.<sup>67</sup> In doing so, the court refused to interpret Section 26 as to entitle applicants to immediate relief.<sup>68</sup> Instead, the court developed a more "general test for the adjudication of socioeconomic rights."<sup>69</sup> The court found the appropriate inquiry was "whether the measures taken by the state to realize the right to housing was 'reasonable.'"<sup>70</sup> In order to be reasonable, the housing program must have been "directed towards the *progressive realization* of the right to adequate housing *within the state's available means*."<sup>71</sup>

More importantly, the *Grootboom* court carefully considered international law in reaching its holding. The court fully acknowledged its constitutional obligations under Section 39 to

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limited role in the determination of socioeconomic rights. *Id.* at 102. It seemed that the court had decided to take a "hands-off" approach. *Id.* The author saw this as problematic because a transitioning democracy needs the judiciary's guidance for successful implementation and interpretations of these rights. *Id.*

65. *Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

66. *See id.* para. 13.

67. Joan Fitzpatrick & Ron C. Slye, *Economic and Social Rights—South Africa—Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights*, 97 AM. J. INT'L L. 669, 670-71 (2003).

68. Karen Lehman, *In Defense of the Constitutional Court: Litigating Socio-Economic Rights and The Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 170-71 (2006).

69. *Id.* at 169.

70. Mark S. Kende, *The South African Constitutional Court's Construction of Socioeconomic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617, 619 (2003).

71. *Id.* (emphasis added) (quoting *Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) para. 41 (S. Afr.)).

consider international law when interpreting the South African Bill of Rights.<sup>72</sup> The court went further and added that its obligation to consider international law included consideration of both binding and nonbinding law, such as the decisions of specialized international agencies.<sup>73</sup> Specifically, the court emphasized several differences between the South African Constitution and the ICESCR, and it ultimately decided not to adopt the ICESCR's approach.<sup>74</sup>

## 2. Grootboom's Impact

*Grootboom* became the foundation for South Africa's socioeconomic fulfillment standard: the government's action must be reasonable and aimed at progressively realizing each right within its available resources.<sup>75</sup> Thus, in 2001, when the court decided *Minister of Health v. Treatment Action Campaign* ("TAC"),<sup>76</sup> it applied *Grootboom*'s reasonableness analysis to the right to access health care. There, the court found that the government's failure to provide the public an antiretroviral drug, which was used to prevent mother-to-child transmission of HIV, was unconstitutional.<sup>77</sup>

The court's decision in *Grootboom* demonstrates its adherence to its constitutional obligation to consider international law, including the ICESCR. Despite rejecting many key provisions, the court fulfilled its constitutional responsibility by thoroughly considering the ICESCR before declaring the differences irreconcilable.<sup>78</sup>

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72. Fitzpatrick & Slye, *supra* note 67, at 671.

73. *Id.*

74. *Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) paras. 28, 33 (S. Afr.).

75. *Id.* para. 21.

76. *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (S. Afr.).

77. *Id.* para. 135. There, the court reaffirmed the justiciability of socioeconomic rights and applied the reasonableness standard. *Id.* para. 22. In doing so, the court found in favor of the applicants and held that the government's program was unreasonable because the budget allowed for the distribution of the drug and because its "efficacy and safety" were not seriously open to doubt. *Id.* para. 135.

78. *Id.* para. 26.

Therefore, deciding not to ratify the ICESCR does not mean South Africa will remain apathetic to international principles. The Constitution specifically mandates the courts to consider international law when interpreting the South African Bill of Rights.<sup>79</sup> It also directs the courts to give preference to interpretations of laws that are consistent with international law.<sup>80</sup> Clearly, when drafting the Constitution, drafters intended international responsibility be considered, which gave individuals the constitutional right to draw from international sources to support socioeconomic rights claims. Additionally, these provisions gave courts constitutional reasons to provide such relief.<sup>81</sup> *Grootboom* shows that the Constitutional Court has in fact acknowledged and adhered to these constitutional international law mandates, while developing its own standards.

South Africa's approach creates flexible enforcement by giving its courts the ability to adjudicate on socioeconomic constitutional issues.<sup>82</sup> Members of the ICESCR Ratification Campaign argue that ratifying the ICESCR would give international institutions the ability to hold South Africa accountable for socioeconomic rights violations.<sup>83</sup> The Ratification Campaign contends that ratifying the ICESCR would show the government's willingness to be held accountable for those living in poverty.<sup>84</sup> International enforcement mechanisms, the Ratification Campaign argues, will expedite domestic realization of these rights.<sup>85</sup> Human rights group Black Sash stated that if South Africa ratified at the time of signing, it would have fifteen years of international support.<sup>86</sup> In other words, human rights groups believe an international presence would positively influence government behavior.<sup>87</sup>

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79. S. AFR. CONST., 1996, ch. 14.

80. *See id.* § 233; *see also* discussion *supra* pp. 110-11.

81. *See* discussion *supra* p. 110.

82. S. AFR. CONST., 1996, ch. 8.

83. Letter from The Campaign for South Africa's Ratification of the ICESCR and its Optional Protocol, to President Jacob Zuma, South Africa's President 1 (Dec. 2, 2010), *available at* [http://www.blacksash.org.za/files/icescr\\_govletter.pdf](http://www.blacksash.org.za/files/icescr_govletter.pdf).

84. *Id.*

85. *Id.*

86. PAULUS & MASHINGAIDZE, *supra* note 14.

87. *Id.*

However, some scholars doubt the ability of human rights treaties to improve government behavior.<sup>88</sup> One scholar, Professor Oona Hathaway, conducted a study, but she was unable to find a single treaty that could be reliably associated with better human rights practices when ratified.<sup>89</sup> Instead, Hathaway found several treaties were associated with worse human rights practices when ratified.<sup>90</sup> Another scholar, Laurence Helfer, suggested ratifying a treaty that increases the government's responsibility may result in the "overlegalization" of human rights.<sup>91</sup> Helfer argues that "[overlegalization through] a human rights treaty constrains a government's ability to balance the protection of individual liberties against other pressing social concerns."<sup>92</sup> Essentially, countries lose the ability to adjust their behavior and respond to situations when the remedy requires actions prohibited by the treaty.

Proponents of human rights treaties have responded with equal fervor. In an article responding to Professor Hathaway's findings, authors critically challenged the empirical analysis and theoretical model that she used to support her conclusions.<sup>93</sup> Specifically, the authors criticized the use of statistical analysis and suggested that a "softer kind of empiricism, something more sociological than economic" would be more appropriate.<sup>94</sup> In other words, a softer empiricism would rely less on numbers and focus more on case study.

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88. See Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1940 (2002).

89. *Id.* at 1940. Professor Hathaway does not endorse the idea that human rights treaties do in fact lead to worse human rights practices. See *id.* She suggests several possible explanations for her findings. *Id.* For example, she focuses on the idea that human rights treaties are both instrumental and expressing. *Id.* This means that some countries do seek to modify their practices for the better, whereas other countries may ratify a treaty simply to declare their positions without ever adopting a real intention to carry them out. *Id.* at 1940-41.

90. *Id.*

91. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1910 (2002).

92. *Id.*

93. Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 183 (2003).

94. *Id.*



South Africa, when considered through this “softer empiricism,” has developed its own standards to measure whether socioeconomic rights have been fulfilled. In fact, the court’s decisions in *Grootboom* and *TAC* show that a country can obtain successful enforcement by applying its own standards, rather than fully adopting the international approach. For example, in both cases, the court applied its reasonableness test and the progressive realization principle to grant substantial remedies—ordering the government to provide immediate housing and access to HIV drugs to a significant portion of the population.<sup>95</sup>

Ratification is not necessary if the courts develop their own reliable framework to enforce government compliance with socioeconomic rights.<sup>96</sup> The court’s rejection of the minimum core approach proved to be an important point—using South Africa’s own progressive realization principles, rather than international principles, was not fatal to socioeconomic rights enforcement. The essential purpose of the standards in the ICESCR and the Committee’s comments is to ensure the protection of these rights; the court was able to achieve the same results using the standards prescribed by the Constitution and developed by the Constitutional Court. Ratification of the ICESCR would only create tension between the ICESCR and the Constitution and, as a result, would put the Constitutional Court and the South African Government at odds with its own instrument.

Therefore, although formal international enforcement mechanisms do not bind South Africa, the court has made it clear that international law plays a significant role in its decision-making. In areas where the Constitution is silent and legislation is absent, the court has shown that it may be relied upon to fill in the gaps by considering international law. The court considered both binding and nonbinding law; therefore, the court allows ICESCR principles to be applied in the

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95. See *Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.); see also *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (S. Afr.).

96. Additionally, some scholars believe that an application of minimum core principles is still possible and that the socioeconomic rights in the Constitution can still be converted into individual entitlements. See Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 SAJHR 473, 475 (2006).

future.<sup>97</sup> The court may still draw from other ICESCR principles that are not in conflict with the Constitution, but the government should not ratify a treaty that its courts cannot implement faithfully.

#### IV. SEVERAL TENSIONS EXIST BETWEEN SOUTH AFRICA AND THE ICESCR'S SOCIOECONOMIC RIGHTS FRAMEWORK THAT WOULD HINDER SUCCESSFUL IMPLEMENTATION OF THE ICESCR IF RATIFIED

Three key tensions exist between how South Africa and the ICESCR approach socioeconomic rights. The first and most fundamental difference is the way each framework defines the right to health. The second is the conflicting standards that the two frameworks use to measure fulfillment of socioeconomic rights. The third is the differing views on the purpose and meaning of progressive realization.

##### *A. Definition of the Right to Health*

The ICESCR and the South African Constitution differ fundamentally on how they define the right to health care. As discussed above, the Constitution frames the right to health care as the right to have *access to health care*.<sup>98</sup> The Constitutional Court also emphasizes the importance of the “access” aspect of the health care right.<sup>99</sup> In contrast, the ICESCR defines the right to health care more broadly. ICESCR’s Article 12 defines the right to health care as “the right of everyone to the enjoyment of the highest attainable standard

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97. Fitzpatrick & Slye, *supra* note 67, at 671.

98. S. AFR. CONST., 1996, § 27. Other scholars doubt the substantive value of the ICESCR. Charles Ngwenya, *The Recognition of Access to Health Care as a Human Right in South Africa: Is It Enough?*, 5 HEALTH & HUM. RTS. 26, 30-31 (2000). Instead, they believe that both the ICESCR and South Africa’s definitions of the right to health care are “susceptible to the same criticisms of vagueness and imprecision” and that each has its own strengths and weaknesses. *Id.* at 30. While the ICESCR imposes a stricter obligation by requiring the “‘maximum of its available’ resources,” the South African Constitution’s approach is more “realistic.” *Id.* at 31. However, neither approach successfully defines rights in terms of quantity or quality. *See id.* at 30.

99. *See Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

of physical and mental health.”<sup>100</sup> In General Comment No. 14, the Committee expanded the definition of the right to health in the ICESCR to include not only the provision of health care services but also the “wide range of socioeconomic factors that promote conditions in which people can lead a healthy life.”<sup>101</sup> This includes food, housing, and water, which constitute separate rights related to, but distinct from, the right to health care under the Constitution.<sup>102</sup>

Essentially, the Constitution gives people the right to access health-care services, while the ICESCR demands that the right to health also include the provision of basic economic resources in addition to health care services.<sup>103</sup> While the ICESCR views these rights as an integrated package, the Constitution provides access to each right separately.<sup>104</sup> Therefore, if the Constitutional Court had been required to interpret the right to health care in accordance with the Committee’s interpretation of the ICESCR, it would have had to choose between an international mandate and its own Constitution. Overcoming such a burden would not have furthered the country’s socioeconomic progress. Rather, the country would have faced a difficult legal conflict.

### *B. Reasonableness vs. Minimum Core*

South Africa and the ICESCR employ conflicting standards to determine whether or not the government has fulfilled a socioeconomic right. The ICESCR requires “State Parties to take appropriate steps, which must include legislation,” while the Constitution only requires “reasonable legislative and other measures.”<sup>105</sup> Most importantly, South Africa uses a reasonableness test, while the ICESCR requires a minimum core at all times.<sup>106</sup> In

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100. ICESCR, *supra* note 21, art. 12.

101. U.N. Comm. Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, 34th Sess., ¶ 4, U.N. Doc. E/C.12/2005/4 (2005) [hereinafter General Comment No. 14].

102. *See* S. AFR. CONST., 1996, § 27.

103. *See generally* General Comment No. 14, *supra* note 101.

104. *See* S. AFR. CONST., 1996, ch. 2.

105. Fitzpatrick & Slye, *supra* note 67, at 671.

106. *Id.* at 671-72.

*Grootboom*, the court considered, and firmly rejected, the ICESCR's minimum core approach as inconsistent with the Constitution's reasonableness standard.<sup>107</sup> In making its decision, the court considered the general comments issued by the Committee overseeing the ICESCR.<sup>108</sup> In General Comment No. 3, the Committee stated that parties must provide a "minimum core" for all the rights in the treaty.<sup>109</sup> The court explained that it would be too difficult to determine what constitutes a minimum core.<sup>110</sup> Instead, the court explained:

The real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded . . . are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation. . . . However, even if were appropriate to do so, it would not be done unless sufficient information is placed before a court to enable it to determine the minimum core.<sup>111</sup>

### C. *Progressive Realization*

Furthermore, the ICESCR and the Constitution differ on *when* the country should grant socioeconomic rights. The concept of progressive realization appears in the Constitution under the rights to access health care, food, and water and requires the government to progressively realize each right by taking reasonable steps within its available resources.<sup>112</sup> In the ICESCR, Article 2(1) provides that State Parties must take steps "with a view to achieving progressively the full realization of the rights recognized in the present [ICESCR] . . ."<sup>113</sup> However, the Committee explained that progressive realization is used to describe the "intent" of the phrase

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107. *Id.* at 672.

108. *Id.*

109. General Comment No. 3, *supra* note 31, ¶ 10.

110. *Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) para. 32 (S. Afr.).

111. *Id.* para. 33.

112. *See* S. AFR. CONST., 1996, § 27.

113. ICESCR, *supra* note 21, art 2.

and that full realization of the rights will generally not be achieved immediately.<sup>114</sup> Both interpretations of progressive realization acknowledge that the phrase must be read “in the light of the overall objective” and should not be “misinterpreted as depriving the obligation of all meaningful content.”<sup>115</sup> However, the same concept has led to different expectations. The ICESCR demands a minimum core, while the Constitutional Court rejects the minimum core approach and uses a reasonableness standard.<sup>116</sup>

Perhaps, because progressive realization according to the Committee reflects intent, it expects a different outcome from the Constitution, because the Constitution uses progressive realization as a fluctuating threshold. In other words, progressive realization under the ICESCR excuses a country (i.e., provides a justification) for not immediately satisfying a right.<sup>117</sup> In contrast, under the Constitution, socioeconomic rights are satisfied as long as they are being fulfilled incrementally to the best of the government’s ability.<sup>118</sup>

#### V. SOUTH AFRICA NEED NOT RATIFY THE ICESCR BECAUSE NHI ADDRESSES THE SAME MAJOR CONCERNS AS THE ICESCR

In August 2011, South Africa’s Minister of Health released a policy paper (“Green Paper”) announcing the Department of Health’s (“Department”) goals, objectives, and plans for implementing its universal health care scheme—NHI.<sup>119</sup> NHI is South Africa’s single most important step towards fully realizing socioeconomic rights. The policy was developed within South Africa’s framework, and it was developed without implementing the ICESCR.<sup>120</sup> NHI serves as tangible evidence of the viability of South Africa’s framework. An overview of NHI will show that several of the concerns found in the

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114. General Comment No. 3, *supra* note 31, ¶ 9.

115. *Id.*

116. Fitzpatrick & Slye, *supra* note 67, at 671.

117. ICESCR, *supra* note 21, art 2.

118. *See* S. AFR. CONST., 1996, § 27.

119. GREEN PAPER, *supra* note 3.

120. *Id.* at 14.

ICESCR Ratification Campaign and in the general comments are acknowledged in the Green Paper and integrated into NHI.<sup>121</sup>

### A. Overview of NHI

NHI is a system of universal health care coverage.<sup>122</sup> The overarching goal is to promote equity and efficiency by ensuring that every South African has affordable, quality health care services regardless of socioeconomic status.<sup>123</sup> Specifically, the Green Paper used, as a guide, the three dimensions of universal coverage according to the World Health Organization (WHO): 1) population coverage, 2) service coverage, and 3) financial risk protection.<sup>124</sup> Population coverage is one of the most important features of NHI, because it will extend health care coverage to the entire population<sup>125</sup> over the next fourteen years.<sup>126</sup> The Department plans to fulfill the service coverage requirement through NHI by emphasizing primary health care services, which it will deliver through the “district health system” using three different areas—district-based services, school-based services, and municipal-ward based services.<sup>127</sup> Although NHI emphasizes primary health care, it entitles everyone to health care services and benefits at all levels of care.<sup>128</sup> Lastly, financial risk protection refers to provisions that “ensure that [households] do not suffer financial hardship and/or are not deterred from using needed health services” due to lack of financial means.<sup>129</sup> Financial risk

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121. *See id.* at 4-5.

122. *Id.* at 59.

123. *Id.* at 4.

124. *Id.* at 5.

125. *Id.* at 23.

126. *Id.* at 44. NHI will cover all South Africans and legal permanent residents. *Id.* at 23. Short-term residents, foreign students and tourists will be required to obtain compulsory travel insurance. *See id.* Thus, virtually every person who enters or resides in South Africa is covered or will be required to be covered by some form of health insurance. *See id.*

127. *Id.* at 23-24.

128. *Id.* The Green Paper identifies four levels of hospital care: primary, secondary, tertiary and quaternary. *Id.* at 28.

129. *Id.* at 56-57.

protection also prevents households from suffering catastrophic financial loss when faced with unexpected health expenditures.<sup>130</sup>

NHI was designed according to goals set forth by the WHO<sup>131</sup>—a part of the United Nation’s system—which shows that South Africa is attentive to international standards and is developing its socioeconomic policy in accordance with WHO standards without the commanding hand of the ICESCR. WHO recommendations are frequently mentioned throughout the Green Paper and used to support arguments regarding NHI policies.<sup>132</sup>

### *B. NHI Addresses Inequity in the Health-Care System*

The Green Paper carefully examined the causes of inequity in the health-care system.<sup>133</sup> To date, South Africa has operated on a two-tiered system comprised of the public and private sector.<sup>134</sup> South Africa spends approximately 8.3% of its GDP on health care, which is more than the 5% the WHO recommends, and it is also more than the 7.7% average that high-income countries spend on health care.<sup>135</sup> The problem lies in the distribution of resources between the public and private sector.<sup>136</sup> The 8.3% of GDP that South Africa spends on health care is split evenly between the two sectors, with 4.1% funding the private sector and 4.2% funding the public sector.<sup>137</sup> However, the private sector covers only 16.2% of the population, while the public sector covers the remaining 84%.<sup>138</sup> Thus, while money is spent evenly between the two sectors, it is gravely unequal in terms of the proportion of the population covered.<sup>139</sup>

Furthermore, in the private sector, patients purchase medical schemes, enroll in hospital care plans, or make out-of-pocket

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130. *Id.* at 6.

131. *Id.* at 21.

132. *See, e.g., id.* at 18.

133. *See id.* at 9-10.

134. *Id.* at 5.

135. *Id.* at 9.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See id.*

payments to cover their health care costs.<sup>140</sup> Patients may also be covered as a result of their employment.<sup>141</sup> Thus, private patients have access to services and resources in addition to those provided in the public sector, while those in the public sector must rely solely on the public services.<sup>142</sup> The public sector also suffers from human resource shortages, which exacerbate the problem of higher patient numbers because there is an insufficient number of staff available to respond.<sup>143</sup> NHI attempts to solve these problems by giving everyone access to the same quality of basic health services, regardless of their financial ability to participate in the private sector.<sup>144</sup>

By alleviating inequity in the health-care system, NHI accomplishes several of the goals outlined in General Comment No. 14, which lists all of the rights and entitlements included in the right to health care.<sup>145</sup> Solving inequity directly fulfills Comment No. 14's "[n]on-discrimination and equal treatment" provisions, which provide that access to health care should be equally available to everyone, regardless of race, color, and social status, *inter alia*.<sup>146</sup> General Comment No. 14 also lists the availability and accessibility of health-care services as essential elements, and it also includes the rights to health facilities, goods, and services as components of the right to health.<sup>147</sup> The NHI as a universal coverage system meets all of these requirements.

The district health-care system will provide full service coverage to each individual.<sup>148</sup> The public hospital infrastructure will also be reformed, and individuals will receive a comprehensive health package for hospital care.<sup>149</sup> Moreover, General Comment No. 14 specifically states that satisfying the minimum core of each right, at

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140. *Id.* at 4.

141. *Id.*

142. *Id.*

143. *See id.* at 6.

144. *Id.* at 5.

145. General Comment No. 14, *supra* note 101.

146. *Id.* para. 18.

147. *Id.* paras. 12, 17.

148. GREEN PAPER, *supra* note 3, at 59.

149. *Id.* at 28.



the very least, includes the provision of primary health care.<sup>150</sup> The core component of NHI is the provision of primary health care.<sup>151</sup>

### C. NHI Will Alleviate South Africa's Burden of Disease

The Green Paper also addressed South Africa's high burden of disease prevention, which is heavily emphasized by several human rights groups, such as the People's Health Movement of South Africa—one of the leaders of the ICESCR Ratification Campaign.<sup>152</sup> In General Comment No. 14, the Committee requires States to take steps to reduce the stillbirth rate and infant mortality, as well as provide for the prevention, treatment, and control of diseases, such as HIV.<sup>153</sup>

The Green Paper successfully addressed South Africa's high disease rate and referred to it as the "quadruple burden of disease."<sup>154</sup> It includes HIV/AIDS, tuberculosis, maternal, infant and child mortality, non-communicable diseases, and injury and violence.<sup>155</sup> The Minister of Health stated that the introduction of NHI should take into account each of these burdens.<sup>156</sup> In fact, it does. As part of the district health-care system, teams of specialists will be available to address maternal and child mortality.<sup>157</sup>

The above examples comprise only a small portion of the rights fulfilled by the NHI. More may well come as South Africa continues to flesh out the details of NHI and implement its plans.<sup>158</sup> While NHI will take several years to implement fully, its main objectives are

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150. General Comment No. 14, *supra* note 101, para. 43.

151. GREEN PAPER, *supra* note 3, at 13.

152. ICESCR REPORT, *supra* note 12.

153. General Comment No. 14, *supra* note 101, paras. 8, 14, 36.

154. GREEN PAPER, *supra* note 3, at 6.

155. *Id.* at 7.

156. *Id.*

157. *Id.* at 24.

158. South Africa's Department of Health is in the process of issuing conditional grants to fund pilot sites, which will allow the Department to assess how it will go forward with implementing NHI. *National Health Insurance*, NAT'L DEP'T HEALTH, <http://www.doh.gov.za/list.php?type=National%20Health%20Insurance> (last visited March 6, 2013) (S. Afr.).

clear, and its goals match those found in the campaign and in the ICESCR.

## VI. CONCLUSION

Eighteen years and four presidents later, South Africa has not bound itself to the four corners of the ICESCR, yet its signature remains.<sup>159</sup> However, basing South Africa's socioeconomic achievements on its ICESCR track record would not do the country justice. Through the combined efforts of all three branches of government, South Africa's current socioeconomic rights framework has proven sufficient and successful in progressively implementing socioeconomic rights in its Constitution. Although several human rights groups adamantly advocate for the ratification of the ICESCR, the current framework has resulted in successful outcomes for socioeconomic rights in the form of favorable Constitutional Court decisions.<sup>160</sup> In the context of the right to access health care, the development of NHI is one particularly important outcome that has proven the efficacy of South Africa's framework.

An analysis of South Africa's successes—despite its failure to ratify a prominent international human rights treaty—may not show whether ratification leads to improved human rights practices. However, it certainly shows, in at least one instance, human rights treaties are not necessary to do so. It is important to remember that under the current scheme, the government is not forced to choose between the ICESCR and its own laws. To be clear, South Africa also is not forced to choose between ratifying the ICESCR and ignoring it completely. The South African Constitution not only allows the courts to integrate international law, it *requires* its courts to at least consider international law.<sup>161</sup> Therefore, South Africa's scheme

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159. *ICESCR Treaty Status*, *supra* note 19.

160. *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (S. Afr.); *Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.); *Soobramoney v. Minister of Health* 1997 (12) SA 1696 (CC) (S. Afr.).

161. S. AFR. CONST., 1996, § 39(1)(b).

allows the country to benefit from the best of both worlds. Not ratifying the ICESCR means retaining the country's right to choose its own path, while also retaining the ability to look to the ICESCR for guidance and even use it as authority, when needed.

South Africa's history stands out in more ways than one. It brings special importance to the idea that even a country emerging from a violent past does not need to bind itself to every international instrument to prove that it is willing to change. Sometimes only that country knows what is best for it and its people. Though not perfect and not fully-grown, South Africa has undoubtedly changed. Whatever the actual efficacy of human treaties may be, South Africa should not join the experiment with the ICESCR.

*Isabel Rose Masanque\**

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\* California Western School of Law, J.D. 2012. Special thanks to my family, always. "It always seems impossible until it's done." Nelson Mandela



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