# AN ANALYSIS OF SOUTH AFRICA'S COMPLIANCE WITH ITS REPORTING OBLIGATIONS UNDER SELECTED CORE HUMAN RIGHTS TREATIES

**By**

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# DECLARATION

**I declare this thesis, that I hereby submit for the degree Doctor of Philosophy (International Relations) at the University of Pretoria, is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.**

**SIGNED: Motumisi Tawana**

**27 January 2021**

## ABSTRACT

South Africa's peaceful transition to democracy in 1994 and its related efforts to be a champion for human rights promotion and protection are well documented. Since the advent of democracy, it has signed and ratified seven of the nine core international human rights treaties. Having overcome a history of racism and human rights violations in a peaceful manner, it assumed the status of a leading state actor in the fields of human rights and democracy. This study reveals that state compliance is complex and that many states including South Africa grapple with reporting obligations.

This thesis contributes to the understanding that non-compliance with reporting obligations is not intentional, nor necessarily is it a result of state unwillingness to comply. It reveals that compliance gaps may arise from various factors, including state capacity and institutional effectiveness. This thesis reflects on South Africa's compliance and reporting performance under three selected United Nations (UN) human rights treaties, namely, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR).

The three treaties were chosen owing to the critical role they can play in deepening the understanding of human rights in the country from economic, social, civil and political, and elimination of racism perspectives. They largely mirror the Constitution of South Africa and the country's challenges, as it continues to grapple with the legacy of racism, poverty, inequality and underdevelopment. Their combined meaning and significance in South Africa needs to be better understood and explored.

Compliance with UN human rights treaties is considered a global standard of good global citizenship. State reporting is, therefore, an important avenue to demonstrate South Africa's compliance with its reporting obligations and commitment to human rights promotion and protection.

## ACKNOWLEDGEMENTS

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## DEDICATION

I dedicate this milestone to my late father Matome Tawana who had limitless belief in my ability to achieve the highest academic qualification. He triggered my interest in reading, education, history and politics when I was very young. He also urged me to study towards my doctoral qualification in 1997 when I had just completed my last degree. Upon learning that I finally decided to pursue my doctoral studies in 2017, he was filled with pride. Dad with this qualification I fulfil your long-held dream for me to obtain a doctorate. Ke a leboga nkwe kgosi sehata ka boya. My mother Pontsho Tawana quietly played a supportive role as I pursued my studies. I thank you very much.

I also dedicate this thesis to my wife Nevashnie Tawana who gave me her full support as I embarked on this long and arduous journey to complete my studies. Your unstinting support has been at the heart of my perseverance and dedication. I owe you a debt of gratitude for being there for me throughout this arduous but ultimately rewarding journey.

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| LIST OF ABBREVIATIONS AND ACRONYMS | |
|---|---|
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ACHPR | African Commission on Human and Peoples' Rights |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination |
| CRC | Convention on the Rights of the Child |
| CRMW | Convention on the Rights of Migrant Workers |
| CRPD | Convention on the Rights of Persons with Disabilities |
| CSO | Civil Society Organisations |
| DIRCO | Department of International Relations and Cooperation |
| DOJ&CD | Department of Justice and Constitutional Development |
| DSD | Department of Social Development |
| DWYPD | Department of Women, Youth and Persons with Disabilities |
| DPSA | Department of Public Service and Administration |
| ECOSOC | Economic, Social and Cultural Council (UN) |
| HRC | Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights Intergovernmental Rights |
| IPU | Inter-Parliamentary Union |
| MDGs | Millennium Development Goals |
| NDP | National Development Plan: Vision 2030 |
| NGO | Non-Governmental Organisation |
| NHRI | National Human Rights Institution |
| NSA | Non State Actors |
| OHCHR | Office of High Commissioner for Human Rights |
| OPCCPR | Optional Protocol to the International Covenant on Civil and Political Rights |
| OPESCR | Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Intergovernmental Organisation |
| SAHRC | South African Human Rights Commission |
| SI | Social Institutions |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| UNHCHR | United Nations High Commissioner for Human Rights |
| WHO | World Health Organisation |

## TABLE 1: TABLE OF INSTRUMENTS

Charter of the United Nations (24 0ctober 1945) 1 UNTS XVI

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3

Declaration on the Rights of Indigenous Peoples (2 October 2007) A/Res/161/295

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 1249 UNTS 13

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 1249 UNTS 13

Optional Protocol International Covenant on Civil and Political Rights (adopted 10 December 1976, entered into force 23 March 1976) UN Doc A/Res/63/118

Second Optional Protocol International Covenant on Civil and Political Rights aiming at the abolishment of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) A/Res/44/128

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3

UN Convention on the Prevention and Punishment of the Crime of Genocide A/Res/260 (III) (9 December 1948)
Universal Declaration of Human Rights (adopted 10 December 1948)

UN General Assembly Resolution 66/254, Intergovernmental process of the General

Assembly on the strengthening and enhancing the effective functioning of the human rights treaty body system A/Res/66/254 (23 February 2012)

UN General Assembly Resolution 68/288, Intergovernmental process of the General Assembly on the strengthening and enhancing the effective functioning of the human rights treaty body system A/Res/68/268 (4 April 2014)

Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights, A/CONF.157/23 (12 July 1993)

**REGIONAL**

African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (Banjul Charter)

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July)

**SOUTH AFRICA**

Affirmative Action Act, 29 of 1998

Hate Crime Bill 2016

South African Human Rights Commission Act, 40 of 2013

Constitution of the Republic of South Africa, 1996

The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000

The Employment Equity Act, 55 of 1998

The National Education Policy Act, 27 of 1996

The National Health Act, 61 of 2003

The National Housing Act, 107 of 1997

The Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998

The Rental Housing Amendment Act, 35 of 2014

The Promotion of Access to Information Act, 2 of 2000

The Public Service Act, 103 of 1994

The Labour Relations Act, 66 of 1995

The Promotion of National Unity and Reconciliation Act, 34 of 1995

The Immigration Act, 13 of 2002

The National Economic Development and Labour Council Act, 35 of 1994

The Land Reform Act, 3 of 1996

The Security of Land Tenure Act, 62 of 1997

The Domestic Violence Act, 116 of 1998.

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| TREATIES AND THEIR OPTIONAL PROTOCOLS | DATE OF ADOPTION | DATE OF ENTRY INTO FORCE | NUMBER OF STATE PARTIES |
|---|---|---|---|
| International Covenant on Civil and Political Rights (ICCPR)<br>• Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1)<br>• Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR-OP2) | 16 Dec 1966<br>16 Dec 1966<br><br>15 Dec 1989 | 23 Mar 1976<br><br>23 Mar 1976<br><br>11 Jul 1991 | 173<br><br>116<br><br>88 |
| International Covenant on Economic, Social and Cultural Rights (ICESCR)<br>• Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR-OP) | 16 Dec 1966<br><br>10 Dec 2008 | 3 Jan 1976<br><br>5 May 2013 | 171<br><br>24 |
| International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) | 21 Dec 1965 | 4 Jan 1969 | 189 |
| Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<br>• Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (OP-CEDAW) | 18 Dec 1979<br><br>6 Oct 1999 | 3 Sept 1981<br><br>22 Dec 2000 | 189<br><br>114 |
| Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<br>• Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) | 10 Dec 1984<br><br>18 Dec 2002 | 26 June 1987<br><br>22 June 2006 | 170<br><br>90 |
| Convention on the Rights of the Child (CRC)<br>• Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OPAC)<br>• Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OPSC)<br>• Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC-OPIC) | 20 Nov 1989<br><br>25 May 2000<br><br>25 May 2000<br><br>19 Dec 2011 | 2 Sept 1990<br><br>12 Feb 2002<br><br>18 Jan 2002<br><br>14 April 2014 | 196<br><br>170<br><br>177<br><br>46 |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) | 18 Dec 1990 | 1 July 2003 | 55 |
| Convention on the Rights of Persons with Disabilities (CRPD)<br>• Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD) | 13 Dec 2006<br>13 Dec 2006 | 3 May 2008<br>3 May 2008 | 182<br>96 |
| International Convention for the Protection of All Persons from Enforced Disappearance (CED) | 20 Dec 2006 | 23 Dec 2010 | 63 |

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| TREATY BODY | FOUNDING TREATY |
|---|---|
| Human Rights Committee (HRCee) | International Covenant on Civil and Political Rights (CCPR, 1966) |
| Committee on Economic, Social and Cultural Rights (CESCR) | International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)* |
| Committee on the Elimination of Racial Discrimination (CERD) | International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965) |
| Committee on the Elimination of Discrimination against Women (CEDAW) | Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) |
| Committee against Torture (CAT) | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) |
| Committee on the Rights of the Child (CRC) | Convention on the Rights of the Child (CRC, 1989) |
| Committee on Migrant Workers (CMW) | International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 1990) |
| Committee on the Rights of Persons with Disabilities (CRPD) | International Convention on the Rights of Persons with Disabilities (CRPD, 2006) |
| Committee on Enforced Disappearances (CED) | International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED, 2006) |
| The Subcommittee on Prevention of Torture (SPT) | Optional Protocol of the Convention against Torture (OPCAT, 2002) |

** The Committee was established by ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the functions set out in particular in articles 21 and 22 of the ICESCR. The Resolution is available at the following: http://www.un.org/en/ecosoc/docs/docs.shtml*

# TABLE 4: THE HUMAN RIGHTS TREATY BODY SYSTEM

| TREATY BODY | FOUNDING TREATY (OR INSTRUMENT) | OPTIONAL PROTOCOL (s) TO FOUNDING INSTRUMENT | FUNCTIONS OF THE TREATY BODY | NO. OF EXPERTS |
|---|---|---|---|---|
| Human Rights Committee (HRCee) | International Covenant on Civil and Political Rights (ICCPR, 1966) | • Optional Protocol to the ICCPR (1966)<br>• Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty (1989) | • Monitoring the implementation of the treaty by reviewing the State parties' reports (Art. 40)<br>• Considering individual complaints (OP)<br>• Handling inter-State complaints (Art. 41) | 18 |
| Committee on Economic, Social and Cultural Rights (CESCR) | International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) ECOSOC Resolution 1985/17 | Optional Protocol to the ICESCR (2008) | • Monitoring the implementation of the treaty by reviewing the State parties' reports (Art. 16)<br>• Considering individual complaints (OP)<br>• Conducting inquiries (OP)<br>• Handling inter-State complaints (OP) | 18 |
| Committee on the Elimination of Racial Discrimination (CERD) | International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965) | None | • Monitoring implementation of the treaty by reviewing the State parties' reports (Art. 9)<br>• Considering individual complaints (Art. 14)<br>• Handling inter-State complaints (Art. 11)<br>• Early warning and urgent action procedure (Art. 9, para. 1) | 18 |
| Committee on the Elimination of Discrimination against Women (CEDAW) | Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) | Optional Protocol to the CEDAW (1979) | • Monitoring implementation of the treaty by reviewing the State parties' reports (Art. 18)<br>• Considering individual complaints (OP)<br>• Conducting inquiries (OP) | 23 |
| Committee against Torture (CAT) | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) | Optional protocol to the CAT (2002) to prevent torture (see below the Sub-committee on Torture Prevention) | • Monitoring implementation of the treaty by reviewing the State parties' reports (Art. 19)<br>• Considering individual complaints (Art. 22)<br>• Conducting inquiries (Art. 20)<br>• Handling inter-State complaints (Art. 21) | 10 |
| Committee on the Rights of the Child (CRC) | Convention on the Rights of the Child (CRC,1989) | Optional protocol to the CRC on the involvement of children in armed conflict (2000)<br>• Optional protocol to the CRC on the sale of children, child prostitution and child pornography (2000)<br>• Optional protocol to the CRC on a communications procedure (2012) | • Monitoring implementation of the treaty by reviewing the State parties' reports (Art. 44)<br>• Monitoring implementation of the Optional Protocols on the Sale of Children (Art. 12) and on Children and Armed Conflict (Art. 8)<br>• Consideration of individual complaints (OP)<br>• Conducting inquiries (OP)<br>• Handling inter-State complaints (OP) | 18 |
| Committee on Migrant Workers (CMW | International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, 1990) | None | • Monitoring the implementation of the treaty by reviewing the State parties' reports (Art. 73)<br>• Considering individual complaints (Art. 77). *Not yet operative*<br>• Handling inter-State complaints (Art. 76) | 14 |
| Committee on the Rights of Persons with Disabilities (CRPD) | International Convention on the Rights of Persons with Disabilities (CRPD, 2006) | Optional Protocol to the CRPD (CRPD-OP, 2008) | • Monitoring implementation of the treaty by reviewing the State parties' reports (Art. 35)<br>• Considering individual complaints (OP) | 18 |

| TREATY BODY | FOUNDING TREATY (OR INSTRUMENT) | OPTIONAL PROTOCOL (s) TO FOUNDING INSTRUMENT | FUNCTIONS OF THE TREATY BODY | NO. OF EXPERTS |
|---|---|---|---|---|
| | | | • Conducting inquiries (OP) | |
| Committee on Enforced Disappearances (CED) | International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED, 2006) | None | • Monitoring implementation of the treaty by reviewing the State parties' reports (Art. 29)<br>• Urgent actions (Art. 30)<br>• Considering individual complaints (Art. 31)<br>• Conducting inquiries (Art. 33)<br>• GA procedure (Art. 34) | 10 |
| The Sub-committee on Prevention of Torture (SPT) | Optional Protocol of the Convention against Torture (OPCAT, 2002) | None | • Conducting visits to places of deprivation of liberty (Art. 2) | 25 |

## TABLE 5: REPORTING PERIODICITY UNDER THE TREATIES

| TREATY | INITIAL REPORTS (WITHIN) | PERIODICITY OF REPORTS |
|---|---|---|
| ICERD | 1 year | 2 years but *de facto* periodicity 4* years |
| ICESCR | 2 years | 5 years** |
| ICCPR | 1 year | 3 - 6 years*** |
| CEDAW | 1 year | 4 years |
| CAT | 1 year | 4 years |
| CRC | 2 years | 5 years |
| CRC-OPAC | 1 year | Integrated into next CRC report every 5 years; or 5 years for States not party to CRC |
| CRC-OPSC | 2 years | Integrated into next CRC report every 5 years; or 5 years for States not party to CRC |
| ICRMW | 1 year | 5 years |
| CRPD | 2 years | 4 years |
| ICPPED | 2 years**** | - |

**De facto periodicity since 1988, CERD allows merging two reports into one.*

***Article 17 of the ICESCR states that ECOSOC shall establish the reporting periodicity under the Covenant, and so it did in its resolution 1988/4.*

****The average periodicity is four years. However, in line with article 40 of ICCPR the Human Rights Committee exercises its discretion to decide when periodic reports should be submitted, and it does so depending on a State party's level of compliance with the provision of the Covenant. The number of years chosen by the Committee for periodic reports is decided by the Committee on the adoption of concluding observations of each State and is based on the Committee's view of the human rights situation in the State party concerned.*

*****CED does not refer to initial and periodic reports.*

# CHAPTER ONE

## 1. INTRODUCTION

A recurring theme in the international human rights discourse is state compliance with reporting obligations under core human rights treaties. Since the 1970s, States have ratified international human rights treaties in impressive numbers but largely fell short of meeting their legal obligations to report regularly and timeously (Leblanc *et al.,* 2010:789).

This study seeks to contribute to existing body of knowledge regarding compliance with reporting obligations under core human rights treaties. It seeks to ascertain factors that influence state compliance with reporting obligations under selected core human rights treaties. It uses a case study of South Africa to address this question.

The thesis will focus on South Africa's compliance under three international human rights treaties, namely, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR).

The criteria used for selecting the three treaties for this study are as follows:

1. To a large extent the three treaties greatly inform the Constitution of South Africa, including its Bill of Rights. A study on their practical application at the domestic level could shed light on their significance and applicability.

2. Undertaking this study was of critical importance to establish how South Africa fares in terms of these critical and pioneering human rights instruments which are credited with the onset of the concept of universality of human rights.

3. The three thematic treaties inform South Africa's Constitution and play an important part in South Africa's quest to realise social cohesion, equality and national identity.

4. These instruments are central to South Africa being considered human rights friendly, at the global stage and the country's self-projection as a champion of

human rights (including economic, social and cultural rights) and a major role player in the elimination of racism and racial discrimination arena.

5. The treaties are resonate with South Africa's history and quest for socio-economic, civil and political and racial equality. They would, thus provide an important avenue to gauge the country's political will or capacity to fulfill its reporting obligations.

6. The three treaties are the oldest (dating back to 1965 {ICERD} and 1966 {ICCPR and ICESCR}). South Africa ratified the two (ICCPR in 1998 and ICERD in 1999) but only ratified the ICESCR in 2015. This study presented an opportunity to reflect on how the country fared with its obligations under the two Covenants (ICCPR and ICESCR). It ratified the ICCPR and ICERD over two decades ago and the Covenant (ICESCR), in recent years (2015), albeit over two decades later.

The United Nations (UN)'s State reporting system seeks to enhance the human rights protection framework through holding States accountable for their domestic human practices relative to their treaty obligations. The global human rights system entrenches the protection of individuals and groups internationally, across class, gender and the colour line. Founded on the basis of the UN Charter and the Universal Declaration of Human Rights (UDHR), it elaborates the relationship between States as duty bearers and individuals as rights holders. The human rights protection system places on States the responsibility to protect and respect human rights at the domestic level. To promote implementation and compliance, the system empowers these rights holders to claim their human rights and to seek effective remedies for human rights violations.

The compliance mechanism of the framework is bolstered by a treaty body reporting system under nine core human rights treaties. While the treaty bodies play the role of hearing individual complaints, the main tool to deepen and protect individual and group rights is the system of State reporting. The reporting system also seeks to deepen and protect individual and group rights (OHCHR, 2016).

When South Africa returned to the international system in 1994, there were expectations globally and domestically that it would add to the number of states that champion and respect human rights. Moreover, it signed and ratified critical human rights instruments following its return to the UN system. The country also presided over the Commission for Human Rights in Geneva, in 1998.

It also availed its nationals to serve as independent experts on various UN human rights treaty bodies, namely, the HRCee, CRC, CERD and CESCR. Three of its nationals were elected to serve on the CESCR, CRC and HRCee from 2017 to the end of 2020. Since the beginning of 2020 one more South African expert serves as an expert on the CERD till 2023. Despite taking these steps, it however, fell short of meeting its reporting obligations on time and at times did not report over long periods of time under various human rights treaties.

Its voting record on human rights related matters such as the situation of human rights in Iran, North Korea, Zimbabwe and Myanmar was heavily criticised and seen as inconsistent with its Constitution and identity. This was amplified when it also served on the UN Security Council in 2007-2008 and 2011 – 2012. The two terms on the UNSC signify a highlight in terms of the country's full integration into the UN system (Mbete, 2018).

The State reporting system provides an avenue to States for self-introspection and assessment of the domestic situation. This includes data collection and analysis and domestic policy and legislative review. Despite its noble intentions, the system is saddled with challenges with respect to State compliance with reporting obligations. This is compounded by the major expansion of the system of the past few decades. State parties also have reporting obligations to international and regional human rights bodies, and the task of attending to follow up recommendations or decisions that arise. Thus there has emerged a compliance gap as states have committed themselves to treaties but in many instances have failed to fulfill their reporting obligations. Owing to a variety of factors a majority of states have not been able to fulfill their treaty obligations. They have failed to act in line with their ideals, norms and identities, with regard to meeting their reporting obligations under human rights treaties.

An analysis of factors that explain South Africa's compliance with its reporting obligations under selected core human rights treaties reveals that state compliance is complex, requires political will, capacity (administrative etc) and the involvement of other state institutions, parliament and all organs of civil society. It emphasises that the state alone cannot ensure compliance with reporting obligations under core human rights treaties; the state needs to partner with other domestic role players.

This chapter will outline the primary research questions, the motivation for the study and methodology. It will also provide a background to the study, the problem statement, a literature review and an outline of the study.

## 1.1 Background

South Africa is a State party to seven of the nine core human rights treaties of the United Nations (UN). The treaties are: the ICERD, ICESCR, ICCPR, Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Convention on the Rights of People with Disabilities (CRPD). It has a legal obligation to submit periodic reports to relevant treaty bodies on steps it has taken to implement the provisions of the relevant treaties.

This study will focus on South Africa's compliance with its reporting obligations under three selected treaties, namely, the ICERD (adopted in 1965), the ICESCR (adopted in 1966), and the (ICCPR adopted in 1966). Together with the Universal Declaration of Human Rights (UDHR) of 1948, the adoption of these treaties played a pioneering role in the setting of international human rights standards and the concept of universality (Jensen, 2016:102). State parties have a legal obligation to submit periodic reports to the relevant treaty bodies. South Africa has over the past two decades and the past few years faced challenges in submitting state reports to the seven treaty bodies to which it ought to submit reports. Periodic reports are by definition meant to reflect the steps a State party has taken to implement its treaty obligations under the said treaties it has ratified.

This study seeks to provide an analysis and overview of South Africa's compliance with its reporting obligations under three (the ICERD which it ratified in 1999, the ICESCR which it ratified in 2015 and the ICCPR which it ratified in 1998) of the seven human rights treaties. It will thus analyse South Africa's compliance with its reporting obligations under the mentioned treaties over the past decade.

The study will also reflect on the UN General Assembly's resolution 68/268 on treaty body strengthening, in particular aspects such as the reporting process and proposals for a global reporting calendar. This UN resolution will be analysed given that the resolution outlines the way forward in terms of addressing the UN human rights treaty monitoring system's challenge of low levels of State compliance with their reporting obligations. The reflection on the resolution resonates with this study as it seeks to address the challenge of state compliance with their reporting obligations under core human rights treaties. The UN system of reporting guidelines, as applied by the various treaty monitoring bodies, will also be examined. These guidelines are applicable once a state prepares and ultimately submits its report as per the provisions of the relevant human rights treaty. Each treaty body applies tailor-made guidelines for States parties to follow.

### 1.2 Historical Context

Following atrocities committed during World War II, the United Nations was founded in 1945 to among other things ensure the promotion, protection and respect for human rights and to save future generations from the scourge of war. The Universal Declaration of Human Rights (UDHR) was adopted in December 1948 (UDHR, 1948). The UDHR was followed by the adoption of the ICERD and the two Covenants (ICESCR and ICCPR) in 1965 and 1966 respectively (Komanovics, 2014:7). To date, there are nine human rights treaties, which are referred to as the core human rights treaties. The Charter of the UN requires states "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" (UN Charter). The UN's core human rights treaties are in place to achieve the said goals as outlined in its Charter. The nine core human rights treaties mandate States parties to fulfil the legal obligation to report on measures they have taken to implement their treaty

obligations (OHCHR, 2020).

While there has been impressive signature and ratification of the nine core human rights treaties by a vast majority of states since 1965, there remains a challenge of compliance with reporting obligations. There is a perennial challenge of low levels of compliance with reporting obligations by a vast majority of States parties (Komanovics, 2014:14). In April 2012, the challenge of low levels of compliance and reporting prompted the UN High Commissioner for Human Rights, Ms Navi Pillay, to report to the UN Member States in New York that this problem threatened the very existence of the UN human rights system (Pillay, 2012:19). Subsequently, the UN began a process to seek to strengthen the UN human rights treaty body system.

The persistence of noncompliance reveals a gap between commitment and compliance. The reason for this problem is manifold, ranging from political will and state capacity (bureaucratic efficacy) to the disconnect between international law and domestic role players, such as parliament and civil society.

South Africa was readmitted to the UN in 1994 after decades of international isolation owing to its racist policies (apartheid system) and gross human rights abuses against its black majority. Following readmission in 1994, it subsequently signed and ratified various UN instruments, including human rights treaties. It adopted a posture of a human rights champion and a good international citizen. It also sought to cement an image of being a tireless human rights leader and defender. It declared that human rights, democracy, good governance and respect for rules based multilateralism as central tenets of its foreign policy (Barber, 2005:1079). Also, its Constitution, in section 231(4), states that treaties are legally enforceable in South Africa if they are enacted into law by an Act of parliament. It allows for the incorporation of regional and international instruments into domestic law (Tladi, 2018:712). This applies as long as the treaty provisions are consistent with the Constitution or an Act of Parliament.

Once South Africa committed to these UN core human rights treaties, it had to over time contend with the challenge of implementation and or compliance with treaty obligations. With time, it found itself in the company of many other States parties that struggle to comply with their human rights obligations. States parties to any of the

nine core human rights treaties are legally obliged to report periodically to the relevant treaty bodies. South Africa's reporting record has been mixed and it has struggled overall to fulfil its reporting obligations on time (Chenwi, 2010:1). At times, it has even failed to report over several reporting periods under some treaties, including the ICERD and ICCPR (Olivier, 2006:181). This failure to comply has had negative reputational damage on the country and undermined its role conception as a human right champion and leading human rights actor from the developing world (South). In order to bring about improvements in terms of reporting, it would be important for the country to ensure that the reporting process is underpinned by inclusivity (integration) in terms of engaging other role players who can assist in the reporting process, including civil society.

State reporting to the nine core human rights treaty bodies is one of the central mechanisms to assess norm enforcement by states. It is also an important measure to indicate whether treaty norms have been implemented and or domesticated in legal systems and/or cultures. State reporting accords states an opportunity to engage in self-introspection as well as to apprise the UN treaty system of progress made in terms of the adoption, incorporation and implementation of the treaty provisions. It also provides states with an opportunity to highlight what other measures they have taken to implement the relevant provisions of the core human rights treaties. In this regard, the UN treaty bodies (Committees), play a critical role in the supervision of these treaties. State reporting under the relevant human rights treaties accords the UN treaty bodies an opportunity for inspection (supervision) and, as mentioned above, the States parties an opportunity for self-introspection.

Essentially, states have a central role to play in the implementation of the treaty provisions, including periodic reporting. States are the primary duty bearers for the domestic implementation of the human rights treaties and compliance with reporting obligations under these treaties. The challenges of implementation and compliance are prevalent in the international human rights context. This is despite the proliferation of human rights treaties, the treaty bodies and the near-universal ratification of some of these treaties. It would thus be important to understand why states commit to treaties in impressive numbers but fail in large numbers to comply with their obligations.

## 1.3 Understanding State Reporting

To set the scene for this study, it is important to outline the concept of state reporting. This sub-section of the study focuses on outlining state compliance with reporting obligations under core human rights treaties. As mentioned, States parties are under a legal obligation to submit treaty specific reports periodically under the nine core human rights treaties. Reporting is a primary way of information generation, of increasing transparency about treaty implementation as well as compliance with provisions of a treaty (Leblanc *et al.,* 2010).

When states report to the treaty bodies, they are expected to outline the administrative, judicial, legal and other measures that they have taken to give effect to the provisions of the relevant treaties (Fraser, 2018:6).

States parties are enjoined to also highlight any difficulties that they have encountered in giving effect to the rights provided for in the relevant treaties. For the reports to be focused, each treaty body issues a set of guidelines to inform the content and shape of state reports. The UN human rights system conceives of the reporting process as an opportunity for states to not only comply with their legal obligations but also for states to take stock of the state of human rights within their jurisdiction and, as such, to enable policy planning and implementation.

There has largely been a tendency on the part of states to see state reporting as a state-centric activity and an exclusive state exercise. In a globalised and a largely human rights friendly world, it is important to open the state reporting process to all role players including, civil society, academic, influential leaders and social institutions. This would enhance the possibility of better levels of compliance especially in countries that lack report reporting capacity and dedicated teams to work on compliance related issues.

### 1.3.1 Reporting Obligations by States

As outlined previously, State reporting is one of the fundamental mechanisms by which the UN treaty monitoring system gauges the extent to which states parties comply with their legal obligations under human rights treaties. It is also the main method of providing information and enhancing transparency about the

implementation of and compliance with the relevant treaty (Creamer and Simmons, 2015:579). The treaty bodies monitor the implementation of human rights standards by considering state reports. Each of the nine core human rights treaties, mandate States parties to regularly submit reports to treaty monitoring bodies. Human rights treaty monitoring bodies therefore play a central role in the UN's effort to safeguard human rights and human dignity by giving practical expression to human rights by states. The UN human rights system, in this way, seeks to influence states to observe internationally established human rights norms and standards by obligating states to submit reports in line with their legal obligation (Creamer and Simmons, 2015:579).

The effectiveness of the system tends to be undercut by non-reporting, late reporting and low levels of reporting by states. At times the quality of given reports is not good enough. They appear to be merely submitted for the purposes of complying with the deadlines and may not represent honest reflections on the challenges that states face. The treaty bodies have in many ways alluded to this disjuncture and have called on states to do submit reports that speak to their challenges and their achievements in an open and frank manner.

Flood (1998: xiii) highlights that the international community has established several UN mechanisms to act as community agents for specified human rights purposes. Under each treaty, a monitoring body is established to supervise compliance with the obligations outlined in each instrument. The submission of reports is on the one hand procedural and on the other substantive. The substantive part requires states to adhere to the reporting guidelines. According to the UN reporting guidelines, state reports to treaty monitoring bodies need to be in line with the requirements of the relevant treaties (OHCHR, 2014).

All TMBs provide specific guidelines on what states should include in their reports. The initial report has to be based on a 'core document', which needs to reflect on aspects such as demography, gender, geography, and legal and political considerations as well as other basic information about the relevant State party (OHCHR, 2014). As alluded to above, numerous states tend to fail in terms of providing reports that represent open and critical outline of their challenges and

achievements. They may at times present reports that are very general and that praise their framework and achievements without any self-critical reflection (Chenwi, 2010:1). The treaty bodies have at times bemoaned this reality. The situation gets compounded by low levels of overall reporting as evidenced by the OHCHR report that found that 16% of states complied (Pillay, 2012:19).

The core document of a state party gets distributed to all treaty bodies to which the concerned state is a party. It has to be updated regularly, especially when major changes take place in the state party. The initial report must cover all the substantive articles of the instrument - this has to include information on the legal and constitutional framework insofar as it is not provided in the core document, including legal and practical measures taken to give effect to the treaty. As mentioned, human rights treaties require State parties to give details on measures taken about the practical realisation of the particular human rights. In this regard, the CERD, in article 9, calls for state reporting in respect of "legislative, judicial, administrative or other measures" adopted to observe rights as outlined in respect treaties (Seidensticker, 2004:5).

The Committee on the Economic, Social and Cultural Rights (CESCR) is more specific in that it requests states to, among other things, provide "information on the situation, level and trends of employment, unemployment and underemployment" (CESCR: Revised general guidelines, E/C.12/1991/1, Para B, 2a). Complete and truthful information is an important requirement, even though this is not easy to verify. An additional avenue for the TMBs to obtain information is through what is called shadow reports. These reports are prepared by NGOs and also refer to other channels, such as information received through the media for example (OHCHR, 2014).

As outlined above, when ratifying or acceding to the human rights treaties, states commit to submitting initial reports within a set time frame in line with the relevant treaty - usually one or two years after the entry into force of the treaty for the state concerned. States thereafter are required to submit reports at intervals of 4 or 5 years. The ICCPR, in the last paragraph of its concluding observations to a state report, mandates states to submit reports by a certain date (OHCHR, 2014).

Each report has to provide the following details:

a) Measures that the state party has taken to give effect to the provisions of the treaty,

b) Progress made in terms of implementing the provisions of the relevant treaty, and

c) Factors and difficulties faced by the state party that have impacted on its ability to fulfil its obligations under the treaty.

Overall, many states have not even submitted their initial reports to the treaty monitoring bodies (OHCHR, 2016). Overdue reports and the backlog in terms of reports that the TMBs have yet to consider are some of the major challenges faced by the human rights system. As mentioned previously, this problem prompted the UN Member States to adopt a resolution in 2014, resolution A/68/268, which seeks to realise improvements in terms of states reporting, among other things.

The challenge of poor levels of reporting amounted to 37% of state parties to various human rights treaties to submit their reports as at January 2016 (Carraro, 2019). This underscores the fact that late reporting and non-reporting by states is not a peculiar problem to the UN system as states continue to experience reporting backlogs and/or challenges in terms of reporting. The overarching research question is as follows:

What factors explain South Africa's compliance with reporting obligations under selected human rights treaties? This research work uses South Africa as a case study to engage in this enquiry.

This study seeks to reflect on whether States parties to the UN human rights treaties comply with their reporting obligations and by extension whether human rights treaties have an impact on state behaviour. State reporting can have positive ramifications internationally and domestically, especially on the human rights system, states and most importantly the rights holders. Compliant state behaviour can help to entrench and deepen human rights treaties at the international and domestic levels and thus have a force multiplier effect on the global human rights architecture. It can

also shape global structures.

The study will apply an analytical outlook of constructivist compliance theory. It will contribute to the debate on state compliance by means of operationalising a theoretical framework and typology of human rights obligations and related state party behaviour. The study will also add to the body of literature on South Africa's human rights behaviour and its overall foreign policy. This will be done through a presentation of a systematic study and analysis of the country's human rights behaviour (compliance) within the framework of its reporting obligations relative to the three treaties (ICERD, ICESCR and ICCPR).

## 1.4 Research Problem

Despite international human rights treaty ratification by states, there remains a challenge of state compliance with reporting obligations under core human rights treaties. There is a gap between treaty ratification and compliance on the part of States parties to human rights treaties (Dionis, 2013; Riise, 2013, *et al.,*, 2010; Simmons, 2020). There is insufficient information on factors that explain state noncompliance with reporting obligations (Bayefsky, 2001:8; Gauri, 2013; Leblanc *et al.,* 2010). There is also a lack of sufficient literature on South Africa's compliance with its reporting obligations. This occurs amid noncompliance with reporting obligations by numerous States parties (Pillay, 2012). The problem manifests itself by means of states reporting late and/or when they do not submit reports at all.

Noncompliance has the attended effect of impacting negatively on the system of human rights protection at the global and domestic level. The worst impacts tend to be at the domestic level and on the lives of ordinary men and women, children and other vulnerable groups that need protection from the human rights system. The persistence of the problem can potentially undermine the entire human rights machinery at the global and domestic levels and can weaken the human rights protection framework.

The study analyses compliance with reporting obligations in an effort to understand its potential to improve human rights promotion, protection and fulfilment. It also seeks to consider the role that other actors, including parliament and civil society,

can play in improving state reporting.

State compliance with reporting obligations is a pivotal tool to gauge whether states are taking requisite steps to implement the relevant provisions of the treaties that they have signed and ratified. State compliance through periodic reporting provides a lens to point out whether states have moved from commitment (ratification) to compliance. The study seeks to critically reflect on the fact that states struggle to fulfil their legal obligation in this regard - it is a puzzle that states voluntarily commit to treaties but thereafter struggle to fulfil the obligation to periodically report.

Scholars such as Risse *et al.,* (2013:8) observe that at the heart of the state non-compliance with treaty obligations, is the need for commitment by states. This argument emphasises that treaty ratification does not lead to compliance. Through this research, I will test this theory. Other theoretical assumptions will also be applied with a view to understanding factors that explain state compliance with human rights reporting obligations. It will, therefore, be necessary to examine how these conceptualisations can be applied so as to analyse the case of South Africa.

The study will mainly focus on the recent round of South Africa's reporting in 2017 and 2018 under the three selected treaties chosen for this study (ICERD, ICESCR and ICCPR). This focus will assist in establishing if it complied with its reporting obligations. It will include identifying factors that explain compliance with reporting obligations and the lessons that can be learnt by states in the African continent and beyond.

It is necessary and important to identify factors that explain state compliance with human rights obligations under core human rights treaties and to help to identify possible solutions to the problem. This study seeks to make a contribution to improved state reporting by means of reflecting on factors that explain state compliance with reporting obligations.

At this juncture, it is important to clarify some of the key terminologies that are central to this study.

## 1.5 Terminology

This study frequently refers to terms and concepts that need to be clarified for the purpose of a lucid understanding of this research work. The terms include state capacity, 'compliance', 'implementation', 'reporting', 'civil society organisations', and 'treaty bodies'.

### 1.5.1 State Capacity

*State capacity* is a central concept in political science research, and it is broadly recognised that state institutions have a major impact on outcomes such as democratic consolidation, civil conflict, economic development, and international security (Hanson and Sigman, 2013:1).

State capacity is defined in general as the ability of state bodies to ensure the effective implementation of official objectives (Sikkink, 1991:2). The definition subscribes to the notion that capable states may have the ability to manage functions such as economic and social life, and may be able to realise these goals by means of different relations with social groups (Hanson and Sigman, 2013:1-2).

### 1.5.2 Compliance

*Compliance* can be defined as behaviour or conduct by a state to fulfil or conform with the requirements of the treaty it has ratified. State compliance is conceived of as "rule-consistent behaviour" (Risse *et al.,* 2013). Compliance is realised when the state's domestic practices and behaviour are in line with its obligations under international law. Compliance also arises when a State(s) fulfill the legal obligation to submit treaty specific reports on time. Specifically, this study understands compliance to mean whether states comply with their legal obligation to submit periodic reports on a timely basis (Leblanc *et al.,* 2010:790).

Further, compliance with reporting obligations is concerned with whether states adhere to the provisions of agreements that they have ratified and to implementing the relevant measures. The definition of compliance goes beyond the related notion of implementation, which entails the translation on paper of international treaties and their conversion into domestic law. In this context, compliance implies an actual

change in state behaviour in line with international commitments (Haas, 1998:19).

On the other hand, when states do not comply with their obligations a compliance gap arises. This comes about when the move from commitment (ratification) to compliance is interfered with. Noncompliance takes place when the state's conduct is not commensurate with the standards embodied in the ratified treaty (Dai, 2013:86). Compliance is the legal determination of whether or not international standards have been met. A State can, as a result, be deemed to violate a treaty if it fails to comply with obligations under international law (Risse *et al.,* 2013).

When a State does not submit its report to a treaty body, it can be held to be in violation of its treaty obligation. The minimum standard is for States to report to the treaty bodies periodically and to also submit reports that comply with treaty specific reporting guidelines. There is a gap between state ratification of human rights treaties and actual compliance with these treaties (Avdeyeva, 2007). Consequently, an important theoretical question follows: Under what circumstances do states conform with international human rights standards and how can they be made to change their policies in case of non-compliance (Carraro, 2019)?
The gap in terms of compliance with human rights treaties obligations is referred to as 'decoupling' and it denotes those cases whereby states' conduct is at variance with subsequent human rights practices (Hafner-Burton and Tsutsui, 2005:1383).

### 1.5.3 Implementation

This study defines *implementation* as the concrete steps that states take to give effect to the provisions of international human rights treaties/human rights standards. Implementation of human rights treaties includes practices that make internationally agreed human rights effective in domestic law (Leblanc *et al.,* 2010:790).

It also refers to the difference between the minimum standards and the enjoyment of rights in practice. The gap can arise when steps taken are not effective in terms of meeting the human rights standards. Effectiveness implies the extent to which particular measures meet the set objectives. Implementation also refers to measures that states can take, which can be legislative, administrative and judicial. These can also be non-legislative measures taken to give rise to the rights. Implementation may

include the appointment of a human rights ombudsman, establishment of human rights institutes, funding human rights NGOs to promote human rights services, and providing human rights education. Implementation also pertains to a process whereby states take measures at a national that have been recommended by the treaty bodies (Murray and Long, 2015).

Therefore, an implementation gap arises when states fall short of meeting the expected standards established in the treaties, thus impacting on the enjoyment of the rights. This can arise when a state's measures are ineffective in meeting human rights standards or if a State party fails to implement measures recommended by a treaty body(ies).

### 1.5.4 Reporting and Treaty Monitoring Bodies/Supervisory Bodies

States parties to core human rights treaties are obligated to participate in the monitoring procedures before the treaty bodies. These treaty monitoring bodies are the only UN mechanisms that have the mandate to supervise States parties' compliance with treaty obligations (Fraser, 2018: 93).

All UN human rights treaty bodies (Committees) promulgated reporting guidelines to provide guidance to States parties when preparing their periodic reports. Reporting guidelines are in place to enable States to report on steps they have taken to give effect to the relevant treaty provisions (UN Guidelines, 2009).

### 1.5.5 Civil Society

*Civil society* is defined in broad terms and there are various definitions attached to it. Zafarullah (2002) notes that civil society is all-encompassing and incorporates non-state actors, those who have become powerless or lost their right to vote, individuals, villagers, ordinary people, professionals, the clergy, students, intellectuals and all those who feel they have no access to those in power/the state.

## 1.6 RESEARCH QUESTIONS

The research questions stated below are key to undertaking this research project and will assist me in terms of analysing the central subject I will be researching. In order to analyse the research topic, the research questions are as follows:

i. What factors explain South Africa's compliance or non-compliance with its reporting obligations under selected core human rights treaties?

ii. What insights does the South African case study provide into state compliance or non-compliance with its human rights reporting obligations and what lessons can the South African case provide?

To answer these research questions, it is important to explore the role of treaty monitoring bodies, the role of parliament, government departments and non-state actors (NSAs) in the state compliance framework within the context of human rights implementation. I will seek to contextualise the mentioned questions in relation to various theories and concepts on compliance with reporting obligations in respect of human rights treaties. There is a need to strengthen the human rights regime in order to limit non-compliance with human rights treaties. It is also critically important for the enhancement of treaty monitoring commitments and the strengthening of self-reporting systems to take root in the human rights sphere, which constitutes the bedrock of most of the human rights treaties (Hathaway, 2003:198).

The relevant questions in this regard are: What explains states compliance or non-compliance with reporting obligations under core human rights instruments, and how does South Africa fare in its reporting obligations under the selected core human rights treaties? These are some of the issues that this study will touch upon. Using the case study of South Africa's compliance with its reporting obligations under three of the seven treaties that it has ratified, this study will seek to answer the mentioned research questions.

Even though this research is rooted in international relations, the study primarily straddles two disciplines namely; international law and international relations. It touches on international human rights treaties, which are by nature issues of international law and also on states behaviour, which is a function of international relations. Some of the literature was sourced from international relations, political studies and sociology fields.

The study, as such, draws from international relations and international law sources such as international human rights treaties, the two Covenants (ICESCR and

ICCPR) and the ICERD. It also draws from the UN treaty monitoring bodies' General Comments, Concluding Observations, and the individual complaints. It further draws from the UN Charter, the UDHR, and UN resolutions and reports. The work produced by academics and other commentators, including reports of UN agencies, the South African government, and civil society (NGOs) was also explored. Given the wide range of fields that this thesis draws from, the study can be described as multidisciplinary.

This research will analyse a number of theories and theoretical assumptions with regards to state compliance with human rights reporting obligations. This study seeks to analyse factors that explain South Africa's/state compliance with reporting obligations in light of relevant theory and research to substantiate conclusions about the sources identified in the case study and how they can be mitigated. It will therefore examine how these theories can be applied to analyse the case study of South Africa. This study aims to make a contribution to the existing body of knowledge on state compliance with reporting obligations under core human rights treaties by means of enhancing existing theories and identifying additional factors that influence state compliance with reporting obligations under core human rights treaties.

## 1.7 RATIONALE/MOTIVATION FOR THE STUDY

The research work is timely, relevant and would provide a necessary contribution to scholarship on compliance with state reporting obligations.

The research takes place at a time when many states parties to core human rights treaties, continue to grapple with meeting reporting obligations to various core human rights treaty monitoring bodies.

This research was triggered by my interest in making a contribution to addressing the challenge of South Africa's compliance with reporting obligations under core human rights treaties and domestic implementation of international human rights treaties. It is also owing to the on-going and current debates on the strengthening of the human rights treaty body system, which also seek to improve state reporting. The mentioned issue and debates sparked my interest in undertaking this study and

the choice of topic. There is a gap in literature on factors that explain state compliance with reporting obligations under international human rights treaties, in particular South Africa's compliance with its reporting obligations. There are largely varied explanations with regard to the country's reporting record and noncompliance. In the main the relevant line departments tend to shift the blame when it comes to accounting for the country's reporting record. In this regard the study seeks to obtain insights into source of the problem.

The mentioned treaties were chosen for this study owing to their relevance in respect of deepening human rights and equality in the country. As South Africa continues to grapple with the legacy of racism, poverty and inequality, the selected treaties present an avenue to reflect and analyse how the country fares in terms of its overall compliance with its treaty obligations with regard to the thematic issues that they cover. They also resonate with what the country is seized with, namely dealing with socio-economic challenges, underdevelopment, civil and political challenges, social cohesion and racial equality. There is also a need to better understand and explore the impact of these treaties. It would not have been easy to focus on more or all seven core human rights treaties that the country has ratified hence only the mentioned treaties were selected.

South Africa faces challenges with respect to among other things; gender based violence and discrimination against people with disabilities. I however, selected the mentioned three treaties (ICERD, ICESCR and ICCPR). I did not include four other treaties, namely; the CAT, CEDAW, CRC and CRPD. This is owing to the fact that I observed a gap in literature in terms of the chosen treaties insofar as South Africa's compliance is concerned. The CEDAW, CRC and the CRPD are just as important as the selected instruments, it would not have been easy to focus on four or more of the seven treaties that the country has ratified and to provide them adequate attention.

When I undertook the study in 2017 South Africa had just become a State party to the ICESCR in January 2015, it was due to submit its initial report to the treaty supervisory body (CESCR). It became a critical juncture as the envisaged study would also intersect with the State party's preparation and presentation of its reports to the Covenant Committees (CESCR and HRCee) and also ahead of its reporting to

the CERD.

Given the need to study factors that explain South Africa's compliance or non-compliance with reporting obligations under international treaties in order for human rights to be better protected and fulfilled in the country, it was useful to undertake this study. In general, non-compliance with reporting obligations under core human rights treaties is under explored and not well appreciated. There is insufficient literature on this subject, especially regarding compliance on the part of African states, including South Africa.

Consequently, I chose to undertake this research work on South Africa's compliance with its reporting obligations owing to the country being a well-developed African country, which has a well-developed human rights architecture, a globally admired Constitution and relatively strong democratic institutions. In this regard, a case study of the country and findings thereon can potentially guide other African states in terms of addressing their compliance challenges. Conceptually, owing to its characteristics, a country with South Africa's attributes ought to easily comply with its reporting obligations under human rights treaties. Thus, it was important to explore the case study of South Africa.

Within the political science discipline, I am not aware of any political studies research at doctoral level done on South Africa's compliance with its reporting obligations under core human rights instruments. Thus, I observe that there is a gap in political science literature on South Africa's compliance with its reporting obligations under core human rights treaties. Furthermore, there appears to be an under-exploration of factors that explain states compliance with its reporting obligations under core human rights treaties. There does not appear to be sufficient information/studies about factors that explain South Africa's compliance or lack thereof with its human rights treaty obligations. This body of research work will endeavour to address some of these gaps and issues by focusing on South Africa's compliance with its reporting obligations under selected core human rights instruments.

This study will be useful to students and scholars of state compliance with reporting obligations under human rights treaties, domestic implementation of human rights treaties and human rights treaty effectiveness. Human rights policymakers in

national, regional and international governments and civil society organisations could also draw lessons from this research project. This study will contribute to a better understanding of state compliance with reporting obligations under human rights treaties and factors that explain late or non-reporting under core human rights treaties by states.

State noncompliance with reporting obligations has negative implications on the human rights system worldwide and in particular on the promotion, protection and fulfilment of human rights. It is in this context necessary and important to engage in this study in order to identifying factors that explain state compliance with human rights obligations under core human rights treaties and to help to identify possible solutions. This study is undertaken in order to make a contribution to knowledge and to enhance the body of literature in the state compliance area, and serve as a guide to academic scholarship, the work of practitioners and the international policy environment.

## 1.8 RESEARCH METHODOLOGY

The approach to the research project will be analytical and interpretive. It will critically reflect on factors that explain state behaviour regarding reporting and compliance under core human rights obligations. This research project will be a qualitative study.

I will use three thematic areas to structure this research project. They are:

- State reporting as a mechanism for gauging state compliance with human rights treaty obligations,
- State compliance with international human rights treaty obligations, and importantly,
- South Africa's compliance with its reporting obligations under selected core human rights.

Desktop research informed by a literature review of both primary and secondary sources of information will constitute the core of this research project. The research questions that I have outlined will enable me to conduct an extensive and critical

documentary study. Insights that I will draw from the questions will play a significant role in the research project. Primary sources will include national legislation and regional charters as well as UN treaties, insofar as South Africa's reporting obligations are concerned. The research will, importantly, use treaty bodies' relevant guidelines for reporting as a baseline, in that these guidelines inform norms on procedural and substantive reporting.

Secondary sources will include books, reports, journal articles and commentaries that reflect on issues of state compliance with reporting obligations, with a particular focus on South Africa. I will use online sources and literature in the relevant libraries. This project will utilise traditional methods within the disciplines of political science and to some extent legal theory. The locus of this study will be the analysis of treaty compliance in order to conduct this inter-disciplinary study. I will also utilise a descriptive-analytical approach to carry out this critical study.

Further, this research project will also use the case study approach to identify key factors that explain South Africa's compliance with its human rights treaty obligations. The case study approach provides a useful tool for analysis in considering the status of South Africa's reporting. It will also examine empirical literature and secondary sources in relation to South Africa's reports to treaty bodies.

Since the research is largely library based, desktop research and primary and secondary sources about South Africa's reports to UN treaty bodies were utilised in this research project. In this regard, the research examined books, journals, articles, academic works (published and unpublished), regional and international treaties, domestic legislation, state reports and information sourced through the internet.

This study will focus on three selected treaties out of the seven that South Africa has ratified, namely the ICCPR, ICESCR and ICERD. I have selected these three treaties for this study as it would be cumbersome to focus on all seven core human rights treaties that South Africa has ratified. The three selected treaties are of great importance in the UN system and to South African in particular. The two covenants (ICCPR and ICESCR) together with the UN Declaration of Human Rights (UNDHR) constitute the universal bill of human rights. The covenants also inform South Africa's bill of rights in terms of its 1996 Constitution (the Constitution, 1996). The

ICERD is also of great importance to South Africa, given its history of institutionalised racism and racial discrimination (apartheid).

The project was also embarked upon by means of participating in a treaty body session (CESCR). I attended South Africa's presentation of its initial report to the CESRC's session from 2 to 3 October 2018. I also participated in the preparation of the country statement, interventions made etc. and the two-day meetings when the country was under review. I participated in both the open and closed meetings of the Committee. The experienced gained was useful in giving me practical understanding of how the CESCR engages in constructive dialogue with a State party.

## 1.9 LITERATURE REVIEW

There is literature on state compliance with reporting obligations under core human rights treaties. Numerous scholars have written on state compliance with human rights (reporting) obligations and have either argued that these treaties are not sufficiently complied with or that states ratify treaties without the intention to meet the attendant obligations outlined in these treaties (Creamer and Cosette, 2020:18; Bayefsky, 2001:8; Gauri, 2013; Leblanc *et al.,* 2010).

Scholars like LeBlanc *et al.,* (2010) maintain that central to understanding whether states live up to human rights treaties that they have ratified, is compliance with reporting obligations. In their work, LeBLanc *et al.,* (2010), establish the potential effects of governance effectiveness, regime type, level of economic development, and political stability with regards to compliance with reporting obligations under various human rights treaties, including the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Racial Discrimination (CERD) by states parties. LeBlanc *et al.,* (2010)'s study, spanning a decade (1996-2006), is instructive in terms of providing empirical evidence regarding factors that explain state compliance with reporting obligations and as such this work will inform this study.

It is also important to mention that most scholarly work on state compliance with reporting obligations under human rights treaties has not focused on the effectiveness of the treaties, the actual and full implementation of the provisions of

these treaties, the quality of the reports and the extent to which states follow up on the conclusions and recommendations of the core human rights treaty monitoring bodies (TMBs). However, there has been some level of analysis of state non-compliance with reporting obligations given the high rates of non-reporting, late reporting and non-compliance by states. Further, existing literature, including the work of Shelton (2014) and Viljoen and Heyns (2002), has shed light on the fact that treaty monitoring bodies lack enforcement powers in terms of their ability to compel states to comply with their legal obligations.

I will use relevant literature that will help to provide appropriate theoretical, conceptual and empirical context on state compliance with reporting obligations under core human rights. The literature will explore theoretical and conceptual issues concerning state compliance with human rights obligations.

In this regard, the study will draw from various theoretical models, including the instrumentalist or rationalist models and the external or international incentives models. It will also be informed by the works of scholars such as Simmons (2010), Krommendijk (2014), Moore (2003) and other eminent scholars as their theoretical models are instructive in terms of allowing for a deeper reflection on factors that explain state compliance with human rights obligations.

Further, when it comes to state compliance, Simmons (2010), for example, maintains that the signalling models predict state compliance with treaties, but do not outline it (compliance). Committed states are therefore likely to face consequences of ratification, whereas uncommitted states are unlikely to be affected owing to their non-ratification. Simmons further highlights that in situations where treaty ratification is politically costly, that treaty ratification serves as a separating equilibrium wherein only those states that are committed tend to pay the heavy political price of ratification.

Related to Simmons' position is that of Moore (2003) who produced insightful literature in his essay entitled: "A Signalling Theory of Human Rights Compliance". In this research, he maintains that no set of theories best explain why states comply with their legal obligations. He posits that each of the theories on compliance with human rights fails to acknowledge what he refers to as an important dynamic in

human rights compliance, namely, signalling. Moore seeks to address this shortcoming by generating a signalling theory of human rights compliance. He stresses that his theory does not elucidate human rights compliance as a whole. The signalling theory supplements the rational choice outlook on compliance (Moore, 2003). The signalling theory of human rights will also be useful in terms of developing a theoretical framework for this study.

An important insight that will be utilised in order to develop a theoretical framework is that of Krommendijk (2014:35) who maintains that the instrumentalist or rationalist models view state behaviour as influenced by a logic of anticipated outcomes and prior preferences. In this context, states are treated as "rational and self-interested strategic utility maximisers". He argues that state compliance is a result of reasoned weighing and calculation of the consequences and costs and benefits of different methods of action.

The external models perceive compliance with international human rights law as a consequence of international substantive inducements, which influence the calculation of states or state behaviour (Krommendijk, 2014:35). States comply when their interests are served, and the benefits outweigh the costs of detection. Krommendijk's work will assist greatly in terms of establishing the extent to which the mentioned models can best elucidate factors that explain state compliance with human rights treaty obligations.

Another school of thought on compliance can be found in Dionis's (2013) view, namely, that the managerial school of thought has not been explored with regards to human rights compliance. Dionis states that this is the case insofar as the movement from commitment to compliance is concerned and when state authorities lack the institutional capacity and administrative capacity to enforce the decisions, including upholding international standards. It is thus important to reflect on this model and its applicability to compliance with human rights treaties.

An important discussion to consider is that of Risse *et al.,* (2014) who examined when and how international human rights norms change states. They reflected on the way international organisations, transnational pressure groups and opposition parties interact to collaborate to exert pressure on governments. They argue that the

transformed global environment is more important than particular country features and economic conditions in explaining how there have been a spread of human rights norms worldwide.

Importantly, analysing state compliance with reporting obligations under core human rights treaties needs to be underpinned by recognition of the factors that explain state compliance. Thus, it is of central importance to understand what these factors are and what State parties are doing to address them. Creamer and Simmons (2015:579) stress that there is a close relationship between new democracies and state capacity on the one hand and the ability of the state to comply with treaty obligations on the other. They observe that new democracies appear to do better in terms of providing reports of high quality. They also note that domestic considerations, state capacity (financial and human resources) and the capacity of civil society to exert pressure as well as national human rights institutions capacity play a role in encouraging governments to meet their human rights obligations.

In terms of realising human rights at the domestic level, this research project will also draw from the work done by scholars such as C Creamer (2015 and 2020), B Nielsen (2014), F Viljoen (1997 and 2002), L Chenwi (2010, 2011 and 2018), J Fraser (2018 and 2019), M Olivier (2006), V Gauri (2011) and J Biegnon (2009). Their work will provide critical analytical information on state compliance with human rights obligations and the impact of human rights treaties at a domestic level in terms of the respect, protection and fulfilment of human rights.

When it comes to the effects of human rights treaties on human rights practices by states, a number of scholars have shed light on the issue, namely, B Nielsen (2014), O Hathaway (2002), B Simmons (2010), V Gauri (2011), K Sikkink ()1998, 1999 and 2001), F Viljoen (1997 and 2002) and C Heyns (2002). Their work will also provide useful information for undertaking this research project.

Further, this research will reflect on factors such as political will, how seriously states take their legal obligations and state behaviour in general. As a result, an examination will ensue in terms of how some of these elements may apply to the study on South Africa's compliance with its reporting obligations under selected core human rights treaties.

This research project will also draw from the contributions made by various African scholars on the issue of state reporting/compliance with human rights reporting obligations. They include A Etuvouta, L Chenwi, C Heyns, J Mubangizi, F Viljoen, and M Olivier. The work of the abovementioned scholars is the key in terms of providing analysis and context in terms of the challenge of state compliance with reporting obligations under core human rights treaties from the perspective of African intellectuals.

It should also be mentioned that scholarly reflection on the mere submission of reports periodically (pro forma), in line with human rights treaties, has not provided avenues to establish how seriously states take their reporting obligations, the quality of such reports, the extent to which states implement the treaty provisions and how states follow up in terms of addressing concluding observations and recommendations of the treaty bodies (Gori 2013:893).

At the same time, Creamer and Simmons (2015) maintain that there tends to be more focus on the requirement for states to report by a certain period (pro forma) rather than the quality of the report and whether states have indeed complied with the provisions of the relevant treaties (substantive). They maintain that this outlook could be at the expense of the actual understanding of the reporting requirements by states.

However, Hillebrecht *et al.,* (2008) have measured the attainability of regional and UN human rights treaty bodies' recommendations and rulings. They maintain that measuring compliance with the rulings and recommendations made by the UN treaty bodies and regional bodies is the most effective tool to support and give effect to the recommendations and judgements on the domestic level. Their paper aims to contribute to understanding how states manage their reports and recommendations received from the treaty bodies, challenges they confront in reporting to the treaty bodies and implementing treaty bodies' recommendations. As a side note, it should be mentioned that Hillebrecht's (2008) work would be useful in terms of a follow-up study to this current study on state compliance with reporting obligations as it would reveal the length and depth of compliance and implementation of the recommendations made by the UN treaty bodies.

Although the recommendations of treaty bodies play a central role in the realisation of rights, Fraser (2019:974) notes that there is state-centricity and legalism at play. She maintains that the role of social institutions in the domestic implementation of international human rights law is under-explored and under-exploited. Fraser (2019:974) correctly highlights that the treaty bodies urge states to also use "other measures" to ensure state compliance. She notes that a State-centric and legalistic approach has shortcomings as all organs of civil society and the state have a pivotal role to play in terms of State compliance with human rights treaty obligations.

Gori (2013:893) posits that whereas there has been an expansion of many treaties, charters, and bodies, the central question regarding states compliance with treaty obligations remains: To what extent do states comply with their human rights obligations? It is also important to ask, what explains state compliance (non-compliance) with human rights treaty obligations, why do states bind themselves to treaties and thereafter fail to comply and, how do states behave in respect of their treaty obligations?

As mentioned, whereas there has been near-universal ratification of human rights treaties, the human rights treaty system lacks in terms of domestic enforcement (Heyns and Viljoen, 2002). Heyns and Viljoen (2002) observe that while treaties have made a huge impact in the world, when considering their potential impact at the domestic level, much still needs be done. They posit that there had not been a systematic and comprehensive investigation of the impact of treaties at the domestic level. In this regard, they embarked on a research project covering 20 states that are party to 6 core human rights treaties that were in place during the research period (1998 – 2000). South Africa is among the 20 countries that they reflected upon. Their work will also be useful in the execution of this research project since the focus of this work is mainly on South Africa's compliance with treaty obligations.

Another important perspective to consider is that of Bayefsky (2001: xiii) who observes that there exists a big gap between universal rights and remedy. She argues that this void threatens the integrity of the UN treaty system. Bayefsky notes that there are huge numbers of overdue reports, difficult backlogs, large scale refusal by states to provide remedies in instances of human rights violations and few

individual complaints from a large number of potential victims. Her work will provide useful insights into the challenge of state compliance with treaty obligations and the factors that explain this problem.

Along the same lines, Hathaway (2002:185) maintains that the international legal community should engage in efforts to better understand the nexus between human rights treaties and state behaviour. This would be with a view seeking to make treaties effective in terms of realising their set goals. Hathaway also calls for the exploration of alternative models to analysing state behaviour. This is because scholars, policymakers and activists have jointly operated based on unexamined assumptions: that states parties generally comply with their treaty obligations and that their practices will be improved if they are signatories of human rights treaties than they would otherwise be. Hathaway states in her 2002 study titled: "Do Human Rights Treaties Make a Difference?" that she put the assumptions to the test and found evidence that the assumptions are not always true.

Simmons (2009:4) takes a somewhat different line and posits that there is a dynamic link between the international formal regime and domestic practices. She maintains that once formal commitments have been made, they can have noticeable positive effects. Furthermore, she notes that depending on the domestic context, treaties can have a positive effect on domestic politics in a way that affects state behaviour towards its citizens. She maintains that treaties hold governments accountable at the domestic and external levels. Simmons stresses that treaties are a strong indication that states are serious about human rights. She asserts that they shape political behaviour, set the scene for new political alliances, heighten political scrutiny and empower new political role players. Later in the thesis, I will use Simmons' perspectives on state behaviour to analyse state compliance with treaty obligations.

Hathaway (2002:1940) reflects on whether states comply with the demands of human rights treaties that they voluntarily ratify. She also seeks to establish if these treaties are effective in terms of changing states' behaviour for the better. She reflects on this matter through a large-scale analytical study of the relationship between human rights treaties and countries' human rights practices. Her study covers 166 countries and spans almost four decades in the realm of human rights

law. The study finds that although the behaviour of states that have ratified human rights treaties are generally better than those that have not ratified, non-compliance with treaty obligations appears common among States parties. Hathaway contends that since human rights treaties tend to be weakly monitored and enforced, States parties may enjoy reduced pressure to improve their practices without experiencing major costs.

It is further important to mention that numerous states ratify human rights treaties in order to signal their commitment to human rights to other role players and actors. Since core human rights treaties have a legal character, treaty ratification is considered to be virtually without costs as unimplemented treaty rules do not require any tangible changes in terms of state practice (Hathaway, 2001:1935). On the other hand, the broad ratification of human rights treaties plays a critical role in the process of inculcating national human rights cultures and practices. It is observed that the global ratification furthers the objectives of acceptance of human rights norms on the international stage (Goodman and Jinks, 2003: 182).

In this regard, Oberdoster's (2008:687) maintains that ratification and compliance are on a continuum and hence are interwoven. According to Oberdoster, states join treaties with the intention to follow on their motivation for joining. This approach is in contrast with the observation by realists who argue that states' intentions are not always sincere.

Factors explaining state compliance with human rights obligations tend to vary with regard to the rights in question (Gauri, 2011; Leblanc *et al., 2010*). I concur with Gauri when he notes that the reality of varying state behaviour in relation to human rights conduct following treaty ratification has not received sufficient attention. State compliance with treaty obligations varies in terms of the economic well-being of states, the intrinsic benefits of compliance to the state, significance of the treaty concerned, the costs involved in the promotion and protection of the rights, the political costs to judges, non-governmental organisations (NGOs) and whether other interested parties are able to impose in the event of non-compliance including the financial and economic costs of compliance. Gauri's theories outlined above will be utilised in the study to partly explain the factors that influence state compliance with reporting obligations under the selected core human rights treaties.

It is also important to reflect on the role that other actors like the legislature can play in the realm of state compliance with reporting obligations, given that the treaty bodies entrust them with the domestic implementation and monitoring responsibility in terms of human rights and State reporting. Legislatures are seen as an important pillar for human rights promotion and protection as they scrutinise proposed legislation (Evans and Evans, 2006). When reflecting on the role of non-state actors such as Parliament, it is of critical importance to take into account the conceptual complexities of human rights and the institutional peculiarities of legislatures (Evans and Evans, 2006). The role of Parliament in the report writing process and monitoring of treaty implementation will be interrogated in this research project as legislatures are the custodians of the will of the people and they are critical role players in the promotion, protection and fulfilment of human rights and fundamental freedoms.

It is of critical importance for a state to have a strong human rights protection record, as this is the key for a state to maintain a positive global reputation (Gearty and Douzinas, 2012). They suggest that states utilise treaty ratification and compliance with treaty obligations to enhance their reputation and to seek to realise their foreign policy goals. They posit that states use compliance with treaty obligations to improve their reputation in three particular ways:

i) in situations when a state faces regional pressure as a result of a necessity to join a regional organisation,

ii) when a state is under regional pressure not to defy a court within a regional formation, or

iii) in a case when a state seeks foreign assistance from an entity that requires compliance with human rights obligations as a condition for providing aid.

Gearty and Douzinas test this theory by examining human rights reports in state compliance with specific treaty obligations in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). They note that while the results of their hypothesis are mixed, they establish to an extent that state compliance is linked to the reputation of states. The reputation approach to state

compliance will also form part of the outlooks that will inform this research work.

Considerable literature exists on why states bind themselves to human rights treaties, even though they may not intend to comply with them. Risse *et al.,* (2013:10) are among the authors who have noted that states ratify treaties without the aim of complying with them. Similarly, Neumayer (2005:1) asserts that states' ratification of treaties does not lead to compliance and that ratification has no effect on state behaviour and is, at times, associated with human rights violations. I do not agree with his observations. I posit that state compliance and state behaviour are positively affected by treaty ratifications, as this is in the interest of the states that ratify treaties. Rather, the challenge of capacity could be one of the sources of the problem of compliance.

Avdeyeva (2007) also notes that there is a gap between state ratification of human rights treaties and actual compliance with these treaties. As a consequence, an important theoretical question is: Under what circumstances do states conform to international human rights standards and how can they be made to change their policies in case on non-compliance? (Carraro, 2019).

Carraro explains that the challenges of poor levels of reporting amounted to 37% of state parties to various human rights treaties to submit their reports as at January 2016 (Carraro, 2019). This underscores the fact that late reporting and non-reporting by states is not a peculiar problem to the UN system as states continue to experience reporting backlogs and/or challenges in terms of reporting. The critical research enquiry revolves around this question: What factors contribute to this state of affairs (non-compliance with reporting obligations)?

In this regard, Carraro (2019) wrote an insightful article on state compliance with UN human rights treaties. Her paper assesses the performance of the UN's Universal Periodic Review (UPR) and the state reporting procedure to the UN human rights treaty bodies. The article assesses these bodies' process performance that might ultimately lead to states realising a set of goals of implementing their human rights recommendations. Carraro's paper, however, does not focus on state compliance with reporting obligations under the core human rights UN treaties.

For Shelton (2014:221), human rights treaty bodies lack enforcement power and depend on the political will of states parties for cooperation, funding and personnel to enable compliance with the decisions they make. She highlights that there is a general agreement among interested parties that treaty bodies typically have no binding interpretative authority nor direct enforcement power. The contrasting view is that treaty bodies have a monitoring role, they gather information, develop a body of jurisprudence, and engage in dialogue with states in order to encourage states towards the implementation of treaty provisions.

Scholars, like Mbete (2018) argue that State behaviour is influenced by role conceptions and role prescriptions that emanate from the external environment. This includes the structure of the system, norms and laws, international rules as well as multilateral and bilateral agreements. The foregoing is important to this research project owing to the apparent mismatch between foreign policy (national role conceptions) and global expectations in terms of how South Africa should behave with regard to human rights issues within the UN system and in relation to its UN human rights treaty obligations.

Perhaps state compliance should be linked to a state being a good international citizen. Good citizenship is a term that has become prominent in international relations discourse and foreign policy. It has been ascribed to those states that are seen to be exemplars of human rights, democracy, transparency and accountability.

The way a state engages with international law, its treaty participation, compliance with its global treaty obligations, and practice in issue areas such as human rights, the environment, indigenous issues, drug control, treatment of migrants and asylum seekers and cross border issues, exemplifies a good international citizen.

The following are attributes of a good international citizen:

(i) compliance with international law;

(ii) support for multilateralism, including UN and Bretton Woods Institutions;

(iii) willingness - to be involved in international activities;

(iv) morality or ethics – international good deeds; and

(v) leadership – improving or raising international standards.

Good international citizenship is about going beyond the minimum standards of international state behaviour. In this regard, doing more than pronouncing that human rights are cherished values and doing more than signing and ratifying treaties is of paramount importance (Pert, 2012:96). A good international citizen must do more than submit reports to international human rights treaties. Such a citizen must comply with the substantive aspects of reporting, including addressing the conclusions and recommendations of the treaty bodies. It would also be prudent to ensure that in line with treaty law, that states domesticate the provisions of these treaties into national law. In some cases, national law may be incompatible with the said treaty or fall short of set international standards.

South Africa would thus have to, in cases where its legislation falls short, need to adopt acts of parliament to domesticate the relevant treaty (ies) and its provisions. This also requires that parliament plays a central role in the process.

The first conceptualisation of the notion of a good international citizen was by Cooper, *et al.,* (1993). The concept of good citizenship provides an important lens through which to analyse South Africa's compliance with its reporting obligations and its general behaviour in the human rights realm. Furthermore, South Africa seeks to play a lead role in the international system as a:

a) Norm entrepreneur,

b) A champion of human rights, and

c) An example.

It should be noted that this list is not exhaustive. Below, I explain what these attributes entail:

With regard to norm entrepreneur, the state believes in solving problems by means of diplomatic skill, dialogue, and use of expertise. Such states take initiative in order to resolve problems and lead in terms of initiatives to advance the common cause of

their nationals. They use soft power to advance the development of norms and standards in the international system (Mbete, 2018:54). Informed by its soft power, South Africa has taken on the role of an international norm entrepreneur by playing these roles; thus it seeks to uphold, advocate, formulate and advance international norms. The country needs to show greater consistency and coherence when it comes to its posture as a human rights champion. Its human rights credentials dating back from 1994 when it transformed peacefully, remains its currency despite occasional missteps in terms of its voting pattern on human rights issues and noncompliance with reporting etc.

In terms of being a champion of human rights, the State joins/leads in global efforts to promote, protect and fulfill human rights and fundamental freedoms. It signs and ratifies regional and international human rights treaties and joins global efforts to promote and protect human rights and democracy. Since the advent of its democracy in 1994, South Africa has projected itself as a 'beacon of hope and light' in terms of human rights. It has championed the cause of human rights, democracy and freedom internationally and the cause of people living under foreign occupation, in particular the Palestinian people and the people of Western Sahara. Human rights and democracy are some of the pillars upon which it asserts its foreign policy rests (Barber, 2005:1079).

South Africa's particular objectives when it comes to the realisation of human rights as well as being a norm entrepreneur signals that a study that examines its non-compliance when it comes to reporting is of the utmost importance. As such this research is concerned about how South Africa interphases with the UN human rights system in terms of its compliance with its reporting obligations under selected core human rights treaties. This study will use the above-mentioned literature to delve deeper into state compliance with reporting obligations under core human rights treaties. The mentioned literature will assist in terms of focusing closely on state compliance with reporting obligations and to reflect in the procedural and substantive aspects of state reporting under human rights treaties.

## 1.10 OUTLINE OF STUDY

The first chapter provides an overview of the study. It will include an extended and critical literature study covering the theoretical approach and framework. The chapter also explains the primary research questions, the motivation for the study and methodology. It covers the background of the study, the statement of the problem, research questions, methodology, literature review and outline of the study.

The second chapter (theoretical framework) examines theories which explain state compliance with obligations under international human rights treaties. Once different theories of compliance (strands) are explored, the constructivist theory will be explained and adopted. It will be adopted as it provides the most appropriate theoretical approach to the study.

The third chapter reflects on State compliance with reporting obligations under core human rights obligations. The chapter will also reflect on the response of the UN to the endemic challenge of State compliance, non-compliant state reports, late reporting and non-reporting on the part of states.

The fourth chapter reflects on the case study of South Africa and touches on the research questions in the study. It primarily focuses on and analyses the reports that South Africa has submitted to the three identified treaty bodies it reports to (ICERD, ICESCR and ICCPR). The chapter concludes by identifying factors such as the absence of a reporting methodology and poor coordination as some of the challenges that explain the state of South Africa's compliance with its reporting obligations under UN human rights treaties.

The fifth chapter will provide an overview of existing mechanisms for the management and coordination of state reports. It will also use the UN's reporting guidelines as a standard to assess South Africa's compliance with its reporting obligations. It will reflect on the role and purpose of state reporting in human rights treaties and discuss the relevant theoretical literature. It will provide an analysis of State Compliance with Human Rights Reporting Obligations under Core Human Rights Treaties.

The chapter will also reflect on existing mechanisms for the management and coordination of state reports. It will reflect on South Africa's mechanism(s) to facilitate its compliance with its reporting obligations, reporting requirements, conclusions and recommendations of treaty bodies and follow up processes.

The chapter concludes by identifying factors such as state capacity and political will as among some of the factors that explain South Africa's compliance with its treaty obligations under UN human right treaties.

The sixth chapter will reflect on the oversight roles that Parliament, Chapter 9 institutions (Human Rights Commission and the Commission on Gender Equality etc.) play or should play on terms of monitoring state compliance with reporting obligations. It will also reflect on the role that civil society organisations play in state reporting, submitting shadow reports and in the process of report preparations. The study also analyses the role of these actors in State writing and reporting processes and whether their role in State reporting can be enhanced.

Following reflection on the potential role that can be played by the mentioned role players in terms of state reporting, the chapter finds the important role that Civil Society organisations can play in State compliance with human rights obligations. The chapter concludes that a state-centric approach to state compliance is not in keeping with the aim of the human rights treaties. Compliance with human rights treaties requires the State to enhance engagement with all role-players including non-state actors. Human rights promotion and protection needs a national approach and involvement of all organs of society.

The seventh chapter, provides a summary of findings, observations and conclusions arrived at on South Africa's compliance with its reporting obligations will be provided. The chapter will attempt to provide the theoretical contribution of this research project to scholarship in the field of international relations (political studies). Following the study, I will make recommendations and concluding observations.

# Chapter Two

# Theoretical Framework

## 2.1 Introduction

As mentioned above, this chapter seeks to develop a theoretical framework for this study. The chapter will provide a framework for the understanding of South Africa's compliance with its reporting obligations under selected core human rights treaties. As such, the chapter seeks to develop a prism through which to analyse state compliance with reporting obligations. The chapter begins by outlining theories on state compliance obligations. Specifically, it reflects on two international relations theories, namely, compliance theory and constructivism.

This chapter is divided into two substantive parts; the first part focuses on the various compliance theories, and the second part outlines why I chose constructivism as a framework to explain state compliance with human rights obligations.

State parties to core human rights treaties have a legal obligation to comply with reporting requirements under those human rights treaties and to subject themselves to scrutiny by the relevant treaty monitoring bodies (TMBs). Thus, it is crucial to understand state behaviour following ratification of core human rights obligations under human rights treaties. In order to have such an understanding, a study of relevant international relations and comparative politics theories is required. I have reflected on various theories of international relations both within the realists and normative schools of thought and have determined that the constructivist and compliance theories provide an important theoretical lens to analyse state compliance with reporting under obligations to core human rights treaties.

I will, as a result, utilise a combination of constructivist and compliance theories, as this theoretical approach is the most appropriate theoretical framework for this study. The two theories will be employed to address the research topic and questions for this study.

The theories will, inter alia, assist in terms of answering the following questions:

- What factors explain South Africa's compliance or non-compliance with their reporting obligations under selected core human rights treaties?
- What insights does the South African case study provide into state compliance or non-compliance with its human rights reporting obligations?

The chapter will also reflect on the typology of obligations that international human rights treaties impose on states.

This chapter will seek to situate the study within the normative theory of State compliance with human rights obligations and state behaviour in relation to human rights treaties. This approach will play an important role in addressing the core focus of this study, which is South Africa's compliance with its reporting obligations under selected core human rights treaties.

## 2.2 The Basis for Understanding Compliance

The reasons why states do not comply with their international obligations are confounding, as states elect to voluntarily ratify legally binding treaties. The central question is what motivates states to comply and what factors explain state compliance with treaty obligations. Kingsbury (1998) maintains that compliance is rooted in the understanding of the following relations: behaviour, law, objectives and justice. He also argues that compliance is a function of competing conceptions of international law. These relations are of critical importance in understanding the real- world problems that exist (Etuvouta (2019:43). Problems that international lawyers are required to handle perpetually and which must be theorised prior to having any real theoretical understanding of compliance.

Various scholars have posited several reasons as to why states choose to comply. Burgstaller (2007) advances three reasons on why states comply - they are as follows:

- to avoid sanctioning or punishment within the enforcement perspective,
- when States determine that the rule to be complied with and the institution from which it originates is legitimate and opens ways for future cooperation, and

- a cost-benefit analysis of the state's self-interest.

The preceding will be explored within the context of different theories that will be discussed below. In the main, state compliance is indispensable to the promotion and protection of human rights.

## 2.3 Theories of Compliance

There have traditionally been two approaches applied to compliance theory, namely; rational choice theory and normative/constructivist theory. As mentioned above, this study will take a constructivist and compliance theoretical approach for reasons I will outline below.

### 2.3.1 Rational Choice Theory

This theory conceives of states as rational self-interested actors that are able to identify and advance their interests. It depicts states as interested in material gain for themselves rather than being interested in the common good. In this regard, states have no innate preference for complying with international treaties (Geisinger, 2008:1171). In reality States do have the desire to comply and may be restricted by capacity challenges when it comes to compliance.

In undertaking this research, I established that normative theory is best applicable to the research questions and to this study. The research questions for this study are on compliance with reporting obligations under core human rights treaties, I established that compliance theory (component of normative theory) is relevant for this study. Compliance theory also relates to State sovereignty, securitisation and security, these aspects may constitute issues of normative conflict and can be the justification for state non-compliance with human rights obligations (Hermansen, 2015:9). Compliance theory is also helpful in terms of establishing under what circumstance, through which means, States are able to move from commitment to compliance with UN human rights norms and standards (Hermansen, 2015:9).

The chapter will reflect mainly on constructivist approaches, by focusing on constructivist theory, managerial theory and sophisticated constructivism. On the rational choice theory, the chapter will provide a brief outline of the theory.

### 2.3.2 Sophisticated Constructivism

Stubbins Bates (2014:1169) notes that there has in recent years been a marked increase in academic work on compliance theory in international law in general and human rights in particular. The work is in various disciplines and largely influenced by international relations and political studies in terms methodology and substance (Stubbins Bates, 2014:1169). Bates also notes that over time the typology of compliance theories has been developed and refined to levels of sophistication and rigour.

Subsequently, a typology of compliance theories emerged out of several distinct components to fuse into two contesting outlooks, namely normative and rational choice approaches (Stubbins Bates, 2014:1169). Rational choice outlooks are centered on hegemony, incentives sanctions, and material self-interest, Guzman added reputational concerns and constructivist outlooks. And constructivist outlooks stress that reprised interactions, discussions, and familiarity with norms are symbolic of and construct state practice (Stubbins Bates, 2014:1169)

Stubbins Bates, 2014:1169) observes that the typology of compliance theory includes Slaughter's liberal internationalism and trans-border elite networks, Goldsmith and Posner's neorealism and Guzman's rational choice theory approaches; Chayes and Chayes's managerialism, Finnemore and Sikkink's concept of norm entrepreneurs, 'take for-granted' norms, Koh's transnational legal process. It also includes Brunee and Toope's interactional theory of legal obligations.

Rational choice theory has focused mainly on hegemony, incentives, sanction and material self-interest (Bates, 2015). This theory conceives of states as rational self-interested actors that are able to identify and advance their interests. It depicts states as interested in material gain for themselves rather than being interested in the common good. In this regard, states have no innate preference for complying with international treaties (Geisinger, 2008:1171). From the preceding, this outlook is very restrictive and does not provide a sound basis for analysing state compliance with human rights treaties.

On the other hand, Krook and True (2010) assert that constructivist theory maintains that states do not rely on the result of logical material consequences for their actions alone. They behave in line with the logic of appropriateness as well as material self-interest.

In this regard, it become important to ask; what is compliance with human rights norms? Compliance is on a continuum, and it entails the fulfilment of treaty obligations including state reporting and any other requests by supervisory bodies (treaty monitoring bodies), the domestication of the provisions of the relevant human rights treaties and rules consistent behaviour at the domestic level (Schmidtz and Sikkink, 2002). Risse *et al.,* (2013) define compliance as "sustained behaviour and domestic practices that conform to the international human rights norms". It is also referred to as "Rule-Consistent Behaviour".

Hermansen (2015:14) argues that when evaluating compliance, it is necessary to bear in mind that compliance is not only an objective measure of behavioural change but that it is also a subjective yardstick which increases over the years as a result of efforts by human rights organisations. The increases exist because new treaties get ratified, including optional protocols to close protection gaps, scopes get widened, more and better reports are submitted by states and information on human rights set new standards for states to comply with human rights norms (Hermansen, 2015:14).

Hillebrecht (2014) maintains that state compliance is a function of state institutional capacity (incapacity). Hillebrecht recognises that compliance is not necessarily a direct result of failed or failing states or those operating in 'areas of limited statehood'.

Hillebrecht's (2014) work on compliance focuses on processes within and between domestic political institutions and civil society role-players with reference to their implementation of measures directed by regional human rights courts. She maintains that 'domestic institutions are critical for compliance'. In this regard, Stubbins Bates (2014:1176) notes that compliance is an inherent domestic matter, with pro-compliance alliances of political actors (the legislature, executive and judiciary) and human rights role players/reformers interacting to execute judgments of human rights courts. Compliance is a function of states taking steps to act following the

judgements of international and regional organisations. Hillebrecht maintains that implementation is political, requiring the relevant stakeholders to take the political decision to abide by the decisions of the relevant bodies/stakeholders.

Hillebrecht's political science analysis categorises the discussion of socialisation and compliance as one of two 'normative approaches'. It constitutes a very important alternative premise to inter-state political analysis. She focuses on intrastate processes rather than inter-state contexts. Her approach reflects on political processes within the state. Hillebrecht's definition of compliance relates to the implementation of judicial findings of non-compliance. This approach can be adapted and broadened for this study to encompass compliance with reporting obligations under human rights treaties.

Hillebrecht (2014) proposes three causes of compliance with human rights judgements:

- Concerned governments can use these judgements to demonstrate a commitment to human rights;
- Domestic organs of civil society extract mileage from them in the form of 'impetus and political legitimacy' for reform; and
- Certain 'strong democracies' may elect to comply with human rights judgements begrudgingly ('begrudging compliance'), highlighting limits imposed on them by what they consider politically inconvenient international law (Hillebrecht, 2014).

Hillebrecht puts a stronger emphasis on incentives and political costs rather than socialisation mechanisms. Her work combines rational choice and constructivist approaches and its emphasis on political actors' implementation of human rights adjudications is a significant contribution to compliance scholarship.

From the foregoing discussion, the theoretical framework of this project will be informed by constructivism. This approach entails the integration of the state capacity dimension into the theoretical framework for this study. State capacity would be an independent variable to explain compliance (non), as per Risse and Börzel (2013:10)'s recommendation that institutional capacity ought to be treated "as a

variable rather than a constant".

Constructivism, as already outlined in this chapter, constitutes an important theoretical tool to analyse state compliance with human rights treaties. For this research, I will use it to analyse state compliance with human rights treaty obligations.

### 2.3.3 Constructivism

Constructivists believe that ideas and norms constitute identities and behaviour of actors. They believe that states and non-state actors have the ability to produce and reform structure. The theory enables us to study how human rights norms are conceived and reproduced within the framework of human rights treaties. Whereas human rights are considered inalienable and inviolable and should not be interfered with, they are essentially a social construct. These rights are still subject to codification in the legal system (Forsythe, 2012).

Schmidtz and Sikkink, 2002, maintain that human rights norms are essentially clear examples of what constructivist theory refer to as a "social construct". Human rights norms and standards are societal creations and they exist only due to human beings believing that they exist, thus acting in accordance with them. As social constructs they require human institutions to guarantee their existence (Ruggie, 1998). Constructivist theory reflect on how ideas define and can change the nature of global politics and how they can frame interests and identities of states and decide what constitutes justifiable action (Hermansen, 2015:9).

They also believe in the social construction of reality and the significance of facts. Constructivists posit that reality, which we take for granted, is a project undergoing continuous construction - they therefore see reality as socially constructed. Constructivists attach importance to identity, because to have identity presupposes that the actor will follow the norms that are associated with the identity, meaning that some form of behaviour or actions are more appropriate than others.

Constructivism is primarily focused on the normative nature of international relations. Flockhart (2012:92) asserts that constructivism has its roots in critical theory and post-modernism. Its foundation lies in problematising that which is taken for granted.

Constructivists focus on the way the world shapes and is shaped by human beings. Constructivists believe that the material world (international system) is a social construct; it is what humans conceive of the world. It entails the way human beings interact with each other and perceives each other (Behravesh, 2011:4).

Constructivists maintain that reality is a project under construction. They also see the world as coming into being rather than already existing (Flockhart, 2012:92). Constructivism enables a study of how human rights are accepted as inalienable and should not be violated by authorities. It remains necessary to identify and construct these rights and to codify them in legal jurisdictions (Forsythe, 2009). Schmidtz and Sikkink (2002) maintain that human rights are without a doubt an example of what constructivist theory considers a "social construct".

Constructivists maintain that since norms specify behaviour, a normative structure will thus define certain forms of behaviour as acceptable and others as not acceptable. In this regard, constructivism differs fundamentally from realism and idealism, as it posits that actors will consider options for action impulsively and assess whether the action is in line with their identity (Flockhart, 2012:82).

Whereas other scholars consider constructivism to be an approach rather than a theory, it is broadly viewed as a social theory that has particular outlooks about the nature of social life and social change. Constructivism offers an alternative explanation to a number of key themes in international relations, including the meaning of anarchy and balance of power, the prospects for change and the interplay between interest and state identity (Flockhart, 2012:80).

Haas (1998:31-32) posits that social constructivism is the process by which collective representations of the world are made and diffused. The constructivist theory assumes that states are incapable of seeking new information each time a decision is needed. He argues that states are content with what they find as information and rely on previous cognitive outlooks to comprehend how their national interests may be affected by any related decision. As a result, he maintains that the decisions to comply are not based on rational calculations of interest by states. Instead, compliance is based on the application of socially generated understanding and convictions concerning how national interests may be realised in a particular

policy area.

Constructivism is of major importance and relevance to this study as it constitutes an appropriate theoretical framework, given that it perceives human rights as social constructs. As constructivism maintains that actors will consider options for action impulsively and assess whether the proposed action is in line with their identity (Flockhart, 2012:82) - this is in line with actual state practices in relation to human rights issues in the international system. Constructivism provides an important lens to analyse state behaviour and state compliance with human rights obligations. In this regard, constructivism is an important analytical tool to interrogate South Africa's compliance with its reporting obligations under human rights treaties.

Flood (1998:5) observes that while giving practical effect to the implementation of domestic laws and standards there may appear to be simply a cause-effect relationship and in reality, efforts to realise compliance are uneven and they often produce mixed results. He argues that once the promotion and protection of human rights obligations require international respect and observation by sovereign states, it becomes extremely difficult to determine which external factors caused what internal behavioural change on the part of the country concerned. In this regard, identified international relations theories are important means to reflect and analyse state behaviour.

Haas (1998:19) argues that compliance is a matter of state choice to discipline civil society. Even though states may wish to comply, not all are capable of complying; this is owing to political will and technical factors related to the decision to comply. He also argues that some states may lack the political will to comply and lack the political power to foster behavioural change on their citizens. Haas also posits that the extent of the political will on the part of the states may vary owing to the anticipated degree of resistance at the domestic level, owing in part to identity and to the number and influence of those actors who have to change their behaviour. He also argues that the state may elect to influence the behaviour of the private sector rather than parastatals and public activities. The state choice analogy will not be pursued and applied in this study as it is not conceptually in line with the goals of this project.

### 2.3.4 Constructivism and the Norms underlying International Relations

Finnemore and Sikkink (1998:893) sought to provide an empirical analysis of norms and determinants of behaviour in international relations. They posit that a state's behaviour is defined by its identity and interest, the products of the interaction between international forces and the norms of behaviour rooted in international society. Domestic norms are important considering that many international norms originated in the domestic arena of states (Finnemore and Sikkink, 1998:893).

They also maintain that the interests of states are shaped by norms that develop at the systemic level and can be structured by international institutions to become influential collective norms. Thus, the norms of international society are transferred through international institutions to states only to "shape national policies by 'teaching' states what their interest should be" (Finnemore and Sikkink 1998:888). In this regard, according to constructivists, national interests should not be treated as a given but only exist because they are constructed by inter-subjective norms. Finnemore and Sikkink's approach thus explains what motivates states to align their aims and objectives to establish communities of inter-subjectivity based on norm dynamics and the role that norms play in the international system.

Epstein (2017:2) notes that constructivists are curious as to why in the absence of a central governing structure over states and international actors are able to observe the same rules to cooperate in an anarchical international system. Epstein assails critical constructivists by stating that a major shortcoming of conventional constructivists is that they overlook the entrenched unequal power relations that manage norms in the international system (Epstein, 2017:3).

Concerning limits on behaviour, Epstein (2017:4) concurs with Foucault's distinction between laws, which function as external limitations on behaviour and norms and the internal, "chosen" prescriptions. Epstein (2017:4) posits that the power of norms comes from "this taken-for-granted unquestioned quality they command". The extent to which constructivism explains state behaviour in relation to state compliance with international law of human rights law does not come out clear in the preceding paragraphs.

Thus, while constructivism refers to state behaviour within the international relations realm, it does not explain why states commit to treaties and then struggle or fail to comply with their obligations. It also does not explain why states even commit in the first place and thus surrender their sovereign right to reign over their citizens in terms of human rights. Despite the aforementioned criticism of constructivism, it is a useful analytical tool for undertaking this study on South Africa's compliance with its reporting obligations under human rights treaties. Thus, no theory can absolutely and conclusively explain all factors that influence state behaviour and state compliance with international human rights treaties.

### 2.3.5 Constructivism and International Organisations

Constructivists have two approaches in terms of the role of international organisations in the international system. They maintain that international organisations are independent actors who possess power. They assert that these organisations operate in a world wherein there is cooperation and clearly defined interests of states. In essence, constructivists consider international organisations such as the UN to have the ability to influence states and other actors with significant power to inspire them to conform to expected international expectations in so far as accepted action and behaviour are concerned (Barnett and Fennimore, 2005:161-162). International organisations seek to influence states to perform key functions, including, implementation of agreements, sourcing information, and assisting states to attend to collective problems in the international system (Barnett and Fennimore, 2005:161-162).

Constructivists believe in the relevance, power and validity of international organisations. Barnett and Fennimore (2005:161-162) argue that constructivism emphasises the central importance of international cooperation and the need to address problems through collaborative efforts. Constructivists perceive international organisations as the key drivers of order in the global system of governance. They do not see states as selfish actors who seek to accumulate power at the expense of the stability of the global system.

With regard to norms, the constructivist theory maintains that norms are social constructs and can be seen within a context of a life cycle of norms, one that is as

follows: norm emergence to norm cascade and finally norm internalisation or institutionalisation (Hermansen, 2015:13). As stated earlier in this chapter, constructivists focus on the way the world shapes and is shaped by human rights. Constructivists perceive the material world to be a social construct and they maintain that reality is a project under constant construction (Flockhart, 2012:92).

On the other hand, Adler (1997), Wendt (1995), Haas (1992), and Haas and Haas (1995) argue that social constructivism "looks at the process by which collective representations of the world are constructed and diffused". They maintain that constructivists perceive states as lacking the ability to search for new information whenever a decision is required and that they act and rely on earlier cognitive outlooks to understand how national interests may be impacted by any relevant decision.

While constructivists assert the ability of international organisations to persuade states to conform to expected action and behaviour, the reality is that states often act in terms of their national interests, they may face domestic constraints and at times they may pursue their goals through regional groupings. There are often variations in terms of expected behaviour on the part of states such as different compliance patterns by states. In this regard, constructivism will be pivotal in responding to the central questions in this study, including; what factors explain South Africa's compliance with core/selected human rights treaty obligations?

The emergence of constructivism has played an important role in analysing state behaviour and state compliance with international human rights treaties and in determining the effectiveness of international human rights systems. In this regard, I will use constructivism as the important framework to analyse South Africa's compliance with its reporting obligations under core human rights treaties. It will assist in terms of addressing the research questions this study seeks to address.

### 2.3.6 Managerial Model

The managerial approach conceives of compliance to be a management problem. Chayes and Chayes (1993) conceive of compliance as seldom deliberate and calculated, but that it can be a result of state capacity limits and major changes over

time (Stubbins Bates, 2014:).

The Chayese (1998) argue that external factors such as “treaty ambiguity” and administrative and or financial capacities of states are critical factors to state compliance with international obligations. Their outlook differs from other compliance approaches, as conventional theories postulate that states do not comply owing to factors such as the lack of political will and deliberate noncompliance (Risse *et al.,* 2013). The managerial theory identifies institutional capacity as the cause of compliance (non). Chayes and Chayes (1998) note that state capacity has a direct bearing on the ability of a state to comply. They maintain that compliance is a function of state capacity.

The Chayese’s perspective (managerial) is also suitable for this thesis as it is in line with the thrust of this research project, namely understanding factors that explain state compliance with human rights obligations. I also theorise that the state is a central role player in compliance with international human rights treaties milieu. The state plays an indispensable role in the compliance process as the major role player in implementing treaty obligations. It is thus of critical importance that the state is able to respect, fulfil and protect human rights. Complying with reporting obligations would be a useful means of demonstrating state capacity.

## 2.4 Typology of State Obligations

Typologies of human rights obligations by states were developed in the 1980s to elaborate on the nature of obligations required by human rights treaties (Moyo, 2013:181). Since the 1980’s, academics began to reflect on types of obligations that human rights treaties placed on states. Henry Shue (1980:83) notably proposed an analytical approach to state duties that went beyond the classical hypothesis of a single correlative duty of each for each right. Consequently, state obligations under international human rights treaties began to be seen as entailing the three types of obligations, namely; the obligation to respect, the duty to protect and the obligation to fulfil. UN treaty bodies use this typology when analysing state obligations. The analytical approach taken by the UN human rights treaty monitoring bodies when reflecting on state obligations is in line with this typology. Below is an elaboration of the tripartite typology of obligations.

i) The obligation to respect,

The obligation to respect requires the state to refrain from engaging in acts (policies, measures) that negatively impact on the rights of individuals and groups. The state cannot directly or indirectly interfere with rights. Thus states are obligated not to obstruct or hinder human rights and from taking measures that deprive groups and individuals of their rights. This duty imposes restrictions on the state in terms of what it can do with respect to human rights (Chirwa, 2004).

ii) the obligation to protect,

The duty to protect requires the state to engage in measures that safeguard human rights. It requires states to take positive steps to realise rights protection. It also directs states to limit, regulate and prevent adverse measures that can be taken by NSAs. In this regard, states are duty bound to regulate private interactions in order to ensure that human rights are not negatively affected by other actors, individuals or groups. This duty requires the state to hold all actors responsible for rights violations, including third parties (Moyo, 2013: 181).

iii) the obligation to fulfil,

The obligation to fulfil the relevant human rights responsibilities enjoins the state to take appropriate steps to ensure that particular rights are accessible individuals and groups. It mandates states to ensure that legislative, judicial and other measures are taken to ensure to access to particular rights. The state would need to for example ensure that within its means, it ensures the right to for example food or water. This right is difficult to ensure as it requires the state to have the will, capacity and resources to ensure its realisation (Chirwa, 2004).

Owing to its usefulness, the UN developed Shue's typology and thereafter introduced it in its system. In 1987 Asbjorn Eide, Special Rapporteur to the then UN sub-commission in the Prevention of Discrimination and Protection of Minorities, led the effort. Eide also differentiated between the obligations to respect and protect human rights (Eide, 1987). Van Hoof further refined his conceptualisation of state obligations and introduced a fourth level of obligations, which he called the obligation to facilitate (Leib, 2011:63).

The additional obligation (to facilitate) mandates the state to avail opportunities so that the rights in question can be enjoyed. Eide refers to article 11(2) of the ICESCR which calls upon States to improve measures of production, conservation and distribution of food. He proposes that this facilitation be done by employing the full use of technical and scientific knowledge and by developing or transforming agrarian systems. Eide highlighted the importance of clarifying the correlative duties on States imposed by rights (Moyo, 2013). Such duties are not outlined in detail in academic literature, or in the core human rights treaties, nor in international and regional judicial human rights mechanisms by the UN's independent experts and special rapporteurs (Leib, 2011:63).

Koch (2005) notes that the negative features of the obligation to respect have been used to counter the argument that socio-economic rights are justiciable rights. Most importantly, he questions whether there is such a thing as "one can hardly have an obligation not to interfere which would not require some kind of positive measure". This is owing to the distinction between negative and positive duties that "is not static, a static or immutable quality of rights".

Koch (2005) questions the insertion of the obligation to protect between a "predominantly negative" obligation to respect and the predominantly positive obligation to fulfil in the tripartite typology. She is also of the view that the extension of state obligations to private disputes is a rather complex issue with many angles owing to increasing privatisation. Koch (2005) maintains that such a complex issue might not be addressed adequately if it is discussed in the framework of human rights typologies.

Koch (2005) further questions the assumption that the obligation to protect is always more positive than the obligation to respect and always less positive than the obligation to fulfil. She points out that "the obligation to protect does not necessarily call for steps which are naturally to be placed on a scale in between a predominantly negative obligation not to interfere and a predominantly positive obligation to provide". Further, Shue (1985:83-86) strongly argues that "[f]or all its own simplicity, (the typology)……. goes considerably beyond the usual assumption that for every right there is a single correlative duty, and suggests instead that for every basic right

– and many other rights as well – there are three types of duties, all of which must be performed if the basic right is to be fully honoured but not all of which must necessarily be performed by the same individuals or state institutions".

It is often assumed that the implementation of the obligation to respect does not broadly entail resource requirements or distribution or re-allocation measures (Moyo, 2013:184). This assumption does not assist in terms of changing the conditions of the poor and disadvantaged members of society, who seek to realise the right to decent living conditions and better lives, including having access to clean and adequate water. This perception does not allow for challenging the patters of social exclusion that might be in place in particular societies (Moyo, 2013:184).

The tripartite typology of obligations is a sound basis to seek to understand under what conditions states comply with their human rights treaty obligations. I concur with Koch (2005) who concedes that the tripartite typology has some relevance in terms of deciding what is concretely necessary to be done for a State party to comply with its human rights obligations. The tripartite typology of obligations will be integrated into this study in the quest to understand factors that influence State compliance. The tripartite typologies are critical in terms of obligating the state to respect, protect and promote human rights by means. There is also a causal link between these obligations and the requirement to comply with reporting obligations under the treaties human rights treaties.

### 2.4.1 Categorising State Obligations

It is worth noting that Article 2(2) of the ICESCR places the primary responsibility of human rights on states. Chirwa (2004:218-232) asserts that states are contracting parties to international and regional human rights treaties and, as a result, they are held singularly responsible for the realisation of human rights.

The principle of subsidiary asserts that the main party responsible for the implementation and enforcement of internationally protected human rights norms is the state party to the relevant treaty. This approach is also consistent with the rule of exhaustion of domestic remedies (IJRCenter, 2018:1). In this context, a State needs to be afforded an opportunity to remedy an alleged shortcoming or violation within its

domestic legal system. This ought to be attended to before its international commitment can be considered at the regional level or the international level. International human rights norms, standards and mechanisms are in place to close protection gaps and to also complement the domestic human rights norms and standards, in line with the subsidiary principle.

Moyo (2013:193) argues that the typologies approach has dealt a major blow to the notion that each human right falls into compartmentalised categories. As a result, it is now accepted in doctrine and jurisprudence that each human right places a variety of obligations on a state. When reflecting on different kinds of duties imposed on the state by a particular right within the framework of the respect, protect and fulfil typology, it becomes easy to appreciate specific state action required for the state to implement a particular right.

In the main, human rights treaty bodies broadly apply different formulations in their provisions with regard to states obligations. The ICCPR, for instance, obligates states to "respect and ensure" the rights provided in the instrument. On the other hand, the ICESCR mandates states to "undertake the steps […] to the maximum of its available resources, to achieve progressively the full realisation" of human rights guaranteed in that instrument (ICESCR, 1976).

Moyo (2013:194) argues that "the typology of state obligations is an important analytical tool in elaborating the duties that human rights such as the right to water impose on states". He also argues that elaborating state obligations in this manner emphasises that states have a major role to play in the implementation of human rights. This is in contrast with the simple obligation of non-interference with the enjoyment of human rights. The methodology of enunciating state duties has proved to be a viable means of establishing state accountability for the enforcement of socio-economic rights.

Given the above, it is of critical importance for states to act in line with the tripartite typology of obligations and to also comply with their reporting obligations. Respecting the typology of obligations, without complying with reporting obligations, would not be enough, as there would no self-introspection and international inspection by the supervisory bodies of the treaties. It is a duty of states to regularly

submit their reports and to implement to the best of their abilities the recommendations made by the supervisory bodies that oversee the relevant treaties.

Below, I have outlined typologies that can be helpful in terms of enhancing State compliance with human rights obligations on the part of States parties. These include 'good international citizenship', 'norm entrepreneurship' and 'example'.

### Good International Citizen

Good international citizenship is about States going beyond the minimum standards of international behaviour. In this regard, it requires doing more than pronouncing that human rights are cherished values and therefore more than signing and ratifying treaties. Being exemplary is part of good international citizenship (Pert, 2012). A good international citizen must practically move from ratifying human rights treaties to compliance with treaty obligations. It must submit reports to international human rights treaties on a timely basis. Such a citizen must comply with the substantive aspects of reporting, including, addressing the conclusions and recommendations of the treaty bodies. It would also be prudent to ensure that in line with treaty law, states domesticate the provisions of these treaties into national law. In a number of cases, national law may be incompatible with the said treaty or fall short of set international standards. In this regard, political will and state capacity become critical in terms of state compliance.

South Africa would thus, in cases when its legislation falls short of international standards, need to adopt acts of parliament to domesticate the relevant treaty(ies) and its provisions. This also requires that parliament plays a central role in the process. Decisions of the courts would also have to be respected insofar as they are consistent with its international obligations.

### Norm Entrepreneur

A norm entrepreneur initiates diplomatic processes, leading and drafting policy. This also includes leading in terms of resolving given problems, employing technical skills and bringing diplomatic skill to the fore to initiate diplomatic processes. This role conception also includes playing a leading role in promoting new international norms and standards (Mbete, 2018:54). In this globalised and changed context, States are

able to punch above their weight and exert leadership in various forms in the international fora. Their source of power is more varied, and this includes the use of soft power to influence the global system (Nye, 2004). Soft power is as useful as conventional power (material capability). It enables States to lead initiatives within the framework of pursuing a global policy in global institutions of governance. It also enables States to reach beyond the limits of their given capabilities.

Policy entrepreneurship requires resources such as a skilled civil service and diplomatic corps with advanced technical ability, communications expertise, and analytical capabilities. Chapter four will reveal that South Africa has faced challenges in terms of fulfilling its reporting obligations on a timely basis under core human rights treaties. Among its main challenges is the lack of a standing reporting mechanism. Its current report writing mechanism is a loose arrangement. Being a State party to seven of the nine treaties has presented major challenges to South Africa's ability to meet its reporting obligations.

***Example***

The notion of a good global citizen is closely connected to the idea of a State serving as an example of ideal conduct in the global arena. Developing States that conceive of themselves as major role players in the international system offset their limitation by means of soft power. Soft power denotes a situation whereby states are in a position to realise their goals without the use of force or making payments. It is characterised by a country's political ideals, policies and culture (Nye, 2004: x). Chapter four will highlight some efforts South Africa has sought to take to set an example as a country based in deeply rooted human rights ethos and an acclaimed constitution.

I will use constructivist compliance theory and the typology of obligations approach outlined above to engage in the analysis of state compliance with human rights obligations. This approach will provide an important analytical tool to reflect on state obligations in respect of human rights treaty obligations. The typology approach will help in terms of analysing state compliance with human rights treaties as it mandates states to implement human rights, thus holding states accountable for the enforcement of human rights. It will also be useful in establishing the domestic and

international implications of treaty compliance.

## 2.5 Conclusion

This chapter reflected on relevant international relations theoretical approaches, in particular constructivism and compliance theory. These theories are helpful to better understand state compliance with human rights treaties, the international system of human rights promotion, protection and fulfilment, relevant phenomena and developments in the international system.

The managerial model, which is embedded in constructivism, will be useful to help in understanding and explaining the nature of the world and its complexity and to analyse state behaviour in respect of compliance with reporting obligations under core human rights treaties. Theoretical elements derived from the constructivism and compliance theories will be useful in terms of analysing state compliance with reporting obligations under selected core human rights treaties. It will show that state behaviour is explained by ideas, identities and norms. Constructivism also demonstrates that nature of reality is not fixed but is rather prone to change. Thus, the challenge of states compliance is attributable to how states chose to act in line with their ideas, identities and priorities.

As stated earlier, the typology of obligations will also serve as an important theoretical guide - one of the most important ways of measuring state compliance is through understanding the impact of the tripartite and quadruple typologies of human rights obligations. I opine that as a result there is a dynamic link between state behaviour and fulfilling the tripartite typology of obligations.

## 2.6 The Framework Chosen for the Thesis

The framework for this chapter is informed by constructivism and compliance theory. The outlook will set the scene for analysis of state behaviour in respect of state compliance with reporting obligations under core human rights treaties. The application of constructivist theory is the most theoretically appropriate approach for undertaking this study. Constructivism is not state centric, rigid and unresponsive. Whereas treaties, place the state at the heart of compliance with treaty obligations, leaders, individuals and groups are also critical role players. These role

players/actors perpetually shape and occasionally reshape the form and content of interstate relations by means of their action and interaction.

Furthermore, state capacity is an important variable in terms of compliance with human rights obligations. State capacity is also informed by individuals, structures and relevant competencies. Thus, it is important for the state to have strong and capable institutions, competent officials and leaders in order for the state to meet its human rights obligations.

A constructivist compliance theory will be applied to answer the research questions herein reflected above and in chapter one of this thesis. Compliance theory enables us to explore under which conditions, and by which mechanisms, states are able to transition from making commitments to complying with international human rights treaties. Compliance theory also explains the reasons why states make progress or fail to comply and what rationale states may give to dispel accusations of non-compliance with their obligations.

# Chapter Three

## State Compliance with Reporting Obligations

### 3.1 Introduction

At this juncture, the research project will utilise international relations theory and concepts that underline constructivism, including human rights norms and the interplay between interest, state capacity and state identity. These concepts play an important role in analysing and understanding state compliance with human rights treaty obligations. The concepts will be particularly important in terms of analysing South Africa's compliance with its reporting obligations under selected human rights treaties.

As mentioned before, State compliance with reporting obligations under UN human rights treaty bodies is central for monitoring the implementation of human rights standards and compliance with state obligations. As such, treaty reporting is an important avenue for constructive dialogue between States parties and the treaty bodies.

The enjoyment of human rights is contingent on the states' domestic implementation of human rights as enunciated in the core human rights treaties. Domestic implementation of the treaty rights is the main instrument envisaged by the core human rights treaties, to give effect to the individual rights outlined in the treaties and the reporting system. Furthermore, the interstate complaint system and individual complaint system are in place to monitor or supervise the domestic implementation of the treaties (Wheatley, 2019:115) and as a result, they are considered to be the secondary means of implementation.

Human rights treaty monitoring bodies are composed of dedicated UN Secretariat staff and unpaid independent experts, who are essentially volunteers. The independent experts are a key feature of the UN treaty body monitoring system (OHCHR, 2018).

This chapter seeks to provide background on state compliance with reporting obligations and it will also seek to provide context by reflecting on contributory

factors to state compliance with reporting obligations. Further, the chapter will also tie in constructivist compliance theory and some of the research questions for this study.

The chapter proceeds from the premise that understanding state compliance with reporting obligations is important in terms of appropriately reflecting on factors influencing states compliance (non-compliance) with reporting obligations. It will reflect on the issue of state compliance with reporting obligations, bearing in mind the supervisory role played by human rights treaty bodies.

### 3.2 Background – State Compliance with its Reporting Obligations

Over a decade ago, the Human Rights Committee "expressed" in its annual report "serious concern" that "more than two-thirds of all states parties were in arrears with their reports". Furthermore, in 2012, the then High Commissioner for Human Rights, Ms Navi Pillay expressed concern about the poor level of state reporting to the UN human rights treaty bodies, which were at a paltry percentage of 16% (Pillay, 2012:19). The situation of low levels of state reporting has to date not changed significantly, yet States parties are obliged to report periodically on their implementation of the relevant provisions of human rights treaties.

Importantly, the former High Commissioner for Human Rights, Ms Navi Pillay, stressed in her report to the UN General Assembly in April 2012 that low compliance levels by states parties in terms of reporting amounting to 16% over an average of 2 years (2010 and 2011), had saved the system from total collapse as the under-resourced treaty bodies would not have been able to handle higher volumes of reports by states (Pillay, 2012:19).

In the human rights arena, there is a broad understanding that one set of human rights cannot be separated from another and that human rights are a legitimate concern of the international community. Human rights are universal, indivisible, interrelated and interdependent and ought to be treated with the same emphasis and place on an equal footing. Civil and political rights are considered immediately realisable or enforceable, whereas others are not immediately realisable and are subject to progressive realisation. This fact has an impact on the enjoyment of the relevant rights; it may also impact on the implementation of the treaty provisions and

the measurement of state compliance in respect of treaty provisions (Sloth-Nielsen, 2018:2). It is thus of central importance that there are in place core human rights treaties which are supervised by TMBs. Their primary function is to monitor state compliance with procedural and substantive obligations under the relevant human rights treaties.

The preceding is an outline of the nature of state reports and the reporting system: The system is generally described as inadequate, ineffective, and even "in crisis". Failure to submit reports at all by many States is common. Furthermore, there is a great deal of reports variation across countries, regions and in their form and quality. States often provide inconsistent and meaningless information and data in their reports (Bayefsky, 2001:8). This tends to make it difficult for the treaty body to measure implementation of the said treaties. The quality reporting simply requires expertise in and familiarity with the treaty and the reporting process, something which many states lack. It is also observed that capacity on the part of States is not the only issue. It is noted that some States do not have an interest in submitting self-critical reports. This, it is argued, is the case with resource rich and democratic States (Creamer and Cosette, 2020:18).

Government commitment and state capacity both tend to contribute to compliance with reporting requirements. Gross domestic product per capita is strongly associated with the likelihood of reporting, suggesting that wealthier states are better able to bear the costs of compiling legislation, collecting data, and studying outcomes. For some treaties (such as CAT and CRC) bureaucratic capacity (in the form of an NHRI) also correlates with report submission as well as reporting quality (Creamer and Cosette, 2020:18). NHRIs provide many states the institutional capacity needed to give factual knowledge of, expertise in, and familiarity with the treaty regime and reporting process. Two other factors also correlate with better reporting: commitment to human rights law (widespread human rights treaty ratification) and regional reporting norms and socialisation (the higher the regional reporting density, the more likely a state from that same region will report (Creamer and Cosette, 2020:18).

Creamer and Cosette (2020) argue that well-resourced States that have a broad legal commitment to international human rights treaties are more likely to submit

their reports compared to poor states and inconsistent ratifiers. It is, however, not the case that nondemocratic countries or those with poor human rights records systematically avoid reporting (Creamer and Cosette, 2020:18).

On the other hand, Hanson and Sigman (2013:1) engaged in a study measuring State capacity and obtained insightful information. They use the State capacity dataset derived from their study to provide fresh insight into current theories of the influence of state capacity on development and the success of World Bank projects. Their study seeks to give effective guidance and tools to those who study the causes and results of state capacity.

It is important to note that in the main states behave differently in terms of compliance with reporting obligations as evidenced by the low percentage of compliance (16%) stated above. The low percentage indicates that regardless, of their form of governance or capacity, states can comply or fail to comply. As highlighted above and in the theoretical framework, each state may behave in terms of appropriateness, ideals, role conception, and norms.

A state may see the value and advantages of being a consistent complier and thus project itself as a leader with respect to the relevant treaties. This may be for domestic and or international reasons. At the same time a state that lacks institutional capacity to report may struggle to report even though it may desire to comply. Such a state, may alternatively, seek assistance from the academia, experts and the UN treaty body capacity building teams in order to comply. Ultimately, it is the state, its willingness, determination that shapes its conduct in terms of compliance with its human rights obligations. A state would weigh whether complying is in line with ideals, identity and norms. If there are advantages to compliance versus noncompliance, it would act accordingly. The high number of low ratifiers may signify a situation whereby states either do not appreciate the importance of treaty reporting or see no cost benefit with regard to compliance. Perhaps, the absence of direct sanctions for noncompliance accounts for low levels of accountability.

Understanding state capacity will be useful in appreciating the power and the limits of the state in respect of the promotion and protection of human rights.

### 3.3 Implementation Mechanisms of Human Rights Treaties

In the main, compliance mechanisms of core human rights treaties are underpinned by the following measures:

i) ratification or accession;

ii) legislative and policy measures;

iii) administrative measures;

iv) domestication of treaty provisions;

v) reporting to treaty bodies;

vi) judicial interpretation and the involvement of organs of civil society.

Depending on the constitutional order of a state party, the ratification or accession to any international treaty may automatically result in the provisions of that treaty being incorporated into domestic legislation, and being immediately and fully operational (Begum, 2016:2).

In other cases, the legal tradition or legal system of a country, may require following the ratification of a treaty, the implementation of a treaty by means of amendment of the constitution or national laws to comply with the standards of the treaties; amendment of policies to comply with the standards of the treaties; and transformation of the convention into national law by passing new legislation (Begum, 2016:2), including administrative action or measures to achieve the goals of the Convention. Once a country ratifies a treaty, this not only creates state obligations to formulate appropriate legislation and undertake requisite measures at the domestic level, but it also creates a special relationship between a state party and the UN human rights treaty system. The UN reporting system encourages States to monitor, track and analyse human rights abuses (Begum, 2016:2).

Consequently, the global ratification of human rights treaties plays an important role in the process of building national human rights cultures. It also deepens the importance and legitimacy of the human rights norms in the international system (Goodman and Jinks, 2003:182). As a result, human rights treaties perform a

(global) expressive function and a (domestic) constitutive function (Goodman and Jinks, 2003:182).

The Vienna Programme of Action of 1993 states that the promotion and protection of human rights is the primary responsibility of states. As a result, the three tiers of government (national, provincial and local), the executive, legislature and judiciary have critical roles to play in the promotion and protection of human rights within their respective powers (Begum, 2016:2).

Further, the basic obligations for State parties to core human rights treaties are fourfold (Sloth-Nielsen, 2018:2) and are as follows:

i) the obligation to respect the treaty provisions. It directs the State party to refrain from any steps that violate the rights of citizens to enjoy their basic human rights, including actions that citizens/groups take with a view to realising their rights;

ii) the obligation to protect the rights enshrined in the treaty and, more specifically, to protect individuals within their jurisdiction from breaches of their rights by the state or by non-state actors;

iii) the obligation to promote the rights (by raising awareness, publicising them, and creating a human rights culture); and

iv) the obligation to fulfil the rights to the benefit of the rights holders/beneficiaries.

The obligation to protect rights mandates states to take action to prevent violations of human rights by others. It involves encouraging individuals and organisations to respect the rights of others, as well as imposing sanctions for violations that are committed by private individuals or organisations. The obligation to fulfil rights requires states to take steps to achieve the full realisation of human rights. The measures can include the passing of laws, the implementation of budgetary and economic measures, or enhancing the functioning of judicial bodies and administrative agencies (Sloth-Nielsen, 2018:2).

It is common to categorise the human rights obligation of states at the national level as vertical and horizontal at the local level (Knox, 2008:2). The 'vertical obligation' speaks to the fact that human rights treaties impose direct obligations on states to protect the rights of their citizens. The 'horizontal obligation' concerns the duties of individuals to respect the human rights of others (Knox, 2008:2). In simple terms, it requires that while states must not violate human rights of individuals, they should simultaneously also ensure that the human rights of an individual are not violated by other private persons or private entities (Knox, 2008:2).

The constructivist outlook is apt in this context, as ideas may develop into norms, and norms influence state behaviour. States are susceptible to persuasion and reason; hence they commit to treaties voluntarily despite the inherent and implied reduction to their sovereignty. States internalise norms when they are convinced of the truth, validity, or appropriateness of a norm. States are also influenced by their neighbours and how the neighbours behave. Normative arguments may persuade states to comply with their obligations. As a result, changes in international norms can lead to changes in state behaviour (Oberdoster, 2008:691).

### 3.4 State Reporting

The principal objective of the State reporting mechanisms is to monitor and assess the extent to which states are respecting their obligations under international treaties. To meet their reporting obligation, states must submit an initial report usually one or two years after ratification of a treaty and then periodically in accordance with the provisions of the treaty (usually every four or five years). In addition, to the government report, the treaty bodies may receive information on a country's compliance with treaties from other sources, including NGOs, UN agencies, other intergovernmental organisations and the press.

State reporting provides states parties an opportunity to do the following (UN Training Guide, 2017:35):

1. Engage on self-assessment of compliance with treaty obligations, decisions, and recommendations in realising human rights and identifying remaining gaps and challenges;

2. Stimulate national dialogue and ownership with key stakeholders on regional and international human rights obligations and commitments when preparing reports, reinforcing national ownership of human rights; and also,

3. Deriving benefits from good practices emanating from other states parties and expert advice through active engagement with the international human rights system.

### 3.5 Reporting Periodicity

For the purpose of enhancing predictability, most of the international human rights treaties establish a framework for regular reporting by State parties, known as "reporting periodicity". It covers initial and periodic reports. The timetable for the submission of these reports is notably either clearly stated in the provisions of the treaty or is highlighted in the ICESCR and ICCPR at the discretion of the Treaty Body. Treaty bodies require states parties to submit their reports within one or two years following the entry into force of the relevant treaty for the particular State party. With regard to the periodic report, the time frame for submitting reports varies from two to six years.

State reports are not always submitted on time, and the system of reporting is structured in a haphazard manner (Greal, 2014:184). As a result, there is no coordination among the treaty bodies with regard to scheduling report consideration. The Committee of Enforced Disappearances (CED) is the only treaty body that has provisions to take other Committees into account when making observations and recommendations. This provision is assumed to provide states parties with a predictable, efficient and streamlined system in relation to the CED treaty (Greal, 2014:184). Other treaty bodies may need to consider taking this approach, with a view to improving and strengthening the reporting system.

All UN human rights treaties require submission of state reports by state parties, the treaties are as follows:

- International Covenant on Civil and Political Rights (ICCPR);
- International Covenant on Economic, Social and Cultural Rights (ICESCR);

- International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment (CAT);
- Convention on the Rights of the Child (CRC);
- Convention on the Rights of People with Disabilities (CRPD);
- International Convention on the Protection of the Rights of All Migrant Workers and their Families (IMCWF);
- The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).

South Africa is a state party to the above-mentioned treaties except for the Convention on the Protection of the Rights of Migrant Workers (IMCWF) and the Convention on Enforced Disappearance (CCED). It has the legal obligation to report periodically to the supervisory bodies for these treaties. It has had an opportunity to present reports to all the relevant treaty bodies, the most recent time being October 2018 when it presented its initial report to the CESCR within the 2 years after it had become a state party.

The foundation for the system of human rights state reporting began in 1965 when the CERD was adopted by the UN General Assembly and also adopted the ICCPR and ICESCR in 1966. The CERD came into force in January 1969 following the 26$^{th}$ and 27$^{th}$ states ratification of the treaty by India and Poland on 3 and 5 December 1968 (respectively). CERD thus became the first-ever human rights treaty to come into force and the monitoring body for the CERD was thereafter established. In essence, the year 1968 was a landmark year and an important turning point in the human rights space as human rights formally became international law once the CERD came into force. Human rights henceforth were transformed into international

human rights law (Jensen, 2016:208).

Following the coming into being of the CERD in 1969 and the establishment of its treaty body, the submission of compulsory state reports to the Committees became part of the treaty obligations and constitutes a State party's accountability with regard to its treaty responsibilities (Olivier, 2006:180).

State reporting constitutes the globalisation of human rights, insofar as the international community has a primary stake in the compliance of parties with their reporting obligations under the instruments that they have ratified. Whereas reporting to the treaty monitoring bodies is compulsory, it is not meant to replace national mechanisms of human rights implementation. It is meant to play a supplementary role (Olivier, 2006:180).

The UN human rights treaty reporting system provides a platform for states to showcase and reflect on their challenges and achievements, in a constructive, transparent and forward-looking manner. It provides an opportunity for States parties to openly and frankly engage in a dialogue on steps and measures they are taking to give effect to the UN's core human rights treaties. It is a critically important accountability mechanism for States parties to showcase their human rights practices and to openly highlight steps they are taking or challenges they face in giving effect to treaty obligation. The treaty system is an essential cog in the wheel in terms of keeping the core human rights treaties relevant and allows for them to essentially give practical expression to the relevance and validity of treaty obligations.

As alluded to above, the UN treaty monitoring system obligates states to report regularly on their implementation of treaty provisions. Each State party is expected to submit reports at least every 4 or 5 years and to appear before the relevant treaty monitoring body (TMB). The TMBs are composed of independent experts, who are essentially volunteers as they are not UN staff and are not remunerated for their work as experts.

Compared to other international institutions, the formal enforcement mechanisms in the international human rights regime are rather weak. Committees (TMBs) created

to determine whether states are complying with a particular treaty frequently operate on a system of self-monitoring whereby states submit reports on the situation of human rights within their borders and the measures they are taking to eliminate any human rights violations (Hafner-Burton 2005; Lebovic and Voeten 2006). For their part, the Committees provide interpretation of the treaties and are in a position to reflect on institutional practices by states. They also make observations and conclusions about the states under review.

Each TMB has in place guidelines that states need to follow when preparing their periodic reports. Upon the submission and presentation of state reports, the TMBs produce reports that contain conclusions and observations in respect of each state that has presented its report. The states are required to follow the guidance provided by the conclusions and observation of the TMBs. Although the TMBs have no power to compel states to act, they are the backbone of the UN human rights treaty system (Wheatley, 2019:115).

The general comments and general recommendations are considered in context, to constitute an authoritative interpretation of the provisions in the human rights treaties. This view applies to some of the core human rights treaty bodies as the Vienna Convention on Treaties does not provide all the TMBs interpretive authority. In fact only five of the nine treaty bodies, namely, the CESCR, CEDAW, CAT, ICMW and the CED, are considered to have the interpretive authority as per treaty law (Wheatley, 2019:115).

### 3.6 Compilation and Submission of the State Party Report and the Role of Civil Society

The submission of a State party report to the relevant treaty bodies leads to a straightforward process, which leads to presentation of the State reports. The relevant Committees are in session three times a year in Geneva for a period of 4 weeks. The first 3 weeks are utilised in a plenary session with State party representatives, and 1 week is spent on pre-sessional working group meetings with NGOs, UN Agencies, NHRIs, etc. (OHCHR, 2018). NGOs/Civil Society Organisations and NHRIs present their alternative/shadow reports to those prepared by States. Their reports tend to emphasise elements that the State parties did not

highlight - they may try to dispel inaccuracies in the State reports (OHCHR, 2018).

State parties are required to widely consult when they prepare their initial and periodic reports. This includes consultations with the parliament, public, national human rights institutions, civil society and NGOs. This procedural requirement is enunciated in the treaty bodies' concluding observations and the revised guidelines (UNHRI, 2009).

In case a state party has not submitted its report by the set deadline, the review by the relevant Committee will be held in abeyance until the State report is submitted. Thus, it is critically important for states to submit their report otherwise this leads to a reporting backlog. Furthermore, States that default on their reporting obligations deny themselves of an opportunity to engage in what is called a constructive dialogue with the treaty body.

### 3.6.1 Content of State Reports under Core Human Rights Treaties

In 2006, the UN treaty bodies decided to adopt harmonised reporting guidelines on the content of State parties' reports, with a view to strengthening state parties' capacity to fulfil their reporting obligations in time and efficiently. The harmonised guidelines also facilitate consistency by all TMBs when considering reports; it helps each committee to consider the human rights situation in each country on an equal basis. This approach also reduces the need for a TMB to request supplementary information ahead of considering a report. This was later on endorsed by the UN General Assembly in its resolution 68/268 (2014) on strengthening and enhancing the effective functioning of the human rights Treaty Body system, which was adopted within the context of A/Res/68/268 of April 2014 (UN Training Manual, 2017:34).

Harmonised guidelines envisage numerous implementation measures and have a main focus on legal measures. It requires States to report on which sets of rights are either in the bill rights, the constitution, a basic or any other domestic legislation (Fraser, 2018). States parties are also obligated to report on whether they have taken steps to give effect to the relevant treaties, and to state which judicial, administrative or other mechanism have jurisdiction over human rights matters. Also, whether these provisions can be directly appealed through the courts, tribunals etc.

They are also supposed to reflect in their reports on available remedies for rights violations, and whether the State is a signatory to regional courts or other related mechanisms (UN report, 2006). The guidelines also allow for an elaboration of the de facto situation regarding treaty implementation. In essence, the State reports ought to reflect how the provisions of the treaty under consideration are reflected in economic, political, social, cultural realities and general conditions that exist in the State (UN report, 2006).

### 3.6.2 The Common Core Document

Overall, state reports ought to be supplemented by what is called a Common Core Document (CCD). The CCD and treaty-specific reports need to outline comprehensive information regarding the implementation of treaty provisions to which States are party. As a general rule, state reports should not be limited to lists of legal instruments adopted in the country concerned. Ideally, these reports should highlight how these legal instruments are reflected in economic, cultural, social and political realities as well as the general conditions of the country. State reports need to provide evidence-based analysis underpinned by statistical indicators and data that is disaggregated by age, sex and population groups. Information contained in the CCD is considered useful if it speaks to the status of vulnerability and marginalisation of these groups or to the risk of discrimination (OHCHR, 2020).

The CCD constitutes the initial common document of all state reports to the TMBs. Its utility lies in seeking to avoid any undue duplication of information among various reporting obligations of state parties. In the main, the report should entail general information on the reporting State, including aspects such as population, land and political structure. It should also reflect on the general framework for the protection and promotion of human rights, on non-discrimination and equality, including effective remedies that are in place. The information should also be in line with harmonised guidelines on reporting under the core human rights treaties. The submitted information should bear in mind the list of indicators on the political system as well as reflect on crime and administration of justice as outlined in annex 3 of the aforementioned harmonised guidelines (OHCHR, 2020).

### 3.6.3 Substantive Content of Treaties

In terms of norm-based approaches such as constructivism, state compliance is influenced by the substantive content of the applicable treaty (Cole, 2009:571). States parties ratify such treaties in order to affirm their deep-seated, normative, cultural or ideological commitments. Constructivists maintain that states become parties in order to affirm a genuine commitment to the principles of the treaties. Truly committed States parties comply with their obligations even in the absence of enforcement measures, and regardless of the strength or weakness of the enforcement mechanism of the treaty concerned. In this regard, the content of the treaty is a major factor in terms of influencing state compliance. In this context, countries ratify unreservedly and comply in full. They are not influenced by the nature or robustness of mechanisms established for monitoring and enforcing compliance.

The content of a treaty may appeal to a broad base of states or to those who value certain human rights aspects. The substantive content of the Convention on the Rights of the Child (CRC) enjoys near-universal appeal as 196 states except the US have ratified it. The substantive content of a treaty has a major bearing on the number of states that commit to a treaty and who will in turn seek to meet the inherent obligations of the treaty.

## 3.7 Human Rights Treaty Monitoring Bodies

States parties to the nine human rights treaties are obliged to report to the treaty bodies regularly. The obligation to report is an inbuilt UN mechanism for ensuring state accountability regarding human rights practices within state jurisdiction. States are obligated to reflect in their reports, measures that they have taken to give effect to the rights provided for by the Covenant.

They also have the following obligations under core human rights treaties, namely;

1. the obligation to protect human rights,

2. the obligation to respect the treaty provisions, and to protect the individuals within their jurisdiction from the violation of their rights by state actors or non-

state actors, and

3. the obligation to promote the rights (by raising awareness, publicising them and creating a human rights culture and to fulfil the rights to the benefit of the rights- holder (Sloth-Nielsen, 2018:2).

All the treaty bodies (Committees) promulgated reporting guidelines to provide guidance to States parties when preparing their periodic reports. The guidelines are in place to enable States to report on steps they have taken to give effect to the relevant treaty provisions. Upon States submitting periodic reports, the treaty bodies consider them and then engage in an open exchange with representatives of the relevant States, the exercise is referred to as 'constructive dialogue'. The dialogue between the States parties and the treaty bodies is non-adversarial and seeks to improve the situation of human rights (UN Reporting Guidelines, 2009).

Once the treaty body has engaged the State party in a dialogue, it reviews the report and makes its observations and conclusions about the human rights situation in the country concerned. It makes a determination as to whether the State party has measures in place that meet the treaty standards. The implementation measures taken by the State party must (a) be adequate to fulfill the treaty obligations and (b) those measures that have proven to be effective have to be noted (Fraser, 2018:94).

The treaty body report is presented to the relevant State party in the form of Concluding Observations. The treaty body report highlights positive developments, including challenges in implementation as well as the proposed remedial steps. The findings (Concluding Observations) of the treaty bodies are non-judicial and are not binding. The treaty body establishes whether the State party has met the standard set by the treaty, if not, it highlights steps that must be taken and reported on in the next State report. Since the decisions of the treaty bodies are not legally binding, States have the discretion when it comes to implementation.

It is broadly recognised that the enforcement of international human rights treaties is better achieved through voluntary compliance with reporting obligations by State parties. State compliance with reporting obligations is of vital importance for the protection and promotion of human rights (Hathaway, 2002).

## 3.8 Human Rights Treaty Bodies: Reporting Guidelines

The report of a State party signifies an essential element within the continuous review of a State party's efforts in implementing the rights outlined in the relevant instrument. It is of central importance to appreciate the following basic elements around the preparation of a State party report, in particular the reporting periodicity, and the content and format of a report (UNHRC, 2016).

State reporting is an opportunity for a State party to demonstrate the progress it has made in implementing its human rights obligations and an opportunity to honestly highlight obstacles that have impeded meeting the obligations. The reporting procedure also creates avenues for progress to be made in respect of entrenching human rights practices. It is a time consuming, expensive and laborious process. It requires the mastering of political will, leadership, requisite capacities and a budget to get it done sustainably. Compliance with treaty reporting obligations ought to show what States parties have done concretely to effect legislative changes and what they have implemented in line with the provisions of the relevant treaty (OCHR, 2018).

The state reports to the TMBs need to be compiled in accordance with the relevant Committee's Revised Guidelines for periodic reports (Revised Guidelines 2015). Each Committee has its tailor-made guidelines. The initial report from a state party has to incorporate a "core document". The document needs to include information relating to geography, demographics, legal, political and other related basic information about the country concerned. The Core Document needs to be given to all treaty bodies to which the country is a State party. It has to be continuously updated whenever major changes in the country concerned take place. The second part of the initial report should cover all substantive articles of the treaty, including information on the state party's legal and constitutional framework that is not incorporated in the Core Document (Seidensticker, 2005:1).

These guidelines were developed in accordance with the harmonised guidelines on reporting under the international human rights treaty bodies, including guidelines on a Common Core Document (CCD) and treaty-specific documents (HRI/GEN/2/Rev.6, Chap.I) that were last revised in 2009. State parties are supposed to note that the Revised Guidelines ought to be followed in line with the

guidelines for the preparation and submission of the Common Core Document as incorporated in the harmonised guidelines.

It is also critical for States to note that paragraph 7 of the Revised Guidelines explains that "the Common Core Document is an integral part of the reports submitted to the Committee in accordance with the harmonised guidelines". The document should contain general information about the reporting State, such as its general framework for the protection and promotion of human rights. It should also contain information on non-discrimination, equality and effective remedies. The CCD should not exceed 42 000 words, and it must be updated with relevant information upon submission of a treaty specific report. Any treaty specific report should not repeat information contained in the common core document. A State party can use the same document for all treaty reports (Sloth-Nielsen, 2018:5).

It is critical for States parties to submit reports that are compliant, that provide an honest assessment of the facts and that set the scene for a constructive dialogue with experts on the respective treaty body. A periodic report should address directly, the suggestions and recommendations of the previous concluding observations made by the relevant committee (UNHRI, 2009). It defeats the purpose if the reports are submitted by States merely to comply with the procedural requirement to submit on time and not fulfil the substantive requirement to submit compliant reports.

### 3.9 Human Rights Treaty Bodies: Concluding Observations

The pronouncements of the TMBs manifest themselves in one of three fundamental forms, namely; the Concluding Observations on the periodic reports submitted by the States parties; opinions and views on complaints by individuals alleging violations of human rights contained in the convention(s); and the General Comments on the meaning of the terms that are seen as reflective of the experience of the treaty body (Wheatley, 2019:115).

Once the treaty bodies have engaged in a constructive dialogue with States parties regarding their initial or periodic report, they prepare, adopt and release Concluding Observations. The treaty bodies use information sourced from the State party, the media, NHRIs, civil society and other UN entities. These Observations are not

general or applicable to other States but are specific to a State party under consideration and to their treaty implementation status (Fraser, 2018:98). The Committee uses the Observations to reflect on the latest development in the State party and on the positive and negative trends therein insofar as the implementation of the treaty is concerned. (Sloth-Nielsen, 2018:5). In essence, the Concluding Observations are a useful indicator in terms of how the TMBs perceive and appreciate the process of domestic implementation. This includes the measures they see as available and effective (Fraser, 2018:98). This segment reflects in turn on Concluding Observations by the CERD, the CESCR and HRCee.

### 3.9.1 CERD: Concluding Observations

Established in 1970 under terms of article 8 of the Convention, the CERD is a precursor to other core human rights treaties (UNCERD Working Methods, 2018). Its working methods, including the Concluding Observations, helped to shape and inform Concluding Observations of other treaty bodies. As mentioned, it reflects on each State report and expresses concerns by means of Concluding Observations.

The CERD's legal approach is noticeable in its Reporting Guidelines to State reporting. It's Concluding Observations focus on legal measures of implementation. It typically encourages States to take legal measures to incorporate the treaty into domestic law or to take required steps to ensure the Covenant is given effect in the domestic legal system.

The CERD also encourages Non-State Actors (NSA's) to play a role in the domestic implementation of the treaty. It encourages civil society to play effective roles in the promotion and protection of human rights and to combat racial discrimination (CERD/C/GBR/CO/18-20, para.45).

### 3.9.2 CESCR: Concluding Observations

The CESCR's legal approach is visible in its Reporting Guidelines to State reporting. Its Concluding Observations tend to focus on legal measures of implementation. It typically encourages States to take legal measures to incorporate the treaty into domestic law or to take required steps to ensure the Covenant is given effect in the domestic legal system (Fraser, 2018:105). It also recommends that States parties

need to adopt specific legislation. This includes the treaty bodies' recommendation that States take legal measures to protect children facilitating their birth registration, enable indigenous people to gain access to land or claim it, equal enjoyment of their rights enshrined in the Covenant, ensure the right to work and the right to an adequate standard of living (UN CESCR, E/C.12/ZAF/CO/1, 2018, para14, 28 and 61).

The Committee also tends to encourage States parties to adopt measures aimed at combatting discrimination, which are covered in article (2)(2) of the ICESCR. It also advises States to take additional alternative measures to help combat gender discrimination and inequality. The Committee also tends to recommend that States, as appropriate, adopt affirmative action measures, undertake education and training, and raise awareness. The CESCR also encourages Non-State Actors (NSA's) to play a role in the domestic implementation of the treaty. It encourages civil society to play a more effective role in the promotion and protection of economic, social and cultural rights (CESCR BDI/CO/1, 2015).

### 3.9.3 HRCee: Concluding Observations

The HRCee's approach is evident in its Reporting Guidelines to State reports. The treaty body requests States parties to enact particular legislation, such as anti-discrimination legislation, banning torture and the criminalisation of marital rape (Wheatley, 2019:115. Additionally, the Committee does not limit its focus on legal measures of implementation but also refers to other measures of implementation. It encourages States parties to engage in institutional reforms as appropriate, to establish NHRIs, action plans, to establish independent mechanisms such as oversight bodies and take other measures aimed at increasing access to safe abortions (UN CCPR/C, ZAF/CO/1, paragraphs 10 and 11).

The treaty bodies' recommendation that States establish NHRI's, ensure their effective functioning, and to provide adequate resources (finance and human) functioning is commonplace (CCPR/C/ZAF/CO/1 paragraph 39 f). The HRCee also encourages Non-State Actors (NSA's) to play a role in the domestic implementation of the Convention. It encourages civil society to play a more effective role in the promotion and protection of civil and political rights (Fraser, 2018:105).

### 3.10 Adoption of Legislative and Policy Measures by States

The core human rights instruments encourage State parties to pursue legislative measures or adapt existing laws to comply with human rights norms. As stated earlier, South Africa is a state party to seven of the nine core human rights treaties. It has yet to ratify the Convention for the Protection of All Persons from Enforced Disappearance, 2006 and the Convention on the Rights of Migrants and their Families. Overall, South Africa has been quick to sign and/or ratify international treaties. However, it has a mixed record in terms of fulfilling its reporting obligations as required by the various treaties (Chenwi, 2010:1).

Once a State party has finished its constructive dialogue with the Committee regarding the State's periodic report, the relevant Committee drafts, adopts, and publicly release what are called Concluding Observations. Concluding Observations are based on the State reports, including other sources of information, obtained from the media reports, civil society and NHRIs, other UN bodies etc. The Observations focus strictly on State reporting and their status of implementation. In essence, the Observations are State party focused. They attend to the national context of the State party and the level of treaty implementation (Sloth-Nielsen, 2018:4).

The Concluding Observations are used to reflect progress made by the State party in terms of its compliance with its treaty obligations and they are also used to highlight areas of concern together with proposed remedial measures. In essence, these Observations give a sense of what the relevant Committee conceive of the State party's domestic context, processes and challenges. This includes obtaining a sense of what arrangement and measures are in place at the domestic level (Fraser, 2018:99).

### 3.11 The Selected Core Human Rights Treaties (ICERD, ICESCR and ICCPR)

The following section reflects on the three selected treaties and their monitoring roles.

#### 3.11.1 The Adoption of the ICERD, ICESCR and ICCPR

When the selected human rights treaties came into being in 1965 and 1966, the international political context allowed for consideration of binding legal obligations

which forbid discrimination based on race. The draft text prepared for the ICERD was developed together with the ICESRC and the ICCPR. The ICERD became the first of the three treaties to come into force. It became a model for implementation and it subsequently influenced the contents of human rights treaties that followed (Jensen, 2016:208). States that drafted the treaty saw the draft treaty as complementary to international law and not as a substitute.

They were mindful that racial attitudes were entrenched and that they needed the use of treaty law, information, education, and supportive media and courts of law (Creamer and Cosette, 2020:12). The State reporting procedure was considered an effective way of developing state capacity to avert and deal with racial discrimination. Some of the important delegations were keen on having the "fact-finding and reporting machinery […] of the United Nations" in order to establish national institutions and national laws to give meaning to the provisions contained in the draft treaty (Creamer and Cosette, 2020:12).

The adoption of the ICERD in 1965 marked a significant milestone in ensuring that the international bill of human rights subsequently became a reality. It opened the way for the adoption of the ICESCR and the ICCPR in 1966, whose negotiation had been deadlocked since the early 1960s. It became a path-breaking treaty which serves as a model for almost all international human rights treaties that followed. It also led to a precedent that mandated human rights treaties to include means of implementation (Creamer and Cosette, 2020:12).

Therefore, the ICERD was a ground-breaking UN human treaty as the first main UDHR related treaty that came into effect to obligate states to report to a treaty body. It also set the scene and a model for the establishment of an anti-discrimination treaty, the Convention on the Elimination Discrimination against Women (CEDAW), which was negotiated a decade later (Creamer and Cosette, 2020:11). A confluence of various historical developments converged in the 1950s and early 1960s to amplify racial equality above what was considered "sacred notions of sovereignty" which were very closely cherished by most UN members (Jensen, 2016:103).

### 3.12 The International Convention on the Elimination of All Forms of Racial Discrimination

This landmark treaty came into force on 4 January 1969. Its goal is to eliminate racial discrimination in all its forms and manifestations (Jensen, 2018:208). The convention seeks to contribute to the realisation of an international order that would be without all forms of racial segregation and racial discrimination. Its Article 2 mandates State parties to condemn racial discrimination and commit to pursuing all necessary steps to end racial discrimination in all its forms and manifestations. It enjoins State parties to take special and visible steps to ensure the adequate development and protection of certain racial groups or individuals belonging to such groups with a view to ensuring them the full and equal enjoyment of human rights and fundamental freedoms (ICERD, 1976). 182 States are party to this treaty (UNTC, 2020).

### 3.13 The International Covenant on Economic, Social and Cultural Rights

The ICESCR was adopted by the UN General Assembly in December 1966 and came into force in January 1976. It seeks to promote economic, social and cultural rights. The ICESCR focuses on issues such as the following rights; the right to work, food, health, shelter and education (ICESRC, 1976). It forbids discrimination and has 171 State parties (UNTC, 2020).

### 3.14 The International Covenant on Civil and Political Rights

The ICCPR was adopted by the UN General Assembly in December 1966 and came into force in January 1976. It seeks to promote civil and political rights. It focuses on issues such as the right to life, liberty, freedom of speech, religious freedom and the right to vote (ICCPR, 1976). It forbids discrimination and has 173 State parties (UNTC, 2020).

### 3.15 The Monitoring Provisions of the ICERD, ICESCR and ICCPR

#### ICERD

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in its Article 9 requires state reporting in respect of legislative, judicial,

administrative or other measures that have been adopted to give effect to the treaty (ICERD, 1969).

The first report to the Committee is due one year after entry into force of the Covenant for the State party concerned. Subsequent States reports have to be submitted when the Committee requests them. Article 28 of the Committee mandates States parties to submit these reports. The reports must highlight factors and challenges that impact on the implementation of the Covenant (ICERD, 1969).

**ICESCR**

In terms of Article 17 of the ICESCR, a State party to the treaty shall submit a report that outlines the specifics regarding the implementation, in law and in fact, of Articles 1 to 15 of the treaty, taking into consideration comments made by the Committee, including information on recent developments in law and in practice affecting the realisation of the rights outlined in the treaty. The Committee on Economic, Social and Cultural Rights requires the state to provide more details on the practical realisation of rights (ICESCR, 1976).

**ICCPR**

The Committee of Civil and Political Rights (CCPR) is commonly referred to as the Human Rights Committee (HRCee). The International Covenant on Civil and Political Rights' Article 40.2 encourages states to report on "factors and difficulties" affecting the implementation of the treaty. State reports have to reflect on progress achieved with respect to the observance of the rights enunciated in the given treaty (ICCPR, 1976).

Article 2(2) requires states to take the necessary legislative or other measures to give effect in their domestic law to the rights recognised in the ICCPR. In terms of Article 2(3), states are also required to provide effective remedies for individuals whose rights have been violated (ICCPR, 1976).

### 3.16 UN Response to Poor State Reporting: Treaty Body Strengthening

The Committee on the Covenant on Civil and Political Rights (HRCee), widely referred to as the Human Rights Committee, adopted an optional reporting

procedure from 2013. It is broadly called the list of issues prior to reporting (LOIPR); it is also referred to as the Simplified Reporting Procedure. At its ninety-seventh session, held in October 2009, the Committee decided to adopt this reporting procedure (CCPR/C/99/4). Through this procedure, it would send States parties a list of issues (what is called a list of issues prior to reporting (LOIPR). The HRCee would thereafter consider their written replies in the place of a periodic report. The LOIPR method is optional; States parties may choose to continue with the standard reporting procedure (CCPR/C/99/4).

In terms of the new procedure, the State party's replies to the list of questions would constitute a report in accordance with article 40 of the Covenant. A number of treaty bodies have adopted this procedure, including the Committee on the Rights of Persons with Disabilities for periodic reports which were due in 2014 and beyond (Sloth-Nielsen, 2018:13).

In line with this procedure, the HRCee would prepare and adopt lists of issues to be transmitted to states parties, and the replies of the state party to this list of issues are considered an equivalent of the state party report. The simplified procedure seeks to smoothen the states parties reporting process and strengthen the states parties' capacity to fulfil their obligations in a timely and effective manner. Furthermore, it seeks to provide the HRCee with more targeted periodic reports, improve the effectiveness of the treaty monitoring system by reducing the need to request supplementary information before considering a report, and by extension, allow the HRCee to plan ahead for its work (Sloth-Nielsen, 2018:13).

In the past two decades, the United Nations has explored ways of strengthening the treaty monitoring system and establishing a capacity building program for States parties, especially for those that face challenges in meeting their multiple reporting obligations. States parties to the nine core human rights treaties also have reporting obligations to various optional protocols. The following Optional protocols include 3 Optional Protocols to the Convention on the Rights of the Child, 2 Optional Protocols to the Covenant on Civil and Political Rights, the Optional Protocol to the Covenant on Economic, Social and Cultural Rights, and the Optional Protocol to the Convention against Torture. In addition, States parties to the nine core human

instruments also have reporting obligations under the UN's Universal Periodic Review (UPR) mechanism and several International Labour Organisation (ILO) conventions.

Given the backlog in state reporting, an average of 16% and weak states' capacity to report, the UN General Assembly adopted resolution 48/141 to "rationalise, adapt, strengthen" the UN treaty mechanism in the area of human rights with the goal of realising its efficiency and effectiveness. The UN High Commissioner for Human Rights, Ms Navi Pillay, began the process of exploring ways of strengthening the UN machinery (Pillay, 2012:19). In her report of 2012, she proposed various far reaching proposals, which included a universal reporting calendar, equal treatment of all States parties, strict compliance with human rights bodies, improving the independence and impartiality of the members of the UN treaty bodies, realising consistency of the treaty body jurisprudence, enhancing coordination between treaty monitoring and improving transparency (Komanovics, 2014:14).

Following the presentation and consideration of the UN High Commissioner for Human Rights report, the UN began an intergovernmental process which culminated in the adoption of resolution 68/268 of April 2014. Resolution 68/268 is entitled "Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System". The resolution sought to address the critical challenges highlighted by the High Commissioner's report (OHCHR, 2012:19).

The UN General Assembly also requested the Secretariat (OHCHR) to submit a comprehensive report on the status of the human rights treaty body system and to consider the state of the human rights treaty body system before the end of 2020. The UNSG is also requested to submit a report in January 2020, ahead of the review of the UN human rights treaty body system (OHCR, 2014).

The obligation to report to various treaty bodies around the same period of time presents challenges to States parties and presumes state capacity to deal with heavy reporting burdens (Komanovics, 2014:14). A state that has ratified all nine core treaties, may find itself having to submit twenty reports to the treaty bodies within a period of ten years and also to the Universal Periodic Review (UPR) mechanism. Thus, as Komanovics (2014:14) notes, the challenge of heavy reporting

duties on the part of States parties is one of the many factors that explain State non-compliance. She posits that this unpredictable and unbalanced schedule of deadlines necessitate sufficient state capacity and resources. Furthermore, Komanovics posits that the backlog in the consideration of State reports leads to the need for States to engage in the major updating of their data/information by the time the constructive dialogue takes place.

In view of the challenge of non-compliance, resolution A/68/268 of 2014 gave effect to the treaty reporting capacity building program of the UN. The program is biennially endorsed by UN member states who adopt resolutions in recognition of the challenge of low rates of reporting by states parties to the 9 core human rights treaties. In this regard, regional offices of the UN Human rights office facilitate training among interested states and regions in the relevant training. Training may be arranged upon request for national departments in countries that need capacity building, or it can also be conducted regionally. The training course exposes states to options for obviating the challenges of non-compliance with reporting obligations, the need to have viable systems for report writing and, where appropriate, the need to set up reporting and coordination mechanisms.

The OHCHR asserts that in the absence of standing national reporting mechanisms that can preserve institutional memory and capacity, its program would not make a difference. It stresses that the absence of standing reporting mechanisms would not lead to durable reporting capacity (OHCH, 2016:14). It recommends that States ought to establish standing reporting mechanisms, which have strong ties with other ministries.

Observers maintain that in order for the UN human rights treaty system to cope with requisite levels of reports, the system would need to be radically overhauled, by means of, inter alia, significantly increased budgets, increased size of the treaty bodies (committees), additional hours, and additional staff. To compound matters, the UN budget has been undergoing severe cuts in recent years to the extent that anecdotally, early this year, the UN High Commissioner for Human Rights gave consideration to cutting the length of the treaty Committees' sessions. As a result, the on-going UN treaty body strengthening underway in 2020 will be critical in

addressing the challenges faced by the treaty system.

State parties (and other role players, including parliaments, the judiciary, national human rights institutes and civil society) make requests regularly to the UN Office of the High Commissioner for Human Rights (OHCHR) to provide capacity building workshops in the area of state reporting under human rights treaties and, at times, individual communications procedures. The UN itself does not have sufficient capacity to readily provide this support to all states that lack capacity and those that are late with regard to the submission of reports. It compounds matters for states and in particular, for those that need capacity building when they do not have standing national drafting mechanisms for reporting to the treaty bodies.

The absence of reporting mechanisms and the use of ad-hoc reporting mechanisms tend to exacerbate the problem of state noncompliance with reporting obligations. Standing national reporting mechanisms are useful for skill retention and institutional memory, without which states perpetually struggle to compile reports when these reports are due. Reliance on this technical capacity building avenue from the UN is not a sustainable way of resolving the state reporting backlog or late reporting by states. States need to have established national reporting and follow up mechanisms in order to be able to comply with the procedural requirement of submitting reports on a timely basis and to submit compliant reports. Thus, the capacity building program needs to be underpinned by the establishment of standing national mechanisms for reporting by states that rely on this kind of intervention mechanism.

As alluded to in this chapter, human rights treaty reporting obligations are not complied with by a majority of States parties as evidenced by reports of the UN Office of High Commissioner for Human Rights, which highlighted reporting compliance levels amounting to 16% during the 2010 and 2011 period (OHCHR, 2012:19). Whereas States parties seek to abide by the provisions of the treaties and to meet their reporting obligations, they do not report in overwhelming numbers. In spite of these challenges, the human rights system has endured despite various problems that were presented by the cold war, decolonisation and the non-interference in domestic politics principle. Human rights continue to remain a legitimate concern of the international community in the globalised world.

### 3.17 Critiquing the Human Rights Treaty Bodies

Though the human rights system is perceived to be stronger than before, human rights treaties operate differently from other treaties as they do not provide for reciprocity and mutual gain (Simmons, 2009:114).

Apart from the obvious lack of incentive to report one's own wrong doings, even if states felt compelled to call attention to their own transgressions the human rights committees that review the reports are powerless to punish recalcitrant states (Hill, 2010:1162). Many treaties provide no recourse against offending states beyond "naming and shaming" by other States parties, and these complaints are often not made public. A useful recourse to the lack of "enforcement" powers is the Optional Protocols to many of the core human rights treaties, which do create a system of accountability for individual violations of human rights.

Blau and Moncada (2007) have observed that the treaty monitoring bodies that have the power to monitor compliance do not have legal authority to enforce their decisions. They assert that not all surveillance and enforcement mechanisms are created equally, in fact some are more intrusive than the others. Despite the perceived ineffectiveness of the treaty monitoring bodies with regard to enforcing human rights treaties, treaties can inform patterns of treaty membership (Cole, 2009:566).

It is a truism that the UN human rights treaty monitoring system lacks the power to punish states that do not comply with their obligations. The treaty monitoring committees merely require states to submit their reports and have no punitive mechanisms to deal with those that do not comply. At best such states suffer reputational damage for failing to submit reports to the treaty monitoring bodies and being forced to account by means of being reflected upon by the committees in the absence of country generated reports. Alternatively, states and individuals may lodge interstate or individual complaints against non-compliant states (Wheatley, 2019:115).

Cole (2009:566) argues that existing research on the determination of treaty membership has thus far been limited to two aspects. Scholars usually reduce treaties as functionally equivalent and analytically transposable. This ignores the reality of different implementation mechanisms of the treaties and their substantive content. Human rights treaty bodies in fact differ with respect to the procedure they establish in terms of monitoring compliance. Some treaty bodies are more intrusive than others, which may explain the variation in the rates of membership across the ten human rights treaty bodies. For example, the Sub-Committee on Torture allows for visits to concerned countries once individual complaints have been made about torture in particular countries.

### 3.18 Conclusion

The need for States parties to comply with reporting obligations under human rights treaties has been a subject of on-going debate in the UN system for decades. To date, States have generally struggled to comply with their legal obligation to periodically report ever since the inception of the UN human rights reporting system.

The UN human rights reporting system is an accountability mechanism, even though it does not have hard enforcement powers. Since the treaty bodies do not have enforcement powers, they do not have the power to force state parties to undertake particular domestic practices. The current human rights architecture suffices and functions, nonetheless. A human rights treaty body system that depends on sanctioning recalcitrant states or imposing sanctions on such states would most likely attract fewer State parties as few states would want to become parties to treaties that could negatively impact on their sovereignty and international standing. Despite its shortcomings and challenges, it has grown in terms of States parties to the nine core human rights treaties and a reasonable number of States parties continue to submit their periodic reports.

This chapter sought to discuss and analyse state compliance with reporting obligations under international human rights treaties. It sought to provide context by reflecting on contributory factors to state compliance with reporting obligations, its general functioning and to address some of the research questions for this study. For example, the chapter outlined the broad and specific contours of state reporting,

including; reporting guidelines, concluding observations and the general comments. The discussion will be helpful in terms of analysing South Africa's compliance with its reporting obligations under selected human rights treaties. It will make it easy to establish whether South Africa is compliant with its treaty obligations.

In closing, this chapter attempted to provide context on the human rights treaty body system and aspects with regard to its functioning. In the next chapter, I will look at South Africa's record of compliance. As mentioned before, South Africa serves as a case study for examining the reasons why states fail to comply with their reporting obligations. As such, it becomes important to provide a thorough understanding of South Africa's record and behaviour in this regard.

# Chapter Four

## South Africa's Compliance with its Reporting Obligations

### 4.1 Introduction

As mentioned, State reporting under human rights treaties is a central activity to measure domestic applicability and impact of human rights treaties. It is an important accountability tool to measure State implementation of these rights at the domestic level. This study emphasises the inextricable link between human rights treaties and the measurement of rights enjoyment by means of State reporting. State reporting is and remains a critical instrument to gauge the effectiveness of human rights treaties at the domestic level. Using the case study of South Africa's compliance with its reporting obligations by means of reflecting on its reports to the treaty bodies, is critical to understanding the complexity of State reporting under human rights treaties.

South Africa's relationship with the UN treaty bodies dates back to 1993 (CAT, CRC and CEDAW) and 1994 (CERD, ICESCR and ICCPR) when it signed six treaties and subsequently ratified these treaties over the following years and decades. It has overall been confronted with missed opportunities for timely submission of reports. Two of the three treaty bodies (CERD and HRCee) have witnessed the extent of the State party's late reporting over many years and up to 14 years in the case of HRCee. On the other hand, its first ever report to CESRC was submitted on time in 2017. It has, since becoming a fully-fledged democracy in 1994, sought to be a good example on human rights issues, a champion of human rights and a good international citizen.

This chapter focuses on analysing South Africa's reports to the three selected treaty bodies, CERD, CESRC and HRCee up until 2017 and 2018. In the process, it illustrates the importance of State reporting in the protection and fulfillment of human rights. It notes that State reporting can be an important instrument to hold States accountable and to foster the mobilisation of domestic action in order to implement provisions of human rights treaties. The case study of South Africa's reporting under the three treaties, seeks to analyse the country's reports as well as the complexities of State reporting.

The chapter will also reflect on the response of the UN to the challenge of State compliance, noncompliant state reports, late reporting and non-reporting on the part of States parties.

The chapter concludes by identifying factors such as institutional capacity, reporting methodology and leadership and coordination as some of the challenges that explain South Africa's compliance with its treaty obligations under UN human right treaties.

It is also important to note that the sections below proceed from the premise that states parties have the following obligations under core human rights treaties, namely;

1. the obligation to protect human rights,
2. the obligation to respect the treaty provisions, and to protect the individuals within their jurisdiction from the violation of their rights by state actors or non-state actors,
3. the obligation to fulfil, and
4. the obligation to promote the rights (by raising awareness, publicising them and creating a human rights culture and to fulfil the rights to the benefit of the rights holders (Sloth-Nielsen, 2018:2).

The chapter recognises that state reporting is mainly a function of states complying with their legal obligations to report periodically to the relevant treaty bodies. In this context, treaty bodies monitor state compliance with human rights obligations under core human rights treaties. Information on South Africa's compliance with its reporting obligations is not widely available and as a result, this study will make a contribution in terms of providing updated information on South Africa's compliance with its reporting obligations under selected core human rights treaties.

## 4.2 Status of Human Rights Treaties in South Africa

South Africa's Constitution (Heyns and Viljoen, 2002:542) is described as highly "international human rights law friendly". In terms of the South African Constitution, human rights treaties are a guide to judicial interpretation regardless of whether the country is a party to the treaty or not. Section 233 of the Constitution provides that "when interpreting any legislation, every court must prefer any reasonable

interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". In addition, in terms of Section 39(2) of the Constitution when courts interpret any legislation, they must "promote the spirit, purpose and objects of the Bill of Rights". South Africa's Bill of Rights is primarily based on the human rights treaties (Heyns and Viljoen, 2002:542). Consequently, the South African government, its human rights practices and its voting behaviour on human rights in the UN system are often held to a higher standard than many other countries in the UN system. South Africa's human rights behaviour and role performance are expected to be consistent with its constitution, the UDHR and the UN treaties. Consequently, it ought to report to the treaty bodies regularly and its reports ought to be aligned with the reporting guidelines and the provisions of the treaties.

### 4.2.1 Institutional Arrangements for the Implementation of Human Rights Treaties

The Department of Justice and Constitutional Development (DoJ&CD) has the responsibility of overseeing the following treaties: the ICERD, ICCPR, ICESCR and the Convention against Torture (CAT). The Department of Women has the responsibility of overseeing CEDAW and the CRC, and the Department of Social Development is responsible for overseeing the CRPD (Heyns and Viljoen, 2002:543).

The Human Rights Commission of South Africa is entrusted with the broad mandate of promoting and ensuring respect for human rights in the country. Another statutory body, the Commission on Gender Equality, is required in terms of the Gender Equality Act to "monitor compliance with international conventions, international covenants and international charters acceded to or ratified by the Republic" which relates to the promotion of gender equality (Heyns and Viljoen, 2002:543).

**TABLE 6 : STATUS OF THE SEVEN HUMAN RIGHTS TREATIES IN SOUTH AFRICA**

| TREATY | SIGNED | INSTRUMENT OF RATIFICATION | ENTRY INTO FORCE RESERVATIONS |
|---|---|---|---|
| CERD | 03/10/1994 | 09/01/1999 | No |
| ICCPR | 03/10/1994 | 10 December 1998 | No |
| ICESCR | 03/10/1994 | 12 January 2015 | Yes – right to education |
| CRC | 29/01/1993 | 16/06/1995 | No |
| CAT | 29/01/1993 | 16/06/1995 | No |
| CRPD | 30/03/2007 | 20/11/2007 | No |
| CEDAW | 29/01/1993 | 10/12/1999 | No |

The preceding table reflects the seven treaties that South Africa is a State party, and to which it submits reports. It signed five of them in 1993, 1994 and 1995 as outlined in the table above.

### 4.2.2 Reporting – South Africa's Compliance with Reporting Obligations

Since 1993 South Africa has ratified 7 of the 9 human rights treaties, namely the ICERD, ICCPR, ICESCR, CRPD, CAT, CEDAW and CRC. These ratifications are in addition to the ratification of the African human rights treaties. Ratification of these treaties requires regular reporting on measures taken to give effect to the treaties. Three government departments have the responsibility of overseeing compliance with reporting obligations under the mentioned treaties. The process of reporting is handled in conjunction with other implementing departments. State reports need to be written in line with harmonised guidelines and states are required to submit a common core document. This document is the base document for reflection by all treaty bodies. When a periodic report is submitted by a State party, it gets examined by the treaty monitoring body against the backdrop of the common core document. The common core document needs to be regularly updated (OHCHR, 2018).

### 4.2.3 South Africa's Common Core document

South Africa submitted its first-ever Common Core Document (CCD) to the UN in August 1998. The CCD constitutes the base document for States reports under all ratified human rights treaties. The CCD needs to contain information on a State

party's history, the structure of government, geography, people, economy, income distribution, unemployment, religion, languages and population growth. It also needs to be updated over subsequent reporting periods (OHCHR, 2018).

A common core document is a base document for each State party, which is useful for the preparation of a state's periodic reports across all the core human rights treaties. The last time South Africa had submitted its common core document was in 2012. The 2012 common core document was an update to the December 1997 document. In March 2019, South Africa submitted an updated common core document to the UN treaty section. The common core document needs to be updated regularly (OHCHR, 2014).

The country struggled to comply with its reporting obligations during the period when its CCD document was not updated since 1998 and 2012. While it submitted two combined reports (for the periods 2000, 2002 and 2004) to the CERD in 2004, and four combined reports (for the periods 2006, 2008, 2010 and 2012) to the CERD, this failure to report coincided with the reality that the CCD document had not been updated since 1998 and 2012, a fourteen-year gap. The highlighted coincidence does not in any way provide a singular explanation with regard to South Africa's failure to comply with reporting obligations; it is among many other factors that this chapter and study will take note of. The gap may be a factor in the collation of information relevant for reporting to the treaty bodies.

**Table 7 : South Africa's Reporting Record and Compliance: ICERD, ICESCR and ICCPR**

| Committee | Reporting Period | Record |
|---|---|---|
| ICERD | IX-XI periodic report was due 09 January 2020 | Has not yet submitted it (as at 26 January 2021) – Overdue by 1 year |
| | IV-VIII periodic report was due 09 January 2010 | Submitted it on 26 November 2014 – Overdue by 4 years and 10 months |
| | I-III periodic report was due 09 January 2000 | Submitted it on 26 November 2004 – Overdue by 3 years, and 10 months |
| ICERD | Cumulative period reports were late | 9 years and 8 months |
| ICCPR | 1st periodic report was due on | Overdue by 14 years |

| Committee | Reporting Period | Record |
|---|---|---|
| | 10 March 2000. Submitted: 26 November 2014 | |
| | 2nd periodic report was initially due on 31 March 2020 | Awaiting list of questions prior to reporting. In 2019 South Africa opted to fall under the SRP. |
| The cumulative period its reports to the HRCee were late is 14 years and 9 months. | | |
| ICESCR | 1st periodic report was due in April 2017 | Submitted on time **(**E**/**C**.**12**/**ZAF**/**CO/1**).** |
| ICESCR | 2nd periodic report due 31 October 2023 | Due in 2023 |

### 4.3 South Africa's Reporting under the ICERD

South Africa submitted its last report to the CERD in November 2014. It submitted a combined report covering five reporting periods (4th to 8th). The Convention's article 9 requires states to report in respect of legislative, judicial, administrative or other measures that have been adopted to give effect to the treaty, ICERD (CERD/C/ZAF/4-8).

South Africa presented its combined 6th to 8th report to the CERD in August 2017. Following its presentation of the country report, the Committee asked questions ranging from the legislative measures it have taken, to housing, education, the land question and to the issue of culture. Following the constructive dialogue, the Committee submitted its Concluding Observations (CERD/C/ZAF/CO/4-8).

**Domestic Applicability of the ICERD**

When existing legislation falls short of treaty provisions, there is no enforcement of the treaty, and domestic mechanisms (courts, tribunals etc.) do not provide effective remedies. As such, the CERD, in order to eliminate all forms of racism and to realise equality, encourages States parties to align their domestic practices with its provisions (ICERD, 1969). South Africa's constitution and its legislative framework outlaw all forms of racial discrimination. Its ratification of the ICERD in 1999 is underpinned by a human rights centric Constitution and various legislations including, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000

(PEPUDA Act of 2000).

South Africa did not submit its initial report to the CERD in January 2000. In December 2004, it submitted its initial to second and third reports that were due in 2002 and 2004. The reports were consolidated into a combined report. The Committee noted in its concluding observations that the reports were submitted late and it requested South Africa to comply with the reporting deadlines for the next report. Following its late submission of five periodic reports, South Africa appeared before the CERD in August 2016 (CERD/C/ZAF/ 4-8).

It's comprehensive sixty-eight page report deals with various dimensions of racial discrimination past and present in South Africa. It identified obstacles hampering the implementation of the Convention, and reiterates the country's commitment to attaining a non-racial democracy. In considering the report, the Committee raised questions, which were in turn replied to by the South African delegation at the Committee's 1767$^{th}$ meeting in August 2016. The South African delegation explained that the Convention could not be invoked directly before domestic courts in the absence of enabling legislation (CERD/C/SR.1767, 2016).

The Promotion of Equality and Prevention of Unfair Discrimination Act 2000 goes some way towards implementing the Convention - it provides for civil and criminal remedies (Pepuda, 2000). The South African delegation stated also, in addition, that domestic courts commonly use international treaty law in their interpretation of domestic legislation.

The Committee responded that special measures aimed at remedying a specific situation were not discriminatory under the Convention and in appropriate circumstances were even mandatory. In its concluding observations the Committee pointed out that affirmative action may not lead to the maintenance of separate or unequal rights for designated groups, after the objectives of the policy have been achieved (CERD/C/ZAF/CO/4-8).

The Committee noted that the government had eliminated *de iure* discrimination and apartheid, but that racist attitudes still persisted in various sectors. Committee members raised concern over the treatment of indigenous peoples and xenophobia which should be addressed more vigorously. The Committee noted that affirmative action was needed to reduce the persisting income gaps between whites and non-

whites. The Committee also urged South Africa to enact appropriate legislation that would prohibit hate crimes and hate speech as soon it could (CERD/C/ZAF/CO/4-8).

The South African Human Rights Commission submitted a shadow report and participated in the discussion with the Committee. The report dealt with the integration of various aspects of CERD in domestic law (particularly those embodied by articles 2, 3, 5, 6 and 7). The Committee remarked in conclusion that no nation had suffered as much as South Africa on account of institutionalised racial segregation and discrimination. The Committee's feedback was to an extent critical of South Africa. It did, however, express itself as encouraged by the delegation's assurance that future reports would be more comprehensive and ensure greater participation by the South African Human Rights Commission. The Committee specifically pointed out that it was concerned over the ethnic composition of the different components of the judicial system. It would welcome more carefully considered answers in future (CERD/C/ZAF/CO/4-8).

The CERD also requested the State party to facilitate the overdue visit of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. The request dates back to 2008, with reminders sent in 2010, 2011 and 2012 (CERD/C/ZAF/CO/4-8/4-8, para 28). To date, this request has not been honoured. Another reminder was sent in 2018. Ironically, South Africa extended an invitation to all UN human rights thematic special procedure mandate holders on 13 July 2013 (OHCHR, 2020).

In the last paragraph of its concluding observations, the Committee recommends that South Africa submits its 9$^{th}$ to 11$^{th}$ periodic reports in a single report by January 2020 and that it addresses the various points of concern raised by the Committee (CERD/C/ZAF/CO/4-8).

Essentially, South Africa had not complied procedurally with the provision of the CERD to submit its report on a timely basis, as it had submitted the report 4 years and 10 months late. It has also failed to accept requests of the special rapporteur on racism issues since 2008. This shortcoming is in addition to requests for visits by 18 other special procedure mandate holders (OHCHR, 2020). This role performance is not in keeping with good international citizenship and championship of human rights.

## 4.4 South Africa's Reporting under the ICESCR

South Africa signed the ICESCR on 10 December 1995 but ratified the ICESCR in January 2015. In line with article 17 of the ICESCR, a State party to the treaty shall submit a report that outlines the specifics regarding the implementation, in law and in fact, of Articles 1 to 15 of the treaty, taking into consideration comments made by the Committee, including information on recent developments in law and in practice affecting the realisation of the rights outlined in the treaty.

The Committee on Economic, Social and Cultural Rights (CESCR) requires the state to provide more details on the practical realisation of rights. Its guidelines ask for, among other things, "information on the situation, level and trends of employment, unemployment and underemployment" (E/C.12/2008/2). South Africa's initial report to the Committee was due in April 2017 and it managed to submit the report by the due date. It presented its report to the Committee in October 2018. This timely submission of an initial report was not usual as the country had failed to meet the deadline for submitting initial and periodic reports to six other Committees in the past (Heyns and Viljoen, 2002:27). It was a commendable development and the Committee expressed great appreciation for this development (E/C.12/ZAF/CO/1).

The Covenant (ICESCR) includes an obligation on the state to realise and implement economic, social and cultural rights at the national level, and these obligations mutually reinforce and supplement each other (Steiner and Alston, 2008: 23). Article 2 is the critically important provision, as it deals with the obligation of states at the national level. The article enjoins the State party to commit to take steps to the maximum of its available resources with a view to progressively achieving the full realisation of the rights recognised in the covenant by all appropriate means.

'All appropriate means' includes, but is not limited to, administrative, financial, educational and social measures. The ICESCR encompass four state obligations; the obligation to respect, which directs the state to refrain from interfering with the enjoyment of rights; the obligation to protect, which requires the prevention of violations of such rights; the obligation to promote, which requires raising public awareness of the rights; and the obligation to fulfil, which requires a state to take appropriate measures towards the full realisation of the right (Dias, 1999).

Owing to its history of systematic exclusion, marginalisation and discrimination of the majority population groups, South Africa continues to grapple with poverty and inequality (Liebenberg, 2010:600), thus it remains behind in the realisation of socio-economic rights and fulfilment of obligations under ICESCR. It submitted its initial report to the CESCR, the body responsible for the monitoring of the treaty in April 2017 and presented it on 2 - 3 October 2018 (E/C.12/ZAF/CO/1).

**Domestic Applicability of the ICESCR**

South Africa has yet to enact legislation on the right to work, housing, and employment and has yet to develop comprehensive policies to realise these provisions of the treaty. Overall, its legislative framework enables the rights holder to litigate in favour of the ESC rights and its constitution makes these rights justiciable. On 20 June 2019 South Africa finally ratified the optional protocol to the ICESCR.

When South Africa ratified the ICESCR in January 2015, the 7th core human rights treaty, it had not entered reservations or interpretive declarations on the other treaties. It, however, entered reservations on the ICESCR's article 11 on the right to education. It argued that it does not have the means to guarantee the enjoyment of this right. The Committee raised this reservation sharply during the country report presentation in September 2018. The Committee members were of the view that it was unnecessary for South Africa to have entered a reservation on this article as this right is realised progressively (CESCR, 2018). The reservation does not constitute a violation or non-compliance with the treaty. Members of the Committee would have preferred that the State party did not make this reservation for the outlined reason above.

The Committee's list of issues (LOIS), in question two, concerned the legislative and other measures it has taken to officially recognise indigenous peoples, and to remove the classification of indigenous people who are referred to as Coloured. The question also required the provision of statistical data regarding indigenous people in South Africa, their numbers and distribution countrywide. The Committee also sought to establish the number of indigenous people and their distribution in the country as including statistical data relating to their enjoyment of ESC rights, especially in the enjoyment of employment, health, social security and education. Its next reports

would need to address the Covenant provisions in terms of giving effect to the treaty, the enjoyment of Covenant rights and would also have to reflect on steps taken in light of the concluding observations of the treaty. It would also need to engage in honest reflection on what it seeks to do in line with the Covenant and reflect on its own shortcomings or reasons it had not managed to meet particular provisions of its Constitution and or the Covenant provisions.

### 4.5 South Africa's Reporting under the ICCPR

South Africa ratified the ICCPR on 10 December 1998. It was thereafter supposed to submit an initial report in January 2000 but failed to do so. It was also unable to submit periodic reports that were due in March 2005 and March 2010. As a consequence of failing to submit these reports, in 2015, the HRCee took the step of scheduling the consideration of the state of human right in the country even though no report was submitted as yet. The country was given a list of questions under the Simplified Reporting Procedure (SRP), a procedure that the HRCee began using in 2001 to also get States that have overdue reports to appear before it. In response South Africa submitted written replies (CCPR/ZAF/Q/1/Add.1) to a list of issues that was sent to the State party (CCPR/C/ZAF/Q/1), the written replies were supplemented by oral responses provided by the delegation, and supplementary information provided to the Committee in writing (CCPR/Z/ZAF/1).

Each State party needs to take necessary steps, in accordance with its constitutional processes and the provisions of the Covenant, to adopt legislative and other measures required to make the rights recognised in the Covenant realised (CCPR/C/99/4).

State parties to the Covenant and its first and second protocols have an obligation to report to the Committee regularly. Additionally, States parties shall include in their reports to the Human Rights Committee information on steps they have taken to give effect to the Covenant (CCPR/C/99/4).

South Africa presented its combined report (CCPR/C/ZAF/1) to the Committee on 7 and 8 March 2016. The Committee welcomed the submission of the report but expressed regret it was 14 years overdue. It recognised the enactment of various

legislations, including the Prevention and Combating of Torture of Persons in July 2013, the Combating of Trafficking in Persons Act, which came into force on 9 August 2015 and the Child Justice Act of 2008 (CCPR/C/ZAF/C0/1).

**Domestic Applicability of the ICCPR**

The Committee noted that there was an apparent inconsistency between the Constitution of South Africa insofar as domestic law and information contained in the Core Document (HRI/ZAF/2014), as paragraph 95 is concerned. The Constitution states that international agreements that have been approved by parliament can be domesticated and paragraph 95 of the CCD states that international agreements cannot be implemented before or directly by the courts. The Committee also noted that South Africa only submitted two individual communications under the Optional Protocol to the ICCPR. The Committee observed that this could be indicative of lack of awareness of the Optional Protocol of the Covenant (CCPR/C/ZAF/C0/1).

South Africa was advised to consider taking steps to give full effect to the Covenant under national law, and take strong measures to increase awareness about the ICCPR and its Optional Protocol among legal practitioners, judges and the general public. The Committee recommended that in the event of a transgression of the Covenant, South Africa ought to make sure that there is access to effective remedy, in line with article 2(3), (CCPR/C/ZAF/C0/1).

The Committee noted that the text of South Africa's Constitution provides that a self-executing provision of an international treaty that has been approved by parliament is considered to be part of domestic law. South Africa was advised to consider taking steps to give full effect to the Covenant under national law and take strong measures to increase awareness about the ICCPR and its Optional Protocol among legal practitioners, judges and the general public (CCPR/C/ZAF/C0/1). The Committee recommended that in the event of a transgression of the Covenant, South Africa ought to make sure that there is access to effective remedies, in line with article 2(3).

The Committee expressed concern about the country's failure to implement the decision of the North Gauteng High Court that had ordered the detention of the President of Sudan, Omar al-Bashir, in June 2015. The International Criminal Court (ICC) had issued a warrant of arrest. Al-Bashir was authorised to leave South Africa despite the issuance of a court order and this was deemed to be inconsistent with

the Constitution (CCPR/C/ZAF/C0/1). Thus, South Africa was deemed to have been noncompliant with a domestic court decision (articles 2 and 14). The Committee urged the State party to take the necessary steps to ensure compliance with rulings of domestic courts, including those cases that involve its international treaty obligations.

The treaty body commended the State party for the work that was done by the Truth and Reconciliation Committee (TRC) in dealing with serious human rights violations during the apartheid era. It expressed concern that recommendations of the TRC were not implemented in full, insofar as prosecution of perpetrators, the investigation of cases of disappearance, and the provision of sufficient reparation (articles 2, 6 and 7).

In line with the Committee's reporting schedule, South Africa was requested to submit its next periodic report by 31 March 2020 and to include in that report specific recent information on the implementation of its recommendations in a comprehensive way. It was also requested to broadly consult civil society and non-governmental organisations, as well as minority and marginalised groups, when preparing its future report (CCPR/C/ZAF/C0/1). When the State party presented its first report to the HRCee, it was eighteen years following its treaty ratification. The State party had not been an exemplar in the area of compliance with human rights treaty obligations and its role performance/behaviour was not that of a good international citizen. It had been part of hundreds of States parties that were not compliant with their reporting obligations under this human rights treaty.

### 4.6 Observations Regarding South Africa's reporting to Treaty Bodies

The preparation of state reports needs to be a collective effort by various government agencies in South Africa. At times, these reports are not disseminated widely to parliament, the public, NGOs and civil society, either before or after their submission. The general guidelines on State reporting and the treaty bodies encourage States to share these reports widely, including the concluding observations and recommendations of the treaty bodies (UNHRI, 2009). The non-dissemination of these reports may arise if a report was late or overdue and there was no opportunity to share it with the public and civil society. In this context, national and international NGOs exercise their right to submit 'shadow reports'.

It appears NGOs are more engaging when South Africa submits its report before the UN Committees as evidenced by large numbers of them that submit these reports to the treaty bodies. In 2016 and 2017, several NGOs submitted reports to the HRCee and the CESCR. These NGOs include the Right to Know, Transgender and Intersex in South Africa, Centre for Applied Legal Studies (CALS), African Policing Civilian Oversight Forum, Legal Resources Centre and Environmental Health and Equality in South Africa. Curiously, only two NGOs submitted shadow reports to the CERD in 2016. The concerned NGOs are the Police and Prisons Civil Rights Union (POPCRU) and the Solidarity Trade Union's Centre for Fair Trade (Solidarity). In fact, POPCRU submitted its report in response to Solidarity's report and not in response to the State report (CERD/C/SR.2460).

South Africa submitted reports late amid the fact that "reporting is a difficult and onerous process due to the need for extensive consultation and the compilation of comprehensive information from divergent sources" (Heyns and Viljoen, 2002: 33). Often, there is a lack of expertise and available human resources. In South Africa, reporting regarding fulfilment of human rights treaty obligations tends, in fact, to be poor. Only a small number of reports under a few human rights treaties were submitted to the UN Committees over the years.

Reporting is widely seen as an ad hoc activity, a once-off burden that the state has to deal with every few years and not a continuous effort involving an on-going cycle of reporting, the dissemination of concluding observations and implementation (Heyns and Viljoen, 2002: 33). South Africa has tended to submit combined periodic reports covering up to 4 periods, and then submitting them after due dates, thus demonstrating that it may have serious capacity and organisational problems and/or lack of political will to compile and submit reports on a timely basis during the set reporting periods.

States appear to commit to treaties without political will or ability to domesticate the provisions of the relevant treaties (Olivier, 2006:180). This appears to hold true with regard to many developing countries and those that have weak bureaucracies as they invariably tend to fail to submit their mandatory reports to the treaty monitoring bodies (Cole, 2015).

Less developed countries and those with weak economies struggle to comply as opposed to developed states (Cole, 2015 and Haas, 1998:19). These States parties struggle as a result of having less advanced administrative systems, adequate monitoring and financial resources which could be dedicated to the enforcement of treaty obligations and political will. Given the outlined factors, this may explain why in many cases developing states face challenges in terms of compliance with treaty obligations, including compliance with their reporting obligations. In the main, most of the United Nations capacity building projects on state reporting take place in developing countries. This low level of compliance is suggestive of the real challenges of compliance with treaty obligations by States and those States that have limited bureaucratic capacity. It may also amplify the reality of states ratifying legally binding agreements without appreciating the attendant requirement of compliance.

In general, the low levels of state reporting under human rights treaties necessitated a resolute response from the UN system and Member States to ensure that the human rights system is not weakened further by low levels of state compliance with reporting obligations. Consequently, the UN treaty body strengthening process underway in 2020 in accordance with resolution 68/268 of 2014, is thus an important step in terms of potentially strengthening the human rights treaty body system.

At its last report presentations in 2016 and 2017, the Committees (CERD and HRCee) expressed concerns that, each of South Africa's periodic reports were submitted late. These treaty bodies in the main observed that State party faces challenges owing to the historical legacy of its racial injustice. The TMBs have overall been complementary to South Africa given its laudable transition to a full democracy and its human rights-based Constitution.

**Reflections: South Africa's Report under the ICERD**

The Committee highlighted areas of interest in its concluding statement. They surmised that there was a lack of conceptual clarity in answers on the ethnic composition of the population, for example, the use of the terms 'nationalities' when referring to 'Blacks, Whites the Khoi and San, Indians and Coloureds'. The issues raised by the Committee spoke to what they saw as desirable and also referred to

areas of concern or interest. These concerns did not constitute a violation of the treaty.

South Africa needs to do more to give effect to the provisions of the Convention and also use other measures to implement the treaty. A collaborative effort is needed by all role players to ensure that the treaty is given practical meaning. This is inclusive of having in place an inclusive approach to State report writing.

South Africa had submitted a combined report (4th to 8th) which was nearly 5 years late (4 years and 10 months). The presentation of the combined 4th to 8th report was an opportunity to reflect on its challenges and opportunities over the reporting period since it presented its last report before the Committee in 2006 (CERD/C/ZAF/CO/4-8). This late reporting was also a continuation of late reports under the same treaty as evidenced by its prior report (initial to 3rd report) to the treaty body in December 2004, which was late by nearly four years (3 years and 10 months), (CERD/C/ZAF/CO/1-3). As at 26 January 2020, it had yet to submit its 9th to 11th report which was due on 9 January 2020. This is despite its assurance in 2016 before the CERD that it would submit its next report on time and that it was developing a reporting methodology.

In addition to the reporting challenges under ICERD, it is noted South Africa submitted its National Action Plan (NAP) on racism, racial discrimination and xenophobia in 2019, nearly 18 years later. Submitting NAPs to the UN Secretariat was a requirement arising from the intergovernmental negotiations of 2001 and the World Conference against Racism that produced the Durban Declaration and Program of Action (DDPA) in 2001 (UN/WCAR, 2001: para 66).

One of the critical outcomes of the DDPA of 2001 was the recommendation to UN Member States to “establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance including their gender based manifestations”. South Africa began the process of preparing its NAP in 2016 (UN/WCAR, 2001: para 66). The NAP seeks to give the State party a holistic policy framework to deal with racism, racial discrimination, xenophobia and related intolerance at the domestic level (SAHRC, Annual Report, 2016:49-50).

**Reflections: South Africa's Report under the ICESCR**

South Africa submitted its first-ever report to the CESCR in April 2017. The report was overall welcomed by the CESCR, even though the Committee raised many serious questions about the lack of implementation of the treaty among other things. NGOs equally raised many questions about the lack of implementation. As it was the State party's first report, one that was submitted within the prescribed two year period following treaty ratification, not much could have conceivably been done to give full effect to the treaty provisions. It remains to be seen what progress will be made by the time treaty body will be reflecting on South Africa's next report which is due in 2023.

**Reflections: South Africa's Report under the ICCPR**

It was a cause for serious concern that South Africa had not submitted a report to the treaty body since 2000. It could only submit its first report in 2014, 14 years late when the long outstanding report was finally submitted in 2014. It had to submit a combined report covering the initial period (1998 –1999), and subsequent reporting periods till 2014. This failure to report fourteen years impacted negatively on its role conception as a good international citizen and a champion of human rights. It had not been exemplary during the intervening period when it failed to submit reports for 14 years.

The State party struggled to comply with its reporting obligations during the period, when its CCD document was not updated since 1997. It then updated the document in 2012. It submitted combined reports (for the periods 2000, 2002 and 2004) to the CERD in 2004 (CERD/ZAF/CO/5-7), and four combined reports (for the periods 2006, 2008, 2010 and 2012) to the CERD (CERD/ZAF/CO/4-8).

There needs to be sound management of reports and central coordination by a dedicated team(s) of trained report writers. South Africa ought to make better use of available training and capacity building provided by the UN which has been in place since the 2014 adoption of UN resolution 68/268 on capacity building for state reporting. These training programs in various regions are useful in terms of building report writing capacity. Moreover, the UN's Office of High Commissioner for Human Rights has a regional office in Pretoria, which has dedicated report writing expertise.

The trickle-down effect of obtaining report writing expertise and having in place effective sufficient capacity could be the timely submission of reports and compliance with reporting obligations.

## 4.7 Conclusion

South Africa's self-declared championship of human rights since its democratic transition in 1994 and its rapid signature and ratification of seven of the nine core human rights treaties, led to high expectations about its commitment to human rights and fundamental freedoms. It was also expected that it would meet human rights standards and comply with its reporting obligations under the relevant human rights treaties.

The country's role conception as a human rights champion versus the practical challenges of meeting human rights standards shows a mixed picture. Its performance on the human rights front, especially with reference to compliance international treaties has at times fallen short of expectations as it failed to submit its reports over long periods of time in relation to for example the ICERD and ICCPR.

This chapter sought to reflect on state compliance with reporting obligations under core human rights treaties, in particular South Africa's own compliance with its reporting obligations. It also sought to reflect on one of the research questions for the study, namely; what factors explain South Africa's compliance with reporting obligations?

The chapter also sought to make a contribution to the on-going research on state compliance with reporting obligations under human rights treaties by means of reflecting on the case study of South Africa's compliance with its reporting obligations. It attempted to provide important insights into South Africa's institutional arrangements with regard to dealing with its reporting obligations under human rights treaties.

South Africa needs to establish a strong central reporting mechanism to coordinate report writing with a view to compliance with human rights obligations. In terms of the challenges with the ad hoc arrangements, it is clear that the current framework is not conducive to compliance with the procedural and substantive obligation to report.

There is a need for the establishment of a standing national mechanism for report writing and follow up in order for South Africa to comply with its reporting obligations under core human rights treaties. Overall, South Africa's challenges with the procedural obligation to submit compliant reports on time are not unique. It is a part of the global crisis of poor levels of reporting by State parties to human rights treaty bodies. Nonetheless, the challenge requires an intervention at the national level, in particular at the Cabinet level, in order to coordinate report writing and compliance with treaty obligations, and thus manage to meet the procedural requirements to submit compliant reports timeously.

South Africa's reporting backlog is compounded by the fact that it also has reporting obligations to regional mechanisms, namely, the African Charter on Human and People's Rights and the African Charter on the Rights of the Child. The process of state reporting is a laborious, time consuming, expensive and specialised process. It is a multi-stakeholder process that requires the involvement of a broad spectrum of state and non-state actors. As a consequence, the submission of reports tends to be delayed (Olivier, 2006:181).

The absence of a central coordination mechanism to manage its national reports is a major impediment to fulfilling its reporting obligations. In South Africa, three separate government departments manage the treaty report writing process, they are: The Department of Justice and Constitutional Development, Department of Social Development and Department of Women. Its report writing process is not done using a standard report writing format or guideline and it does not have a standing reporting mechanism.

# Chapter Five

## The Role of Parliament, Chapter 9 Institutions and Civil Society in Monitoring South Africa's Compliance with its Reporting Obligations

### 5.1 Introduction

The purpose of this chapter is to reflect on the oversight function that South Africa's parliament, cabinet, Chapter 9 institutions like the Human Rights Commission and the Commission on Gender Equality and the Civil Society Organisations (CSOs) play in terms of monitoring state compliance with reporting obligations under selected core human rights treaties. It reflects on the role they are permitted to play in the State reporting process – starting with the report preparation and the report review by the treaty monitoring body.

The chapter will also highlight that a state-centric and legalistic approach to compliance with human rights reporting obligations falls short of appreciating the role that can be played by non-state actors in fostering state compliance.

The thrust of this chapter is to highlight that while treaties impose obligations solely on states to implement human rights treaties, states have the discretion to use other measures of implementation (Fraser, 2018; Heyns and Viljoen, 2002). States may encourage or partner with NSA's in terms of compliance with international human rights. Both the Universal Declaration of Human Rights (UDHR) and treaty bodies envisage a role for Non-State Actors in terms of implementing international human rights treaties. In fact, treaty bodies encourage NSA's in particular to play a role in the State reporting process (Fraser, 2018:280). Where necessary, the media and other actors can also possibly assist in upholding human rights norms and standards. (Heyns and Viljoen, 2002).

Human rights treaties give states the discretion to involve NSA's, Civil Society Organisations and other role players in the State reporting process. It should be a process that involves other role players, including parliament, the judiciary and other social institutions (religion, mass media, pressure groups, families).

The role of social institutions and non-state actors in the promotion of human rights can and should be enhanced. The State can, for example, partner with these non-

state actors and the media to advance specific or broader human rights goals. It can collaborate with various social institutions and the media to raise awareness and promote particular rights, thus helping to embed such rights in the mind of the public (Reinisch, 2005). The State may not have full capacity to entrench all human rights and, therefore, needs to partner with other institutions to fully promote and fulfil human rights. Such an approach can also help to deepen the State's reach and help to entrench the human rights initiative that the State seeks to promote (Fraser, 2018:118).

In a globalised world, wherein multinationals and multilateral institutions are critical in civil society, and are more powerful, it is imperative for States to collaborate with non-state actors to promote human rights. Such developments have placed the focus on good governance and the transfer of powers from the States to NSA's. These developments have, therefore, placed greater emphasis on partnerships between the State and NSA's (Reinisch, 2005). Their role is unlikely to be diminished in future and is likely to increase exponentially.

As mentioned, human rights treaties and treaty bodies encourage these non-state actors to play a full and effective role in human rights promotion and protection in partnership with the State. The treaty bodies' harmonised guidelines foresee a role for NSA in human rights protection and implementation. States are mandated to report on the extent to which civil society participation is prevalent in the protection and promotion of human rights within the State party. They can also report on the steps they have taken to promote and develop civil society in light of the promotion and protection of human rights. Essentially, NSAs and other role players have a big role to play in the human rights arena (UN Report, 2016). Together with the State they can engage in collaborative efforts to protect and promote human rights.

States alone cannot promote and protect human rights to the fullest. They need to partner with non-state actors as envisioned in the UDHR's preamble insofar as it is the responsibility of every organ of civil society to realise human rights.

## 5.2 Overview: The Role of Parliament, Chapter 9 Institutions and Civil Society

It is broadly recognised that human rights treaties might emerge because of widespread belief in their general worthiness. Constructivism makes a correlative link between the emergence of international human rights law and the role of NGOs (Finnemore, 1998). There is greater recognition of the influence of NGOs in the human rights sphere, which has been in place for decades. The influence of NGOs has existed for a long time; it has been to a large extent in place side by side with state power, though not outside the sphere of state control (Huffines, 1997).

NGOs play a catalytic role in international politics and in the human rights arena (Brett, 1995:102-103). States are not the only actors and subjects of international politics, even if only states have full legal authority in terms of international law. As such, at the domestic and global level, NGOs play important roles in the realm of human rights promotion, protection and respect. Some scholars opine that NGOs with a global reach are the main bedrock in the process of promoting human rights and deepening them. Global human rights organisations like Amnesty International and Human Rights Watch have amplified human rights and made them an issue of on-going global attention and concern (Nowak *et al.,* 2012:59).

Whereas human rights implementation is the prerogative of governments, CSOs, NHRIs and NGOs are critical role players in monitoring the implementation of these treaties. They play an indispensable role in assisting and holding governments accountable within the realm of human rights.

## 5.3 The Monitoring Role of Parliament in the State Reporting Process

There is amidst the challenge of poor domestic monitoring of international human rights treaties, the reality of insufficient parliamentary oversight in terms of these treaties. In recent years, the UN, the IPU and regional organisations have initiated efforts to embed parliaments in the implementation of international human rights treaties. These efforts have entailed initiatives to set up parliamentary committees on human rights at the domestic level. The aim is to leverage parliament's legislative, oversight and budgetary role in order to enhance effective implementation of the conclusions and recommendations of the UN treaty bodies (URG, *n.d*).

UN treaty bodies envisage that national parliaments and cabinets ought to play a critical in the preparation of national reports. In the past, parliaments largely played a remote role in terms of monitoring state compliance with UN and regional human rights treaties. They have also been overlooked as human rights role players, yet they are among the most important domestic institutions that are promoted by the UN and regional treaty bodies as pivotal role players in the human rights system. In 2018, the UN's OHCHR produced Draft Principles on Parliaments and Human Rights. It was a significant step in bringing to the fore the engagement of parliaments with human rights at the national level and in particular with the international human rights system (Roberts Lyer, 2019:195).

The Draft Principles seek to set the scene for improved national implementation of international human rights treaties. The Principles highlight the following "[…] parliaments have a wide range of tools at their disposal to ensure that national laws, policies, regulations, programmes and budgets reflect the principles and obligations contained in all international agreements" (Roberts Lyer, 2019:195).

Parliament is the embodiment of human rights promotion, protection and fulfilment. It has an important role in overseeing the conduct of the executive and in promoting accountability (Chenwi, 2011:1). It also has the role of ensuring that national policies, legislation and practice are in conformity with international human rights obligations. This is owing to the fact that parliaments and governments (Cabinet) ratify or accede to treaties and play a role in the process of state reporting. These bodies are central pillars when it comes to human rights promotion, protection, respect and fulfilment.

Parliaments, including South Africa's own parliament have important roles to play in the state reporting process. In fact, parliaments have an obligation to monitor state compliance with treaty obligations. CEDAW enjoins states to establish mechanisms to facilitate collaboration between parliament and government with regard to the elaboration of the report, input of parliament into the report and in the process of follow up to the concluding observations of the Committee (Moeckli *et al.,* 2018:76).

Parliaments are the cornerstones of human rights owing to their role as public representative. Their functions have an impact on the promotion, protection and enjoyment of human rights. The South African parliament is empowered in terms of

the Constitution (Sections 42(3) and 55(2) to inspect and monitor Executive action (ISHR, 2013):13. It may also execute this power by means of examining the State's human rights record. Parliament has the latitude to hold public hearings on human rights treaty reporting, to invite ministers and ask for documents and reports from various departments and CSO's. Its members may be included in national delegations to the national treaty reports presentations in Geneva and New York (ISHR, 2013:13).

Furthermore, the South African Constitution includes a number of principles that guide its parliament in executing its mandate. It makes provisions for the advancement of human dignity, human rights, equality, social justice, accountability, responsiveness and transparency (Constitution, 1996). Conceptually, parliament has an important role to play in the promotion of conditional rights by means of safeguarding state compliance with international human rights treaty obligations. Given its legislative status, parliament needs to play a major role in ensuring that the South African government complies with treaty obligations under international human rights treaties.

### 5.4 The Role of Parliamentary Committees

The role of South Africa's parliamentary committees with respect to compliance with international and regional human rights obligations has not been explored and studied sufficiently. In fact, the study of parliament and universal human rights is an emerging field of scholarship. Globally, parliaments are not renowned for active and effective involvement in the monitoring of the implementation of international human rights treaties. The limited roles parliaments play in monitoring the implementation of core human rights treaties signify a gap in the national human rights protection regime. As a consequence, the UN has been pushing for greater parliamentary engagement. It has encouraged the establishment of dedicated national parliamentary focal points in the form of parliamentary committees on human rights (Roberts Lyer, 2019:195).

Parliaments can play a catalytic role in the supervision of the state's implementation of its universal human rights obligations and in terms of promoting transparency, openness and accountability (Chenwi, 2011:3). Parliaments play a critical role of

monitoring the implementation of human rights treaties and fulfilment of reporting obligations (Roberts Lyer, 2019:196).

In terms of Sections 231-233 of the Constitution of South Africa, parliament is entrusted with the oversight responsibility over South Africa's international treaties and agreements. Its oversight role includes raising awareness regarding the country's international obligations under the relevant treaty and it has to encourage the ratification of treaties which are in line with the country's constitution. Parliament needs to ensure that the state copes with its treaty obligations, including the insurance that any new legislation is in line with international law.

Conceptually, parliament needs to play a bigger role in South Africa's compliance with its treaty obligations, including the reporting obligations. In practice, parliament tends to play a limited role or no role in the report writing process. On 12 September 2014, the Chairperson of the Portfolio Committee on Justice and Correctional Services, Dr Motshekga highlighted that ever since he became a member of parliament (over six years), he had not received a report from the SAHRC regarding the annual human rights issues in the country (PMG:2019). This was a telling statement from a chairperson of a key committee, entrusted with oversight over South Africa's human rights issues and international treaty obligations.

His remarks are also echoed by what a former Chairperson of the Portfolio Committee on International Relations, who stated off the record in October 2019, that the committee he once chaired did not reflect on state reports to the treaty bodies. He stated that his committee was more focused on pressing domestic matters. The preceding statements underscore the limited role that parliament plays in South Africa's international human rights reporting and in the monitoring of its international human rights obligations.

During the mentioned meeting between the parliamentary committee and the SAHRC in 2014, Ms Janet Love (SAHRC Commissioner) apprised the portfolio committee on Justice and Correctional Service about the reporting backlogs in terms of the UN treaty monitoring bodies - then chairperson stated that if parliament is not updated about the challenges with compliance with reporting obligations that his committee would not be in a position to hold relevant departments to account. Dr

Motshekga also stated that the same applies to the domestication and ratification of treaties. His comments best summarise the peripheral role that parliament plays in terms of monitoring South Africa's international treaty obligations, including reporting under international human rights treaties (PMG, *n.d*).

The South African parliament does not even submit shadow reports to the treaty bodies and has not ventured into this arena. Members of the South African parliament rarely form part of a delegation presenting a state report to the UN human rights treaty monitoring bodies. Given the current situation, whereby parliament is remotely involved in compliance with regional and international human rights treaties, it would take political will and leadership for parliament to occupy its rightful role and provide leadership on human rights issues and compliance with treaty obligations.

As alluded to, the parliament of South Africa has thus far not played a full and effective part in the state reporting process. National reports to the treaty bodies tend to bypass parliament and at best they are noted or approved by the cabinet. This approach is not in line with what is expected of States parties by the treaty bodies, as these reports should undergo the widest possible consultation, including inputs from civil society and national parliament. In general, reports to the treaty bodies prepared by other state parties that undergo broad and rigorous consultations (parliament, CSOs, NHRIs etc.) tend to be of good quality and compliant.

Chenwi (2010:72) notes that South Africa's failure to involve parliament in the report writing process was raised by CEDAW in 2000. CEDAW enquired in its list of issues about the limited role of civil society and the extent to which parliament was involved in the report writing process. This was raised amid the realisation that the State report to the Committee (CEDAW) did not undergo broad consultation, thus South Africa fell short of what the treaty body envisages when states prepare their reports (broad national consultation). The centrality of parliament as a key stakeholder is of paramount importance to the production of compliant state reports. It has an important oversight function to perform which should give it an opportunity to assess South Africa's compliance with its reporting obligations and reflect on the accuracy of the information contained in state reports.

It is of crucial importance (Chenwi, 2010:73) for parliament to be involved in the process of state reporting. It needs to play its full oversight role so that it can engage the government on its compliance with its reporting obligations under regional and international human rights treaties. Parliament would, in this regard, be in a position to ascertain the accuracy of the information provided in draft state reports. Furthermore, parliament is at liberty to submit its inputs on the draft report.

It would be prudent for parliament to integrate itself into the reporting process as this could also hasten South Africa's compliance with its reporting obligations. Parliament needs to consider insisting on receiving state reports prior to their submission to the UN and regional bodies, and to debate them. It also has the prerogative to be involved in the report writing and presentation process. The UN reporting guidelines encourage parliaments to be involvement in this process (UN Reporting Guidelines, 2009).

The IDC or any future relevant mechanism for reporting would need to explore ways of embedding the South African parliament in the reporting process. The report writing and submission of process that by-pass parliament is not in line with international best practice. As parliament is the embodiment of the will of the people, it would be correct and essential to integrate it in the reporting process. Parliaments play an important role in the legislative incorporation of treaties to the extent that the treaty provisions are not already in line with existing South African law or could be considered to be self-executive in terms of Section 231(4) of the South African Constitution (Olivier, 2006:194).

The non-involvement of the South African parliament in the reporting process deprives it of an essential opportunity to input the state report and to hold the state accountable in respect of human rights promotion, protection, respect and fulfilment. It also deprives parliament of an opportunity to obtain insight into what the treaty bodies recommend in terms of the domestic implementation of the relevant treaties. It is of central importance to embed parliament in the reporting process as this institution holds the key to the domestication of the treaties and the adaptation of legislation to conform to the relevant treaties. Parliament and its committees have to prioritise or appreciate the oversight role they ought to play in terms of state

reporting under core human rights treaties; otherwise its envisaged oversight role will not count for much.

The non-participation of parliament in the process of state reporting weakens the ability of parliament to keep abreast of developments in terms of international human rights law and monitoring compliance with the international treaties. This absence of parliament from the report writing process could also be a contributory factor to South Africa's late reporting and the submission of overdue reports that have spanned up to 14 years in the case South Africa's report to the HRCee. If parliament was an essential part of the reporting process, it could have pressured and could have pushed the executive and the relevant Ministries/departments to submit reports that were/are due, thus averting late reporting. In this regard, it would be prudent for future reporting to include parliamentary engagement as parliament is the embodiment of the free will of the people.

### 5.5 The Monitoring Role of National Human Rights Institutions

The UN system recognised and encourages the important role that NHRIs can play in the promotion and protection of human rights. The 1993 Vienna Declaration and Program of Action are instructive in this regard. It values the important and constructive roles NHRIs play in terms of human rights promotion and protection, especially their advisory role to those in positions of authority. This includes the important role they play in dealing with human rights violations, in distributing human rights information and related human rights education (VDPA, 1993). Various resolutions, including resolution 48/134 of 20 December 1993, outline cardinal principles with respect to the status of such establishments. Resolution 2003/76 of April 2003 also affirms this recognition (Mubangazi, 2006:454).

The NHRIs, which are by definition statutory bodies of state, have an indispensable role to play in the human rights reporting process. Statutory bodies include equivalents such as Ombudsmen. They play a discernible role in the process of domestic implementation of the treaties, including the state reporting process. NHRIs are best placed to bring community-oriented perspectives and they are able to assist the state to get a proper sense of the situation on the ground. They can be the "eyes and ears" of ordinary people and can help in determining the general

feelings of ordinary people. NHRIs also provide advice to their parliaments and respective governments in terms of the promotion, protection and implementation of human rights. They also draft and adopt national human rights action plans and they engage in research on a variety of human rights. NHRIs have a mandate to increase awareness about human rights and engage in human rights education. They can also initiate preventive measures and undertake investigative visits to places of detention. NHRIs also have the authority to, among other things, review the compatibility of draft legislation, publish annual reports about the state of human rights in the countries concerned, and submit shadow reports to international human rights treaty bodies (Nowak *et al.,* 2012:294).

Moeckli *et al.,* (2018:201) describes NHRIs as the local foot soldiers of the HRCee with reference to the ICCPR. The HRCee's high regard for the NHRIs explains why the Committee often times encourage states parties to the ICCPR to establish NHRIs in those countries that do not have them (Moeckli *et al.,* 2018:201).

Nowak *et al.* (2012:294) notes that for NHRIs to be successful, they ought to be independent and have broad powers as well as a robust mandate. They must be pluralistic and have professional staff, personnel and financial resources available in order to be able to do their jobs diligently. Overall, the success of the NHRIs ultimately depends on the political awareness and willingness of the main role players (government and parliament) to recognise that the national implementation of human rights is not easy, that it is a complex and multifaceted responsibility which requires a strong and independent NHRI at the heart of the domestic human rights architecture (Nowak *et al.,* 2012:295).

Boerefijn (2013) observed with respect to the CRC, that NHRIs provide direct avenues for enhanced state accountability and, in the sphere of children's rights, they act as duty bearers for children. He notes that NHRIs are able to close gaps with regard to checks and balances and that they ensure that the effect of policy and practice with respect to children's rights is appreciated and recognised. Boerefijn (2013) also observed that NHRIs are supportive of efforts to bring about remedies and reform when necessary or when results are not adequate.

NHRIs play a supplementary role to line ministries and relevant government agencies that are tasked with service delivery and the fulfilment of children's rights. NHRIs work side by side with line departments in order to improve their performance. With respect to the activities of the NGOs in the realm of the rights of the child, they are able to supplement their activities in the children's rights arena. They also become part of or initiate strategic litigation in the furtherance of children's rights (Sloth-Nielsen, 2018:28).

What is of central importance is that the NHRIs tend to have direct access to those who are in power, in particular decision makers. In general, NHRIs have an obligation to report annually to national parliaments and/or to cabinet. These opportunities enable them to bring to the attention of decision makers concerns they are aware of and have verified to those responsible for preparing, adopting and implementing laws and policies. Before the turn of the century, there were few NHRIs. There has been an exponential growth in their numbers, as has their involvement in the treaty monitoring processes.

The United Nations Emergency Relief Fund (UNICEF) defines the NHRIs and independent human rights institutions for children as "[a] public body with independent status, whose mandate is to monitor, defend and promote human rights and which has a focus on children's rights, either as specialised institutions or because it carries out activities specifically focusing on children, with an identifiable department. It can be established at national or sub-national level" (UNICEF 2013: Xi). Human rights commissions have general human rights mandates, extending from promotional and investigative to research and quasi-adjudicative functions. In the main, NHRIs do not have child rights focus units and have not set up child rights divisions or units. Following a call from the CRC, many states parties have created child rights units or divisions in their particular commissions (Sloth-Nielsen, 2018:28).

The UN adopted the Paris Principles in 1993. The CRC's General Comment No. 2 (The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child) constitute the central framework for considering NHRIs in the international sphere related to children's rights. The Paris Principles encourage states to establish independent national institutions for the promotion and protection of human rights. They were adopted by the UN General Assembly

resolution 48/134 of 20 December 1993. The Paris Principles envisage, for example, the setting up of non-judicial human rights commissions and corresponding structures with a broad mandate of human rights awareness raising, education, monitoring, advising and reporting functions (Nowak, 2012:75).

It is noteworthy that some of the human rights treaties provide for the creation of treaty specific national monitoring bodies. This function can be performed by existing NHRIs. Examples of such bodies includes the National Preventative Mechanism under the Optional Protocol to the Convention against Torture (OPCAT), the Committee on the Rights of People with Disabilities (CRPDs) - article 33 envisages specific monitoring mechanisms with respect to the rights of people with disabilities. The CRPD's article 16(3) makes a provision to prevent exploitation, abuse and violence so that there are in place independent monitoring mechanisms for all the facilities earmarked for people with disabilities. Nowak (2012:75) notes that this function can be given to the monitoring mechanism in terms of article 33 of the CRPD, to a NHRI or, as in the case of Austria, to the National Preventative Mechanism (NPM) under the OPCAT which was established at the Austrian Ombudsman-Board (Nowak, 2012:75).

The Paris Principles' minimum standards provide guidance for the establishment, competence, responsibilities, and composition, including pluralism, independence, methods of operation, and quasi-judicial activities of such national bodies. They set forth six essential characteristics for these institutions: independence guaranteed by statute or constitution; autonomy from government pluralism, including in membership; a broad mandate based on universal human rights standards; adequate resources; and adequate powers of investigation (Sloth-Nielsen, 2018:28).

The Paris Principles require that NHRIs promote and protect human rights and function independently of government. They note that the scope of work of NHRIs should include lobbying for human rights legislation, publicising human rights including human rights violations, and education about human rights. The principles stipulate that harmonisation of national laws with international treaties is part of the core function of a NHRI, and principle 3(d) spells out that NHRIs shall contribute to reports to global and regional organs and cooperate with UN and regional organisations. This has been further elaborated by the International Coordinating

Committee's (ICC) Subcommittee on Accreditation in General Observation 1.4 of 2012, which explained that interaction with the international human rights system means "making an input to and participating in these international human rights mechanisms and following up at the national level to the recommendations resulting from the international human rights system" (Boerefijn, 2013: 440). The ICC's name has changed to GANHRI (the Global Alliance of NHRIs) and the GANHRI Subcommittee on Accreditation accredits NHRIs as either:

1. **A Status** (fully compliant with the Paris Principles)

2. **B Status** (partially compliant) or

3. **C Status** (not compliant with the Paris Principles, e.g., through being uncritical and not independent of government).

South Africa's Human Rights Commission falls within the A status in terms of Paris Principles. The Paris Principles are useful for gauging the independence and effectiveness of various country human rights monitoring bodies responsible for human rights monitoring, promotion and protection (Sloth-Nielsen, 2018:28).

### 5.6 Framework of NHRIs and CSOs Involvement in State Reporting

The UDHR and treaty monitoring bodies encourage national parliaments, NHRIs and CSOs to get involved in issues related to compliance with international human rights. Consequently, they have a role to play in various stages of the reporting process and work of the treaty bodies. This includes the communications procedure, the inquiry procedure, the country visits, early warning and urgent action procedures, during days of general and thematic discussion, and when general comments are developed. Treaty bodies recognise the involvement of these stakeholders as a central element in the promotion and implementation of the core human rights treaties and their optional protocols at the national level (Reinisch, 2005).

In the main, some core human rights treaties make provisions for a role of CSOs or NHRIs in the work of the treaty bodies. Most of the treaty bodies cooperate with NHRIs and CSOs formally and have in place procedures to interphase with them in numerous ways, including in official papers, their working methods, statements and information papers (OHCHR, 2018).

A majority of the treaty bodies engage in outreach measures with respect to NHRIs and CSOs and urge them to get involved in pending reviews of their country of interest (UNCHR, 2017:68). This chapter seeks to elaborate on the role of these stakeholders in the state reporting process.

It is permissible for national parliaments, NHRIs and CSOs to get involved in the state reporting process in the form of active involvement in the national report writing preparations (Fraser, 2018:280). These role players are often able to bring forth useful inputs into the state reports by means of information sharing and assessment of the particular state's implementation of a relevant core human rights treaty and the relevant recommendations that were made by the treaty bodies. These stakeholders are encouraged by the treaty bodies to adopt a participatory approach and to hold broad and substantive engagement with state parties. They have various types of consultations, including meetings, workshops, or requests for inputs and comments with regard to the drafting of state reports.

The involvement of NHRIs and CSOs in the state reporting process has the added advantage of fostering open discussions on the draft reports and response to the treaty bodies. This involvement of the mentioned role players can enhance transparency and accountability. The involvement of these stakeholders should, however, not be seen to imply that they will be joint reporters together with the state concerned or be seen as taking over the drafting of a state report.

The NHRIs and CSOs have the latitude to engage directly with the treaty reporting process by means of submitting their reports, which are referred to as shadow (alternative) reports, to the treaty monitoring bodies. They can also submit oral information to these bodies during various stages of the reporting cycles. Stakeholders that are unable to attend the meetings in Geneva can also participate by means of video conference (OHCHR, 2017:68).

Reports prepared by the treaty bodies are seen as seeking to inform:

a) preparation of List of Issues before reporting and questions (in terms of both the normal and simplified reporting procedures);

b) consideration of a State party report; or

c) the follow up procedures to the concluding observations. NHRIs and CSOs can also meet with the members of the treaty bodies to provide them with country-specific oral information during any period leading to the report preparation and writing sessions. They can also observe the process of constructive dialogue between the state party, during the session at which the relevant state party is scheduled to be considered and the treaty body (OHCHR, 2017:69).

The participation of the NHRIs and CSOs in the state reporting process goes beyond the consideration of a State party report; by means of follow up activities these role players can play a pivotal role in campaigning for the implementation of the recommendations stemming from the treaty bodies, thus making a contribution to the promotion of human rights (OHCHR, 2017:68).

### 5.7 The Role of NHRIs in South Africa

The UN human rights treaty system envisages a role for national parliament, governments, National Human Rights Institutions and Organs of Civil Society with respect to state reporting. The broad idea is that state reporting needs to have national ownership that the state ought to collaborate with various stakeholders to prepare reports to treaty bodies and to comply with reporting obligations. In this regard, it is of critical importance to establish national participation and ownership of the state reporting process. The South African constitutional order is centred on the notion of the centrality of human rights and a people-centred framework. In this regard, the country is at face value working in unison (state and non-state actors) on the compliance with human rights treaty obligations, with other role-players of civil society playing a critical role in the process of state reporting.

With respect to state reporting, governments must ideally arrange inclusive and critical discussion processes in consultation with national human rights, civil society organisations, parliaments, academia, courts and other stakeholders prior to preparing an objective and self-critical state report that would be submitted to the respective treaty body (Nowak *et al.,* 2012:71). However, it is commonplace for states parties not to use the state reporting process as an opportunity for critical self-reflection. States tend to see the reporting process as an unnecessary burden on

overworked public servants. In situations whereby civil society organisations exist, NGOs and other organs of civil society prepare shadow reports and submit them to the treaty monitoring bodies (Nowak *et al.,* 2012:71).

State compliance with reporting obligations and the implementation of treaties should not be approached from strictly legalistic and state-centric perspectives, but as lived experience by citizens (Fraser, 2018:2). It is, therefore, important to ensure that beyond the state, other role players, including NGOs and non-state actors make a contribution in terms of state compliance with reporting obligations and domestic implementation. Involving non-state actors and other organs of civil society can contribute to better levels of compliance with state obligations under core human rights treaties (reporting and implementation) by states.

UN treaty bodies recommend that CSOs, NGOs, academic institutions and NHRIs should play an important role in the state reporting process to the UN treaty bodies. States parties are encouraged to ensure that CSOs, NGOs participate in the process of state report writing and to be fully engaged in the process. They can participate in the initial process of report writing by means of submitting proposals to the state reporting mechanism or submit comments on a draft state report, and submit shadow reports to the treaty bodies (Mubangizi, 2006:466).

Organs of civil society can also play a part in being pressure groups in the government to ensure compliance with human rights treaties with respect to the promotion, protection and fulfilment of human rights. The role of Non-state Actors (NSAs) has been overlooked in terms of the domestic implementation of human rights (Fraser, 2019:974). They can play an important role in terms of pressurising decision makers and mobilising other role players to help the State party to comply with treaty obligations. In-depth studies need to be undertaken to explore the role that can be played by civil society organisations within the realm of state compliance with treaty obligations and state reporting to the treaty monitoring bodies. There is a need to integrate the role of civil society/non-state actors in the process of state compliance with reporting obligations in order to ensure that state compliance with reporting obligations is a function of a collective and collaborative effort between states, civil society and the legislative processes.

### 5.7.1 The South African Human Rights Commission (SAHRC)

In South Africa, the NHRIs such as the SAHRC, Commission for Gender Equality (CGE) and the Commission for Religious and Linguistic Rights (CRL) function alongside other Chapter 9 institutions of the South African Constitution, such as the Office of the Public Protector and the Office of the Auditor-General – all critical organs supporting democracy (Mubangizi, 2006:467). They play a central role in asserting the primacy of the country's Constitution. The government and parliament have increasingly recognised their power as reaffirmed by adjudications of the High Courts and the Constitutional Court, especially with regard to socio-economic rights (Dixon, 2007:391). The SAHRC is the lead NHRI in South Africa on human rights issues.

On an annual basis, the SAHRC requests key state entities to provide it with information on measures that these organs of state have taken with respect to the realisation of the rights enshrined in the South African Bill of Rights in respect of housing, healthcare, food, water, education, social security and the environment (SAHRC pamphlet, 2018:3). It plays an oversight role on human rights and has a responsibility to report to parliament. The SAHRC has played a central role in providing shadow reports to the UN treaty bodies such as CERD, HRCee and CESCR, thus providing independent reports to the treaty bodies. As an independent body, the SAHRC has the latitude to provide information to the treaty bodies, even if it is critical of the government.

### 5.7.2 The Role of the South African Human Rights Commission

The South African Constitution enjoins Chapter 9 institutions of the Constitution to monitor the implementation of human rights and fundamental freedoms in the country. The Constitution of the Republic of South Africa, section 184(3) directs organs of state to provide the SAHRC with information annually on measures that they have taken to give effect to the realisation of socioeconomic rights contained in the Bill of Rights. These rights include health care, food, housing, education, the environment and water (Constitution, 1996). Furthermore, SAHRC and other NHRIs account to parliament. In this regard, the parliament and cabinet have a critical role

to play in the process of state reporting and monitoring the implementation of human rights.

As mentioned above, national human rights institutions have a critical role to play in terms of monitoring and encouraging the state to comply with reporting obligations. The SAHRC has the constitutional mandate to promote, protect and monitor human rights. The South African Human Rights Commission Act 40 of 2013 empowers the SAHRC with the legislative mandate to monitor South Africa's implementation of, and compliance with international and regional human rights instruments and treaties (SAHRC. Annual Report: 2016., 2016)

Another Chapter 9 statutory body, the Commission on Gender Equality (CGE), is also required in terms of the Gender Equality Act to "monitor compliance with international conventions, international covenants and international charters acceded to or ratified by the Republic" which relates to the promotion of gender equality (Heyns and Viljoen, 2002:543).

The South African Human Rights Act (Act 40) of 2013 entitles the SAHRC to seek the cooperation of relevant Ministers and Departments in respect of human rights and compliance with treaty obligations. While there were in the past efforts to give the Commission the task of report writing, this idea was not pursued to the fullest. In fact, the SAHRC as an independent institution has a statutory obligation to encourage and monitor the state to comply with its reporting obligations.

The SAHRC has submitted shadow reports to the UN treaty monitoring bodies as an independent statutory body tasked with overseeing the promotion and protection of human rights issues in the country. Among the most recent times, was when its shadow reports were considered by the HRCee in March 2016, the CERD in August 2016 and the CESCR in October 2018.

Furthermore, the SAHRC produces publications on South Africa's reporting to regional and international human rights treaty bodies. These reports tend to reflect on the status of the country's reporting under regional and international human rights treaties. It also uses these reports to urge the government to improve its reporting record (SAHRC. Annual Report: 2016., 2016).

The SAHRC also has the power to investigate human rights violations and to hold accountable parties that violate human rights and that do not comply with its recommendations. Its profile has been steadily on the rise in recent times. In this regard, it has been playing a critical role in investigating cases of human rights violations by the state, individuals and by any role player (SAHRC Annual Report., 2016). Since NHRIs have a legislative mandate to direct national departments to submit reports to treaty bodies, they can contribute immensely to state compliance with treaty obligations.

A truly independent NHRI makes a great difference to the standing of a country, if it does its job diligently. An NHRI that complies with the Paris Principles can be a major boost to a state party if it is able to make a contribution to the situation of human rights in the country concerned and in monitoring the implementation of the treaty provisions. Thus, an independent and effective NHRI would be in a position to help the country concerned to comply with its treaty obligations.

The SAHRC plays an increasingly important role in the monitoring of South Africa's international human rights treaty obligations. The SAHRC has been involved in the preparation of shadow state reports and in urging relevant government departments to comply with their reporting obligations. The SAHRC has to impress upon the relevant role players the importance of compliance with reporting obligations, as failure to report is essentially a breach of a state obligation under the relevant treaty. Thus, it is important to have effective and independent NHRIs that would help in terms of fostering state compliance with treaty obligations under core human rights treaties.

The NHRIs and CSOs need to participate in the state reporting process and the provision of information to treaty monitoring bodies regarding South Africa's compliance with its reporting obligations under international human rights treaties.

This chapter has highlighted that it is crucial for states reports to entail the involvement of human rights institutes and CSOs. It has outlined how other stakeholders can get involved in the state reporting process. This is in view of the critical oversight role it plays, which affords it an opportunity to scrutinise the state's compliance with its human rights treaty obligations.

Parliament has the authority to interrogate information contained in the state report, to verify its authenticity and reliability. It also has the latitude to submit its inputs on the State report to treaty bodies (Roberts Lyers, 2019:205). Regrettably, the parliament of South Africa has yet to play the aforementioned role in terms of its oversight role.

#### 5.7.2.1 Shadow Reports to the Human Rights Treaty Bodies

Organs of civil society, national human rights institutions (NHRIs), the academia and parliament have traditionally played marginal roles in the State reporting process as they are engaged late in the process and they tend to at that stage submit shadow reports. Ideally, they ought to be involved from the onset of the process (Chenwi, 2010:59). As a consequence, they tend to feature when States have already produced reports or have submitted them to the treaty bodies.

The SAHRC submitted an NHRI shadow report to the CERD in 2017. Noting information provided by the State party in its report to the Committee in report CERD/C/ZAF/4-8, the SAHRC for example provided a succinct and comprehensive reply to the challenge at play with regard to the plight of the Khoi-San people. It highlighted that in 2015 to 2017, it undertook investigative hearings which found that this group was undergoing discrimination, marginalisation, stigmatisation, lack of land redistribution, poor access to basic services and unequal opportunities to employment. It also found that there were insufficient measures in place to protect and promote their language and cultural rights (SAHRC shadow report, 2018). The reply essentially underscored that the State party had not taken legislative measures to address the plight of the Khoi-San people.

The SAHRC also submitted shadow reports to the CERD and CESCR in 2016 and 2018 respectively.

### 5.8 The Role of NGOs and Organs of Civil Society in State Reporting

All UN human rights treaty monitoring bodies welcome and encourage the provision of shadow reports by civil society organisations, NGOs, NHRIs and National Preventative Mechanisms and their participation in the reporting process (Moeckli et al., 2018:76). These bodies also engage in private meetings with the mentioned

stakeholders, a day before State reports are presented. NGOs and other CSOs were originally not envisaged to play a role in the state reporting process. None of the two Covenants, the ICCPR and the ICESCR, make any reference to the roles of NGOs and CSOs or any possible interaction with them (the Committees and civil society), however, the reporting guidelines of these treaties welcome the participation of these entities. Over the years, their (NGOs/CSOs) role in state reporting gradually and progressively developed (Brett, 1995:10-103).

NGOs were initially involved on an ad hoc basis and they were, over time, integrated into the working methods of the relevant treaty bodies. The two Committees (CESCR and HRCee) have recently adopted modality documents that clarify how NGOs would participate in their work. The relevant documents outline the Committees' cooperation with NGOs in three main areas of their work; individual communication, the reporting procedure and the elaboration of General Comments (Moeckli et al., 2018:76). NGO involvement in state compliance with treaty obligations covers three areas:

1. The reporting procedure,

2. The individual complaints, and

3. The implementation of concluding observations.

The involvement of CSOs, NGOs, NHRIs, National Mechanism for Reporting and Follow Up (NRMFs) and national parliaments in the state reporting process can help to mainstream human rights at the national level. It could also assist in increasing accountability and transparency and in the process the production of timely and quality state reports.

Undoubtedly, CSOs and NHRIs have a critical role to play in state reporting and in ensuring that the implementation of the treaty bodies' concluding observations by States parties. In this regard, the German Institute for Human Rights and CSOs has set an example whereby they organised what they referred to as "National Meetings on Concluding Observations" in the aftermath of the examination of a state report. The German Institute has established the practice of organising "national meetings of experts and influential actors concerned with the implementation of human rights

legislation and human rights practice" wherein the focus is on national implementation on concluding of observations (Beigon, 2009). Through this practice, the German Institute distributes the concluding observations to the relevant line ministries and government entities, and implementation measures are thereafter explored.

Furthermore, according to the German Institute, these engagements have yielded positive results, whereby intense and high-quality dialogues took place between civil society, thematic experts and representatives from government ministries. Biegnon (2009) is of the view that African NHRIs and CSOs can learn a lot from the practice of the German Institute for Human Rights.

The CESCR became a trailblazer when it became the first treaty body to formalise cooperation with NGOs. It made the first reference to NGOs in its 1994 Annual Report and in November 2000 it adopted 'Guidelines for NGOs' - these guidelines review its modalities for interacting with organs of civil society. 12 years later the HRCee (the Human Rights Committee) adopted similar guidelines which clarified its relationship with the NGOs.

The reporting guidelines also analysed in detail the role of NGOs in the various areas of its work (Moeckli et al., 2018:76). There is no formal process of accrediting NGOs/CSOs in the reporting process; they do not have to enjoy consultative status with the UN's ECOSOC in order to submit their reports. NGOs can simply submit their shadow reports to the treaty bodies provided they submit these reports on time. In 2015, NGOs submitted 290 shadow reports to the HRCee Committee (Human Rights Committee) and 212 shadow reports were submitted to the CESCR. On average, under the HRCee 15.2 shadow reports were submitted per state in 2015 and under the CESCR 12.6 shadow reports were submitted per state (Moeckli et al., 2018:79).

Treaty monitoring bodies consider shadow reports to be complementary to state reports and are seen as providing an independent lens through which to obtain a sense of the implementation of human rights obligations by states. In the South African context, its NHRIs including the SAHRC and the Gender Equality Commission (GEC) have submitted shadow reports to treaty bodies such as the

CERD and CEDAW (Chenwi, 2010:58). They also submitted these reports to the CESCR, HRCee, and Committee against Torture (CAT) between 2014 and 2018. A number of these NGOs also attended the sessions of the Committees in order to present their shadow reports. The shadow report presentation takes place a day before the review of the state report.

### 5.9 The Role of South African NGOs in the State Reporting Process

The NGO sector plays a critical role in South Africa with respect to human rights issues in general (Chenwi, 2010:59). This role manifests itself in NGO activism in the area of all human rights, including children's rights, women's rights, sexual orientation and gender identity issues etc. South Africa has multiple NGOs that play lead roles in advancing the promotion, protection and respect for human rights. They play advocacy roles, act as pressure groups and, at times, participate in human rights activities such as submitting shadow reports to treaty bodies. Some of the key NGOs are as follows: the Foundation for Human Rights, Section 27, Access Chapter 2, the Centre for Advanced Legal Studies (CALS), Legal Resources Centre (LRC), Lawyers for Human Rights (LHR), Centre for Human Rights at the University of Pretoria, National Children's Rights Committee (NCRC) and the Human Rights Institute of South Africa (HURISA) (Heyns and Viljoen, 2002:550).

Though South African NGOs play an important role in the human rights advocacy arena, they tend to be focused only on certain thematic issues. This includes issues such as women and gender empowerment issues, sexual orientation issues and children's rights etc. Consequently, South African NGOs appear to overlook other important treaty specific and thematic human rights issues such as advocacy for the rights of people with disabilities, combatting torture and the elimination of all forms of racial discrimination and monitoring the domestic implementation of the Convention on the Elimination of All forms of Racial Discrimination (CERD).

Heyns and Viljoen (2002:550) observe that NGOs are not sufficiently informed about the core human rights treaties that South Africa has ratified. They emphasise a major need for education and training regarding these treaties. When South Africa eventually ratified the ICESCR in January 2015, it did not simultaneously ratify the ICESCR's optional protocol. This oversight in terms of the non-ratification of the

optional protocol was not a source of much NGO concern. There appears to be little NGO awareness of the optional protocol to the ICESCR and its attendant advantages. As socio-economic rights are embedded in the South African constitution, the ICESCR has received much attention from NGOs. In this regard, there is a quarterly review publication, called ESC Review (Economic and Social Rights in South Africa), published since early 1998, which is distributed to NGOs (Heyns and Viljoen, 2002:550).

Whereas NGOs submitted reports in large numbers to the HRCee and CESCR in 2017 and 2018, they did not do the same when it came to the CERD. Only two NGOs submitted shadow reports to the CERD in 2016. The NGOs are the Police and Prisons Civil Rights Union (POPCRU) and the Solidarity Trade Union's Centre for Fair Trade. In fact, POPCRU submitted its report in response to Solidarity's report and not in response to the State report (CERD/C/SR.1767: Summary record, 2016).

The lack of awareness about the UN treaties on the part of NGOs extends to their lack of involvement in the state report writing process. As alluded to earlier in this chapter, the state reporting process has yet to fully involve all stakeholders in the country. Often reports are drafted and submitted without the involvement of other organs of civil society (NGOs/CSOs). The effective participation of relevant stakeholders in the state reporting process is critical to the production of compliant state reports, since the preparation of state reports needs to be underpinned by input from a broad range of role players (Chenwi, 2010:1).

Despite South Africa's legacy of racism and discrimination, there appears to be limited NGO interaction in the country in terms of engagement with the shadow reporting process on the thorny issue of racism and racial discrimination, as evidenced by the fact that only NGOs submitted such reports the CERD in 2016 (CERD/C/SR.1767, 2016). This was despite the fact that the report was over four years late.

As a consequence, there is little understanding and monitoring of the country's performance in relation to the UN Convention on the Elimination of Racism (CERD). Limited public and NGO attention on the work of the CERD is in contrast to the role that South Africa plays in the UN system as a leading country on initiatives and

resolutions aimed at combatting racism and racial discrimination and the general perception that it has eliminated racism. South Africa assumed this lead role within the UN system following its successful transition from an apartheid era and ever since it hosted the 2001 United Nations World Conference against Racism, Racial Discrimination and Xenophobia (WCAR) in Durban. It had ever since led the African Group and the Group of 77 and China resolutions on this matter within the UN system on an annual basis. Its leading and pioneering roles have not enjoyed corresponding attention by domestic NGOs.

The reality of the situation in South Africa, when it comes to racism and racial discrimination is that there is reluctance in the country to deal with issues of racism and racial discrimination head-on (Heyns and Viljoen, 2002:548). These shortcomings were exposed to the country when the Penny Sparrow and Vicki Momberg incidents took place, as these ladies' racist and derogatory remarks on social media could not be remedied through the provisions of the CERD as the convention is not yet domesticated in the country. The legislation on hate speech became the avenue to prosecute these individuals. The attendant effect of not giving effect to the provisions of the CERD has manifested itself in Sparrow and Momberg incidents. Momberg was found guilty of crimen injuria for hurling racist remarks to a policeman 48 times, which demonstrate that South Africa does not have domestic legislation criminalising racism and racial discrimination (Reuters, May 2018).

Furthermore, South Africa has not adopted legislative measures to criminalise racism and racial discrimination, in line with the ICERD. As a consequence, it sought to raise awareness in the past during a campaign entitled Roll Back Xenophobia (Heyns and Viljoen, 2002:549). The effort was clearly not enough as combatting racism requires more than one off campaigns and sporadic outbursts of anger and indignation. There is in this regard a truism in the saying, that racial understanding is not a given but is something that must be created in a concerted and painstaking manner. It would appear racism would not be easily confined to the scrap books of history until it is dealt with sufficiently by the state and all organs of civil society (NGOs/CSOs).

In fact, Heyns and Viljoen (2002:549) opine that it appears South African NGOs do not know enough about the various human rights treaties to which the country is a State party. It is necessary for training and exposure to be given to these NGOs, in order to sharpen their knowledge about other UN human rights treaties. The need for such intervention is more urgent within the areas wherein NGOs have no specialisation.

In 2010, the Commission on Gender Equality (CGE) submitted a 53-page shadow report to the CEDAW on South Africa's implementation of this treaty. This shadow report was with reference to South Africa's periodic state report that it had submitted in 2009. The mentioned shadow report also focused on the weaknesses of the state report, reflecting on weak implementation of policies and legislation. It addressed concerns that were raised in the concluding observations to South Africa's initial report to CEDAW.

The shadow report also highlighted that there were insufficient consultations with CSOs during the report drafting process, a point the Committee was also concerned about, as evidenced in the questions raised in the Committee's list issues. The SAHRC submitted a shadow report to South Africa's 2004 report to the CERD, in June 2006. It reflected on the information gaps in the state report and reviewed the State party's compliance with its human rights obligations under the CERD (Chenwi, 2010:58).

Insufficient civil society and NGO involvement in the process of state reporting is a challenge that confronts South Africa in the human rights system. Concerted efforts need to be made to embed these actors in the state reporting process, in order to enrich its state reports and to make them compliant. The involvement of NGOs and CSOs is required at the regional level (AU human rights treaties) and within the UN human rights system. It does not augur well for effective reporting and implementation of the treaties when these critically important role players are not consulted and they end up featuring at the end of the process, the stage when they submit shadow reports. This type of situation suggests poor coordination and consultation with these social actors.

Chenwi (2010:59) explains that numerous CSOs submitted shadow reports in 2005 and expressed concern about South Africa's late reporting to the treaty bodies, including the African Commission. They had particularly expressed concern about what they observed to be the country's lack of eagerness to comply with their regional and international human rights obligations. In addition, they were of the conviction that the state was excluding them from the process of state report preparation. Just like the treaty monitoring bodies, the CSOs also expressed concern about the State report's failure to address concerns that were raised by the Committees during the examination of South Africa's initial and previous reports. They had also raised concern about the use of out-dated data. Bearing in mind the preceding, it would be useful if South Africa could ensure the non-recurrence of these anomalies when preparing its future reports.

The lack of effective participation by South African CSOs in the reporting process remains a major concern. Chenwi (2010:59) notes that while workshops and consultations took place to focus on state reports, these were often done on short notice, and that the input received from the CSOs was often not included in the final reports submitted to the treaty monitoring bodies.

Even in situations when CSOs have organised meetings to facilitate participation in the reporting process, the invited departments did not attend these events. She cites as an example, a case whereby the Civil Society and Prison Reform Initiative (CSPRI) of the Community Law Centre, had as a way of facilitating the collection of information for South Africa's report under the CAT that was being drafted in 2010, set up a meeting with CSOs working on issues related to the CAT. This important expert consultative meeting took place on 18 August 2010 and involved representatives of over ten CSOs, as well as the South African Human Rights Commission and the Judicial Inspectorate for Correctional Services. The main national department, even though it was invited, did not attend this important this meeting (Chenwi, 2010:59).

### 5.10 Reflection: Shadow Reports to the Human Rights Treaty Bodies

As mentioned above, South African organs of civil society, national human rights institutions (NHRIs), the academia and parliament play marginal roles in the State

reporting process as they tend to be engaged late in the process and they tend to at that stage submit shadow reports. Ideally, they ought to be involved from the onset of the process. As a consequence, they tend to feature when States have already produced reports or have submitted them to the treaty bodies. Yet, the UDHR and treaty bodies envisage a greater role for these actors.

In order to offset the mentioned challenges, there have to be concerted efforts made by lead government departments to engage with organs of civil society, NHRIs and other stakeholders to at least establish some kind of mechanism to embed cooperation between these organs of civil society and the treaty reporting mechanism/ role players. Such cooperation would lead to enriched and effective reporting.

Networked information sharing would be a force multiplier when the country presents its reports to the treaty bodies, as the relevant information would most likely be updated, relevant, verifiable, and credible and would enrich the state report. Consequently, shadow reports from these organs of civil society and NHRIs would most likely be complementary to the state report rather than being extremely critical. The shadow reports to the Committees may as a result constitute a practical expression of enhanced cooperation during the process of state reporting.

The effective involvement of CSOs in the reporting process (during and after) may also assist greatly in the process of monitoring the follow-up processes after the Committees' submission of concluding observations. If the process is treated as a continuum and includes sustained collaboration between the reporting machinery and the CSOs in terms of addressing the conclusions and recommendations of the treaty bodies, the likelihood of preparing and submitting compliant and high-quality reports would be greatly improved.

Weak collaboration with organs of civil society and the reliance on the State to comply with treaty obligations has not helped in terms of South Africa's interface with its treaty obligations. The State has largely navigated the reporting process on its own and little or no CSOs involvement has taken place. Enhanced cooperation and involvement of all organs of civil society holds the key to improved state compliance and the effective implementation of human rights treaty obligations. CSOs wield a

great deal of influence and power in terms of the state reporting processes and in the effective implementation of the human rights treaties. Effective state engagement with CSOs is certainly a force multiplier as these organs of civil society organically bring to the fore concerns of communities and are also able to assist in terms of translating and interpreting the provisions of the treaties to ordinary rights holders, thus making a contribution to giving effect to the implementation of the treaties.

Committed CSOs are able to close the gap between the legal obligations enunciated in the treaty and the practical enjoyment of the rights outlined in the treaties. There is often a gap between the treaty provisions and the practical enjoyment of the rights. The traditional assumption that the enactment of the law or giving effect to the provisions of the treaties suffices has proven to have shortcomings. The translation of the treaty provisions into concrete and implementable steps can best be realised when CSOs are embedded in human rights treaty compliance processes. CSOs are in a better position to help give force and effect to the treaty provisions and to monitor the implementation of the treaties.

State-centric approaches have contributed to the current gaps in implementation of the treaties as states have broadly assumed the solution lies in treaty ratification and domestication alone. The critical role CSOs can play had thus been ignored and in the process the treaties were not effectively implemented as the gaps in implementation and protection remained. The effective implementation of the treaties is thus not a product of state-centric activity alone but a dynamic process of State party implementation of treaty provisions, CSO activism and advocacy for the implementation of the relevant human rights under the treaties.

The active and sustained involvement and interphase between the CSOs and the Committees is central to ensuring that progress is realised at the national level. The enhanced CSO activism and collaboration with the UN Committees may be beneficial to the process of UN treaty body reform and serve as a catalyst in the treaty strengthening process. It would hopefully serve the objective of improving and harmonising the Committees' methods of work. These developments could also have the added advantage of having the UN treaty bodies functioning in a more coherent and coordinated way (Moeckli et al., 2018:94).

As amplified in this chapter, there was no provision for NGOs or organs of civil society to be involved in the treaty monitoring bodies' procedures. Their role was embedded progressively and today they have become an integral part of the state compliance with core human rights obligations machinery. The CESCR's pioneering role in this developed in 1994 and it opened the flood gates for NGOs/CSOs to play a role in the state reporting process. Through the development of "Guidelines" for their effective participation, NGOs/CSOs have become an integral part of the treaty monitoring system and have enriched the reporting process. Their reports are taken seriously by treaty bodies, especially when they concern several treaty body provisions and thematic reports.

Committees tend to reflect in their reports concerns raised by NGOs in their findings. Whereas NGO/CSO involvement or activism may vary from country to country, the South African CSOs have been broadly involved in the treaty monitoring processes. They have at times been ahead of the curve in terms of raising issues of concern and even preparing shadow reports when South Africa would have not yet prepared or concluded its report. A case in point is their preparation and submission of shadow reports in 2014 to the CCPR (Human Rights Committee). CSOs have also, at times, initiated processes aimed to foster the submission of state reports, in instances when the state was lagging behind in terms of drafting its reports. Thus, the CSOs play an integral role in the state reporting process and in partnering with government departments as appropriate.

CSOs have also played the role of monitoring the national implementation of the treaties and in particular the concluding observations of the treaty bodies. They are increasingly embedding themselves in long term processes around national implementation of the treaties and the concluding observations. They increasingly see their roles as part of a continuum/cycle, which is inclusive of activities prior to and after the review of the state report.

CSOs, NHRIs and national parliaments, also play a role in terms of ensuring that states comply with their reporting obligations and that they conform to the reporting guidelines. In its consolidated guidelines for state reports, the CCPR (Human Rights Committee) highlights that compliance with the reporting guidelines will minimise the

need for States parties to provide additional information when their reports are considered by the Committee. Compliance with the reporting guidelines will also help the Committee to reflect on the situation of human rights in every state on an equal basis.

The NGO sector tends to be focused on a few topical and thematic issues, to the exclusion of other treaty issues. This tends to impact negatively on other thematic issues such as racism and torture. As a result, there tends to be less attention paid to South Africa's compliance with its treaty obligations insofar as these thematic issues are concerned. The existence of fully effective NGOs that cover a broad range of thematic issues would be helpful in terms of state reporting. There is overall evidently a need for the state reporting machinery to involve the NGOs, parliament and other non-state actors in the report writing process. NGOs need to be fully involved in the reporting process, as this could help to ease the reporting burden and could inject some momentum in the country's compliance with its reporting obligations under the core human rights treaties.

### 5.11 UN Response to the Challenge of State Reporting

Following the persistent challenges of low rates of reports to the treaty bodies of the UN's various High Commissioners and the General Assembly, it sought to realise improvements in the levels of state reporting. It has been a source of great concern that roughly 16% of states parties to the UN treaties submit reports on time (Pillay, 2012:19). In this regard, there have been various proposals made to address the problem. This includes the adoption of various resolutions such as Resolution 68/268 of 2014 on strengthening the UN treaty body system.

There were also proposals by previous high commissioners for the adoption of a global reporting calendar to obviate late reporting and preparation of many reports to various treaty bodies of the UN. It was expected that after 2020, there would be some light shed regarding the treaty strengthening process when the UN Member States would have reviewed the matter of strengthening the UN treaty bodies. The chairpersons of the ten treaty bodies had agreed to meet periodically to reflect on the work of the committees to realise synergies and avert duplication in terms of questions raised by the committees and the concluding observations.

Overall, it is imperative that parliament, CSOs and all organs of civil society should play their rightful role in terms of compliance with treaty obligations as envisaged by the UN treaty body guidelines. Any reform that would ensue in 2020 onwards should contribute to the further entrenchment of the role of non-state actors in the state reporting process.

### 5.12 Lessons Learnt from the South African Case Study

Some lessons can be learnt from the South African case study, given its historical challenges with timely reporting and its unpredictable (haphazard) reporting record. The fact that the reporting process is not embedded in parliament and does not entail thorough involvement of CSOs, is a major source of concern. It is also worrisome that it would appear that members of parliament, including a chairperson of the relevant portfolio committee, stated in 2014 that the SAHRC's annual reports on human rights issues appear not to be disseminated in parliament. The previous Chairperson of the Committee has also stated that parliament was unaware of the reporting backlogs to the regional and international monitoring bodies.

Political will lies at the heart of parliamentary integration into the human rights treaty reporting process. It would need to take the relevant portfolio committee and its chairperson to make the state compliance and reporting issue a standing item on the agenda of the committees. After all, the portfolio committee is vested with giving effect to Sections 231-233 of the Constitution, which relate to South Africa's international treaty obligations and international agreements.

The treaty body system does not impose any sanctions on states that do not submit reports on a timely basis or those that fail to submit them. At worst states suffer reputational damage when they fail to submit reports on a timely basis. A country like South Africa, which has a good reputation globally on the human rights front, tend to suffer the most in terms of reputation as expectations are always high regarding its commitment to human rights and accountability thereon. The country continues to be seen as a torchbearer for human rights owing to its successful transition in 1994. Consequently, it is expected that it would comply with its reporting obligations without fail. As previous chapters showed, the country fell short of the high expectations in terms of compliance with reporting obligations.

Late reporting to the treaty bodies and the submission of non-compliant reports often leads to a backlog in the state reporting process. If a state report is non-compliant, the treaty body may send it back to the state and request the state to ensure that a submitted report is fully compliant, thus leading to a delay in the consideration of the report.

## 5.13 Conclusion

This chapter sought to reflect on the role of Parliament, NHRIs and NSAs in State reporting. It notes that the State alone does not need to shoulder the burden of compliance with human rights obligations. It has the discretion to involve other role players, including parliament, CSO etc. This observation is within the context of deepened privatisation of traditional state activities, a globalised world and powerful private actors and wherein multiple role players including multinationals, engage in activities that have a bearing (negative or positive) on human rights. A partnership between states and NSAs is thus of great importance in ensuring human rights implementation and compliance with international norms and standards.

Given opportunities presented by the role these NSAs can play, South Africa can better coordinate its reports to the UN treaty bodies by working in tandem with these role players. The current reporting arrangement in South Africa does not conform to the guidelines set out for state reporting. Civil society organisations (CSOs), parliament and NHRIs are curiously not embedded in the state reporting process. The marginal role that they play is not in keeping with the reporting guidelines and the expectations set out by the treaty bodies. This situation may also be a contributory factor to South Africa's failure to report timeously and to at times submit compliant reports.

There is also a need to ensure that NGOs/CSOs are involved in the state reporting process as this is theoretically permissible and practical in terms of the UDHR and the guidelines of the human rights treaty bodies. Given shortcomings in State reporting and noncompliance with reporting obligations, it is counterproductive for those States that continue to exclude the CSOs and NHRIs in the reporting process. The human rights treaties recognise these actors as critical role players in the human rights protection framework. As a result, CSOs and NHRIs need to be central

in the report writing process. The CSOs and the NHRIs must be involved in the reporting process and the submission of alternative reports (shadow reports) to the UN treaty bodies.

In view of the possible roles that actors beyond the State can play in human rights implementation and State reporting, the next chapter will reflect on existing mechanisms for State reporting in South Africa.

# Chapter Six

## Overview of South Africa's Existing Mechanisms for State Reporting

### 6.1 Introduction

This chapter will reflect on the existing mechanisms for the management and coordination of South Africa's state reports to the United Nations (UN) human rights treaty bodies. It will therefore examine the mechanism(s) that facilitate South Africa's compliance with its reporting obligations, reporting requirements, management of conclusions, and recommendations of treaty bodies and follow up processes. As highlighted in the previous chapters, South Africa has struggled to keep pace with its reporting obligations. It does not have an effective monitoring and coordination mechanism to deal with its reporting obligations.

The chapter will provide an overview of what South Africa has set in motion to interface with the UN treaty bodies and to deal with the challenge of reporting and implementation. South Africa's has reporting obligations under regional human rights treaties (African Union) and the United Nations (UN) human rights treaties. Being a State party to numerous regional and international human rights treaties comes with enormous responsibilities, there is, as a result, a need to have in place strong coordination and monitoring mechanisms for reporting. Consequently, South Africa's regional and international human rights obligations require the country to inter alia:

1. Plan and allocate public resources, including the implementation of programs to ensure the progressive realisation of human rights as outlined in the various human right treaties,

2. To monitor and report with respect to the statistically measurable progress that has been made with regard to securing the country's human rights and development goals,

3. To engage in an on-going process of remediation of identified gaps and weaknesses by means of government planning, monitoring and reporting which responds to the AU and UN concluding observations and recommendations (DoJ&CD, April 2018:1).

The chapter will also shine the spotlight on how the establishment of national mechanisms for reporting and follow up (NMRF) has proven to be international best practice in terms of coordinating the reporting process to the treaty bodies by numerous States. It will address the critical research question regarding the UN's response to the challenge of state compliance with reporting obligations under core human rights treaties.

The UNHRC's recommends that NMRFs be established by States that face reporting challenges, as this framework is best practice for effective state reporting (DoJ&CD, 2017). This chapter will argue for the need for South Africa to give consideration to the establishment of this model as it is a potentially viable option to address reporting challenges. South Africa as a State party to seven of the nine core human rights treaties has recognised that its current reporting mechanism is not adequate and does not yield the desired results in terms of meeting its reporting obligations under the core human rights treaties. This was occasioned by its persistent challenges in terms of timely reporting to the seven treaty bodies.

This chapter will discuss the NMRF's main functions, capacities and types; with respect to engagement, consultation, coordination and information management. The chapter will also describe the benefits of NMRFs and highlight examples of successful countries that have in place effective reporting mechanisms (NMRFs).

International best practice demonstrates that states with good track records of reporting regularly to the treaty monitoring bodies tend to have statutory bodies, dedicated bodies or cabinet approved structures to coordinate the process of state report writing, submission and follow up once the treaty bodies have made concluding observations. This chapter will cross-reference this best practice with South Africa's own mechanism(s) to facilitate its compliance with its reporting obligations. It will also reflect on the UN's response to the challenge of a lack of compliance and low levels of reporting by State Parties.

As mentioned above, owing to challenges in terms of low levels of compliance and non-reporting by States, the UN General Assembly adopted resolution 68/268 in 2014 to enhance the capacity of States parties to report timeously to the treaty bodies. In the past, there have been initiatives and proposal to streamline the state

reporting process and proposals to have a global reporting calendar to ease the reporting burden on states.

States are obliged to submit regular reports to the treaty bodies; however, these treaty bodies have no power to force states to submit the reports. This aspect of voluntary submission of reports is one of the contributory factors to delays in report submissions and/or even in certain cases the non-submission of reports (Chenwi, 2010:17). Consequently, state compliance with reporting obligations is heavily dependent on political will and state capacity. Nonetheless, a state will be deemed to have violated its treaty obligation(s) if it fails to submit a report(s) as required. Treaty bodies also have the latitude to consider a state's human rights situation in the absence of a report, should a State party fail to submit a report.

### 6.2 South Africa's Arrangements for Reporting to the UN Treaty Bodies

It is important to recall that state reporting, in particular, seeks to assess the degree to which states adhere to their treaty obligations. States voluntarily subject themselves to this process when they ratify the relevant human rights treaties. State reporting is an open-ended activity that aims to promote and enhance respect for human rights in the form of providing feedback on the implementation of treaty provisions and the problems faced by states (Chenwi, 2010:17).

South Africa's reporting mechanism was once based on a collection of various government departments viz. The Department of Justice and Constitutional Development (DOJ&CD), the Presidency, and the South African Police Services (SAPS). The three agencies had the reporting responsibility. This structure excluded the Department of International Relations and Cooperation (DIRCO). It lacked standing report writing capacity and personnel. In general, there was no awareness of the importance of the human rights culture of reporting and accountability; as a result, South Africa's reports were submitted late (Olivier, 2006:181).

Following its challenges with reporting, South Africa established an Inter-Departmental Committee (IDC) in 2013, in order to close the gap in existing national mechanisms on compliance with human rights and humanitarian law treaty

obligations. More specifically, the IDC was established to coordinate compliance with international treaty obligations. It was established as the Inter-Department Committee on Human Rights. It was subsequently renamed the IDC on Compliance with Treaty obligations. The IDC came about when DoJ&CD and the South African Human Rights Commission (SAHRC), led the effort to establish an interdepartmental coordination mechanism (DoJ&CD, 2017:46).

The IDC (the mechanism) sought to address the increasing number of treaty body reports that were required to be submitted to the treaty bodies and to correct the partitioned and disjointed approach to reporting. In this regard, a meeting of key departments took place on 30 October 2013 to begin the operationalisation of the IDC. The IDC reports to International Committee on Trade and Security (ICTS), the Justice, Crime Prevention and Security cluster (JCPS) and Social Protection, Community and Human Development (SPCHD) Clusters. These Clusters oversee South Africa's compliance with treaty obligations (DoJ&CD, 2017:46). All government departments are obligated to participate in the activities of the IDC.

The IDC was initially seen as successful as it had helped the country to make progress in resolving South Africa's reporting backlog, especially with regard to then overdue initial and periodic reports. South Africa's reporting challenges had been compounded by the fact that it ratified the core human rights instruments after 1994 and thus had to prepare a number of initial reports within 1 to 2 years after ratification of these treaties and thereafter the periodic reports that needed to be submitted within short intervals.

Whereas the IDC serves as a conduit for human rights issues and the management of the country reports, it, however, does not centrally manage the preparation, drafting and submission of all treaty reports. It depends on the collaboration of two other departments, namely; the Department of Social Development (DSD) and the Department of Women, Youth and People with Disabilities (DWYPD) in terms of report writing.

The DSD coordinates the preparation of the state report to the Committee on the Rights of the Child (CRC), the DWYPD coordinates the preparation of state reports to the Committee on the Elimination of Discrimination against Women and the

Committee on the Rights of Persons with Disabilities (CRPD). For its part, the DoJ&CD manages report writing to four other treaty bodies, namely; the Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of All Forms of Racial Discrimination (CERD), the Committee on Civil and Political Rights (HRCee) and the Committee against Torture (CAT).

The IDC was designed to be co-chaired at the level of chief director and co-chaired by a troika of government departments, namely; DIRCO, Department of Women, Children and People with Disabilities which is now called (the DWCPD) and DoJ&CD (Justice). Following the dissolving of the DWYPD, it was succeeded by the Department of Social Development (DSD) and the Department of Women (DoW). These two departments mandated DIRCO and DoJ&CD to co-chair the IDC. This bequeathed the IDC with a mechanism that had no real interdepartmental reach, buy-in and power.

Nonetheless, owing to the cross-cutting nature of the human rights treaty obligations, all government departments remain members of the IDC. Theoretically, the following departments; DIRCO, DoJ&CD, DSD, DWYPD, Department of Labour (DoL), Department of Military Veterans (DMV), Department of Arts and Culture (DAC), Department of Environment Affairs (DEA), and the Department of Trade and Industry (DTI), comprise the IDC's steering committee (DoJ&CD, 2017:49).

The IDC's location within the government framework was outlined by a senior official at DoJ&CD, while giving a presentation in 2015 (DoJ&CD, 2015). He stated that the IDC reports to three clusters of Directors-General (DG), they are namely the International Cooperation, Trade and Security (ICTS), the Social Protection, Community and Human Development (SPCHD) and the Justice, Crime Prevention and Security (JCPS). He stressed that oversight is “vested in the Ministers of Justice and Correctional Services, International Relations and Cooperation and the Minister in the Presidency dealing with Performance, Monitoring and Evaluation”. Furthermore, he highlighted that the IDC and the DG's Cluster clear and coordinate country reports and that the cabinet approves them.

The official described the IDC as operating in an open-ended manner but headed by a Steering Committee comprised of key departments. He highlighted that the IDC was not fully operational as other key departments had yet to nominate officials to serve as members. To date, the IDC still lacks quality inputs/data and statistics, this includes delays in supplying such kind of information. A decision taken at the Cluster level directs the IDC to operate at a political and administrative level. It, however, falls short of placing it on a statutory level or giving it legal personality (DoJ&CD Report, 2017:49).

The terms of reference (ToR) of the IDC are briefly described below. Its primary purpose is to consider the implications of concluding treaties and to make recommendations to the government; and to ensure state compliance with reporting obligations. The IDC plays the role of being a clearing house and a coordination mechanism. The purpose of the IDC is broken down into the following objectives:

- To focus on UN and AU human rights systems; including the UN humanitarian systems;
- Facilitate writing state reports;
- To consider review of some treaties;
- Consider the possible ratification to bilateral/multilateral treaties, including negotiation of these treaties, and the implication thereof;
- To consider the resolutions and questionnaires;
- Advise government on these issues;
- To ensure that legal opinions by the relevant departments are sought;
- Capacity building (Seminars, Training Workshops, etc);
- To ensure compliance with government and parliamentary processes for approval;

- Ensure consultation with National Institutions on Human Rights and Civil Society Organisations;
- To consider any matter and obligations relating to the UN and AU Human Rights Systems and UN Humanitarian Law,

In order for the IDC to achieve its goals, it set out to do the following:

- Convene meetings every quarter and special meetings upon request by a member of the IDC and as approved by the co-chairs,
- To report through the co-chairs to the relevant DGs Clusters and Ministers,
- Make recommendations to the cluster and Ministers,
- To implement decisions of Clusters and Ministers,
- Carry out any activity to enhance its work.

The Steering Committee was established to serve as the executive arm of the IDC, with decision-making powers, which would be converted into recommendations to the Clusters and Ministers. The IDC accounts to and reports to the JCPS, Social Sector and ICTS Clusters through its co-chairs.

The Committee (IDC) was mandated to report at monthly meetings of the Clusters as matters relating to treaty obligations are standing agenda items of the Clusters. When necessary, the co-chairs of the Steering Committee are to report to other Clusters, FOSAD-MANCO, Cabinet Committees and Cabinet. Similarly, documents on compliance with treaty obligations should also follow the same route of reporting. The IDC was directed, through its Steering Committee and Working Groups, to review its mandate and status of South Africa's compliance with its obligations with the aim of establishing whether major progress is made, or whether there are gaps that still need to be addressed (NMRF document, 2017:48).

The IDC's working groups were initially meant to convene drafters from all three relevant line departments (DIRCO, DoJ&CD and DoWYPD) in order to pool resources and capacities, including instilling the collective ownership of State

reports. However, the IDC has operated fundamentally differently, as it has functioned as a research or report clearing house. It was conceived of as a full-service provider to holistically meet treaty obligations, including the production of reports and advocating for the implementation of treaties and follow-up to treaty body recommendations (DoJ&CD Report, 2017:49).

Thus far, South Africa's state reports are drafted by three different departments, namely; the Department of Social Development (1 reporting obligation to the CRC), the reconfigured Department of Women, Youth and People with Disabilities (2 reports: CEDAW and the CRPD) and the DoJ&CD (4 reports - Committee against Torture (CAT), HRCee, CESCR and CERD).

The devolved arrangement in terms of reporting and coordination of reports is not underpinned by a strong national mechanism for reporting and follow up. As a result, the country's reports do not follow a uniform style and they tend not to be informed by the UN's reporting guidelines, and they are often non-compliant and are submitted late. The current ad hoc mechanism (IDC) is clearly inadequate in terms of enabling South Africa to fulfil its human rights treaty reporting obligations, as evidenced by the State party's challenges in terms of reporting timeously to the treaty bodies. It is noteworthy that since 2017 the DoJ&CD embarked on an effort to establish an NMRF.

It will take political will and leadership at the level of the executive or the cabinet to rearrange the institutional mechanisms for reporting and to follow up for the current challenge to be addressed comprehensively. Alternatively, there would be a need to establish a statutory body to manage the country's reporting obligations under regional and international human rights treaties.

### 6.3 The IDC's Convening, Coordination and Engagement Capacity

According to DoJ&CD, the IDC serves as an effective instrument for high level-political review and approval of reports drafted by the various government departments (NMRF document, 2017:49). This view could not be corroborated by means of engaging the representatives from the clusters to obtain their views, owing to time constraints on the part of the researchers who prepared a diagnostic report

(Diagnostic report, 2017).

The report proposes that South Africa ought to give consideration to setting up an NMRF. A senior and leading official from DoJ&CD, who handled a number of reports through the cluster process, asserted that the IDC is effective and that it provides full scrutiny to the reports and with checks and balances in place before the reports are approved (NMRF document, 2017:50). The reality is that the IDC was intended to facilitate the collection of administrative data at the level of Chief Director. It is limited in terms of capacity.

DIRCO is mandated to ensure consistency in the drafting of state reports that are at the final stage. DIRCO is reported to have indicated to the researchers that South Africa's draft reports are not of good quality and that the reports show procedural irregularities, which need to be corrected before the reports are submitted. Furthermore, DIRCO highlighted that the draft periodic reports do not appropriately address the treaty body issues and recommendations. DoJ&CD, argues that this problem could be remedied if DIRCO was to be involved in the IDC processes from the beginning (DoJ&CD Report, 2017:51).

Given South Africa's reporting backlogs and absence of a standing reporting mechanism, South Africa needs to seriously work on addressing the current ad hoc and disjointed reporting arrangement. In this regard, it is worth recalling what the former UN High Commissioner for Human Rights, Ms Navi Pillay once said during her tenure as the head of the UN Human Rights machinery. She stated that to ensure state compliance with human rights obligations is best achieved when there is the alignment of national planning, implementation, resourcing and monitoring systems with human rights standards.

Furthermore, she stated that there would also be a need to strengthen the capacity of state institutions and officials to implement them. The instructive perspective made by Ms Pillay holds true for states that have disparate and disjointed reporting arrangements for state reporting, like South Africa. It is therefore of crucial importance that South Africa works on establishing a viable arrangement/mechanism to handle state reporting, as the status quo is not a viable option (DoJ&CD Report, 2017:6).

When preparing a national report, the IDC undergoes the following procedure: Director General to Directors General (DG to DG) letters get sent to all the relevant government departments to provide input to the report. The IDC places the compiled draft report on the agenda and all members of the committee (from all relevant departments) get an opportunity to provide inputs. Thereafter, presentations are made to three committees, the Development Committee (DevCom), the Government Committee on Accountability Cluster (GCAC), and the Technical Working group (TWG), where the reports are conveyed. At times, a request is made for a presentation to provide inputs to the DG clusters.

When necessary, technical working groups are established to deal with particular reports. Once a draft report is finalised, consultations are held with civil society (necessary for country reports not for state responses). Once there is a final draft of the state report, it is taken through the DevCom, GCAC and the TWG, then it goes to the DG Clusters and thereafter to the Cabinet for approval. The state responses to follow up questions from the treaty bodies require DG Cluster approval. Once a report is approved, it gets sent to DIRCO, through a Minister to Minister letter (Minister of Justice and Correctional Services to the Minister of International Relations and Cooperation). The Minister of International Relations and Cooperation mandates the UN Human Rights desk to process the report and thereafter the Minister authorises its onward transmission to the relevant UN Treaty Section in Geneva (DoJ&CD presentation, 20 September 2017:5).

The above outlined process is meant to be consultative, transparent and results driven. It seeks to have in place a seamless process of state reporting. However, there are challenges in terms of the effective functioning of the IDC. There has been growing absence of key departments from the IDC's regular meetings. The challenge with attendance of the IDC meetings was underscored by the fact that following DG to DG letters of 23 June 2017 requesting appointment of 2 officials per department, who would be departmental representatives on the IDC, only two departments submitted the requested names of officials. Consequently, there was a failure of its meetings to quorate. The problem of these meetings failing to quorate dates back to September 2017, when 3 successive meetings of the IDC could not quorate (DoJ&CD presentation, 20 September 2017:6).

The consequence of an ineffective reporting arrangement is a history of late reporting and the submission of non-compliant state reports to the treaty bodies. The IDC appears to be unable to convene meetings regularly as, as mentioned above, in recent times a number of its meetings did not quorate.

Even if the IDC functioned smoothly, met regularly and compiled reports, its major weakness is that it lacks the necessary technical expertise to authoritatively prepare reports and to obtain information that resorts with other relevant developments. It also has no authority to compel other relevant role players to provide it with required data and information that would assist with report writing. It essentially falls short of the Office of High Commissioner for Human Rights (OHCHR) criteria in terms of attributes that would make it equal to the task of effectively and efficiently managing South Africa's compliance with its reporting obligations and follow up to the concluding observations of the treaty bodies.

It is notable that in 2017, the lead department on the monitoring of human rights domestically, the DoJ&CD, initiated a process to explore the idea of establishing an NMRF. This initiative speaks to South Africa’s challenges with reporting under human rights treaties and to the shortcomings of the IDC. The IDC faces challenges with fully, effectively and efficiently coordinating South Africa's reporting obligations and compliance with its international and regional obligations (DoJ&CD Report, 2017).

### 6.4 Unpacking the Inter-Departmental Committee - IDC

The IDC has operated as the main avenue for the coordination and management of South Africa's report to the regional and international treaty bodies. As stated above, it was established in 2013 by to serve as the central instrument for the coordination and management of South Africa's reports to the regional and UN treaties monitoring bodies. It has faced heavy reporting backlogs to the treaty bodies and the non-submission, submission of late and at times non-compliant reports.

Furthermore, the IDC is depended on the preparation of reports by three governments (DoJ&CD, DSD and DoWC) that are tasked with report preparation. It is not led at a level that is close to decision-makers or the high office in the country.

In addition, it is not a permanent structure, nor a statutory body. It is not effective and lacks the authority to command state departments to cooperate.

Whereas the IDC was supposed to be co-chaired by two departments (DIRCO and DoJ&CD), it largely operates under the leadership of DoJ&CD. Its influence and role have over the years begun to diminish as it has in recent times struggled to hold meetings that quorate. The IDC leadership (DoJ&CD) itself does recognise that a more viable mechanism needs to be established as envisaged by the UN Secretariat. The IDC members recognise that the setting up of some kind of National Mechanism for Reporting and follow-up (NMRF) as recommended by the UN Secretariat, would be useful in terms of meeting the need for South Africa to comply with its treaty obligations under the core human rights treaties (DoJ&CD, 2017:51).

South Africa has gone through the entire phase of submitting initial reports to the seven (7) core human rights treaties to which it is a state party, after eventually submitting its overdue initial report to the CCPR (Human Rights Committee) in November 2014, and the timely submission of its initial report to the CESCR in 2016. It henceforth entered the phase of focusing on periodic reports with respect to its reporting obligations under the seven core human rights treaties it has ratified out of the nine (9) treaties.

In order to obviate the attendant challenges with reporting, South Africa has to establish a methodology for managing and coordinating its reporting to the treaty bodies in the interim. Having closed the chapter on initial reporting, it has to transform its approach into a continuum of preparing and submitting an average of 13 periodic reports every five years. To meet its reporting obligations to the treaty bodies would require the existence of an effective national reporting mechanism with the authority to direct national departments to provide required information for the preparation of various state reports to the treaty bodies (DoJ&CD Report, 2017).

State ratification of multiple UN human right treaties comes with heavy responsibilities and competing obligations for concerned states. Being a State party to the treaty bodies comes with the obligation to cooperate with UN treaty bodies regularly (periodically) in relation to implementation, the tracking and follow up on the numerous recommendations made by the treaty bodies to enable implementation of

the provisions of the treaties. In order to deal with the competing demands for regular reporting, a large number of states are increasingly setting up national mechanisms for reporting and follow up (NMRFs). Increasingly, NMRFs are being adopted by States parties with weak reporting structures and that have reporting backlogs as Standing National Reporting Mechanisms (SNRMs)/NMRFs have proven to be efficient and effective in terms of assisting states to meet their reporting obligations (OHCHR, 2017:18).

The IDC's lack of cohesion affects the country's ability to report regularly, engage in introspection and to be periodically subjected to international inspection by the treaty bodies. Failure to comply with reporting obligations owing to the absence of a strong central reporting mechanism has negative implications on state accountability and the promotion, protection and fulfilment of human rights treaty obligations.

The IDC has not functioned cohesively in terms of its human rights reporting coordination and management. As mentioned, the DoJ&CD itself has acknowledged the IDC's shortcomings and has expressed a desire to establish a stronger and dedicated reporting mechanism. It is more of a clearing house for reports rather than a report generation and writing platform. The Department of Justice and Constitutional Development had commissioned a diagnostic report in 2017 to propose a way forward given the structural challenges inherent in the IDC. The report essentially proposes the establishment of a UN recommended national mechanism for reporting and follow up (NMFR), (DoJ&CD, 2017). According to relevant officials at DIRCO and DoJ&CD, thus far, there has been no traction on the proposal to establish an NMFR.

Currently, the IDC's approved reports get sent to the cabinet for approval instead of parliament. While this does not constitute a breach, the non-participation of parliament in the reporting process is not in line with the reporting guidelines on treaty reporting. State reports need to have the benefit of parliamentary input during the drafting stage. The absence of parliament from the process is problematic and needs to be corrected. Parliament, as the representative of the people, has to play a key role in the process including submitting as appropriate its own shadow report and/or forming part of the national delegation to the presentation of the state report.

UN Committees often questions States parties that exclude parliament from the report writing process. South Africa has not been an exception to this enquiry. South Africa needs to include parliament in the report writing process.

Furthermore, the report writing process is not managed across the three spheres of government (national, provincial and local). Effective State reporting also requires coordination by the three tiers of government (National, provincial and local).

## 6.5 Main Impediments that States Face in Meeting their Reporting Obligations

The establishment of a standing national reporting mechanism with the authority to direct government departments to cooperate and that has direct access to the decision-makers are international best practice. The UN Secretariat has in fact, since the adoption of resolution 68/268, advised and urged States parties that have no effective national mechanisms to consider setting up Standing National Mechanisms for Reporting and Follow UP (SNRMs) or NMRFs. It has since then established a Capacity Building Programme for State reporting within the UN Secretariat (UN Human Rights Treaty Section).

The UN Secretariat maintains that appropriately structured reporting mechanisms hold the key to unlocking the ability of states to report timely and effectively to the treaty bodies. It appears the main impediment to effective reporting lies in what former High Commissioner Pillay outlined as the need to align national planning, implementation, resourcing and monitoring systems with human rights standards (UNOHCR:2017). Section 6.9 below outlines the structure of an NMFR.

South Africa's struggle with meeting reporting obligations appears to be squarely linked to having in place disparate and disjointed reporting arrangements for state reporting that lack the attributes described by the former High Commissioner for Human Rights, Ms Pillay.

Whereas the IDC operates as a national mechanism for reporting to the treaty bodies, it lacks the required characteristics, authority and ability to draft and to submit reports to the treaty bodies on a timely basis. Given South Africa’s reporting backlogs and challenges, the time is ripe for South Africa to engage in an effort to

establish an appropriate and effective reporting mechanisms for reporting. South Africa's exploration of the option of a structure modelled on the recommended structure would stand the country in good stead.

### 6.6 The Role of DIRCO in the State Reporting Process

The Minister of International Relations and Cooperation is entrusted with the formulation of, promotion and execution of South Africa's foreign policy. The execution of South Africa's foreign policy is facilitated by the Department of International Relations and Cooperation (DIRCO). DIRCO has the mandate to facilitate and coordinate international agreements (both bilateral and multilateral), including the signing and ratification of treaties (DIRCO APP, 2020).

In this regard DIRCO has a Constitutional obligation to do the following (DIRCO APP, 2020):

- Support the Minister of international relations in terms of the conduct and the management of South Africa's foreign policy.
- DIRCO is mandated to serve as an entry point in the management of international relations for South Africa.
- To advise the government on South Africa's international obligations and the imperative need for the country to comply with its treaty obligations at regional and international levels.

The preceding outline affirms that DIRCO has a major role to play in ensuring that South Africa plays a role in the preparation of national reports for submission to the UN treaty monitoring bodies. In this regard, the fact that there is no effective treaty reporting coordination mechanism and that DIRCO appears not to play its part in its envisaged role as the Co-chair of the IDC is very problematic. A sustainable and credible way out of the deadlock (DIRCO's absence) in the treaty reporting process needs to be found as soon as possible. The solution should be arrived at by means of an interdepartmental process that would lead to the establishment of a structure that would be a creature of statute or Ministerial decree.

As alluded to in the previous chapter the IDC framework has not yielded the desired results, as the IDC is an ad hoc arrangement and does not have authority to compel departments to submit data, to submit reports to the treaty bodies and has limited ability to ensure government wide acknowledgement and remediation of treaty body recommendations. The ultimate effect of having in place an IDC which has fallen short of effectively and efficiently managing South Africa's reporting obligations, is the continuation of state noncompliance with its reporting obligations and non-submission of reports for up to a decade.

The lack of dedicated report writing capacity has contributed to South Africa's failure to account to the treaty bodies regularly and consistently. Consequently, the country has on many occasions failed to engage in its self-introspection and submit treaty reports with regard to its treaty obligations to respect, promote and fulfil human rights and fundamental freedoms. Failure to report to the treaty bodies timeously has also deprived the country of an opportunity of undergoing international inspection.

The treaty reporting system essentially requires State parties to engage in introspection and the UN system engaging in inspection of the country by means of reflection on the state report by the international experts who sit on the treaty bodies. The reporting backlogs and the existence of a weak IDC have deprived the country of an opportunity to take stock of progress made and the obstacles that are in place in terms of the fulfilment of human rights treaty obligations. The inherent weaknesses of the IDC appear to be intractable and not likely to be resolved soon.

It is of great significance that both DIRCO and DoJ&CD are in agreement that the weaknesses of the IDC necessitate the establishment of a robust structure such as an NRFM as a matter of utmost priority. It would appear the coordination and participation challenges within the IDC are symptoms of a structural problem given that other than DIRCO, two other departments, the DSD and DWYPD have distanced themselves from the IDC process. The three departments do not attend the IDC meetings regularly and do not get involved in the relevant processes

The absence of the three departments (DIRCO, DWYPD and DSD) from the reporting process and the lack or poor participation of other key departments from the IDC's meetings are reflecting signs of the IDC's inability "to serve as an effective

high level coordination mechanism in terms of treaty body reporting and follow up", including the consultative process that comes with the state reporting process. The poor attendance of IDC meetings, as evidenced by the absence of DPME, DIRCO, DSD and DWYPD from the scene, confirms the fact that the IDC has no convening authority. In addition, one of the very critically important departments, the Department of Cooperative Governance and Traditional Affairs (COGTA), which is an important link to local government, does not participate in the IDC regularly either (DoJ&CD Study, 2017:51).

The quality of the Inter-Departmental Committee's reports has been critiqued by CSOs, by a South African member of the UN Committee on the Rights of the Child and the South African Human Rights Council (SAHRC). All these role players have maintained that the IDC has systemic shortcomings in its conceptual, political and legal foundation. The IDC has the additional weakness or limitation of coordination capacity in relation to government departments.

The IDC lacks the standing processes and authority to ensure effective, government-wide follow up on concluding observations made by the treaty monitoring bodies (DoJ&CD Study, 2017:52). In its current configuration, the IDC lacks the authority for distribution, guidance and protocol to hold government departments accountable for planning, monitoring, and implementation measures taken to deal with concluding observations.

The root cause of the aforementioned problem is an insufficient synergy between the IDC and the Department of Performance Monitoring and Evaluation (DPME). These weaknesses stem from the legal basis of the IDC as alluded to earlier. The IDC does not have statutory or equivalent political/administrative authority to hold all the relevant role-players accountable. There is also a lack of clarity and collective commitment by key departments into their respective roles and responsibilities in respect of reporting and follow up procedures (DoJ&CD Study, 2017:52).

The IDC's challenges are compounded by the resourcing and capacity constraints. Its Secretariat is driven by the DoJ&CD and it is reportedly under-resourced and under- staffed. Its work entails high-level data gathering and follow up advocacy function it needs to perform. Consistent with this observation/finding, a national

evaluation of South Africa's interdepartmental coordination mechanisms established as follows:

The coordination structure secretariat role should not be seen as administrative but a high-level organisational role requiring at least one dedicated senior official. The job descriptions should be revised by the Presidency working with the clusters to reflect this role. Wherever possible, DGs need to give delegated power to officials to address coordination issues outside of the cluster structures. This includes the establishment of task teams to work on specific issues. Issues should only be brought to the structures if attempts to address these issues outside of the coordination structures have been ineffective (DoJ&CD Study, 2017:52).

Important lessons can be learned from the weaknesses of the IDC. As noted earlier, it has no authority to compel national departments to cooperate, has no convening authority (ability to compel attendance) and is unable to engage in follow ups to the concluding observations of the treaty bodies. Its Secretariat's lack of sufficient capacity to conduct its work and reliance on one department (DoJ&CD) to manage its meetings, logistics and report writing related matters, place an onerous obligation on this Secretariat (DoJ&CD Study, 2017:53).

Organisational arrangements regarding the IDC's report writing are a challenge as it mandates a single drafter to focus on one report thus instilling a silo approach to report writing. The delegation of reporting and follow ups to stand alone line departments, attests to the reason why the DWYPD, the DSD and the DoJ&CD have in place their own separate multi-sectoral coordination mechanisms within each department. This approach constitutes duplication of scarce resources, given the fact that there are broad substantive overlaps in the various treaties. Ideally, this arrangement could be adjusted to set up a team of drafters from the three departments (DWYPD, the DSD and the DoJ&CD) and mandate them to produce concurrent reports on several treaties, in order to bring together respective sector expertise and to fuse data-gathering networks (DoJ&CD Study, 2017:53). This approach would help drafters to network the data that they have and thus be able to holistically respond to the issues raised by the treaty bodies, without having to duplicate anything.

## 6.7 The Role of Parliament, NGOs in the State Reporting Process

The previous chapter highlighted that the NGOs, parliament and other role players, do not play a full and effective role in South Africa's state reporting process. They can play an important role in advocating for state compliance with reporting obligations. In South Africa, they appear to mirror the disparate and disjointed arrangements that characterise the state reporting framework. These role players have yet to be effective watchdogs that act as a pressure group that urge the state to meet its reporting obligations on a timely basis. In the first place, as stated in the previous chapter, they play a marginal or no role in the state reporting process.

The lack of NGO engagement by the state ultimately side-lines them from even monitoring the performance of the state with regard to the reporting obligations. Nonetheless, it is incumbent upon the NGO sector to be up to date with information on the performance of the state in respect of meeting reporting obligations, including, insisting on being involved in the report drafting processes and consultations. After all, the treaty bodies mandate states to engage the NGOs, parliament and relevant stakeholders in the state report writing process.

As alluded to in the previous chapter, the South African NGO sector tends to be focused on a few topical and thematic issues, to the exclusion of other treaty related issues. This tends to impact negatively on other thematic issues such as racism and torture. Consequently, less attention tends to be paid to South Africa's compliance with its treaty obligations insofar as other thematic issues.

If NGOs covering the broad range of thematic issues played a part in the report writing process that would be helpful in terms of enhancing state reporting. There is a need for the state reporting machinery to involve the NGOs, parliament and other non-state actors in the reporting writing process. The limited role of these critical actors and voices does a disservice to the country's duty to submit compliant state reports to the UN treaty bodies. The sooner they are involved in the reporting process, the better it will be for the country as this could help to ease the reporting burden and could inject some momentum in the country's compliance with its treaty obligations under the core human rights treaties. Parliament and NGOs have also not been an effective pressure group when it comes to South Africa's reporting

backlogs. The proposed NMRF would also need to ensure that NGOs/CSOs and parliament are involved in the state reporting process (DOJ&CD, 2018).

The marginal role that they play is not in keeping with the guidelines on the participation of non-state actors (NSAs) in the reporting process. These actors need to be mainstreamed in South Africa's reporting process, with a view to ensuring that state reports are a product of coordination, consultation, engagement and input by these NSAs. Parliaments and CSOs/NGOs are largely excluded from the report writing processes of the IDC. This practice is inconsistent with the reporting guidelines in respect of the involvement of NGOs. These role players ought to be integrated or involved earlier during the report preparation process.

## 6.8 United Nations Human Rights System's Response to address Non-Compliance

Following the perennial challenges of low rates of timely submissions of reports and non-reporting by states to the treaty bodies, the UN's various High Commissioners and the General Assembly have sought to realise improvements in the levels of state reporting. It has been a source of great concern that roughly 16% of the States parties to the UN treaties submit reports on time (OHCHR, 2012). In this regard, there have been various proposals made to address the problem. This includes the adoption of various resolutions such as resolution A/68/268 of 2014 on the strengthening the UN treaty body system. Paragraph 17(d) of the relevant resolution (68/268) states follows: "the OHCHR is in a position to avail direct assistance to States parties at the national level by building and developing institutional capacity for reporting and strengthening institutional capacity for reporting and strengthening technical knowledge through ad hoc training on reporting guidelines at the national level".

The above-mentioned training has been delivered in South Africa by the OHCHR's Regional Office in Pretoria to a number of government departments and to the Southern African states that it covers. In September 2017, such a training programme took place for government officials in the Southern Africa Region. Most recently the training program also took place on April 2019 in Pretoria, targeting officials from various government departments in South Africa.

As mentioned before, in an effort to address late reporting and report preparation to various UN treaty bodies, some High Commissioners have proposed the adoption of a global reporting calendar. In 2020 the UN Member States reviewed the strengthening of UN treaty bodies and as such it is expected that some insight with regard to the possible implementation of the calendar will be provided.

During their annual Chairpersons meeting in New York in July/August 2019, the Chairpersons of the 10 treaty monitoring bodies reflected on the work of their committees. They adopted a position on paper on the future of the treaty body system, which seeks to build on the achievements of resolution 68/268 and which they maintained are in accordance with the treaty bodies mandate.

The position paper also seeks to address issues raised by member states and other role players regarding the treaty system's effective and efficient functioning. The position paper among other things aims at strengthening and improving the treaty monitoring body system, avoiding duplications and improving the rate of reporting. Most importantly, the Chairpersons agreed to avail the Simplified Report Procedure (SRP) to all States parties that prefer to utilise this reporting procedure. The SRP would be streamlined and a standard list of issues prior to reporting (LOIPR) would be developed. There would be reduction of unnecessary overlaps and the LOIPR will be limited to 25 - 30 questions (OHCHR, 2019).

Overall, the Chairpersons of the treaty bodies maintain that their proposals are underlined by increased protection of rights holders by means of strengthened implementation of the treaties. They stated that these proposals can be implemented within 1 to 2 years, assuming there is sufficient support from the OHCHR and other relevant divisions of the UN Secretariat.

The Chairpersons agreed that with regard to the reporting cycle, the Covenant Committees (CESCR and HRCee) will review States parties on an 8-year cycle and would seek to synchronize the scheduling of their reviews. They (Chairpersons) agreed that the CESCR and HRCee will review countries on a 4-year cycle, unless a particular Convention's provisions do not make such a provision (OHCHR, 2019).

The Chairpersons agreed that a single consolidated report may be deposited to the Covenant Committees if they elect to offer this avenue to States parties. Committees overseeing the Conventions may wish to continue the practice of receiving separate reports to avoid diluting Convention specific focus. The Chairpersons of the treaty bodies agreed to the alignment of procedures and working methods as outlined above. The Chairpersons highlighted that these proposals aim to coordinate, focus and streamline the reporting process and dialogues and that they will facilitate enhanced collaboration between States parties, other role players and the treaty monitoring bodies.

They maintained that the introduction of a coordinated timetable of state reviews in line with fixed cycles, in the event of no state report or in the region if necessary, will be operationalised in phases so as to ensure the continuation of normal reviews of all States parties (OHCHR, 2019). The UN has also resorted to encouraging States that struggle to report timeously and periodically, to use the avenue of establishing national mechanisms for reporting and follow ups (NMFRs). The section below outlines the NMFR concept and practice.

### 6.9 Unpacking the NMRF: The Need for the Establishment of the NMRFs

Whereas the NMRFs have been a feature for a long time, states and the UN system have in recent years advocated for their establishment and reinforcement. States like Mauritius, Morocco, Senegal, South Korea, Bahamas, Cambodia, Mexico and Portugal have in place such mechanisms. Former High Commissioner Pillay's 2012 report on strengthening the UN treaty system (A/66/680) strongly recommended the establishment of the NMRFs. Overall, a number of states recognise that they are likely to benefit from the establishment of NMRFs as proposed by the UN General Assembly's resolution 68/268. NMRFs are perceived to enable improved coordination of national reporting.

The UN treaty monitoring bodies emphasise States parties ought to report on a timely and regular basis. They also express concern about the lack of coordination and collaboration among state agencies in terms of the collection of data and their inadequate technical capacities for data collection, analysis and reporting. The treaty bodies maintain that State parties ought to ensure that they set in motion an efficient

division of labour and that regular reporting would be guaranteed by means of establishing effective coordination and reporting mechanisms. During sessions of the Universal Periodic Review (UPR), many member states have largely committed themselves to establishing NMRFs (OHCHR Manual, 2017:18).

**Why Establish a National Mechanism for reporting and Follow-up (NMFR)?**

To obviate State non-compliance with reporting obligations, the UN Secretariat proposes the idea of establishing NMFRs in those States parties that have no effective and standing mechanisms for reporting. The NMFRs are meant to address and achieve the following:

- The perpetual growth in human rights bodies at the regional and international levels, compliance with treaty reporting, numerous treaty bodies decisions/concluding observations directed at States parties.
- The need for timely and quality reporting requires the establishment of sustainable technical expertise.
- Effective State reporting needs effective follow-up and implementation of concluding observations/recommendations by relevant line Ministries and at the local levels.
- The existence of ad-hoc reporting structures/arrangements is not viable.

**Outlining the NMFR**

According to the UN Secretariat, (NHRMFC, 2018) an NMFR is a permanent government institution established to coordinate and prepare state reports. It also has the authority to engage with regional and international human rights bodies (this includes the Universal Periodic Review, treaty monitoring bodies and special procedures). It also coordinates and tracks a State party's follow up and implementation of the treaty obligations and recommendations (decisions/concluding observations).

The UN Secretariat was mandated by the UN General Assembly in 2014 to assist States to build effective reporting capacities, the NMFRs, in light of the challenge of State noncompliance (UNGA Resolution, 68/268). Through the UN Human Rights

Council's Universal Periodic Review (UPR) process many States have undertaken to establish NMFRs.

### 6.10 Types of NMRFs and their Capacities

The OHCHR advises that NMRFs can be established in many ways. The OHCHR has identified four major types of mechanisms, namely: ad-hoc; ministerial; inter-ministerial and institutionally separate mechanisms. Except for the ad hoc mechanism, the other three are referred to as standing mechanisms. The most common type is the inter-ministerial structures that are supported by an Executive Secretariat in a single Ministry (UNOHCHR, Training Manual, 2017:20). South Africa's mechanism is ad-hoc and is not supported by an Executive Secretariat. It relies on the collaboration of other departments. A majority of NMFRFs' rely on the main department or Ministry for support. They need to be standing (perpetual) mechanisms and need to have dedicated resources (human and financial).

The key ingredients for effective and efficient NMRFs that draw on different state practices include the following:

1. The authorities are advised to consider investing in the establishment or strengthening of a standing mechanism. In simple terms, their structure ought to be in place beyond the completion of a single report, whether it is ministerial, inter-ministerial or institutionally separate.

2. The UN Secretariat suggests that an effective NMRF may benefit from having a comprehensive legislative mandate, since executive decrees or policies can be subjected to amendment, including a common intra-governmental understanding of its role and political ownership at the highest level. Its mandate should be comprehensive, allowing the mechanism to engage with all regional and international mechanisms on human rights. It should also follow up on recommendations and individual communications from related mechanisms.

3. According to the OHCHR, it is importance that the NMRF should have dedicated, appropriately equipped and permanent staff. It ought to build sustainable expertise, knowledge and professionalism at the national level.

If there is proper and early planning, including the allocation of resources from different Ministries, there would be appropriate budget allocation for activities such as the travel of a delegation to Geneva for the presentation of a state report or appearance before the Universal Periodic Review (UPR) mechanism (OCHCR, 2017:20).

### 6.11 Key Types of Capacities for NMRFs

The NMRFs need to have four key capacities (UN Training Manual, 2017:20), namely; engagement capacity, consultation capacity, coordination capacity and information management capacity.

Engagement Capacity

This capacity is about engaging and liaising with regional and international human rights bodies (with regard to reporting, interactive dialogue, or the facilitation of country visits by special procedure mandate holders or the Sub-Committee on the Prevention of Torture); and

It seeks to organise and facilitate the preparation of reports to international and regional human rights bodies, and responses to communications, follow-up questions and recommendations or decisions received from such mechanisms. Further, there needs to be dedicated capacity and knowledge through, for example, the creation of a permanent Executive Secretariat with trained staff knowledgeable about each international human rights mechanism, or, through the development of standardised internal reporting guidelines, procedures or checklists for arranging Special Procedures visits.

Coordination Capacity

The coordination capacity of a national mechanism lies in its ability and authority to provide information, and to organise and coordinate information gathering and collection of data from various government entities as well as from other state actors including the National Statistics Office, Sustainable Development Goals implementation focal point or lead "agency", parliament and the judiciary for the purpose of reporting and follow up to recommendations. This capacity requires, for

example, a strong mandate, terms of reference, or annual work plans that involve all relevant Ministries (OHCHR, 2017:20).

Consultation Capacity

The consultation capacity of an NMFR lies in its ability to forge and lead consultations with the country's NHRI(s) and civil society, including the marginalised groups. It may entail having a dedicated focal point for coordinating with other stakeholders, having regular meetings with different stakeholders, creating an email mailing list for the purpose of information sharing etc.

Information Management Capacity

The information management capacity of an NMFR is its ability to do as follows:

- To track recommendations and decisions by the international and regional human rights mechanisms;
- To thematically and systematically cluster (including Sustainable Development Goals) these recommendations and decisions in a user-friendly spread sheet or database;
- To identify responsible government ministries or agencies for their implementation;
- To develop human rights recommendations implementation plans, timelines, with key ministries to facilitate implementation, which can be incorporated in the National Human Rights Action Plans or SDG implementation plans; and
- To manage information on the implementation of treaty provisions and recommendations, among other things with a view to preparing the next periodic report. The need for clustering and managing of information is huge and self-evident for those State parties dealing with several hundreds or thousands or recommendations (OHCHR, 2017:20).

NMFRs seek to set in motion States' capacities to report regularly and to make the reporting process inclusive in domestic contexts. In the process, NMFRs could become significant components of the domestic human rights system. These

structures for reporting and follow up are seen as having the potential to bring international and regional norms and standards directly to the domestic level (OHCHR, 2016).

### 6.12 Observations Regarding the UN Response to the Treaty Body Issues

It is notable that with regard to the UN treaty body system, States parties and other role players have ensured that ahead of the treaty body review in 2020, that consultations and proposals are in place to enhance the treaty body system. In fact, the proposals made by the Chairpersons of the treaty bodies will, once approved by the respective Committees (treaty bodies), go a long way in improving the work of the treaty bodies. The treaty bodies are likely to work more effectively and efficiently once they implement the proposed steps and in the process this will help to strengthen the treaty bodies and hasten the consideration of state reports.

Proposals that have been made by the Chairpersons of the treaty bodies are forward looking and geared to strengthen the treaty body system. It would be interesting to see if the treaty body Chairpersons' proposal will be approved by their respective Committees and implemented in full. States parties to the treaties and the overall UN membership would need to play a central role in supporting the proposal and efforts of the treaty Chairpersons going forward.

The full support of the UN membership and that of the relevant UN divisions will be indispensable to the effective functioning of the treaty body system. The success of the treaty bodies will be determined by the extent to which it will protect, prevent and fulfil human rights. The key to realising this goal rests in the effective and efficient operation of the UN treaty body system. In this regard, it is very important that the treaty bodies act in accordance with resolution 68/268 to fulfil the goals and directives outlined in the said resolution. States parties will give the treaty bodies a significant boost if they fully support the proposals of the Chairpersons of the treaty bodies.

With regard to state reporting, the Simplified reporting Procedure (SRP) is a useful and user-friendly procedure for reporting, especially for State parties that struggle to submit their reports on time and those that do not have effective and efficient treaty

body reporting mechanisms. In this regard, South Africa would benefit a great deal from the SRP. It has in recent times (February 2019) requested the OHCHR to utilise the SRP method going forward when considering its state reports. As a result, South Africa's upcoming report to the Human Rights Committee (HRCee) which was due in early 2020, will henceforth be in the form of an SRP instead of the standard periodic report format. As a consequence of requesting the Simplified Reporting Procedure method of reporting, the UN treaty section will most likely request South Africa to submit its reports later than early 2020, thus giving the country room to get better prepared.

It would also be critically important for more and more States parties to adopt the SRP option for state reporting, especially those states that face the challenge of late reporting or non-reporting. Of critical importance will be the adoption of the NMFR approach for the management of state reports by states. South Africa would benefit greatly from setting up an NMRF as this would contribute to giving practical expression to the centrality of human rights in South Africa. Thus far the country does not have a good track record in as far as submitting reports timely to the seven core human rights treaty bodies. In this regard, it would be critical for the country to engage in action-oriented steps aimed at strengthening its reporting capacity, by adopting a suitable model that would set in motion the establishment of its tailor-made NMRF.

Overall, it is imperative that parliament, CSOs and all organs of civil society should play their rightful role in terms of compliance with treaty obligations as envisaged by the UN treaty bodies. In this regard, any model of an NMRF that will be adopted would need to integrate these role players. Parliament has to be involved in the report drafting process going forward as it is the custodian of the will of the people. There is in fact a legal obligation for states to involve parliament in this reporting process.

Parliament can be involved in the report drafting process, commenting on the draft report, ensuring that the government complies with its reporting obligations and or form part of the delegation that presents the state report to the treaty Committees. For example, the Committee on the Elimination of Discrimination against Women

(CEDAW) urges States parties to create appropriate mechanisms to ensure collaboration between parliament and government with regards to parliament playing a role in the elaboration of reports, and its role in following up on the concluding observation of the CEDAW Committee (Chenwi, 2010:60).

Any treaty body reform that would ensue in 2020 onwards should contribute to the further entrenchment of the role of parliament, the judiciary and other non-state actors in the state reporting process. The treaty body reform process should ultimately lead to better protection of human rights and greater state accountability. There should also be improvements in the quality and quantity of state reports and improved levels of collaboration between states, CSOs and the treaty bodies.

## 6.13 Conclusion

Given the potential role it can play in the state reporting process, it is critical for parliament to ensure that state reporting to treaty bodies is on its agenda, as a standing agenda item. Parliament needs to be an integral part of the state reporting process.

Civil society organisations also need to be embedded in the report writing process. Their limited role in the process does not reflect well on the country in instances where they were totally excluded from the process. Failure to undertake the much needed changes could make South Africa's reporting fall short of meeting its reporting obligations. Constructivist compliance theory envisages that there should be effective mechanisms in place to enable compliance with human rights treaty obligations. The IDC has proven to fall short of this requirement. It needs to be strengthened in order for it to meet the report writing requirements of the country.

It is not sustainable to rely on a structure that has shown to have serious deficiencies and that has no authority to compel other departments to attend its meetings and that appears not to have in house report writing capacity. Without the much need reform of the structure, there is a strong possibility of state reports being outsourced to CSOs without State involvement and input, reports being submitted late or there could be non-submission of these reports over many reporting periods.

There is a need for the country to set in motion a national coordination mechanism to coordinate report writing and to follow up on the concluding observations of the treaty bodies. The IDC framework needs to be bolstered by means of setting up a structure that would be in line with the OHCHR criteria, a permanent/standing structure. There is a need for political will from the government to establish an effective reporting framework to resolve the state reporting challenge. The preparation of quality and comprehensive reports needs political will and proactivity on the part of the state. Therefore, the state needs to establish a central coordination mechanism to address the report writing process and the management of follow up reports and concluding observations.

Given the foregoing, there is a need for political will from the government to establish an NMRF in order to resolve the perennial state reporting challenge. South Africa ought to consider establishing a central coordination mechanism to address the report writing challenges and the management of follow up reports and concluding observations. The envisaged mechanism would need to have the authority to compel departments to cooperate and to provide relevant data, information for report writing and to address the implementation and follow up issues that may arise.

The establishment of an NMRF could be a viable way forward as proposed by the UN and the research team that was tasked by DoJ&CD in 2017 with engaging in a national evaluation of South Africa's reporting mechanism and that explored setting up of an NMFR. As mentioned, the research team that worked on the diagnostic report proposed the establishment of an NMFR as a solution to the current reporting challenges.

# Chapter Seven

# South Africa's Compliance with Human Rights Treaty Reporting Obligations: The Conclusion

## 7.1 Introduction

As mentioned before, a recurring theme in the international human rights discourse and in this study is state compliance with reporting obligations under core human rights treaties. States ratified treaties in impressive numbers but largely fall short of meeting their legal obligations to report regularly and timeously.

This chapter will summarise the main findings of the study on South Africa's compliance with its reporting obligations under selected core human rights treaties, specifically the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention of Elimination of all forms of Racial Discrimination (ICERD). It will conclude the study's analysis of South Africa's compliance with human rights treaty obligations. This study has highlighted that in its interface with the UN Human Rights Treaty System, South Africa has shown some signs of commitment to fulfilling its reporting obligations and also signs of non-compliance. Its performance over the period after 1994 to date reveals that like many other States parties to the UN human rights treaties, it grapples with reporting obligations.

Using a combination of constructivism and compliance theories, in essence, a constructivist compliance theoretical framework in order to address South Africa's compliance with its reporting obligations under the three (ICCPR, ICESCR and ICERD) selected treaties and other core human rights treaties, the study analysed the country's behaviour in terms of its reporting obligations. The analysis was undertaken given the country's role conception as a champion of human rights, a norm entrepreneur and a proponent of democracy and fundamental freedoms.

When South Africa returned to the international community of nations in 1994, it engaged in impressive signature and ratification of various regional and UN human rights treaties. It joined forces with states that espoused the cause of human rights, equality for all, democracy and justice.

South Africa projected itself as a country with high regard for global human rights norms and standards, and rules-based multilateralism. It championed the development agenda, the African agenda, the cause of the Palestinian people and the Saharawi people and the agenda of countries of the South. In fact, then Deputy President Mbeki stated in 1994 as follows: “South Africa can be counted on to adhere to the pursuit of important goals of international peace and security and is committed to being a good citizen of the world” (Graham, 2016:35). Over time, however, its record on human rights issues from 2007 when it served on the UN Security Council and its poor compliance with reporting obligations under core human rights treaties began to show a complex picture (Chenwi, 2010:16).

When South Africa sought to champion its human rights approach regionally and globally, it was heavily criticised by African states for its robust approach to Nigeria’s execution of Ken Saro-Wiwa in 1995 (Black, 2003). Later on, it was also criticised for its perceived protective approach towards Zimbabwe and Myanmar during its first term on the UN Security Council in 2007 and 2008 (Graham, 2008).

Furthermore, its cumulative state reporting record under human rights treaties revealed that it struggled to come to terms with the challenge of reporting to core human rights treaty bodies on a timely basis. It also took exceptionally long to ratify one of the key human rights treaties, the ICESCR, by ratifying it 21 years after its signature in 1994. This prolonged delay created doubts about its commitment to human rights and fundamental freedoms given its leading role within the Non-Aligned Movement (NAM) and the Group of 77 (G77) in respect of economic, social and cultural rights (ESC Rights), and the Right to Development (RTD).

This chapter will start by reflecting on the analytical and theoretical framework of the study before focusing on a summary of the study and its findings and recommendations. It will once more reflect on the research theme/questions that are in chapter one. These questions are central to the study's originality and contribution to knowledge. This chapter will then engage in a discussion on future research prospects, following the findings and recommendations of the study.

## 7.2 Analytical and Theoretical Framework

This study analysed South Africa's compliance with its reporting obligations under three core human rights treaties (ICERD, ICESCR and ICCPR). It highlighted that State compliance with reporting obligations under core human rights treaties is imperative for the promotion, protection and fulfilment of human rights and fundamental freedoms. The study used the prism of constructivist and compliance theories to analyse state compliance with its reporting obligations under the three mentioned treaties.

The analytical theory for this study conceives of compliance within the context of rational self-interested states. It conceives of states as being concerned about their reputation and direct sanctions for their conduct, hence they seek to fulfil their legal obligations. Compliance theory alludes to states fulfilling their legal obligations, implementation of their treaty commitments, domestication of treaty provisions and rule consistent behaviour. The analytical framework highlights that states are susceptible to persuasion and reason and hence they commit to legally binding treaties voluntarily despite the inherent reduction to their sovereignty.

This study sought to make a contribution to knowledge and enhance the body of literature in the area of state compliance with reporting obligations and serve as a guide to academic scholarship, the work of practitioners and the national, regional and international policy environment. It primarily sought to establish factors that explain state compliance or non-compliance with reporting obligations. The study aimed to contribute to strengthening South Africa's compliance with its reporting obligations by analysing South Africa's compliance with its reporting obligations under selected core human rights treaties.

This study sought to fill a gap in literature and in respect of appreciating factors that explain states compliance with reporting obligations under core human rights treaties and South Africa's compliance with its reporting obligations under core human rights treaties. Owing to a limited body of research on the subject in South Africa, it was necessary to explore in detail this research project within the international relations discipline (political studies). This is considering that in most cases related studies have been undertaken within the international law discipline. The study will add to

the body of literature on state compliance with reporting obligations at various levels, including, the policy making, academic and doctoral levels in South Africa, Africa and globally.

Thus this study sought to provide a comprehensive analytical account of South Africa's reporting and compliance under selected core human rights treaties. It will, as a result, contribute to a better understanding of factors that explain challenges faced by states in reporting and complying with their obligations under core human rights treaties.

I used three thematic areas to structure this research project. They are as follows:

- State reporting as a mechanism for gauging state compliance with human rights treaty obligations,
- State compliance with international human rights treaty obligations, and importantly,
- South Africa's compliance with its reporting obligations under selected core human rights.

Desktop research informed by a literature review of both primary and secondary sources of information constituted the core of this research project. The research questions enabled me to conduct an extensive and critical documentary study. They are as follows: What factors explain its compliance reporting obligations under selected core human rights treaties? What insights can be drawn from the South African experience in terms of state compliance with reporting obligations? And reflected on the implications of state failure to comply with reporting obligations and the lessons the South African case study provides.

Insights drawn out from the research questions play a significant role in the research project. Primary sources included national legislation, UN documents, and UN treaties with regard to state reporting obligations. The research project, importantly, used treaty bodies' relevant guidelines (harmonised guidelines) for reporting as a baseline to gauge and analyse state compliance. These guidelines are intended to guide states in terms of meeting their reporting obligations under the relevant core

human rights treaties. Article 40 of the ICCPR, articles 16 and 17 of the ICESCR and article 9 of the ICERD on state reporting (HRI/GEN/2/Rev.6, June 2009) were the relevant articles for this study on state compliance under the selected treaties.

Secondary sources included books, reports, comments and journal articles that reflect on the issue of state compliance with reporting obligations, with particular focus being on South Africa. I used online sources and literature in the relevant libraries. This project utilised traditional research methods in the disciplines of political science and to some extent legal theory. I utilised a descriptive-analytical approach to carry out this critical study. The data I obtained was significant, reliable and critical to undertaking this study effectively and to answering the research questions.

South Africa falls into the category of states that are not fully compliant with their reporting obligations as it has experienced several backlogs in terms of reporting. This was owing to various factors that inhibit states from fulfilling their legal obligations to report. Factors underlining these challenges include the following: weak report writing capacity, absence of a reporting methodology, poor coordination of concluding observations, the absence of a standing/strong and effective central coordination mechanism, South Africa has varied and disparate arrangements for reporting; its reporting structure has minimal or no engagement with parliament, limited engagement civil society, Chapter 9 institutions (Public Protector, Human Rights Commission, Gender Commission, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities).

As alluded to earlier, with regards to state reports to the regional and UN treaty bodies, South Africa has often fallen short of meeting its legal obligations. This was amid expectations that given its history, constitutional framework, and its human rights centric foreign policy, and its relatively strong economy and state capacity, that it would be a lead country on state compliance with human rights treaties. Its reporting challenges came amid its role conception as a champion of human rights regionally and in the UN system, a responsible global citizen, an honest broker, a norm entrepreneur, and a diplomatic facilitator for peace, security and development.

The study notes that there has not been sufficient focus on applying the managerial theory to the lack of administrative and institutional capacity of the state in relation to state compliance with human rights reporting obligations and compliance with conclusions and observations of the human rights treaty bodies. It would be an interesting research area to explore in order to better understand state capacity in relation to fulfilling treaty obligations.

Chapter one of the study reflected on the background to the study and literature debates on state compliance with human rights obligations. It highlighted that state compliance with reporting obligations is a serious challenge to the UN treaty system, as there are more states in arrears when it comes to reporting compared to those that have submitted their reports. The chapter focused on South Africa's compliance with its treaty obligations under selected core human rights treaties (ICERD, ICESCR and ICCPR). It highlighted what literature already showed about the country's challenges in terms of meeting its reporting obligations since becoming a State party to seven core human rights treaties. In particular, it focused on three core human rights treaties (ICERD, ICESCR and ICCPR).

The chapter outlined the requirements of effective state reporting which include administrative support, skilled report writers, strong reporting mechanisms, data, political will and leadership. The chapter noted that state compliance with reporting obligations continues to be a major challenge in the UN human rights system, with many states being in arrears in terms of reporting (Bayefsky, 2000:8).

The chapter highlighted that states tend to sign and ratify treaties in impressive numbers but thereafter fail to comply with their reporting obligations in large numbers. It also noted that at times States appear to ratify treaties without political will to comply, a full appreciation for domestic law, and ability to domesticate the provisions of the treaties (Olivier, 2006:179). It is also important to note that political and state capacity, are critical in terms of state reporting. A state may have the will to comply but not have the capacity to comply. Thus, state capacity (report writing capacity) is crucial to effective reporting.

The study also noted that state compliance with reporting obligations under core human rights treaties is under-explored and not well understood within the political studies discipline. This is owing to the fact that most of the literature on the subject is within the legal field (international law). It observed that state compliance requires the involvement of all stakeholders and that it should not be a state-centric pre-occupation. All organs of civil society and the relevant state institutions ought to be involved in the reporting process. This multi-sector approach would be in line with the harmonised guidelines of the treaty bodies. The chapter showed that state compliance is dependent on varying and interrelated factors and that South Africa has struggled to comply with its reporting obligations.

Chapter two focused on developing a framework for analysing state compliance with reporting obligations under core human rights treaties. It developed an in-depth survey of literature on state compliance with reporting obligations. It also reflected on two international relations theories, constructivism and compliance theory. The two theories underpin the analysis of this research project. As stated in the study, compliance theory conceptualises compliance within a framework of rational, self-interested states. It primarily sees states as being concerned about their reputation and direct sanctions for their conduct. Compliance theory emphasises rule consistent behaviour in terms of state compliance with human rights obligations.

Constructivism asserts that states are open to persuasion and reason and as a result they commit to treaties voluntarily despite the inherent and implied reduction to their sovereignty. As alluded to in chapter three of the study, normative arguments may persuade states to comply with their obligations. As a result, when there are changes in international norms, these can result in changes in state behaviour. In this regard, states need to comply with their human rights obligations under the relevant treaties. South Africa‘s behaviour is informed by its foreign policy and international human rights norms and standards. It thus seeks to comply with its human rights obligations under core international treaties.

Using Sikkink *et al.,* (2013) and Hermansen (2015), I developed the analytical framework to define compliance as follows: *Sustained state behaviour and domestic practices that conform to international human rights norms.* It is referred to as *“rule*

*consistent behaviour".* As stated in this study compliance is not static, that it is dynamic as states ratify new treaties and protocols. Consequently, scopes get widened, improved reports get submitted by states and new information on human rights set high standards for states to comply with treaty norms. I also used Finnemore and Sikkink's (1998) notion of norm entrepreneurs to analyse South Africa's human rights behaviour. South Africa's overall behavioural attributes and role conception include the following:

a) a norm entrepreneur,

b) a champion of human rights, and,

c) a good international citizen,

d) an example,

This study is based on a number of analytical assumptions about state compliance and South Africa's compliance with reporting obligations under human rights treaties. The assumptions are as follows:

1. States that have resources and appropriate institutions comply with their legal obligations to report under core human rights treaties;

2. State compliance is a function of state choice, ability and political will;

3. South Africa's legacy of regional dominance and apartheid is a major influence on its human rights centered foreign policy and its behaviour; and

4. The centrality of human rights in South Africa's foreign policy influences its compliance with reporting obligations.

5. South Africa has moral authority on human rights and democracy.

I also used the typology of states obligations under human rights treaties to analyse state behaviour with respect to reporting obligations. The UN's core human rights treaties in general mandate State parties to 'respect', 'recognise', 'ensure', 'secure', or 'give effect to' the rights provided in the treaty. State parties also have to take all the necessary measures to give effect to the rights guaranteed in the treaty in line

with their constitutional processes. I also used what is referred to as the tripartite typology of obligations, namely, the obligation to respect, protect and fulfil and the fourfold typology, which includes the obligation to promote. In summary, the typology of state compliance theories, role conception, role perception and role performance, and the tripartite typology of obligations means the following:

**TABLE 8: TYPOLOGY OF STATE OBLIGATIONS UNDER CORE HUMAN RIGHTS TREATIES**

| State obligations | Description | Behaviour |
|---|---|---|
| **Obligation to respect** | The obligation to "respect" requires States to abstain from violating a right. | Advance norms and standards in international human rights law. |
| **Obligation to protect** | The obligation to "protect" requires States to prevent third parties from violating that right. | Work towards enhancing human rights treaties and condemn human rights violations wherever they take place. |
| **Obligation to fulfil** | The obligation to "fulfil" require States to take measures to ensure that the right is enjoyed by those within the State's jurisdiction. | Ensure domestic implementation of rights. |
| **Obligation to promote** | The obligation to promote requires the State to raise rights awareness. | Promote rights awareness by publicising them, and creating a human rights culture. |

## 7.3 Summary of Findings

Ever since it became a State party to seven of the nine UN Human Rights treaties, South Africa struggled to fully meet its reporting obligations under these treaties. Its failure to comply fully with reporting obligations is ascribed to lack of political will, that it is not fully committed to the treaties, its administrative failures, and that it may lack capacity to report (Thipanyane, 2011). This failure to comply with its reporting obligations is in contrast with the expected behaviour of a country that has a human rights centred foreign policy and a country with the role conception of moral authority on human rights issues, norms and standards.

Its declared foreign policy is human rights centric (centrality of human rights), fully supportive of the international system of global governance. Mbete (2018) opines that South Africa as a middle power, abides by norms and values, and has a public administration that is efficient and skilled and as such it is expected to fulfil its global

commitments. However, it has failed to meet its reporting obligations at times. Given the foregoing, the role conception of a country does not always correspond to the expectations or perceptions of the state. States do fall short of their role conception and expectations, especially if they do not have effective reporting mechanisms, capacity, and if they fail to submit their reports on a timely basis or if they do not submit reports.

The enjoyment of human rights as contemplated in the core human rights treaties depends on the implementation measures that States parties take. Domestic implementation of these rights is the main means envisaged by the core human rights treaties, to give effect to the individual and collective (group) rights that are provided for in the respective treaties and the reporting system, inter-state compliant system and individual complaint system. It is important for states to give effect to the tripartite typology and quadruple typology of rights (obligation to respect, promote, protect and fulfil). States need to meet these obligations in order for the rights holders to enjoy these rights.

This study finds that in order for States to comply with their reporting obligations, they ought to have sufficient report writing capacity. This entails having administrative capacity, relevant data, resources, trained report writers, technical knowledge, political will, establishing a central reporting unit, reporting methodology and government-wide collaboration among the critical departments.

Human right is a transversal theme and needs to be seen as a national responsibility (Alburquerque and Evans, 2012:139-121). It has in the main been seen to be the responsibility of the DOJ&CD, DSD and DSW to write country reports. Other government departments consider international reporting obligations as a responsibility of the mentioned departments and not a collective obligation. The reality is that State reporting is time consuming, costly and requires a national effort or at least a standing reporting mechanism. Inaccurate information and non-compliant reports can be submitted if there are no appropriate and adequate capacities embedded in the reporting process.

Chapter three reflected on State compliance with reporting obligations under selected core human rights treaties. It highlighted the necessity of domesticating the

provisions of the relevant human rights treaties in order to guarantee the enjoyment of such rights. It stressed the importance of timely and periodic reporting to the treaty bodies.

Chapter four reflected on South Africa's compliance with its reporting obligations under selected core human rights treaties. The chapter revealed that it is important for states to give practical effect to human rights treaties by making these rights a lived experience (domestication of the treaties/rule consistent behaviour), especially for the rights holders. It stressed the need for South Africa to act in line with its legal obligations (compliance with reporting obligations) in order to promote the enjoyment of such rights. It also stressed the importance of timely and periodic reporting to the treaty bodies.

The fifth chapter focused on the role of South Africa's parliament, the Chapter 9 institutions of the constitution designed to support democracy and the role of civil society in the state reporting process. The chapter reflected on the oversight roles that parliament, Chapter 9 institutions, the Human Rights Commission (HRC) and the Commission on Gender Equality (CGE) play or should play in terms of monitoring state compliance with reporting obligations. It recommended that these critical role players ought to be involved in the reporting process, including the preparation of shadow reports and attending/participating at the national report presentation meetings between the Committees and the State party. It highlighted the fact that while the SAHRC plays a visible role in the process, overall these critical stakeholders play a marginal role in the state reporting process and that they need to be given greater roles as envisaged by the treaty bodies.

Chapter six gave an overview of South Africa's existing mechanisms for state reporting. It was necessary to undertake this overview in order to determine how South Africa manages its reporting responsibilities, how it's reporting structure functions and to establish the source of its reporting challenges, which may explain South Africa's poor record of reporting and compliance with treaty obligations. It reflected on mechanisms for the management and coordination of state reports in South Africa. This discussion engaged in an in-depth reflection on South Africa's mechanism(s) to facilitate its compliance with its reporting obligations, compliance

with obligations to implement the conclusions and recommendations of treaty bodies and follow up processes. It established that South Africa's ineffective and disparate reporting arrangement is one of the impediments to effective reporting.

As alluded to in this study compliance is a continuum (Schmidtz and Sikkink, 2002), it entails the ratification of human rights treaties, the fulfilment of treaty obligations including state reporting and any other requests by supervisory bodies (treaty monitoring bodies), the implementation of treaty obligations, the domestication of the provisions of the relevant human rights treaties and rule consistent behaviour at the domestic level.

Influenced by Cole (2009:571), this study avers that state compliance is informed by the substantive content of the applicable treaty. States parties ratify such treaties in order to affirm their deep seated, normative, cultural or ideological commitments. I agree with constructivists who maintain that states become parties in order to affirm a genuine commitment to the principles of the treaties, thus they ratify these treaties and meet their legal obligations to comply. States may have the will to comply but lack the capacity to comply (Dionis, 2013). I note that South Africa's political posture is compliance friendly but it lacks the capacity to comply with its reporting obligations as evidenced by its role performance in respect of the two treaties (ICERD and ICESCR).

Furthermore, there is no methodology to write state reports on the part of South Africa to deal with reporting and reporting backlogs. I note that there is also a challenge in terms of dedicated report writers or experienced report writers within the current reporting framework in South Africa. As a result, reports that are produced do not follow a similar approach/style and tend to be submitted years after they were due. These reports also tend to be less focused on the substance and do not outline the actual challenges faced by the State party in terms of fulfilling its treaty obligations.

The report writing process requires dedicated human resources as well as technical expertise, trained report writers, a central reporting structure, political will etc. In general, states may underestimate the inherent requirements of state reporting and thus submit late reports, fail to submit reports or submit non-compliant reports.

South Africa appears to grapple with these challenges some twenty years since it progressively became a state party to seven of the nine treaties. It has had a less than satisfactory reporting record from 1999 to 2016. During this period it has submitted reports late to two (CEDR and HRCee) of the three selected treaty bodies and utilised the combined report approach, as a means to catch up with overdue reports. It had also not managed to domesticate the provisions of the three treaties into national law.

It is of critical importance for a central coordination mechanism to be established in order for South Africa to comply with its reporting obligations. The current arrangement whereby DoJ&CD works loosely with other Departments to coordinate and write reports is not viable and sustainable. It has in fact led to reporting backlogs.

Compiling reports is a system-wide and a government wide activity. It requires the collaboration of all the relevant stakeholders who have the data and relevant information. High level leadership on the part of Director Generals of departments is very important and so is the political will and leadership on the part of Ministers. It is also of critical importance for South Africa to ensure that the Conclusions and Observations made by the treaty bodies are given priority attention. This is in order to avert falling behind the international human rights standards for compliance with reporting and to ensure that the substantive content of the reports are compliant.

As stated in the last chapter, there are challenges in South Africa's reporting process. Over and above this problem, there is no mechanism to incorporate treaty body recommendations (COs) into policies, programs and legislation. The preceding challenges speak to capacity and coordination constraints.

As alluded to earlier in the study, the proposal to establish an NMRF would be a critical step in the right direction and would give practical expression to being a good international citizen, commitment to human rights and fundamental freedoms. It could enhance State capacity in respect of human rights reporting. In the meantime, South Africa continues to incrementally benefit from the UN Capacity Building Training Program by means of enhancing the report writing skills of its officials. The training needs to be less ad-hoc as there are challenges with effective reporting.

I note that committed and capable States parties comply with their obligations even in the absence of enforcement measures, and regardless of the strength or weaknesses of the enforcement mechanism of the treaty concerned. In this context, countries ratify unreservedly and comply in full if they are committed to the treaties and have the capacity to fulfil their obligations. They are not influenced by the nature of robustness mechanisms established for monitoring and enforcing compliance. Their commitment underlines their ability to comply with their legal obligations under the core human rights treaties. As a result, the analytical framework of the study seeks to interpret states compliance with their procedural and substantive obligations under the core human rights treaties.

## 7.4 Key Challenges Facing Reporting and Compliance in South Africa

South Africa's documented reporting challenges in terms of two (ICERD and ICCPR) of the three selected treaties, is a microcosm of its reporting challenges under four other core human treaties [Convention Against Torture (CAT), Convention on the Rights of the Child (CRC), Convention on the Rights of People with Disabilities (CRPD) and Convention on the Elimination of Discrimination Against Women (CEDAW)] that it has ratified. As chapter five demonstrated, the absence of a strong reporting and coordination mechanism is one of the major sources of its noncompliance with reporting obligations.

It is of central importance that South Africa should have in place an effective and strong reporting and coordination mechanism in order to meet its reporting obligations on a regular basis. As alluded to in the preceding chapters, international best practice demonstrates that those States parties that have set up strong reporting and coordination mechanisms are able to report to the UN treaty body system regularly, thus fulfilling their reporting obligations under the relevant treaties. It is important to note that political will is an important factor when it comes to state reporting and the fulfilment of relevant legal obligations by states. When the political leadership of a country is fully seized with its core human rights obligations, this helps states to better manage their reporting obligations. With regards to South Africa, reporting appears to be left in the hands of bureaucrats, with no sign of political leadership and guidance being provided.

The study found that political leadership and involvement is lacking when it comes to South Africa's reporting obligations under core human rights treaties. State reporting appears to be left to the bureaucrats to initiate and finalise. There does not appear to be a hands-on approach to state reporting by the political leadership and this also includes the legislature. There has yet to be political leadership in terms of oversight over the management and coordination of the country's reports. At best, reports are merely sent to cabinet for approval and parliament tends to be excluded from the report preparation and finalisation process. Even parliament plays a remote role in the process as evidenced by its absence in the reporting arena, its lack of involvement in passing legislation to domesticate the ratified treaties and or ensuring that existing legislation is in line with the ratified treaties.

This study has noted that state behaviour is influenced by role conceptions and role prescriptions that emanate from the external environment. This includes the structure of the system, norms and laws, international rules as well as multilateral and bilateral agreements. Finnemore and Sikkink (1998) posit an important perspective on state behaviour and outline the critical notion of norm entrepreneurship.

The foregoing is important to this research project owing to the apparent disjuncture between foreign policy (national role conceptions) and global expectations in terms of how South Africa should behave with regard to human rights within the UN system and the UN human rights treaty bodies. Whereas South Africa has sought to pursue an independent foreign policy, one that is anchored on the promotion and protection of human rights, it has often fallen short of what human rights defenders, advocates, activists and other human rights experts have expected. A constraining factor for South Africa has been its desire to balance role conception with its commitment to the African continent (African Agenda), anti-imperialism, decolonisation and strong association with countries of the South and BRICS countries.

With regard to the role of the legislature, the study observes that states have varied approaches to involving their legislatures in the human rights treaty sphere. It notes that there are conceptual complexities of rights and institutional peculiarities of the various legislatures. Paradoxically, South Africa's parliament does not play a role in the reporting process, yet it has a constitutional responsibility of overseeing human

rights issues domestically and internationally. Parliament is the custodian of the will of the people and is charged with dealing with human rights in general. It is an anomaly that South Africa's national parliament plays a remote role in respect of human rights treaties and in particular state reporting. The Portfolio Committee on International Relations and Cooperation, and the Portfolio Committee on Justice and Correctional Services do not play a central role in liaising with the relevant role players (the IDC and line departments) in terms of South Africa's reporting obligations under the core human rights treaties.

Parliament needs to ensure that the relevant line Ministers who oversee the Departments of International Relations and Cooperation and Justice and Constitutional Development, report to parliament regularly on the status of reporting under the relevant treaties, that steps are taken to implement the provisions of the treaties, including rule consistent behaviour, and when necessary, the domestication of treaties. The study also found that parliament is not sufficiently involved in reflections on draft reports to be submitted to the treaty bodies, it does not make inputs and it does not prepare shadow reports where necessary.

Parliament should be consulted when reports are prepared and it should, if possible, also be represented when South Africa presents its state report to the treaty bodies in Geneva. The current arrangement wherein parliament is not at all involved in the reporting process is a serious anomaly which needs correction. It is not enough that draft reports are processed through the cabinet of the country and parliament makes no input on these reports. This limited role of parliament is inconsistent with the reporting guidelines of the treaty bodies and it is not in line with international best practice. As a result, it would be of paramount importance that going forward and when South Africa establishes a much-desired national mechanism for reporting and follow up that national parliament should be integrated in the state reporting process. Parliament needs to play a greater role in the reporting process, as it is the custodian of human rights and the will of the people.

Furthermore, National Human Rights Institutions (NHRIs), Civil Society Organisations (CSOs) and interested role players ought to be incorporated in South Africa's state reporting process. As highlighted in preceding chapters, the guidelines

of treaty monitoring bodies provide for the involvement of NHRIs and CSOs in the state reporting process. The potential role that these entities can play is big as they are the bridge between the people (rights holders) and the government (duty bearers). It is, therefore, of crucial importance that they are integrated in the reporting system. Since, they are the eyes and ears of the people, they can play a catalytic role in helping to shape state reports that are substantive and balanced, and which incorporate actual realities on the ground.

The role of these entities, especially CSOs, has been understated, yet they can be a motive force in the quest for the promotion, protection, fulfilment and respect of human rights and fundamental freedoms. Their integration in South Africa's reporting procedures, without outsourcing the reporting responsibilities to these role players, can help to strengthen South Africa's ability to engage in state reporting. The early involvement of these entities would also help to shape the content of the state reports in terms of the information that they share with the states reporting mechanisms under the relevant treaties. Making these entities an integral part of the reporting process can also assist in terms of obviating multiple submissions of shadow reports to the treaty bodies.

I concur with Fraser's (2018) assertion that it is about how human rights are implemented practically that make a difference in the lives of ordinary people. It is also a fact that state-centricity and legalism with regard to the implementation of treaties has shortcomings and that the Non-State Actors (NSA's) ought to be integrated in the implementation process. In this context, when NSA's are involved in the implementation process, there could conceivably be better implementation of human rights treaties. This would take place within the context of NSA's having greater legitimacy with ordinary people as opposed to the state, which can be seen as distant and not in tune with the people. Ordinary people may see treaties as legalistic and alien and not informed by realities they face.

Thus, the involvement of NSA's to facilitate the implementation of human rights treaties in culturally appropriate ways is important (Fraser, 2019). In this regard, the treaty bodies could stress the role of social institutions in human rights implementation. It may be useful to explore the necessity for states to collaborate

with civil society organisations at the domestic level within the realm of implementation and state reporting. This approach would go a long way in countering the critiques of state-centricity and legalism.

I note that compliance is concerned with whether states do adhere to the provisions of agreements that they have ratified and to implementing the relevant measures (Haas, 1998:19). The theoretical framework asserts that compliance goes beyond the notion of implementation. Compliance entails the actual change in state behaviour in line with international commitments that a state has made.

The perennial problem of states noncompliance with reporting obligations bedevils the UN human rights treaty system and denies States parties an opportunity to gauge the extent to which States parties honour their human rights obligations under core human rights treaties.

This study observed that despite the existence of nine core human rights treaties, human rights are not practically enjoyed globally and that they are also weakly monitored and implemented. The non-implementation of core human rights instruments remains a major problem on the part of States parties. This challenge shows the existence of a gap between law (legal obligations) and practice (implementation). It also highlights the fact that states do make commitments that they cannot fulfil. There are often challenges of implementation once commitments have been made, including states' failure to report periodically to the treaty bodies. South Africa is one of those countries that are confronted by the challenge of lack of implementation when it comes to complying with its legal obligations.

This study established that South Africa has in place disjointed reporting arrangements, which on paper are meant to be supervised by an Interdepartmental Committee (IDC). Whereas the country seeks to be a responsible global citizen and a champion of human rights, its institutional arrangements have serious shortcomings. These shortcomings have led to a situation where it once took fourteen years to comply with its reporting obligations under the ICCPR in 2014 and four years to report under the ICERD in 2004 and almost four years under ICERD in 2014. The reporting backlogs persist.

The study observed that three departments coordinate reports namely, the DoJ&CD, the Department of Social Development (DSD) and the Department of Women, Youth and People with Disabilities (DoWYPD). However, these lead departments do not follow a particular methodology for reporting. The departments channel their reports through an ad-hoc mechanism called the IDC. The IDC lacks convening authority and the power to direct departments to cooperate and provide required data. This weakness impacts in a major way on the country's ability to meet its reporting obligations and to submit timely and compliant reports.

There should be a whole of government approach to reporting, whereby relevant departments are directed to dedicate key staff to serve on a reporting mechanism. The mechanism should be a standing mechanism, with convening authority and power to compel relevant actors to attend the relevant meetings. A standing mechanism is the solution to the problem as per international best practice. The mechanism should ideally be led by DIRCO as the custodian of South Africa's foreign policy.

The study has also established that the key role players in South Africa's human rights framework in terms of human rights promotion and protection, namely, parliament, civil society, chapter nine institutions etc. play a marginal role in the state reporting process. It would be of critical importance for South Africa to review and change its approach to human rights monitoring and reporting. Parliament, NHRIs and CSOs, need to be an integral part of the reporting process as recommended by the treaty bodies. Parliament needs to reclaim its rightful role as the de facto defender of human rights and fundamental freedoms, by being hands-on in terms of monitoring regional and UN human rights treaties. It ought to effectively use its convening authority to summon relevant lead departments to outline their reporting calendar to present their reports thereto prior to their finalisation and submission to cabinet.

Though South Africa's constitution embodies the provisions of the two Covenants (ICESCR and ICCPR) and the ICERD, the study also found that the country has not yet domesticated the provisions of the core human treaties that it has ratified. It has relied on existing legislation and sought to ensure that enabling legislation is in place

to give effect to the treaties when required. While States parties have the discretion to use other measures of implementation, treaty monitoring bodies place high premium on the domestication of human rights treaties by States parties. This is due to the fact that the lack of rule consistent behaviour or the lack of domestication of these treaties can have negative implications for the enjoyment of human rights, the rights holders and the human rights system.

The study notes that with regard to the CERD, it is odd that despite the legacy of racial discrimination and racism in the country, that South Africa has faced challenges in meeting its reporting obligations under this treaty over several reporting periods. It also took the country eighteen years to submit a National Action Plan (NAP) on Racism, Racial Discrimination and Related Intolerance. The production of National Action Plans by UN member states was a recommendation that emanated from the UN World Conference against Racism of 2001, which was hosted by South Africa in Durban (SAHRC, Annual Report, 2016:49-50).

The study also noted that States parties, informed by the legally binding nature of the core human rights treaties, take a state-centric approach to reporting. It noted that there is broad reliance on the state alone to address the issue of state compliance with human rights treaties. Thus, State centric legalism has been at the core of the problem in terms of state compliance. State reporting should be a national effort and needs to involve all stakeholders. The state alone cannot fully and effectively fulfil human rights obligations. States need to be in partnership with other critical role players like parliament, civil society Organisations and NHRIs, when they engage in the process of state reporting. A report that is a product of national consultation (state and non-state actors) enjoys more legitimacy and has national ownership.

It also noted that the treaty bodies are highly dependent on the collaboration of States parties to fully and effectively manage their supervisory work. Though overworked and understaffed, the treaty bodies provide a vital service to the State parties and they play a fundamental role in the supervision of the treaties and keeping the system alive. While the treaty bodies engage in the supervision and monitoring of the treaties, States parties need to use the reporting process to engage in self-introspection. The treaty review process as outlined in UN Resolution 68/268,

would hopefully result in much needed treaty body reforms and better levels of state reporting once it is concluded from 2020 onwards.

The study avers that other measures and non-legislative means that are provided for by the treaty bodies are not sufficiently explored and are not fully operationalised by States parties. Thus, it is important to factor in the role of civil society and the use of 'other measures' to effect domestic implementation of the treaties. These actors can play an important role in the state reporting process when they are made an integral part of the process of domestic implementation process.

The study highlights that South African civil society and the NHRIs tend to prepare shadow reports largely without interacting with each other and with the state reports. This is also largely a function of state reports being submitted late to the treaty bodies and with little or no consultation with civil society. South Africa's first and overdue report to the HRCee was submitted following the HRCee's issuance of a list of issues (LOIS) in 2014, this procedure allows for the review of countries that have overdue report(s) and those that have requested to be considered using this procedure.

Further, there needs to be better coordination by the lead departments and the IDC with CSOs and NHRIs. Effective participation of all relevant stakeholders is important in the reporting process in order to ensure compliance with reporting obligation. After all, the preparation of comprehensive and balanced state reports is enriched by input from a variety of sources.

In the main this study observes that States parties including South Africa generally focus more on the reporting process than on the implementation of the treaties. Once State reports are submitted, not much takes place in the intervening period between the submitted report and the subsequent report submission. States need to do more to close the implementation gaps that tend to be in place. They also need to ensure that they implement the concluding observations (COs) of the treaty bodies, as the COs are critical indicators of the state's implementation of the relevant treaties. When subsequent reports are considered, the treaty bodies seek to establish the extent to which the COs were attended to.

The project established that though treaty bodies do not strictly have “enforcement” powers, the Optional Protocols to core human rights treaties, create a system of accountability for states’ violations of human rights. In fact, the reporting system can also be seen to be an accountability mechanism even if it does not amount to hard enforcement. Thus, accountability is embedded in the UN human rights treaty system.

### 7.5 Summary of Recommendations

South Africa's approach to state reporting is largely state-centric and does not fully integrate parliament, NHRIs and other organs of civil society. South Africa's reports are at best channelled through the cabinet and these reports do not undergo parliamentary scrutiny. Parliament must be more involved in the State reporting process. It has to exercise its oversight function, engage on the contents of the reports and question the information as appropriate. It should in the process ensure that state reports are prepared and submitted on time. Parliament also has the latitude to provide inputs on draft reports and prepare its shadow reports in the process. It can also form part of the State party delegation when the country presents its reports before the treaty bodies.

There needs to be enhanced NHRI and civil society involvement in the reporting process in South Africa. There can be better utilisation of CSOs or consultants to prepare reports, by means of effective interagency coordination. Concerted efforts need to be made to enhance state capacity to write reports and to have meaningful partnerships with other role players (NSAs), with a view to writing timely and quality reports. Furthermore, South Africa needs to improve institutional capacity and coordination at the interdepartmental level when the preparation of reports takes place.

I concur with Lebanc *et al.,* (2010:805) who argue that state compliance is a function of the state’s capacity to comply. State reporting requires various resources, administrative support, technical expertise, data, trained report writers, coordination mechanism(s), political will, leadership, support from relevant stakeholders such as organs of civil society, academia, the media etc. It is also important to have in place a common approach (reporting methodology) to reporting by the various

departments that have the reporting responsibility, otherwise there is always a risk of producing reports that are non-compliant and which do not conform to the reporting guidelines.

The concluding observations of the relevant treaty bodies must be mainstreamed into policy discussions and documents of concerned government departments. Often State parties do not implement the conclusions and observations of treaty bodies; as a result, subsequent state reports do not address these critical recommendations. The implementation of these concluding observations would assist in the effective implementation of treaties.

Given the challenges of the IDC, an NMFR needs to be established. The establishment of a central reporting coordination mechanism, which would have convening authority and appropriate resources, is the way to address the problem as per international best practice. The IDC's lead departments (DoJ&CD and DIRCO) need to take concrete steps to obtain cabinet or ministerial approval to overhaul the IDC and to usher in a reporting mechanism akin to an NMRF. Under the current arrangement, the structure needs to be led by both departments. It must be adequately resourced (dedicated staff, budget, secretariat etc) and must convening authority.

Taking such steps would be congruent with South Africa’s consistent statement that its foreign policy is principally guided by human rights. It is notable that at the administrative level, it is giving some consideration to establishing a central reporting mechanism (NMFR) as per the diagnostic report that was compiled in 2017 and the reflection of this drive in the Department of Justice’s Annual Report of 2017.

The South African Human Rights Commission (SAHRC) as a Chapter 9 institution has the broad mandate of promoting and respecting human rights. In addition, the Commission for Gender Equality (CGE) has the mandate of monitoring compliance with international treaties that relate to gender equality. The CGE thus far has played a limited role in human rights reporting and monitoring.

The SAHRC has a broader and an enhanced mandate. These NHRIs tend to play a remote role in the state reporting process albeit they ought to play a more prominent role in the state reporting process. They need to be better engaged by the IDC throughout the report planning and drafting process.

The study highlighted that South Africa needs to establish a robust reporting mechanism given the weaknesses of its current reporting mechanism. It revealed that South Africa has a disjointed approach to reporting wherein state departments prepare reports without following a methodology or reporting system. It also showed that parliament, NHRIs and other organs of civil society are excluded or get involved seldom in the process. The study highlighted the need for their involvement in the state reporting process. It encouraged the exploration and exploitation of these role players in the reporting process. This study showed that amid the challenges of poor state reporting, the UN system has responded to this challenge and sought to address it through adopting various resolutions including resolution 68/268 on treaty body strengthening. The process envisaged in the resolution will culminate in treaty body reforms in 2020.

It also highlighted that the implementation of the human rights treaties does not solely rest on the State, that the treaty bodies encourage other means of domestic implementation. The relevant means include embedding in the reporting process organs of civil society, cultural groups, religious communities etc. The CSOs can play a critical role in the reporting and implementation process as they are closer to ordinary people and are community-based.

Though human rights treaty monitoring bodies have supervisory functions over states parties to core human rights treaties and are seen as lacking the authority to compel states to comply with their treaty obligations, they are an essential catalyst that holds the global human rights treaty system together. They play an indispensable role in holding states accountable for their human rights conduct and implementation of the treaties.

Thus far there has been State-centricity in terms of South Africa's approach to human rights reporting. It is characterised by limited roles played civil society, cultural institutions, religious institutions and parliament in the process. This practice

is not in keeping with international best practice and what treaty bodies recommend. All organs of civil society ought to be integrated into the reporting process in order to realise effective state reporting. In line with constructivism and managerial theory the state, groups and individuals need to play positive roles from the onset to bring about change in the state human rights implementation and reporting arena. The capacity of the state is best enhanced by means of inclusion of relevant role players and obtaining capacity building training from relevant actors. The State and its capacity, together with the role of civil society have to be brought to bear in order to fulfill the tripartite and quadruple obligations, so that human rights are protected, promoted, respected and fulfilled.

As alluded to South Africa's reports are handled on an ad hoc and disjointed basis, without any schedule or timelines to address pending and overdue reports, prepare reports and meet the reporting deadlines. It is recommended that South Africa should prepare a methodology to deal with reporting obligations under regional and UN human rights treaties, and any reporting backlog. This would be in line with constructivism, would signal change and appreciation for ideas, norms and doing things differently. Civil society and social engagements would be useful in terms of the approach the country takes to dealing with compliance issues.

It is worrisome that regarding the CERD, that amid the legacy of racial discrimination and racism in South Africa, that South Africa has faced challenges in meeting its reporting obligations under this treaty over several reporting periods. As stated earlier in the study, the relevant Convention (ICERD) was adopted in 1965 out of global disapproval of state engineered racism and racial discrimination in South Africa.

Consequently, South Africa has to close the chapter on overdue reporting under this treaty. It needs to make concerted efforts to have in place a robust reporting methodology/arrangement to ensure in the short to long term that it reports regularly to the CERD and set trends in terms of dealing with the scourge of racism, racial discrimination, xenophobia and other related intolerance. South Africa needs to live up to its commitments in terms of complying with the CERD at the domestic level and to do a much better job of reporting regularly and faithfully to the CERD. After

all, since January 2020, a South African national began to serve on the treaty monitoring body. Thus the country, ought to take its role conception as a global leader in the fight against racism seriously and practically demonstrate leadership in the compliance sphere.

As South Africa has not yet domesticated the provisions of the core human treaties that it has ratified, the country has to give consideration to ensuring that its legislature embeds the provisions of the human rights treaties in its legislative framework as appropriate and ensure that these treaties are closely monitored by means of parliamentary committee(s). This would entrench parliament in overseeing all aspects of international treaties as per its constitutional obligations.

There should be further consideration by the treaty bodies of human rights implementation beyond the procedural requirement to report to the treaty monitoring bodies (TMBs). Consideration should be given to recommending the inclusion of social institutions in the process of state reporting. It would be important to ensure inclusivity in human rights implementation. Inclusivity can also help to improve the efficacy and legitimacy of the reporting process. Working towards inclusivity (embedding CSOs in the reporting process) presents a unique opportunity for the human rights treaty system to re-engage with the ideals of human rights, which remain a work in progress.

Given its challenges with timely reporting, South Africa needs to overhaul its reporting mechanisms and give due regard to ensuring that its reporting mechanism is effective. Additionally, its failure to report on a timely basis under UN treaties has had a negative impact on its perceived reputation as a champion of human rights. As a consequence, the country tends to fail to implement its human rights obligations under the UN treaties. Various treaty bodies have raised this issue sharply (late reporting) as a point of concern in terms of the need for South Africa to fulfil its human rights obligations. Consequently, the South African parliament needs have a hands-on approach when it comes to these human rights treaties and hold relevant role players responsible to ensure that they prepare and submit reports on time. This approach would go a long way in ensuring the implementation of the relevant core human rights treaty provisions.

## 7.6 Study Contribution to Knowledge

The study showed that despite of its role conception as a champion of human rights and liberal democracy, that South Africa has serious weaknesses in terms of its reporting record. It also showed that South Africa's reporting machinery (IDC) is at worst dysfunctional and is in need of relief or revitalisation, owing to the IDC's chronic organisational and capacity weaknesses. South Africa relies inordinately on the IDC for the management and facilitation of its national reports. It is thus of critical importance for South Africa to give consideration to providing it with the right resources (human and capital). The study shed light through a constructivist lens on the importance of ideas, norms and agency (ability of someone to act) in bringing about social change and progress. It highlighted that the state and other role players have a role to player in the compliance milieu and that progress is best realised when there is an inter-play between the state, groups and individuals in the pursuit of progress and change.

The study highlighted that the role conception of a state, its perception by others and the practical realities, are often incongruent. The practical realities with regard to states compliance/state behaviour may be adversely affected by other factors such as political, administrative challenges and bureaucratic shortcomings. It also noted that state compliance requires a national effort and that it cannot be a state-centric preoccupation. State compliance and state reporting require the involvement of all relevant stakeholders including parliament and all organs of civil society.

The study highlighted that state reporting is an important accountability tool and measure for gauging the extent to which states promote, protect and fulfil human rights. It revealed that without state reporting, it is difficult to assess the extent to which states meet their treaty obligations.

This research project endeavoured to make a contribution to understanding the performance/state behaviour on the part of a developing country such as South Africa in relation to compliance with the core human rights treaties. It adds to the limited body of knowledge/scholarship on state compliance with reporting obligations under core human rights treaties in South Africa and on the continent.

The project also hopefully adds to the literature using constructivist theory and compliance theory to illuminate the complexities of human rights reporting and the challenges and peculiarities of state reporting leading, to the appreciation of the complexities of states compliance.

The infusion of role conception and the tripartite/quadruple typology of human rights obligations helped in crystallising the requirements of state compliance and state reporting. It helped in terms of clarifying the role conception and role expectations on the part of states with regard to compliance with core human rights treaties.

This study hopes to encourage research on the need for South Africa to comply with its treaty obligations under the seven core human rights treaties to which it is a party, including state compliance with core human rights treaties in the Southern African region, including ideas on how South Africa and countries on the continent can improve their reporting record under the UN human rights treaties. This study makes crucial the need to foster a whole of government approach to reporting in South Africa, whereby state reporting will be a collective effort by government, parliament, NHRIs and all relevant organs of civil society.

The research project highlighted the importance of ensuring that state reporting is not merely proceduralist (pro forma) but that it should be substantive and illustrative of progress and challenges faced by states in terms of the domestic application of these treaties. The effectiveness of the treaties is best measured by the depth and quality of the reporting guidelines and the reports themselves. Treaty reporting also needs to have visible international and domestic impacts, especially in the lives of the rights holders.

The study found that South Africa is not compliant with its reporting obligations under two of the three treaties (ICESCR and ICERD). It also has report writing capacity constraints.

This research will hopefully enrich the general debates on compliance with core human rights treaties from a developing country and African perspective.

The study clarified that state compliance with reporting obligations is dependent on various factors and conditions, including, state report writing capacity and political

will, the involvement of different stakeholders (NHRIs, parliament and organs of civil society). It tested assumptions about state compliance, in particular, South Africa's compliance insofar as the following: states' capacity (institutional capacity), state choice, legacy of discrimination and historical injustices, and human rights embeddedness. It observed that state compliance is varied and influenced by many factors. It also observed that despite having adequate capacity/resources that states may struggle to comply with their reporting obligations. South Africa is a case in point, as it struggles to comply in spite of having the necessary resources, a human rights centered constitutional framework and foreign policy, and an ad hoc reporting mechanism (the IDC). The assumption that South Africa's moral authority would lead to its compliance with human rights reporting, was confounded by its varied and inconsistent reporting record.

## 7.7 Implications for Theory

This study aimed to analyse state compliance with reporting obligation under selected core human rights treaties. The research topic triggered a total of three issues, which are addressed in the summary below. The answers thereon provide useful theoretical insights in terms of understanding state compliance with reporting obligations under core human rights treaties. They are as follows:

***Factors explaining states compliance or non-compliance with their reporting obligations under selected core human rights treaties.***

Chapter one of the study reflected on the evolution of international human rights law following the atrocities committed during the Second War. The founding of the UN in 1945 sought to achieve global peace and security, human rights and development. The UN's principal aim was to ensure that succeeding generations do not face the scourge of war. In signing the UN Charter, states gave up some of their sovereignty to a supranational body, the UN Security Council. The chapter highlighted that the founding of the UN-led to the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 and the two Covenants (ICESCR and the ICCPR).

The adoption of the Covenants in 1966 and the Convention (Convention on the Elimination of All Forms of Racial Discrimination–CERD), in 1965, led to the

codification of the human rights treaties and the UN treaty system. When these treaties became ratified and came into force in 1969 (ICERD) and 1976 (ICESCR and ICCPR), States parties voluntarily surrendered their sovereignty when it came to human rights issues. The concept of universality came into being once the first human rights treaty came into force, the CERD in 1969. States parties became obliged to account to the UN human rights treaty system and assumed reporting obligations. As a social construct, the human rights treaty system and the reporting process are an innovative intervention to safeguard human rights and fundamental freedoms, following the scourges of the Second War.

The study has established that state compliance with reporting obligations is dependent on various factors and conditions, including, effective reporting mechanisms, state report writing capacity, political will, the involvement of different stakeholders (NHRIs, parliament and organs of civil society). It highlighted that state compliance requires a national effort and that it can't be a state preoccupation alone. In essence state compliance and state reporting require the involvement of all relevant stakeholders including, parliament, NHRIs, the media, and all relevant organs of civil society. Despite the legal obligation to comply, the recurrence and persistence of non-compliance with reporting requirements, late reporting and non-reporting by states continues. I concur with Leblanc *et al*., (2010:805) who note that little is known about factors that explain state compliance with reporting obligations and that the reasons are varied.

***South Africa's Compliance with its Reporting Obligations under selected core human rights treaties and Insights that the South African case study provides into state compliance or non-compliance with its human rights reporting obligations***

Chapter four reflected on South Africa's compliance with its reporting obligations under selected core human rights treaties and obtained insights from the South African case study. It reflected on the state of South Africa's reporting as a state party to the three selected core human rights treaties and revealed that it is important for states to give practical effect to human rights treaties by making the rights enshrined therein a lived experience, especially for the rights holders. It

highlighted the importance of timely and regular reporting and the necessity of domesticating the provisions of the relevant human rights treaties and or the adoption of enabling legislation in order to guarantee the enjoyment of such rights. The lack of domestication of the treaties broadly keeps relevant provisions of human treaties in suspense and unimplemented. Thus, when necessary, it is important for parliament to domesticate these treaties, so that they become national law once the president ascents to the relevant bills of parliament. Domestic courts also have a critical role to play in terms of interpreting these treaties and ensuring that they are given effect in domestic law.

States parties to the core human rights treaties need to move from commitment to compliance, in order to fulfil their human rights obligations. This ought to take place in the form of states implementing human rights treaty obligations, domesticating them, and meeting their reporting obligations on a timely and regular basis.

South Africa's failure to comply with its human rights reporting obligations has largely affected its perception as a champion of human rights on the African continent and beyond. It's important for the country to comply with its treaty obligations otherwise, it may continue to suffer reputational damage. Leblanc *et al., (*2010:805) and Dionis, (2013)'s assertion that state compliance is to some degree a function of the states' capacity to comply is critically important. The state is at the centre in terms of ensuring that it fulfils its legal obligations to report.

***Implications of state failure to comply with reporting obligations and lessons the South African case can provide.***

States that fail to comply with their reporting obligations tend to suffer reputational damage in the eyes of the public, pressure groups and human rights activists. Domestic actors such as the media, activists and NSA's can argue that the State is derelict its duty to account and to fulfil its international obligations, when it fails to report. Failure to submit reports timeously has a negative effect on the treaty system as there is a huge and existing reporting backlog by States parties. It may also undermine the very treaties that States have ratified.

Late submission of reports eventually forces these States to submit combined periodic reports. Combined reports cover previous reporting periods that were missed by the State parties and can at times include a period spanning over a decade. Non-compliant states deprive themselves of an opportunity for introspection, when they fail to submit their reports. States that do not comply, also deny themselves of an opportunity for a constructive dialogue with the relevant treaty bodies. As a consequence failure to comply has domestic and global implications on States and the human rights system. The standing of country that seeks to project itself as a champion of human rights and a good international citizen is thus adversely affected by noncompliance with reporting obligations.

The extent to which the UN human rights system makes a difference in the lives of the rights holders, can best be appreciated by means of regular reporting by states. It is of central importance to the UN treaty system that the state reporting system functions effectively so as to gauge the extent to which human rights are respected, protected and fulfilled. State reporting provides the best avenue for assessing the performance of states in respect of fulfilling their legal obligations to implement the relevant provisions of the core human treaties that they have committed themselves to. In this regard a strong partnership between the State, parliament and NSAs is very crucial in terms of ensuring compliance with human rights treaty obligations.

In this regard, it is of crucial importance that states facing the same reporting challenges, such as South Africa, explore ways of strengthening their reporting mechanisms and or establish a UN recommended structure for effective reporting, in particular, an NMFR.

The narrative below summarises some of the challenges faced by states in terms of fulfilling their reporting obligations, and the steps the UN has taken to address the recurring problem of state compliance with reporting obligations

***The main impediments or obstacles that states face with regard to reporting***

The absence of strong reporting mechanisms, poor administrative capacity, lack of political will, the marginal role played parliament in the reporting process, and other organs of civil society are some of the impediments/obstacles to effective state

reporting. It is of critical importance that states build capacity, develop report writing capacity, establish strong and effective reporting mechanisms and that they include parliaments, NHRIs and all relevant organs of civil society with a view to ensuring effective reporting and compliance with treaty obligations.

***The UN response to the Problem of State Compliance***

The UN Member States, the human rights system and the treaty bodies have the task of ensuring that the UN human rights treaty system does not collapse and that it endures in the interest of the promotion, protection and fulfilment of human right and fundamental freedoms. In this regard, previous High Commissioners for Human Rights, including, Mary Robinson, Navi Pillay and Zeid Ra'ad Al Hussein brought the challenge of poor levels of state reporting to the attention of the UN membership and the State parties to the treaties. Their concerns pointed to the potential collapse of the treaty reporting system if no action was taken by the States parties to among other things, strengthen the reporting system, build report writing capacity and to increase levels of reporting.

At the twenty-fifth meeting of the Chairpersons of the human right treaty bodies in May 2013, expressed deep concern about late reporting and non-reporting by majority of States parties to human rights treaties. They decided to include the issue of states compliance with reporting obligations, as a standing item on the agenda of their annual meeting (A/68/334, para 47). Data on the status of reporting is regularly updated on the website of the UN Office of High Commissioner for Human Rights (A/70/302, para 93).

Concern raised by previous High Commissioners and Chairpersons of the treaty bodies about state compliance with reporting obligations, culminated in among other things, the adoption of resolution 68/268 of 2014 on treaty body strengthening. One of the main interventions by the UN system is the establishment of the capacity building program on reporting, which has been useful in the training of trainers and the enhancement of state reporting capacity. Developing countries have benefited from this intervention, including South Africa, countries in the South African region and other states in the world.

Furthermore, in June 2019, the chairpersons of the 10 treaty bodies met at their 31st annual meeting in New York to reflect on strengthening the UN treaty system. They agreed on a number of viable proposals to improve and streamline the state reporting process in accordance with UN resolutions on treaty bodies strengthening (OHCHR, 2019). Among other things, all treaty bodies agreed to offer States parties, the simplified reporting procedure (SPR), reduce unnecessary overlaps in terms of list of issues prior to reporting (LOIPRs) and the Covenant Committees would review States parties on an 8-year cycle (OHCHR, 2019).

### 7.8 Proposals for Further Research

This study suggests that there is room for in-depth studies into state compliance with reporting obligations under core human rights treaties. It has created space for developing assumptions or generalisations about South Africa's commitment to human rights within the realm of the UN human rights treaty system. This study also highlights the need to engage in further research on the factors that explain state compliance with reporting obligations under other international and regional human rights treaties.

A study on factors influencing state compliance with reporting obligations under other core human rights treaties (CAT, CRC, CRPD and CEDAW), would be an interesting research area.

Also a study on state compliance with reporting obligations under regional instruments would be a useful research area of enquiry.

The framework for analysis used for this study could apply to analysing behaviour of other states within the context of compliance with reporting obligations under regional and UN human rights treaties. This framework could be useful to establish whether other states comply with their reporting obligations under these treaties. It would make a contribution to further improving our understanding of state compliance with UN treaty obligations. There is a need to research deeper into the national mechanisms for reporting and to understand the detail of impediments and potential for improvement.

The role the South African legislature should play in state reporting (compliance) is under-explored. As alluded to earlier in this study, parliament plays a marginal role in terms of the UN human rights treaties and is not embedded in the state reporting process. Consequently, a study on the role or the potential role of the legislature thereof would be worth exploring. The legislature has a critical role to play in terms of the domestic implementation of human rights and overseeing human rights treaties.

Furthermore, a case study on the role of legislatures in the domestic implementation of human rights treaties and in the preparation of state reports would be an interesting area of research enquiry and an important research topic.

Further, it seems that research into the role of individual Chapter 9 institutions would also establish what their practices are and what the impacts of their involvement are in the state reporting process. The treaty bodies envisage a role for bodies such as South Africa's Chapter 9 institutions (NHRIs). As a result, focused research on their enhanced involvement in the process, their strengths and the role they could play in the State reporting process would be an important area of research.

Research on the role of civil society in reporting process will yield insights into what can be done better in terms of compliance with treaty obligations under human rights treaties. The role that can be played by the various organs of civil society needs to be explored and exploited.

Research into the role that can be played by other role players, including the judiciary, the media and the academia in expanding the understanding of compliance/implementation of human rights treaties would be useful in understanding factors that explain states compliance with human rights treaties. This study would, in turn be beneficial to rights holders.

Comparative analysis of how different and similar size countries handle reporting and compliance should be undertaken in order to distil how these countries fare.

It would be useful to engage in case studies on the domestication of regional and or UN human rights treaties and the impact of international and regional human rights treaties in South Africa, Africa and beyond.

It would also be a useful exercise to explore as a research area, treaty compliance and its international and domestic impact.

A study on the interplay between regional and international human rights treaties insofar as state reporting and domestic implementation would be an interesting research area.

Further analysis would also need to be made on inter-agency or intra-governmental coordination within designated South African entities in dealing with the issue of compliance with reporting obligations.

The foregoing also necessitates further research into the efficacy of international human rights treaties in making a difference in the lives of rights holder. It would also be important to establish if South Africa's reporting under regional and international human rights treaties can be linked with improvements in its human rights practices.

# ANNEXURE

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