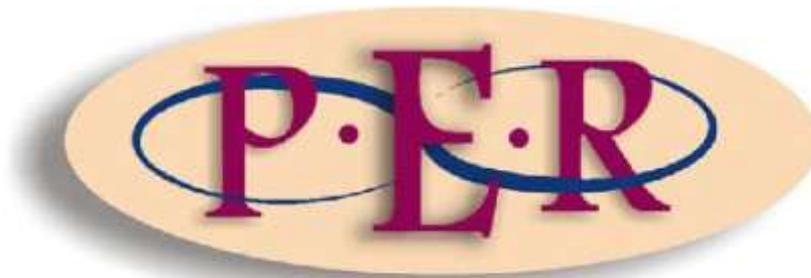


**Author: T Stein**

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INTERNATIONAL LAW: "YOU ARE NOT ALONE"**

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**CONSTITUTIONAL SOCIO-ECONOMIC RIGHTS AND INTERNATIONAL LAW:  
"YOU ARE NOT ALONE"**

**T Stein\***

Dear ladies and gentlemen,

As the title of my speech suggests, I should like to share today some thoughts about the nature, development and implementation of socio-economic rights. Setting out from the perspective of International and European law I should like to highlight a couple of similarities and parallels which I think exist when we consider the position of this kind of fundamental rights in our societies.

on two further international treaties was started immediately,<sup>1</sup> finally becoming what we know as the *International Covenant on Civil and Political Rights (ICCPR)*<sup>2</sup> and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.<sup>3</sup>

These two treaties of international law involve different mechanisms of legal enforcement. In the case of the *Covenant on Economic, Social and Cultural Rights*, the ability to enforce its provisions became part of the conflict between "East" and "West" in what were some of the first chills of the "Cold War". Western countries believed at the time that the establishment of this new treaty would mean that policy choices would be made on an international stage, and would have to be taken in a democratic manner on the national level. There was a fear of a loss of autonomy.<sup>4</sup> On the other hand, socialist countries tried to emphasise the importance and equality of this new set of human rights, seemingly promoting them in a stronger way. The reality was, as we all know, a bit different.

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\* Torsten Stein. Doctorate in Law, PhD (habilitation) (Heidelberg Univ). Professor of Law. Director of the Institute of European Studies and holder of the chair for European law and European Public Law at Saarland University, Germany. Email: t.stein@mx.uni-saarland.de. Keynote speech delivered on 16 November 2012 at the Konrad-Adenauer Foundation and Faculty of Law (NWU, Potchefstroom Campus) 3rd Human Rights Indaba on The Role of International Law in Understanding and Applying the Socio-economic Rights in South Africa's Bill of Rights.

<sup>1</sup> OHCHR 1996 <http://bit.ly/ZxzFp5> Section Background.

<sup>2</sup> *International Covenant on Civil and Political Rights* (1966).

<sup>3</sup> *International Covenant on Economic, Social and Cultural Rights* (1966).

<sup>4</sup> Chirwa 2002 *Human Rights Brief* 14; Riedel "Vorbemerkungen" Rn 1

Nevertheless, one has to consider here that Marx' ideology considered the legal system as being a part of what is called the "superstructure". This means that law in general is seen as something artificial or cultural. It is only an abstract expression of what actually counts, namely the factors of production.<sup>5</sup> As a result of this view, legal norms are more unlikely to create as strict obligations as they might in other types of societies. That is how one also comes to understand why under Communist regimes there tended to be a rather flexible approach to the enforceability of legal provisions.

But even after overcoming the difficulties encountered at the beginning, nations all around the world remained wary of binding themselves to the *ICESCR*. The Covenant finally came into force in 1976, ten years after it had been opened for signature. Often being described as the "second generation" of human rights,<sup>6</sup> their concrete dimension in our everyday lives is as hard to define in detail as their implementation is crucial in general. When we think about ensuring the ability of all of the citizens of a nation to be able to cover their daily needs, respecting and promoting socio-economic rights is at the centre of our common attention. The issue is also interconnected with bridging the gap of inequality in a state. However, and as we learned from the past, a lot of challenges arise when it comes to the implementation of this category of legal entitlements. Therefore, I said in my title: You are not alone.

Ever since the attempt was made to frame socio-economic rights in international law, they were subject to lively debates. As is generally known, the authors of the United Nations *Universal Declaration of Human Rights* were in 1948 unable to make the document legally binding on its members.<sup>7</sup> In order to overcome this, the work was done in a more practical way, by the signature of a large number of states.<sup>8</sup> In South Africa, the government only recently, in a cabinet decision dating from the 10<sup>th</sup> of October 2012,<sup>9</sup> decided that the South African parliament should ratify the treaty in line with section 231(2) of the *Constitution*. This decision,

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<sup>5</sup> See Marx and Engels *Werke* 7-11.

<sup>6</sup> See Herdegen "Entwicklung der Menschenrechte im Völkerrecht" art 1 abs 2.

<sup>7</sup> Riedel "Vorbemerkungen" Rn 1.

<sup>8</sup> UN Treaty Collection 2012 <http://bit.ly/64bPHA>.

<sup>9</sup> GCIS 2012 <http://bit.ly/PpCNVN>

which was warmly welcomed by a number of NGOs active in the field,<sup>10</sup> came almost eighteen years after South Africa originally signed the Covenant.<sup>11</sup>

While this may seem to be a rather long time span at first glance, it should also be considered that the United States of America also has not ratified the covenant yet, despite its initial commitment to do so stemming on the 5<sup>th</sup> of October 1977.<sup>12</sup> In other words, one of the leading promoters of Human Rights on the world stage has not completed the ratification of the *ICESCR* for more than 35 years - and still counting. One could therefore also state that it might take the US at least twice as long as South Africa to put the provisions of the covenant into force, if it is ever going to do so.

When we now look to Europe, we once more discover that the protection of human rights on my home continent is mainly a matter of regional cooperation. In the light of the experiences during World War II, the doctrine was developed that the effective protection of human rights can be achieved only through the involvement of strong international organizations with the states monitoring each other permanently.<sup>13</sup> As a result, the protection of human rights has become a central building-block for the modern European Identity.

This is manifested mainly in the creation of two international treaties for the region, the *European Convention of Human Rights* of 1950 being the more salient one.<sup>14</sup> But soon it was recognised that this legal framework was not sufficient for the establishment and protection of socio-economic rights. To overcome this, the *European Social Charter (ESC)* was signed in 1961 in Turin, under the auspices of the Council of Europe.<sup>15</sup> The aim was to grant to Europeans, finally, certain minimum standards concerning housing, health, education, employment, social

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<sup>10</sup> ICESCR Ratification Campaign Driver Group 2012 <http://bit.ly/SXvo1d>.

<sup>11</sup> ICESCR Ratification Campaign Driver Group 2012 <http://bit.ly/SXvo1d>.

<sup>12</sup> UN Treaty Collection 2012 <http://bit.ly/64bPHA>.

<sup>13</sup> See for instance Churchill *Speech*.

<sup>14</sup> For detailed information on the Convention and all of its protocols, see Council of the European Union Treaty Office Date unknown <http://bit.ly/10rW3ms>.

<sup>15</sup> *European Social Charter* (1961).

protection, free movement and non-discrimination.<sup>16</sup> However, the original text of the charter left the signatory states a very wide margin of appreciation, allowing them initially to "pick and choose" a number of socio-economic rights they would grant their nationals. In order to check if the treaty parties were living up to their obligations, a reporting system was set up.<sup>17</sup> But in contrast to the *European Charter of Human Rights*, no entitlements for complaints in the case of an infringement were established for individuals or states.

The initially loose framework of protection was later "upgraded" and tightened by adding additional protocols. And finally, a total revision of the treaty in the year 1996 followed.<sup>18</sup> One of the biggest improvements can be seen in including the possibility for collective complaints, given to trade unions or NGOs for example.<sup>19</sup> However, the basic pattern for the commitment to social human rights remained.

The most recent step in the attempt to improve the protection of social rights in Europe was taken by the European Union. Title IV of the new *Charter of Fundamental Rights of the EU*, bearing the name "solidarity," which came into force on the 1<sup>st</sup> of December 2009, was one of the most discussed parts of the new human rights charter of the European Union.<sup>20</sup> And despite the fact that one can hardly doubt that the protection of socio-economic rights in Europe will be improved by the new legal framework, how and to what extent the new provisions are exactly binding for the European Union and its member states are still in dispute.<sup>21</sup>

As you can conclude from my remarks so far, South Africa IS NOT ALONE in facing the difficulties of implementing socio-economic rights.

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<sup>16</sup> Part II *ESC*.

<sup>17</sup> Article 20, Part IV *ESC*.

<sup>18</sup> Riedel "Vorbemerkungen" Rn 2; *European Social Charter* (Revised) (1996).

<sup>19</sup> See *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* (1995); Part IV, Art D *European Social Charter* (Revised) (1996).

<sup>20</sup> Riedel "Vorbemerkungen" Rn 1.

<sup>21</sup> Wehlau and Lutzhöft 2012 *EuWZ* 45.

While it seems to be rather easy for states to accept them in general or to commit to them as goals of their policies, the crucial question is how exactly to define the nature of the states parties' obligations. The Committee on Economic, Cultural and Social Rights, which consists of 18 independent experts on the subject and which was set up by the Economic and Social Council of the United Nations in 1985,<sup>22</sup> also recognised this problem and tried to address it in several statements. The main task of the committee is to monitor the nations' implementation of the provisions laid down in the *International Covenant on Economic and Social Rights* of the United Nations.<sup>23</sup>

One of their comments is:

... while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>24</sup>

The committee has made it clear that socio-economic rights are not to be granted as such by the parties. However, mechanisms have to be set into place which eventually will have to be improved over time and which finally create a state where socio-economic rights are being enjoyed by all the citizens of a nation, without discrimination.<sup>25</sup> The "tools" to achieve this are legislation, an effective system of judicial rectification, and so-called other measures of an "*administrative, financial, educational or social*"<sup>26</sup> nature.<sup>27</sup>

The crucial provision of the Covenant itself can be found in Article 2 paragraph 1 of the *ICESCR*. The words 'to take steps ... to the maximum of its available

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<sup>22</sup> ECOSOC 1985 <http://bit.ly/Z2RmUt>.

<sup>23</sup> See CESCR 1990 <http://bit.ly/16tj3VO>; CESCR 2007 <http://bit.ly/16tjr6v>; CESCR 2011 <http://bit.ly/XUSXFE>.

<sup>24</sup> CESCR 1990 <http://bit.ly/16tj3VO> para 2.

<sup>25</sup> Article 2 para 2 of the *ICESCR*.

<sup>26</sup> CESCR 1990 <http://bit.ly/16tj3VO> para 7.

<sup>27</sup> CESCR 1990 <http://bit.ly/16tj3VO> para 3 ff.

resources<sup>28</sup> in particular need further clarification, which the committee tried to deliver in a statement given in the year 2007.<sup>29</sup> Basically, the experts find that all steps have to be taken by a nation, which are "adequate"<sup>30</sup> or "reasonable"<sup>31</sup> on the one hand, while at the same time not exceeding the level of available resources on the other.<sup>32</sup> Here the committee tries to name a couple of issues which should be considered in detail, but, I should like to avoid getting too technical at this point.

Allow me to sum up the rationale by saying that each signatory should definitely live up to its commitments, but the bar has been set lower for those parties whose resources are scarce. It doesn't make sense, for instance, to be granting each person the entitlement to be living in a freshly renovated apartment when an armed conflict is currently taking place inside a country, threatening people's health or even lives, and potentially destroying a nation as such.

Another issue which has recently gained increased importance around the world as well as in South Africa is the responsibility of the corporate sector in regard to the establishment of economic, social and cultural rights.<sup>33</sup>

From the perspective of International Law it is undoubtedly clear that the signatories also have to live up to their given promises in that context. This has to be expressed in a three-fold manner by respecting, protecting and fulfilling the establishment of socio-economic rights.<sup>34</sup> Despite the growing role and power of non-State actors in the sector, the duties imposed by the *ICESCR* upon the Member States remain in place. Therefore, signatory states are obliged to take care of the establishment of a framework which allows the development and strengthening of socio-economic rights.

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<sup>28</sup> Article 2 para 1 of the *ICESCR*.

<sup>29</sup> CESCR 2007 <http://bit.ly/16tjr6v>.

<sup>30</sup> CESCR 2007 <http://bit.ly/16tjr6v> para 8.

<sup>31</sup> CESCR 2007 <http://bit.ly/16tjr6v> para 8.

<sup>32</sup> CESCR 2007 <http://bit.ly/16tjr6v> para 8 *ff.*

<sup>33</sup> CESCR 2011 <http://bit.ly/XUSXFE>.

<sup>34</sup> CESCR 2011 <http://bit.ly/XUSXFE> para 4 *ff.*

Unfortunately, though, the "lack of arm's length" problematic describing the paralysis of legal enforcement often experienced when States attempt to enforce legal provisions against big international corporations seems to be a growing concern in the beginning of the 21<sup>st</sup> century. "Money makes the world go round" – in a globalised economy more than ever before.

In effect and as we all know, multi-national companies sometimes become more powerful than national legislators and their executive branches. This is clearly threatening peoples' socio-economic rights all around the world. Let me just reference briefly the very well-known situation of the Ogoni people in Nigeria, whose land has been severely damaged over the last decades by the activities of the international oil industry.<sup>35</sup> These large corporations still deny their responsibilities,<sup>36</sup> highlighting once more the importance of an effective enforcement of socio-economic rights' provisions.

Considering the issue of enforceability as well as the decision by the South African government referred to above to ratify the UN covenant on socio-economic rights in detail, I should now like to share a few thoughts on the possible impacts of the new situation.

Analysing the principles of the establishment and enforcement of socio-economic rights in International Law and comparing them with the guidelines given by the South African Constitutional Court, I can repeat that YOU ARE NOT ALONE.

What impresses a European lawyer about the South African *Constitution* is its comprehensive approach to granting enforceable human rights, regardless of whether they are first, second or third generation rights. This comprehensiveness is also widely recognised in the academic literature.<sup>37</sup> It makes South Africa stand out

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<sup>35</sup> See UNEP 2011 <http://bit.ly/11gl2vf>. The report claims that it may take up to thirty years to restore the conditions in the harmed region.

<sup>36</sup> Sekularac and Deutsch 2012 <http://reut.rs/129H8IF>. See also *Kiobel v Royal Dutch Petroleum Co* Case No 10-1491 (US Supreme Court).

<sup>37</sup> See Jaichand 2006 <http://bit.ly/14Kub2x> 1 *ff*; Mubangizi 2007 <http://bit.ly/1022ttA> 1.

on its home continent, with such strong enforceability being found in scarcely any other nation in Africa.<sup>38</sup> Looking at the world, a similar approach could perhaps be found in the Inter-American system of human rights protection. But in terms of the effectiveness of the legal remedies offered by the system, one would arguably have to recognise that the possibilities of the American mechanism are limited.<sup>39</sup> As already described for Europe, Western systems tend to distinguish pretty clearly between the different rights' categories, with every nation being very cautious when it comes to legally binding itself to granting socio-economic rights.

As I have already said, the Committee on Economic, Cultural and Social Rights, which is supervising the signatories compliance with the United Nation's *ICESCR*, has in its history tried to define the key elements of what granting socio-economic rights means in detail. It is very interesting, though, that the South African constitutional court emphasises similar principles in some of its key rulings on socio-economic rights.

In the case *Soobramoney v the Minister of Health (Kwazulu-Natal)*,<sup>40</sup> for instance, the court discussed what section 27 of the *Constitution*, which obliges the Republic of South Africa to take care of its citizens when they are in need of medical treatment due to the existence of an emergency, actually means. It found that if the state is not capable of providing appropriate medical treatment due to its lack of resources, even a life-threatening permanent disease, which required dialysis in the specific case, could be denied by the public authorities.<sup>41</sup> Nevertheless, this does not mean that the state is not obliged to put a system into place which is capable of delivering the necessary therapies.

The essence of this decision comes very close to what the UN's committee stated in its 38<sup>th</sup> session in 2007, when it defined the necessity to take all steps which are

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<sup>38</sup> Mubangizi 2007 <http://bit.ly/1022ttA> 8.

<sup>39</sup> Cançado Trindade 2010 *ZaöRV* 634.

<sup>40</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC).

<sup>41</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 36.

"adequate"<sup>42</sup> and "reasonable"<sup>43</sup> to realise economic and social rights. Therefore, the decision of the South African Constitutional Court of 1997 is in line with international law, at least with the provisions of the *ICESCR*.

In another famous landmark case which was decided in the year 2000, namely *Government of South Africa v Irene Grootboom*,<sup>44</sup> the question of available resources was also highly relevant. As you all know, the state was held responsible for not having lived up to its duties in providing enough support for national housing programmes. As result a large group of people, especially a large number of children, had to live under very poor conditions.

From an international perspective, the interesting thing about this decision, which led to the reinforcement of housing programmes in the region concerned,<sup>45</sup> was the fact that the institutional checks and balances seemed to be working at the time on a national level, which cannot be taken for granted in human rights issues in any nation state. As I already said, the European experience especially shows that fundamental rights are best protected in networks of international surveillance.

The Constitutional Court, however, interpreted section 26 of the South African *Constitution* to the conclusion that South Africa had failed to fulfil its responsibility of what the UN's Committee on Economic, Cultural and Social Rights would describe as "to take steps ... to the maximum of its available resources"<sup>46</sup>. As you see, the wording of the international body can easily be used to justify the decision of the national court.

The decision in the case *Minister of Health v Treatment Action Campaign*,<sup>47</sup> dealing with the conditions of the treatment of HIV/AIDS diseases in South Africa could also

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<sup>42</sup> See CESCR 2007 <http://bit.ly/16tjr6v> para 8.

<sup>43</sup> CESCR 2007 <http://bit.ly/16tjr6v> para 8.

<sup>44</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC). The Court relied on General Comment No 7 even before being bound by the *ICESCR*.

<sup>45</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) 2.

<sup>46</sup> Article 2 para 1 *ICESCR*.

<sup>47</sup> *Minister of Health v Treatment Action Campaign (TAC)* 2002 5 SA 721 (CC).

be understood in this way. It therefore marks a continuation of the basic principles of the jurisdiction of the South African Constitutional Court.

All of this is remarkable, since it shows that socio-economic rights do enjoy a relevant position in South Africa. The country has shown in the past that it is capable of taking care of socio-economic rights in a way which can be seen as complying fully with international standards.

However, and as I have tried to show throughout my presentation, the realization of socio-economic rights is the result of a constant process which derives from constant and serious commitment. And this means that, although one battle another may have been won in the past, the "war" for the full realisation of socio-economic rights has to be fought until it is over. And this important duty has the nature of a Sisyphus task; for South Africa, as well as for the rest of the world.

Allow me some concluding remarks on cooperation. Fortunately, there are reasons for hope: when we consider the further development of socio-economic rights in your country, again YOU ARE NOT ALONE.

Just recently, on the 18<sup>th</sup> of September 2012, the fifth European Union-South Africa summit was held in Brussels under the title: "A partnership for our people, prosperity and peace".<sup>48</sup> At the same time a number of side events like the first EU-South Africa Business Forum also took place.<sup>49</sup>

This came at a time when the relationship between the EU and South Africa had become more important than ever. South Africa is one of the EU's key partners in Africa and globally. In 2007 a Strategic Partnership was concluded<sup>50</sup> following the Trade, Development and Cooperation Agreement (TDCA) concluded in 1999.<sup>51</sup> As a

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<sup>48</sup> Council of the European Union 2012 <http://bit.ly/ZxH3Ro>.

<sup>49</sup> Business Europe, BUSA and Black Business Council 2012 <http://bit.ly/YPYWyF>.

<sup>50</sup> EU 2007 <http://bit.ly/YPYWyF>.

<sup>51</sup> EU 2004 <http://bit.ly/129P1HP>.

result of these agreements, 90 percent of the two-way trade had been gradually liberalised by the year 2012.<sup>52</sup>

The EU is South Africa's main trading partner. 28 percent of the nations' total exports are destined for the area of the union.<sup>53</sup> Since 2004, total trade between the EU and South Africa has more than doubled, with a total increase of 125 percent.<sup>54</sup> The Union is the primary foreign investor in the country, being solely responsible for more than three quarters of foreign direct investment.<sup>55</sup> And finally, the EU is the most important development partner of South Africa, providing in total 70 percent of all external assistance.<sup>56</sup>

How does this interconnect with socio-economic rights? First of all, an improved economic environment provides more resources for granting them. The realisation of this category of human rights largely depends on the possibility of each nation to do so. When there are not the necessary economic preconditions, it is almost impossible to set up a working health or education system.

Secondly, chapter two of the above Joint Country Strategy Paper for the years 2007-2013 tries to address the main challenges facing the country, each of them being closely related to socio-economic rights.<sup>57</sup> There we find issues like unemployment, fighting HIV/AIDS, land-reform, environmental problems and much more.<sup>58</sup> By supporting South Africa in developing further on these issues, the EU also assists in the realisation of its socio-economic rights. This support is of a sustainable nature, since both sides have committed to continuing their work beyond 2013, when the period of the current strategy paper ends.<sup>59</sup>

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<sup>52</sup> Council of the European Union 2012 <http://bit.ly/YQ08Cj> 2.

<sup>53</sup> Council of the European Union 2012 <http://bit.ly/YQ08Cj> 2.

<sup>54</sup> EU 2012 <http://bit.ly/129QmOX>.

<sup>55</sup> Council of the European Union 2012 <http://bit.ly/YQ08Cj> 2.

<sup>56</sup> Council of the European Union 2012 <http://bit.ly/YQ08Cj> 2.

<sup>57</sup> EU 2007 <http://bit.ly/YPYWyF> 7 ff.

<sup>58</sup> EU 2007 <http://bit.ly/YPYWyF> 1.

<sup>59</sup> Council of the European Union 2012 <http://bit.ly/ZxH3Ro> 6.

Thirdly and lastly, the EU and South Africa have recently tried to foster the ties between their civil societies. Concrete examples are events like the first EU-South Africa Business Forum which I referred to above, which will be held on a regular basis in the future.<sup>60</sup> The Conference on Innovation for Poverty Alleviation is yet another example of such cooperation, where programmes for capacity development, employment and support for the implementation of the Trade, Development and Cooperation Agreement between South Africa and the EU have been created.<sup>61</sup> And steps to draw closer in the academic context are also being taken, taking the shape of student programmes like "Erasmus Mundus".<sup>62</sup>

Ladies and gentlemen,

In this globalised world we live in, which is getting smaller in some sense every day, it is crucial that our societies should take more care of each other than we did in the past. In our age, protecting human dignity and creating the opportunities for a good life are tasks not only for national governments but for the entire world community. Europe and South Africa share a long history. This means that we understand each other's roots, situations and aspirations. But it also means that we understand the challenges each of us is facing. If we use this knowledge about each other and transform it into sincere support for the other's needs, both sides will win. Socio-economic rights will win.

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<sup>60</sup> Business Europe, BUSA and Black Business Council 2012 <http://bit.ly/YPYWyF>.

<sup>61</sup> Council of the European Union 2012 <http://bit.ly/ZxH3Ro> 6; Department of Science and Technology 2012 <http://bit.ly/VTbKj2>.

<sup>62</sup> Council of the European Union 2012 <http://bit.ly/ZxH3Ro> 6; Erasmus Mundus Action 2 for South Africa Date unknown <http://bit.ly/Z35JYJ>.

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**List of abbreviations**

BUSA	Business Unity South Africa
CESCR	Committee on Economic, Social and Cultural Rights
ECOSOS	Economic and Social Council
ESC	European Social Charter
EU	European Union
EuR	European Monetary Unit
EuZW	Europäische Zeitschrift für Wirtschaftsrecht / European Journal of Economic Law
GCIS	Government Communication and Information System
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OHCHR	Office of the High Commissioner for Human Rights
TDCA	Trade, Development and Cooperation Agreement
UN	United Nations
UNEP	United Nations Environment Programme
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht