Antônio Augusto Cançado Trindade and César Barros Leal
Coordinators

THE CHALLENGE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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PREFACE

In each edition of the Brazilian Interdisciplinary Course on Human Rights, organized in Fortaleza, Ceará, Brazil, by the Brazilian Institute of Human Rights (IBDH), the Inter-American Institute of Human Rights (IIDH), the Center for Studies and Training of the Attorney General's Office of the State of Ceará and the Farias Brito University Center, we have a huge challenge before us: to compose several books that are part of a collection of texts, distributed to teachers, students and observers from different countries, written in four different languages(Portuguese, Spanish, English and French) on the theme of the event.

It is not an easy task, which we have decided to face since the first Course and is justified by the enormous interest aroused by this academic activity in Brazil and abroad. Counting on a network of friends, spread throughout many countries, we seek to gather texts that deal with issues related to the central theme every two years, which the Challenge of Economic, Social and Cultural Rights in the 2019 edition.

The choice of this theme is a tribute to Soledad García Muñoz, a Spanish-Argentinean teacher, who was in charge of the IIHR Regional Office for South America in Montevideo from 2009 to 2017 and, in this position, participated in the organization of this Course for five years. In 2017, she was nominated Special Rapporteur on Economic, Social, Cultural and Environmental Rights (DESCA) of the Inter-American Commission on Human Rights (IACHR) for a tree-year term, renewable only once.

The subject was previously the theme of a two-volume publication commemorating the Fiftieth Anniversary of the UN Covenants on Human Rights (the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights) under the coordination of Antônio Augusto Cançado Trindade, César Barros Leal, and Renato Zerbini Ribeiro Leão. The fifteen articles, in Portuguese, Spanish, French and English, discussed the historical antecedents of the Covenants, their content, their importance and their transcendental reach, in the construction of a culture of respect for human rights, seen in their universality and interdependence.

The theme was previously the subject of a two-volume publication (2016) celebrating the Fiftieth Anniversary of the two Covenants. The text of the two Covenants was presented in four languages, and the collection was a historic milestone in the celebrations of the Fiftieth Anniversary. In the words of Virginia Brás Gomes, Member of the UN Committee on Economic, Social and Cultural Rights, in an article included in the second volume, she said: "Celebrating the 50th anniversary of the ICESCR means recognizing its validity and relevance in times of economic and social constraints, in which the realization of core obligations is an essential guarantee for those in need of state protection. It also means recognizing that the progressive realization of all rights offers opportunities to improve living conditions and thus becomes an effective antidote to violence and extremism that feed on the poverty, misery and despair of men and women who find no reason to believe in a better world for themselves and their children. It also means recognizing that what truly counts is equal rights, conditions and opportunities, so that everyone, without exception, can participate fully in the economic, social and cultural life of the societies in which they live. Finally, it means not lowering the arms in adverse conditions, so that legitimate aspirations can become true in lived reality."[1]

The books of this new collection are in addition to other publications offered by the mentioned course, namely: the Guidance for Participants, the seventh volume of the Series of Criminal Sciences and Human Rights Studies (in tribute to Antonio Sánchez Galindo, organized by César Barros Leal and Julieta Morales Sánchez), Antônio Augusto Cançado Trindade's book entitled Right to Reparation - Origin and Evolution in International Law, and number 19 of the Journal of the Brazilian Institute of Human Rights. This precious collection, by the way, can be found on the IBDH websites and the Journal's portal, and you can download any edited text.

We are confident that, by conducting the Interdisciplinary Courses (undoubtedly one of the most important human rights

1. GOMES, Virgínia Brás, "Pacto Internacional dos Direitos Econômicos, Sociais e Culturais: 50º Aniversário entre Aspirações e Realidade, in TRINDADE, Antônio Augusto Cançado, BARROS LEAL, César e LEÃO, Renato Zerbini Ribeiro, *O Cinquentenário dos dois Pactos de Direitos da ONU*, vol. 2, V Curso Brasileiro Interdisciplinar em Direitos Humanos, Expressão Gráfica, Fortaleza, 2016, pp. 125-126.

events in South America), we are contributing to the sedimentation of a vigorous culture of human rights in our continent, either in the sphere of civil and political rights, or in the sphere of economic, social and cultural rights, the latter object of our priority attention in this VII Course, in which we seek to emphasize the need for positive actions of the State (with the use of resources, investments, in different degrees), in the context of public policies, which sometimes makes its implementation complex (or unfeasible), but it should never encourage negative ideas that oppose their enforceability and justiciability.

In this regard, it is convenient to recall the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), reproduced in the annexes (Article I: The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol), as well as the Limburg Principles (drafted by a group of experts in the field of international law convened by the International Commission of Jurists, the University of Limburg Law Faculty (Maastricht , The Netherlands) and the Urban Morgan Institute of Human Rights, University of Cincinnati (Ohio, USA),who met in Masstricht from June 2 to 6, 1986, "for the purpose of considering the nature and scope of the obligations of States Parties under the International Covenant on Economic, Social and Cultural Rights" , which reads as follows: (8) Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time. And more: (21) The obligation "to achieve progressively the full realization of rights" requires States Parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying that States have the right to postpone efforts indefinitely to ensure full effectiveness.

In conclusion, it should be pointed out that economic, social and cultural rights are also required as indispensable instruments for the full observance of the principle of dignity (object of study by the IV Brazilian Interdisciplinary Course on Human Rights, in the year 2015), inseparable from the perception of quality of life, well-being (physical and mental) and access to justice, including social justice.

Antônio Augusto Cançado Trindade

César Barros Leal

REFLECTIONS ON THE PRINCIPLE OF HUMANITY IN ITS WIDE DIMENSION

Antônio Augusto Cançado Trindade

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I. INTRODUCTION

1. In the brief reflections that follow, the principle of humanity will be addressed in its wide dimension, encompassing the whole *corpus juris* of international protection of the human person, in any circumstances, and particularly in those of great adversity. The principle of humanity, in line with the longstanding thinking of natural law, will then be considered as an emanation of human conscience, projecting itself into conventional as well as customary international law. Attention will then be turned to its presence in the framework of the Law of the United Nations, as well as to its judicial recognition in the case-law of contemporary international tribunals. The way will thus be paved for the presentation of my concluding observations on the matter.

II. THE PRINCIPLE OF HUMANITY: ITS WIDE DIMENSION

2. When one evokes the principle of humanity, there is a tendency to consider it in the framework of International Humanitarian Law. It is beyond doubt that, in this framework, for example, civilians and persons *hors de combat* are to be treated with humanity. The principle of humane treatment of civilians and persons *hors de combat* is provided for in the 1949 Geneva Conventions on International Humanitarian Law (common Article 3, and Articles 12(1)/12(1)/13/5 and 27(1)), and their Additional Protocols I (Article 75(1)) and II (Article 4(1)). Such principle, moreover, is generally regarded as one of customary International Humanitarian Law.

3. My own understanding is in the sense that the principle of humanity in endowed with an even wider dimension[1]: it applies in the most distinct circumstances, in times both of armed conflict and of peace, in the relations between public power and all persons subject to the jurisdiction of the State concerned. That principle has a notorious incidence when these latter are in a situation of vulnerability or great adversity, or even *defencelessness*, as evidenced by relevant provisions of distinct treaties integrating the International Law of Human Rights.

4. Thus, for example, at U.N. level, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides, *inter alia*, in its Article 17(1), that "[m]igrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity". Likewise, the 1989 U.N. Convention on the Rights of the Child stipulates that "States Parties shall ensure that [e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.(…)" (Article 37(b)). Provisions of the kind can also be found in human rights treaties at regional level.

5. To recall but a couple of examples, the 1969 American Convention on Human Rights, in providing for the right to humane treatment (Article 5), determines *inter alia* that "[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person" (para. 2). Likewise, the 1981 African Charter on Human and Peoples´ Rights disposes *inter alia* that "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status" (Article 5). And the 1969 Convention on the Specific Aspects of Refugee Problems in Africa sets forth, *inter alia*, that "[t]he grant of asylum to

1. This is the position I upheld in my lengthy Separate Opinion in the recent decision of the International Court of Justice in the case *A.S. Diallo* (merits, Guinea vs. D.R. Congo, Judgment of 30.11.2010). I devoted part V of my Separate Opinion specifically to the principle of humanity in its wide dimension (paras. 93-106), and further considerations related thereto permeated part VI of my Separate Opinion, on the prohibition of *arbitrariness* in the International Law of Human Rights (paras. 107-142).

refugees is a peaceful and humanitarian act (…)" (Article II(2)). And the examples to the same effect multiply.

III. THE PRINCIPLE OF HUMANITY IN THE WHOLE *CORPUS JURIS* OF INTERNATIONAL PROTECTION OF THE HUMAN PERSON

6. The treatment dispensed to human beings, in any circumstances, ought to abide by the *principle of humanity*, which permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), conventional as well as customary, at global (U.N.) and regional levels. The principle of humanity, in effect, underlies the two *general comments*, n. 9 (of 1982, para. 3) and n. 21 (of 1992, para. 4) of the U.N. Human Rights Committee, on Article 10 of the U.N. Covenant on Civil and Political Rights (humane treatment of persons deprived of their liberty)[2]. The principle of humanity, usually invoked in the domain of International Humanitarian Law, thus extends itself also to that of International Human Rights Law. And, as the Human Rights Committee rightly stated in its *general comment* n. 31 (of 2004), "both spheres of Law are complementary, not mutually exclusive" (para. 11).

7. International law is not at all insensitive to the pressing need of humane treatment of persons, and the principle at issue applies in any circumstances, so as to prohibit inhuman treatment, by reference to humanity as a whole, in order to secure protection to all, including those in a situation of great vulnerability (paras. 17-20). *Humaneness* is to condition human behaviour in all circumstances, in times of peace as well as of disturbances and armed conflict. The principle of humanity permeates the whole *corpus juris* of

2. In respect of the recent case *A.S. Diallo* (Guinea *versus* D.R. Congo), resolved by the ICJ, I saw it fit to point out, in my Separate Opinion, *inter alia*, that the principle of humanity underlies, e.g., Article 7 of the U.N. Covenant on Civil and Political Rights, which protects the individual´s personal integrity, against mistreatment, as well as Article 10 of the Covenant (concerning persons under detention), which begins by stating that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (para. 1). This comprises not only the negative obligation not to mistreat (Article 7), but also the positive obligation to ensure that a detainee, under the custody of the State, is treated with humanity and due respect for his inherent dignity as a human person (para. 98).

protection of the human person, providing one of the illustrations of the approximations or convergences between its distinct and complementary branches (International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), at the hermeneutic level, and also manifested at the normative and the operational levels[3].

8. In faithfulness to my own conception, I have, in recent decisions of the International Court of Justice (and, earlier on, of the Inter-American Court of Human Rights as well), deemed it fit to develop some reflections on the basis of the principle of humanity *lato sensu*. I have lately done so, e.g., in my Dissenting Opinion[4] in the case of the *Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Request for Provisional Measures, Order of 28.05.2009), and in my Dissenting Opinion[5] in the case of *Jurisdictional Immunities of the State* (Counter-Claim, Germany *versus* Italy, Order of 06.07.2010), as well as in my Separate Opinion in the Court´s Advisory Opinion on *Accordance with International Law of the Declaration of Independence of Kosovo* (of 22.07.2010)[6].

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3. Cf., on this particular point, e.g., A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66.

4. Paragraphs 24-25 and 61.

5. Paragraphs 116, 118, 125, 136-139 and 179. In this lengthy Dissenting Opinion, my reflections relating to the principle of humanity are found particularly in its part XII, on human beings as the true bearers (*titulaires*) of the originally violated rights and the pitfalls of State voluntarism (paras.112-123), as well as in its part XIII, on the incidence of *jus cogens* (paras. 126-146), besides the Conclusions (mainly paras. 178-179).

6. In the Court´s recent Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (of 22.07.2010), I devoted one entire section (XIII (4)) of my lengthy Separate Opinion expressly to the "fundamental principle of humanity" (paras. 196-211) in the framework of the law of nations itself. I saw it fit to recall that the "founding fathers" of international law (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) propounded a *jus gentium* inspired by the principle of humanity *lato sensu* (paras. 73-74). My aforementioned Separate Opinion is permeated with my personal reflections on basic considerations of humanity in the treatment of peoples under the law of nations (paras. 67-74); part VI is centred on the contemporaneity of the `*droit des gens*´, with particular attention to the humanist vision of the international legal order (paras. 75-96); part XII is focused on the people-centered outlook in contemporary International Law (paras. 169-176), part XIV on a comprehensive conception of the incidence of *jus cogens* (paras. 212-217); and part XIII, on principles of international law, the Law of the United Nations and the humane ends of the State (paras. 177-

IV. THE PRINCIPLE OF HUMANITY IN THE HERITAGE OF NATURAL LAW THINKING

9. It should not pass unnoticed that the principle of humanity is in line with natural law thinking. It underlies classic thinking on humane treatment and the maintenance of sociable relationships, also at international level. Humaneness came to the fore even more forcefully in the treatment of persons in situation of vulnerability, or even defencelessness, such as those deprived of their personal freedom, for whatever reason. The *jus gentium*, when it began to correspond to the law of nations, came then to be conceived by its "founding fathers" (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming the *necessary* law of the *societas gentium*. This latter prevailed over the will of individual States, respectful of the human person, to the benefit of the common good[7].

10. The precious legacy of natural law thinking, evoking the natural law of the right human reason (*recta ratio*), has never faded away, and this should be stressed time and time again, particularly in face of the indifference and pragmatism of the "strategic" *droit d´étatistes*, so numerous in the legal profession in our days. In so far as the International Law of Human Rights is concerned, it may further be recalled that, in the aftermath of the II World War, the 1948 Universal Declaration of Human Rights proclaimed that "[a]ll human beings are born free and equal in dignity and rights" (Article 1). The fundamental principle of equality and non-discrimination, according to the Advisory Opinion n. 18 of the Inter-American Court of Human Rights [IACtHR] on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), belongs to the domain of *jus cogens*.

11. In that transcendental Advisory Opinion of 2003, the IACtHR, in line with the humanist teachings of the "founding fathers" of the *droit des gens* (*jus gentium*), pointed out that, under that fundamental principle, the element of equality can hardly be

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211), wherein I address specifically the fundamental principle of humanity, in the framework of the Law of the United Nations (paras. 196-211 - and cf. *infra*).

7. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 9-14, 172, 318-319, 393 and 408.

separated from non-discrimination, and equality is to be guaranteed without discrimination of any kind. This is closely linked to the essential dignity of the human person, ensuing from the unity of the human kind. The basic principle of equality before the law and non-discrimination permeates the whole operation of the State power, having nowadays entered the domain of *jus cogens*[8].

V. PRINCIPLES OF HUMANITY AND THE DICTATES OF PUBLIC CONSCIENCE: THE MARTENS CLAUSE

12. In so far as International Humanitarian Law is concerned, one may recall that, as early as 1907, the IV Hague Convention contained, in its preamble, the *célèbre Martens clause*, whereby in cases not included in the adopted Regulations annexed to it, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the principles of humanity, and the dictates of the public conscience" (para. 8). The *Martens clause*, inserted into the preamble of the IV Hague Convention of 1907, - and, even before that, also in the preamble of the II Hague Convention of 1899 (para. 9)[9], both Conventions pertaining to the laws and customs of land warfare, - invoked the "principles of the law of nations" derived from "established" custom, as well as the "principles of humanity" and the "dictates of the public conscience".

13. Subsequently, the Martens clause was again to appear in the common provision, concerning denunciation, of the four Geneva Conventions

8. IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, Series A, n. 18, paras. 83, 97-99 and 100-101. In my Concurring Opinion, I stressed that the fundamental principle of equality and non-discrimination permeates the whole *corpus juris* of the International Law of Human Rights, has an impact in Public International Law, and projects itself onto general or customary international law itself, and integrates nowadays the expanding material content of *jus cogens* (paras. 59-64 and 65-73). - In recent years, the IACtHR, together with the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, have been the contemporary international tribunals which have most contributed, in their case-law, to the conceptual evolution of *jus cogens* (well beyond the law of treaties), and to the gradual expansion of its material content; cf. A.A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law", *in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* – OAS (2008) pp. 3-29.

9. It was originally presented by the Delegate of Russia (Friedrich von Martens) to the I Hague Peace Conference (of 1899).

of International Humanitarian Law of 1949 (Article 63/62/142/158), as well as in the Additional Protocol I (of 1977) to those Conventions (Article 1(2)), - to refer to a couple of the main Conventions of International Humanitarian Law[10]. The fact that, throughout more than a century, the draftsmen of the Conventions of 1899, 1907 and 1949 and of Protocol I of 1977 have repeatedly asserted the elements of the Martens clause in those international instruments reckons that clause as an emanation of human conscience as the ultimate material source of International Humanitarian Law and of International Law in general.

14. In this way, it exerts a continuous influence in the spontaneous formation of the contents of new rules of International Humanitarian Law. By intertwining the principles of humanity and the dictates of public conscience, the Martens clause establishes an "organic interdependence" of the legality of protection with its legitimacy, to the benefit of all human beings[11]. The legacy of Martens is also related to the primacy of Law in the settlement of disputes and in the search for peace.

15. Contemporary juridical doctrine has also characterized the Martens clause as source of general international law itself[12]; and no one would dare today to deny that the "principles of humanity" and the "dictates

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10. The Martens clause has thus been endowed, along more than a century, with continuing validity, in its invocation of public conscience, and it keeps on warning against the assumption that whatever is not expressly prohibited by the Conventions on International Humanitarian Law would be allowed; quite on the contrary, the Martens clause sustains the continued applicability of the principles of the law of nations, the principles of humanity, and the dictates of the public conscience, independently of the emergence of new situations. The Martens clause impedes, thus, the *non liquet*, and exerts an important role in the hermeneutics and the application of humanitarian norms.

11. C. Swinarski, "Préface", *in* V.V. Pustogarov, *Fedor Fedorovitch Martens - Jurist i Diplomat*, Moscow, Ed. Mezdunarodinye Otnoscheniya, 1999, p. XI. And cf. also, e.g., B. Zimmermann, "Protocol I - Article 1", *in Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* (eds. Y. Sandoz, Ch. Swinarski and B. Zimmermann), Geneva, ICRC/Nijhoff, 1987, p. 39; H. Meyrowitz, "Réflexions sur le fondement du droit de la guerre", *in Études et essais sur le Droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (ed. Ch. Swinarski), Genève/La Haye, CICR/Nijhoff, 1984, pp. 423-424; and cf. H. Strebel, "Martens' Clause", *in Encyclopedia of Public International Law* (ed. R. Bernhardt), vol. 3, Amsterdam, North-Holland Publ. Co., 1982, pp. 252-253.

12. F. Münch, "Le rôle du droit spontané", *in Pensamiento Jurídico y Sociedad Internacional - Libro-Homenaje al Prof. D. A. Truyol y Serra*, vol. II, Madrid, Univ. Complutense, 1986, p. 836.

of the public conscience" invoked by the Martens clause belong to the domain of *jus cogens*[13]. The aforementioned clause, as a whole, has been conceived and reiteratedly affirmed, ultimately, to the benefit of humankind as a whole, thus maintaining its topicality. The clause may be considered as an expression of the *raison d'humanité* imposing limits on the *raison d'État*.[14]

VI. THE FUNDAMENTAL PRINCIPLE OF HUMANITY IN THE FRAMEWORK OF THE LAW OF THE UNITED NATIONS

16. In my lengthy Separate Opinion in the recent Advisory Opinion of the ICJ on the *Accordance with International Law of the Declaration of Independence of Kosovo* (of 22.07.2010), I dwelt, *inter alia*, upon the fundamental principle of humanity, in the framework of the law of international organizations, and in particular of the Law of the United Nations (paras. 196-211). I recalled therein that the experiments of international organizations of *mandates*, *minorities* protection, *trust* territories, and, nowadays, *international administration* of territory, have not only turned closer attention to the "people" or the "population" concerned, to the fulfillment of the needs, and the empowerment, of the inhabitants, but have also fostered - each one in its own way – their access to justice at international level (para. 90).

17. Such access to justice is understood *lato sensu*, i.e., as encompassing the *realization of justice*. Those experiments of international organizations (rendered possible by the contemporary expansion of the international legal personality, no longer a monopoly of States) have contributed to the vindication by individuals of their own rights, emanated directly from the *droit des gens*, from the law of nations itself (para. 196). In my perception, this is one of the basic features of the new *jus gentium* of our times. After all, every human being is an end in himself or herself, and, individually or collectively, is entitled to enjoy freedom of belief and "freedom from fear and

13. S. Miyazaki, "The Martens Clause and International Humanitarian Law", *in Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de J. Pictet* (ed. C. Swinarski), Geneva/The Hague, CICR/ Nijhoff, 1984, pp. 438 and 440.

14. A.A. Cançado Trindade, *International Law for Humankind – Towards a New Jus Gentium*, Leiden, Nijhoff, 2010, pp. 150-152 and 275-285.

want", as proclaimed in the preamble of the Universal Declaration of Human Rights (para. 2).

18. Every human person has the right to respect for his or her dignity, as part of the human kind[15]. The recognition of this fundamental *principle of humanity* – I added in my aforementioned Separate Opinion - is one of the great and irreversible achievements of the *jus gentium* of our times (para. 197). At the end of this first decade of the XXIst century, the time has come to derive the consequences of the manifest non-compliance with this fundamental principle of humanity[16]. States, created by human beings gathered in their social *milieu*, are bound to protect, and not at all to oppress, all those who are under their respective jurisdictions (para. 199).

19. This corresponds to the minimum ethical, universally reckoned by the international community of our times. States are bound to safeguard the integrity of the human person from repression and systematic violence, from discriminatory and arbitrary treatment. The conception of fundamental and inalienable human rights is deeply-engraved in the universal juridical conscience; in spite of variations in their enunciation or formulation, their conception marks presence in all cultures, and in the history of human thinking of all peoples[17].

20. It should be kept in mind that the acknowledgement of the principle of respect for human dignity was introduced by the 1948 Universal Declaration, and is at the core of its basic outlook. It firmly asserts: - "All human beings are born free and equal in dignity and rights" (Article 1). And it recalls that "disregard and contempt for

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15. B. Maurer, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme*, Paris, CERIC/Univ. d'Aix-Marseille, 1999, p. 18.

16. I further added that: "Rights inherent to the human person are endowed with universality (the unity of the human kind) and timelessness, in the sense that, rather than being "conceded" by the public power, they truly precede the formation of the society and of the State. Those rights are independent of any forms of socio-political organization, including the State created by society. The rights inherent to the human person precede, and are superior to, the State. All human beings are to enjoy the rights inherent to them, for belonging to humankind. As a corollary of this, the safeguarding of such rights is not exhausted – it cannot be exhausted – in the action of States. By the same token, States are not to avail themselves of their entitlement to territorial integrity to violate systematically the personal integrity of human beings subject to their respective jurisdictions" (para. 198).

17. Cf., e.g., [Various Authors,] *Universality of Human Rights in a Pluralistic World* (Proceedings of the 1989 Strasbourg Colloquy), Strasbourg/Kehl, N.P. Engel Verlag, 1990, pp. 45, 57, 103, 138, 143 and 155.

human rights have resulted in barbarous acts which have outraged the conscience of mankind" (preamble, para. 2). The Universal Declaration warns that "it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (preamble, para. 3). And it further acknowledges that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (preamble, para. 1).

21. Since the adoption of the Universal Declaration in 1948, one could hardly anticipate that a historical process of generalization of the international protection of human rights was being launched, on a truly universal scale[18]. Throughout more than six decades, of remarkable historical projection, the Declaration has gradually acquired an authority which its draftsmen could not have foreseen. This happened mainly because successive generations of human beings, from distinct cultures and all over the world, recognized in it a "common standard of achievement" (as originally proclaimed), which corresponded to their deepest and most legitimate aspirations.

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18. Already throughout the *travaux préparatoires* of the Universal Declaration (particularly in the thirteen months between May 1947 and June 1948), the holistic view of all rights to be proclaimed promptly prevailed. Such outlook was espoused in the official preparatory work of the Declaration, i.e., the debates and drafting in the former U.N. Commission on Human Rights (*rapporteur*, René Cassin) and subsequently in the Third Committee of the General Assembly. In addition, in 1947, in a contribution to the work then in course in the U.N. Commission on Human Rights, UNESCO undertook an examination of the main theoretical problems raised by the elaboration of the Universal Declaration; it circulated, to some of the most influential thinkers of the time around the world, a questionnaire on the relations between rights of individuals and groups in societies of different kinds and in distinct historical circumstances, as well as the relations between individual freedoms and social or collective responsibilities. For the answers provided, cf. *Los Derechos del Hombre - Estudios y Comentarios en torno a la Nueva Declaración Universal Reunidos por la UNESCO*, Mexico/Buenos Aires, Fondo de Cultura Económica, 1949, pp. 97-98 (Teilhard de Chardin), 181-185 (Aldous Huxley), 14-22 and 69-74 (Jacques Maritain), 24-27 (E.H. Carr), 129-136 (Quincy Wright), 160-164 (Levi Carneiro), 90-96 (J. Haesaert), 75-87 (H. Laski), 143-159 (B. Tchechko), 169-172 (Chung-Shu Lo), 23 (M.K. Gandhi), 177-180 (S.V. Puntambekar), and 173-176 (H. Kabir). The two U.N. World Conferences on Human Rights (Teheran, 1968; and Vienna, 1993) have given concrete expression to the interdependence of all human rights and to their universality, enriched by cultural diversity.

VII. THE FUNDAMENTAL PRINCIPLE OF HUMANITY IN THE CASE-LAW OF CONTEMPORARY INTERNATIONAL TRIBUNALS

22. Last but not least, the fundamental principle of humanity has been asserted also in the case-law of contemporary international tribunals. It has met with full judicial recognition[19]. May I recall, on the basis of my own experience, the *jurisprudence constante* of the Inter-American Court of Human Rights [IACtHR] in this respect, which has properly warned - during the period I had the honour to preside the IACtHR - that the principle of humanity, inspiring the right to humane treatment (Article 5 of the American Convention on Human Rights), applies even more forcefully when a person is unlawfully detained, and kept in an "*exacerbated situation of vulnerability*"[20].

23. In my Separate Opinion in the Judgment of the IACtHR in the case of the *Massacre of Plan de Sánchez* (of 29.04.2004), concerning Guatemala, I devoted a whole section (III, paras. 9-23) of it to the judicial acknowledgement of the principle of humanity in the recent case-law of that Court as well as of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia. Furthermore, I expressed therein my understanding that the principle of humanity, orienting the way one treats the others (*el trato humano*), "encompasses all forms of human behaviour and the totality of the condition of the vulnerable human existence" (para. 9).

24. In the case of the *Massacre of Plan de Sánchez* (Judgment of 29.04.2004), at a certain stage of the proceedings before the IACtHR, the respondent State accepted its international responsibility for violations of rights guaranteed under the American Convention on Human Rights, and, in particular, for "not guaranteeing the right of the relatives of the (...) victims and members of the community to express their religious, spiritual and cultural beliefs" (para. 36). In my Separate Opinion in that case, I pondered that the primacy of the principle of humanity is identified with the very end or ultimate goal

19. Cf. A.A. Cançado Trindade, "Le déracinement et la protection des migrants dans le droit international des droits de l´homme", 19 *Revue trimestrielle des droits de l´homme* - Bruxelles (2008) pp. 289-328, esp. pp. 295 and 308-316.

20. Inter-American Court of Human Rights [IACtHR], Judgments in the cases of *Maritza Urrutia vs. Guatemala*, of 27.11.2003, para. 87; of *Juan Humberto Sánchez vs. Honduras*, of 07.06.2003, para. 96; *Cantoral Benavides vs. Peru*, of 18.08.2000, para. 90; and cf. *Bámaca Velásquez vs. Guatemala*, of 25.11.2000, para. 150.

of the Law, of the whole legal order, both domestic and international, in recognizing the inalienability of all rights inherent to the human person (para. 17).

25. That principle marks presence - I added - not only in the International Law of Human Rights, but also in International Humanitarian Law, being applied in all circumstances. Whether it is regarded as underlying the prohibition of inhuman treatment (established by Article 3 common to the four Geneva Conventions on International Humanitarian Law of 1949), or else as by reference to humankind as a whole, or still to qualify a given quality of human behaviour (*humaneness*), the principle of humanity is always and ineluctably present (paras. 18-20). The same principle of humanity, - I concluded in the aforementioned Separate Opinion in the case of the *Massacre of Plan de Sánchez*, - also has incidence in the domain of International Refugee Law, as disclosed by the facts of the *cas d´espèce*, involving massacres and the State-policy of *tierra arrasada*, i.e., the destruction and burning of homes, which generated a massive forced displacement of persons (para. 23).

26. Cruelties of the kind unfortunately occur in different latitudes, and in distinct regions of the world, - human nature being what it is. The point to be here made - may I insist upon it - is that the principle of humanity operates, in my view, in a way to foster the convergences among the three trends of the international protection of the rights inherent to the human person (International Law of Human Rights, International Humanitarian Law and International Refugee Law - cf. *supra*).

27. Likewise, the *ad hoc* International Criminal Tribunal for the Former Yugoslavia [ICTFY] likewise devoted attention to the principle of humanity in its Judgments in, e.g., the cases of *Mucic et alii* (2001) and of *Celebici* (1998). The ICTFY (Appeals Chamber), in the *Mucic et allii* case (Judgment of 20.02.2001), pondered that both International Humanitarian Law and the International Law of Human Rights take as a "starting point" their common concern to safeguard human dignity, which forms the basis of their minimum standards of humanity[21]. In fact, the principle of humanity can be understood in distinct ways. Firstly, it can be conceived as a principle underlying the prohibition of inhuman treatment, established by Article 3 common to the four Geneva Conventions of 1949. Secondly, the principle referred

21. Paragraph 149 of that Judgment.

to can be invoked by reference to humankind as a whole, in relation to matters of common, general and direct interest to it. And thirdly, the same principle can be employed to qualify a given quality of human behaviour (humaneness).

28. Earlier on, in the *Celebici* case (Judgment of 16.11.1998), the ICTFY (Trial Chamber) qualified as *inhuman treatment* an intentional or deliberate act or omission which causes serious suffering (or mental or physical damage), or constitutes a serious attack on human dignity; thus, - the Tribunal added, - "inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed `grave breaches´ in the Conventions fall"[22].

Subsequently, in the *T. Blaskic* case (Judgment of 03.03.2000), the same Tribunal (Trial Chamber) reiterated this position[23].

29. For its part, the *ad hoc* International Criminal Tribunal for Rwanda [ICTR] rightly pondered, in the case of *J.-P. Akayesu* (Judgment of 02.09.1998), that the concept of crimes against humanity had already been recognized well before the Nuremberg Tribunal itself (1945-1946). The Martens clause contributed to that effect (cf. sup*ra*); in fact, expressions similar to that of those crimes, invoking victimized humanity, appeared much earlier in human history[24]. The same ICTR pointed out, in the case *J. Kambanda* (Judgment of 04.09.1998), that in all periods of human history genocide has inflicted great losses to humankind, the victims being not only the persons slaughtered but humanity itself (in acts of genocide as well as in crimes against humanity)[25].

VIII. CONCLUDING OBSERVATIONS

30. Contemporary (conventional and general) international law has been characterized to a large extent by the emergence and evolution of its peremptory norms (the *jus cogens*), and a greater consciousness, in a virtually universal scale, of the principle of humanity. Grave violations of human rights, acts of genocide, crimes against humanity, among

22. Paragraph 543 of that Judgment.
23. Paragraph 154 of that Judgment.
24. Paragraphs 565-566 of that Judgment.
25. Paragraphs 15-16 of that Judgment. An equal reasoning is found in the Judgments of the same Tribunal in the aforementioned case *J.P. Akayesu*, as well as in the case *O. Serushago* (Judgment of 05.02.1999, par. 15).

other atrocities, are in breach of absolute prohibitions of *jus cogens*. The feeling of *humaneness* - proper of a new *jus gentium*, of the XXIst century, - comes to permeate the whole *corpus juris* of contemporary International Law. I have called this development, - *inter alia* in my Concurring Opinion in the Advisory Opinion n. 16 (of 01.10.1999), of the IACtHR, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, - a historical process of a true *humanization* of International Law[26].

31. The prevalence of the principle of respect for the dignity of the human person is identified with the ultimate aim itself of Law, of the legal order, both national and international. By virtue of this fundamental principle, every person ought to be respected (in her honour and in her beliefs) by the simple fact of belonging to humankind, irrespective of any circumstance. The principle of the inalienability of the rights inherent to the human being, in its turn, is identified with a basic assumption of the construction of the whole *corpus juris* of the International Law of Human Rights.

32. In its application in any circumstances (in times both of armed conflict and of peace), in the relations between public power and human beings subject to the jurisdiction of the State concerned, the principle of humanity permeates the whole *corpus juris* of the international protection of the rights of the human person (encompassing International Humanitarian Law, the International Law of Human Rights, and International Refugee Law), conventional as well as customary. The principle, emanating from human conscience, in the line of natural law thinking, has further projected itself into the law of international organizations (and in particular into the Law of the United Nations), and has met with judicial recognition on the part of contemporary international tribunals. It has given expression to the *raison d'humanité*, imposing limits on the *raison d'État*.

26. Paragraph 35 of the Concurring Opinion.

THE SOCIAL RIGHTS IN PRISON. THEIR PRECARIOUSNESS. THE MESSAGE OF INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS

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1. INTRODUCTION

I confess to you that, while beginning to write this article, I thought of doing a review of human rights, from their first steps until now, also showing the differences between civil and political rights and economic, social and cultural rights. It would be an opportunity to reaffirm the need to show respect to a universal, pluralist and integral vision of these human rights that are inherent to our condition of human being, precede the State itself, and are even superior to it. Only after this introduction, I would project an image of the prison universe, seen in a normative and factual framework, and then establish the relationship between overpopulation and human rights, focusing on the second one. But this is not the way I elected to tread.

Notoriously, there are many violations of human rights in these outrageous spaces where medieval dungeons are rescued, because, under the indifferent and complicit glance of society, the State promotes a systematic disrespect for rights, mainly those that are not affected by law or the sentence, like the right to work, education and medical care (the incidence of respiratory, dermatological, venereal, gastric, and urological infections is common, among many others), a practice that has increased with the progression of organized crime.

2. THE RIGHTS OF PRISONERS

In a gradual and historical conquest, prisoners have acquired rights (correspondingly to their duties), which conformed their legal status. This has not been easy for them, and those rights continue to be ignored daily, with a greater or lesser degree, despite their legal construction.

In the great majority of facilities, prisoners experience situations that deny the ideals of humanity of those who created safeguards, reproduced in dozens of national and international documents.

In a sense, they, the prisoners, live outside the regulations, as if seeking to legitimize the illegitimate, trying to design a project that for many would be embodied only in the dream world of its defenders.

Many people inquire about the usefulness of those instruments, seen as programmatic declarations, on account of the distance that separates them from the reality of prisons. The answer is: they are necessary, essential, since they point, first of all, to the dignity of whom is serving a sentence or is awaiting trial and, for this reason, cannot be denied the status of human being and not respected for their physical, psychological and moral integrity. How can we stop pursuing those goals? They are guides, and as such, it depends on us to preserve them.

Professor at the Center for Prison Studies at the University of London and former Director of Brixton Prison from 1991 to 1997, Andrew Cole warns: "The issue of human rights and prisoners has an emotive burden. Why someone who has been charged or convicted of an offense is entitled to enjoy fundamental rights? The explanation is that it is relatively easy for humans to show respect and humanity to those who deserve that respect or show it to others. But what differentiates us as human beings is our ability to distinguish between who a person is and what he/she does; consequently, the acknowledgment that it is necessary to show respect and humanity even to those people whom we feel they do not deserve them.[1]

The Spanish Constitution provides that a person who is sentenced to prison shall enjoy his/her fundamental rights, except

1. COYLE, Andrew, "La Sobrepoblación en las Prisiones. La Prisión y la Comunidad", in CARRANZA, Elías (coordenador), *Justicia Penal y Sobrepoblación Penitenciaria: Respuestas Posibles*, Naciones Unidas/Ilanud y Siglo Veintiuno, San José, Costa Rica, 2001., p. 119.

those expressly limited by the content of the conviction, the sense of the penalty and the penitentiary law. The introduction of the General Organic Penitentiary Law of Spain reads that "that the offender retains all the rights recognized to the citizens by the norms in force, except those whose deprivation or limitation correspond precisely to the content of the sentence."

The Constitutional Chamber of Costa Rica, in turn, proclaims that those deprived of their liberty: enjoy all the rights and guarantees contained in the Constitution, with the exception of those that are incompatible with their state. In other words, although the loss of freedom is the main consequence of the sentence imposed, they still retain the rights inherent to their status as human beings; for this reason, the Penitentiary Administration has the duty to respect and guarantee those rights, an objective that can only be effective if the necessary conditions are established so that their enjoyment is adapted to the state of their imprisonment.[2]

3. THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF PRISONERS

The idea that economic, social, and cultural rights would not be enforceable has, over the years, been dismissed by numerous authors, who point out with emphasis that they must be observed and recognised as fundamental rights, applicable and mandatory. And that reaches everyone, no matter their condition of imprisoned or not.

In the introduction to the Program of the XXI International Congress on the History of Human Rights of the University of Salamanca - The Second Generation of Human Rights, from July 12 to 14, 2018, at the Law School and at the *Colegio Maior Archbishop Fonseca* (in which I delivered a lecture on the theme of this article), its organizers stated:

> In 1948, the Universal Declaration of Human Rights included a broad list of first-generation individual rights (civil and political), to which it added, after many debates and negotiations, also individual rights, conventionally qualified as *second generation* (economic, social and cultural), often referred as *social rights*, which are mainly those contained

2. MORA, Luis Paulino Mora, "Sobrepoblación Penitenciaria y Derechos Humanos: La Experiencia Constitucional", in CARRANZA, Elías (coordenador), op. cit.,p. 70.

in the block of articles 22 to 27 of the UDHR, among which the right of everyone to education, to work and rest, to a fair and non-discriminatory salary, to union membership, to an adequate standard of living which would ensure to them as well as to their family, health, well-being and, in particular, food, clothing, housing, medical care, social services, social security, and protection against unemployment, sickness, invalidity, widowhood, old-age insurance and other cases of "loss of subsistence by circumstances independent of their will." To them, are added the rights of every person (whether mother or child) to the special protection of motherhood and childhood (in anticipation of article 16, the right of the family to protection), as well as the right to enjoy culture and arts and to intellectual and moral property of their literary or artistic scientific production. The distinction between *second generation right*s, which we have just briefly referred to, and the so-called *first-generation rights*, has given rise to numerous debates. Today, the presupposition, which facilitates its definition, is questioned, or rather emphasized, that the former would by nature be *negative*, in the sense that they would require no more than inhibition or respect of the State to them, whereas *Second Generation Rights* or *Social Rights* would be *positive*, that is, would require the *positive* action of the State or organized international society, in the form of *public policies*, national or international, with the potential help, in this case, of civil society.

In 1948, *civil and political rights* and *social, cultural and economic rights* were united in a single text and applied to all of them for the assurance of their implementation, "by progressive measures of national and international character," which indicated their non-binding character, but maintained their cohesion. The United Nations decided to give rights merely *declared* legal, force and initially equal value. To this end, it instructed the Commission on Human Rights to draw up an International Agreement with which such principles could obtain legal recognition from the States members of the United Nations, and to that end, by means of a resolution adopted by the UN Assembly on December 4,ordered the formulation of a single draft of an International Covenant on Human Rights, specifying the precise measures for its application and emphasizing the indivisibility and interdependence of rights collected in it; this indivisibility has been theoretically maintained until today, and was reiterated in 1968 in the

Tehran Proclamation, and in 1993, in the Vienna Declaration and Program of Action: Despite such good intentions, strategic pragmatism finally brought about the division of Human Rights in two Covenants, adopting in 1966, in one hand, an immediate binding one, the International Covenant on Civil and Political Rights, and on the other hand, a less demanding one, the International Covenant on Economic, Social and Cultural Rights, which was followed by several Agreements on specific rights.

The truth is that human, civil and political rights, as well as economic, social and cultural rights, are universal, indivisible, interdependent and interrelated. Regardless of the conditions of those who hold them (after all, all men are born free and equal in dignity and rights), they must be protected, respected and guaranteed, without any kind of discrimination.

Among the latter, I will mention only those related to health (physical and mental), work and education, either because of the precarious nature of their access in prison or because of the unanimous recognition of their importance.

Making a comparative analysis, I will quote only four international instruments (there are dozens, with identical or very similar texts; it would not make sense to report to all of them), the Additional Protocol to San Salvador; the International Covenant on Economic, Social and Cultural Rights, with its rules applicable when and where possible to prisoners; the Principles and Good Practices on the Protection of Persons Deprived of Liberty in the Americas, and the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Mandela Rules, with their specific standards for those imprisoned, under different conditions.

For Antônio Augusto Cançado Trindade, Jugde of the International Court of Justice, the adoption in 1988 of the Protocol of San Salvador finally filled the historical gap that persisted in the inter-American system regarding the protection of those rights. It should be noted, however, that the Inter-American Commission on Human Rights, in its 1978 *Report on El Salvador*, took into account the situation of certain economic, social and cultural rights, based on the relevant provisions of the 1948 American Declaration. In the same sense, the following year, in its *Report on Haiti*, it took into account the rights to education, health and labor. Significantly, in its *1979-1980 Annual Report*, the Inter-American Commission

noted the 'organic relationship' between civil and political rights and economic, social and cultural rights. In its *1985-1986 Annual Report*, the Commission noted that the future Protocol to the American Convention on Economic, Social and Cultural Rights should take as its starting point 'the fundamental core constituted by rights to work, health and education' and 'other related rights' should be added or linked to them, taking into account their 'practical implementation'."[3]

4. HEALTH CARE

Among the basic activities in prison, one of the most important and at the same time the most ignored, especially in overcrowded prisons (where all evils are exacerbated), is health care (viewed as an unfolding of the right to life, an essential individual guarantee that can be considered "the condition of possibility of all other human rights, which only have meaning and reason of being to the extent that they are preached and practiced from the autonomous and dignified existence of the person"[4]), an object of strong testimony narrated by Eduardo Galeano, the exceptional Uruguayan writer and journalist, author of "The Open Veins of Latin America", imprisoned by the military dictatorship in the 70's and exiled in Spain until 1985, having died in April 2015:

> In the year 1984, sent by an organization of Human Rights, Luis Niño crossed the galleries of Lurigancho Prison, in Lima. Luis barely made his way through the passage and merged into drowsiness, pain, astonishment. In that loneliness full of people, all men were doomed to perpetual sadness. The naked prisoners, piled on top of each other, babbled with delirium and exhaled fevers and expected nothing.

3 TRINDADE, Antônio A. Cançado. *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*. Santiago: Editorial Jurídica de Chile, pp. 107-108).

4 "The right to life refers not only to biological existence, but also and especially to socioeconomic, cultural, political and moral existence in decent and productive conditions, so that each member of humanity is recognized in his dignity and respected in his freedom, and have all the goods, services and resources necessary and sufficient to live as well as most of his fellow citizens and contemporaries. It forms the undefeatable nucleus of fundamental freedoms, together with the right to physical integrity, the right to freedom, the right to due process and the right to citizenship "(VILLA, Hernando Valencia, Diccionario Espada de Derechos Humanos, Publisher Espasa-Calpe, Madrid, 2003, p.429)

> Then Luis said that he wanted to talk to the prison director. The director was not there'.
>
> The chief of doctors received him and Luis said that he had seen many prisoners in agony, vomiting blood or eaten by the wounds, and no doctor. The boss explained:
>
> J: The doctors are only in action when the nurse calls us.
>
> L - And where is the nurse?
>
> J - We do not have budget to pay for a nurse.[5]

This dialogue confirms what I have seen in my excursions in Latin American prisons, where medical attention is often deficient, either because of the lack of hygiene and the shortage of professionals, or because of the precariousness of the facilities and insufficient supplies, with drastic repercussions in the incidence of infectious and contagious diseases, common in those clusters of human exclusion.[6]

If we consider that this assistance covers not only the medical but also the psychological, pharmaceutical and dental care, with a preventive and curative character, the problem gains even more distressing dimensions, distancing itself entirely from the prisons of the first world, where those services, visualized in the scope of public policies, are provided on the same level as those offered to the general public and health is promoted there, unlike our reality, where it is a good compromised by inefficiency and abandonment.

Mirabete and Fabbrini, in their comments on the Penal Enforcement Law in Brazil, about health care, noted that the convicted person, like anyone else, "is susceptible to catching an illness. It may occur that, when he enters the prison, he/she already presents a disturbance of health, physical or mental illness. It is also possible that a disease is latent and will come to light after imprisonment, either by its natural evolution, or because the environment of the prison, influenced, in whole or in part, its outbreak or unleashing. Among them, we must mention a possible psychological trauma caused by the first contact with the prison environment, capable of triggering latent

5 J "is from Jornada, since the episode was published by La Jornada, April 6, 1977, p. 30.

6 "The World Report on Human Rights in the World - Issue 2016, presented by Human Rights Watch, highlights that,"in Brazil, the incidence of HIV in prisons is 60 times higher than in the rest of the population, whereas this same ratio is 40 times more for cases of tuberculosis."(op. cit., p. 75)

disease or provoke states of disruption that could turn the prisoner into a mental patient. It is known, in fact, the occurrence of prison psychosis, consisting of symptoms, syndromes and pathological states provoked or triggered by the very nature of the prison situation of which they are part: oppressive atmosphere, resulting from the interaction of negative feelings and psychological states, like revenge, rancor, sadness, mistrust, distress, fear etc.; frustration of various orders, such as those related to nourishment, affection, sex and work, not compensated; poor hygiene, food and clothing, which are capable of causing or triggering not only somatic diseases, but also psychic and/or psychosomatic disorders and/or diseases. There are diseases that can be provoked or triggered by the bad conditions of hygiene, food and clothing, such as those due to inadequate diet, qualitative or quantitative, lack of physical activity, malnutrition, etc. Finally, there is the possibility of diseases whose causes are independent of prison conditions and injuries generated by common or labor accidents and aggressions suffered by the prisoner indoors.[7]

Certain diseases in prison are like a double penalty. People are incarcerated as punishment and not for punishment, in a system where safety is the priority, in disfavor of other services, such as health, for which everything should give way, in Schopenhauer's words.

What about the physically handicapped, as paralyzed, semi-paralyzed, deaf and blind people? What does the prison offer to this vulnerable group, with special needs, in terms of treatment and accessibility?

What about assisting addicts, who abuse all kind of drugs, which, in one way or another, enter prison? I visited prisons where not only drugs are consumed and trafficked, but also produced to be sold inside and outside their walls. Only in a few places we may find detoxification clinics.

What about mental health? Judicial asylums, basements of the mentally ill, have practically no psychiatrists and offer a mock treatment that has been criticized by the Inter-American Court of Human Rights, whose decisions also stress the fact that prisons, not being totally isolated, represent a problem (a risk, a threat) of public health for the entire population, because of the continuous

7. MIRABETE, Julio Fabbrini and FABBRINI, Renato N. *Execução Penal*. 14º edition. Atlas, São Paulo, 2018, p. 57-58.

flow of people (inmates, staff, visitors) entering and leaving those areas where diseases proliferate.

It is worse when inmates undergo a dual pathology, that is, when, besides the mentally ill, they are addicted or, at least, are under drug addiction treatment.[8]

As to health, the Protocol of San Salvador states that everyone has the right to health, which is understood as the enjoyment of the highest level of physical, mental and social well-being. State Parties, in order to implement the right to health, recognize health as a public good and, above all, adopt measures that guarantee this right: primary health care (essential medical care available to the individuals and family members of the community); extension of the benefits of health services to persons under the jurisdiction of the State; immunization against major infectious diseases; prevention and treatment of endemic, occupational and other diseases; education on prevention and treatment of health problems; satisfaction of health needs of the highest-risk groups, which, because of their poverty situation, are much more vulnerable.

The Principles and Good Practices of Persons Deprived of Liberty in the Americas reaffirm the terms of the Protocol of San Salvador and add essential medical, as well as adequate psychiatric and dental care as substantial for their well-being; the permanent availability of qualified and impartial medical personnel; access to appropriate treatment and medication completely free; the implementation of educational and promotional programs in health, immunization, prevention and treatment of infectious, endemic and other diseases; and special measures to address the special health needs of persons deprived of liberty, from vulnerable or high-risk groups, with treatment based on scientific principles which are regarded as best practices.

Medical care is the responsibility of the State and prisoners must be able to enjoy the same standards of health services available to the community and have free access to the necessary health services without any discrimination based on their legal status. The Mandela Rules also point out that medical services should be organized in close liaison with the public health administration, in order to ensure continuity of treatment and care for infectious diseases and

8. About this theme we recommend: DOMÍNGUEZ, Miriam. "Mental Health and Prison: The Perspective of Volunteers in Prison", in GARCÍA, Julio Fernández (Dir.), Op. cit., p. 201 to 207.

drug dependence. Prisons should have a health service charged with assessing, promoting, protecting and improving the physical and mental health of prisoners, mainly those with special needs or health problems that hinder their rehabilitation. The health services must be composed of an interdisciplinary team, with qualified and sufficient personnel, capable of carrying out their activity with clinical independence, having specialized knowledge of psychology and psychiatry.

We must not forget that, on account of its fundamental nature, the right to health makes up what is called the existential minimum, safeguarded as far as possible (Der Volberhalt des Möglichen), a complex, always current issue that involves budgetary arguments and the reasonableness of demands presented.

5. THE PRISON WORK

Work has always been considered essential - the core activity, that one which, according to Charles Baudelaire, is the best remedy against all evils - particularly within prisons; its character in the passage of time (formerly distressing, now educational) is confused with the history of prisons/regimes systems.

Regarding prison work, Mirabete and Fabbrini pointed out in their comments to the Penal Enforcement Law that the concept of penitentiary work has "historically followed the evolution of the conception of custodial sentence. Initially, it was tied to the idea of revenge and punishment and maintained these characteristics as the more serious and distressing way of serving the sentence in prison. Even after the work of the prisoner has become a source of production for the State, the work was used in this sense, within the utilitarian tendencies of the penal and penitentiary systems… In the modern penitentiary conception, the moment of enforcement of the sentence contains a rehabilitation or social reintegration purpose, indicating the pedagogical meaning of the work.""[9]

Right and duty of the prisoner, work has not been offered very much in hundreds of facilities (its absence is bigger in public jails and police stations), in which the greater option still is, in addition to maintenance and preservation services, the craftsmanship which should be limited to tourism regions, without taking into

9. MIRABETE, Julio Fabbrini and FABBRINI, Renato N., op. cit., p. 83.

account, contrary to the laws on the subject, the personal condition (qualification and capacity of each one, which occurs exceptionally), and the future needs of the prisoner, as well as opportunities offered by the market. A statement that is not valid for many prisons where work activities are multiple, and to which are added workshops/factories (among them, furniture, jewelry, and recycling), together with private initiative, exploiting their workforce in the Taylor molds and/or emphasizing their qualification.

As a social human right, work aims to be a basic instrument of participation and empowerment. With a productive and educational purpose that is fundamental to the physical and mental health of the prisoner and to the proposal of social reintegration (a requirement for the prisoner to make better choices in the future), it is a condition of his/her human dignity. Remunerated in reasonable terms (generally mean, merely symbolic), it helps the inmate to pay his/her personal expenses and assist his/her family.

Prison legislation tends to assign other purposes to the product of the remuneration for prison labor, namely: reimbursement to the State of expenses made with its maintenance, which, as far as we know, was never done; compensation for damages caused by the offense, only if, of course, there is a judicial determination and no reparation has taken place by other means; and constitution of a peculIum, to be delivered to the inmate when he is released.

It is false to say that the prisoner does not want to work. The vast majority are willing to do so, even if it is only to occupy their hours and reduce the time of their sentence (1 day of sentence for every 3 working days). And the State should be interested in its offer, since it guarantees the institution to maintain discipline and order. In daily life in prison, work is valued more by the Administration than the educational activity, since the school is seen with reserve merely because it is a locus where they would be planning escapes and riots.

From the Protocol of San Salvador, I draw that everyone has the right to work, which includes the opportunity to obtain the means to have a dignified and decent life through the performance of a licit, freely chosen or accepted activity. Measures will be taken to ensure the full effectiveness of the right to work, including those concerning the achievement of full employment, vocational guidance and the development of professional/technical training projects, in particular

those for the disabled. They also undertake to implement and strengthen programs that support the adequate care of the family, so that the woman has a real possibility of exercising her right to work.

Under the terms of the International Covenant on Economic, Social and Cultural Rights, the right to work is recognized, that is, the right to earn a living through freely chosen work. It also recognizes the right to enjoy favorable working conditions, guarantees of a fair wage, and equal remuneration for work of equal value, without any distinction; as well as the conditions of decent existence; safety and hygiene at the work; an equal opportunity for all to be promoted, in their work, to the superior category that corresponds to them, with no other considerations than those of time of service and capacity.

Convicted prisoners, as recommended by Mandela Rules, should have the opportunity to work and/or participate actively in their rehabilitation, this activity being subject to the determination, by a doctor or other qualified professional, of their physical and mental fitness. Sufficient work of a helpful nature should be offered to keep them occupied during a normal work day. Prison work should not be of a stressful nature, and prisoners should not be held in bondage or servitude; no prisoners should be asked to work for the personal benefit of any member of the prison team. Moreover, when possible, work will contribute, for its very nature, to maintaining or increasing their ability to live in dignity after release, and should be offered training in useful professions.

6. EDUCATIONAL ASSISTANCE

Thousands of prisoners, usually young people between the ages of 18 and 25, many of whom coming from poor segments of society, illiterate or with low/minimum education (most of them did not even complete high school), do not have access to educational activities, whether of instruction or vocational training, contrary to the aims of a criminal policy integrated in social policy, which seeks to transform the "penal institution into a school of literacy and professionalization of the prisoner, to insert it in the process of development of the Nation,"[10], taking into account that educational assistance should be "one of the most important benefits not only for the free man, but also for the prisoner, constituting in this

10. ALBERGARIA, Jason. *Comentários à Lei de Execução Penal.* Rio de Janeiro: Aide, 1987, p. 41.

case an element of penitentiary treatment as a means of social reintegration."[11]

What is intended, in the official discourse, is that the prisoner should learn to read or write, to advance/complete his/her studies, to develop a sense of self-worth, to acquire skills, to transform himself/herself and to (re)build his/her life, insofar as education, art of the arts, the passport to the future, helps to insure his/her return to society.

It is clear that the absence or insufficiency of educational assistance affects (in spite of opposing positions) the order inside prison, because idleness (which multiplies the vices of the prisoner, according to Michel Foucault[12]) contributes to cause or amplify the tensions that are observed inside, sometimes leading to riots and escapes.

Like work, education can lead to remission of the penalty. The same happens in many places, as we have seen, with reading, which stimulates the creation of libraries, providing the prisoner with an essential collection of publications to guarantee such benefit.

The constitutional mandate to guide deprivation of liberty to re-education and social reintegration "prevents those sentences from being reduced to mere custody and retention", and the Administration must generate the necessary conditions to prepare inmates to live in freedom and, therefore, ensure the fulfillment of the right to education because of the social dimension of the human being.[13]

I would like to draw attention to certain particularities which must be taken into account in this context. A relevant consideration is that "... coexist the specificities of each prison unit, its management and common sense around education as a right to be implemented in prison. In this regard, the following considerations are taken into account in the ongoing research carried out by the United Nations Educational, Scientific and Cultural Organization (UNESCO): 'The legal situation of the inmates influences the organization of classes. People accused of a crime but not yet sentenced have greater difficulty (or less motivation) to enter fixed classes. ... In some countries,

11. MIRABETE, Julio Fabbrini and FABBRINI, Renato N., op. cit., p. 66.
12. FOUCAULT, Michel. *Vigilar y Castigar: Nacimiento de la Prisión*. Siglo Veintiuno, México, 1976, p. 118.
13. ALAMEDA, Cristina Ventura, "El Derecho a la Educación en el Medio Penitenciario", em GARCÍA, Julio Fernández (Dir.), *La Cárcel: Una Institución a Debate*. Colección Estudios Ciencias de la Seguridad, Salamanca, 2014, p. 113.

attendance is compulsory, organized by the state with qualified teachers, who have been trained to adapt their educational methods to the special prison context. In most countries, however, education is an option and competes with the possibility of working. ... The creation of technical education programs leads to the organization of productive activities that, on the one hand, allow the development of technical skills for the labor market, but, on the other hand, hamper educational activities or alter the social dimension of educational programs. ... Overcrowding in prison is a reality unfavorable to the organization of educational sessions."[14]

In addressing the right to education, the Protocol of San Salvador affirms that everyone has the right to primary, secondary, and higher education. First-level education must be compulsory and accessible to everybody, free of charge; secondary education in its various forms, including technical and vocational education, should be generalized and extended to all persons, by appropriate means and especially by the progressive introduction of free education; higher education must also be made accessible to all individuals, according to their ability, by appropriate means, and in particular by the progressive introduction of free education; finally, differentiated education programs for the disabled should be set up in order to provide special education, and training for people with physical or mental disabilities.

States Parties recognize, under the International Covenant on Economic, Social and Cultural Rights, the right of every person to education, declaring that it should aim at the full development of the human personality and the sense of dignity, and strengthen respect for human rights and fundamental freedoms. Education, at various levels, should be accessible to all individuals, observing the capacity of each one.

According to the Mandela Rules, education is, like work, a tool that ensures, as far as possible, the reintegration of prisoners into society, so that they can lead a self-sufficient and law-abiding life; to that end, prison administrations and other competent authorities should, inter alia, provide education, in line with the individual needs of prisoners, and provide means to promote the education of all,

14. OLIVEIRA, Carolina Bessa Ferreira de. *A Educação Escolar nas Prisões: Uma Análise a Partir das Representações dos Presos da Penitenciária de Uberlândia (MG)*. Educ. Pesqui., São Paulo, v. 39, nº 4, pp. 955-967,2013.

including religious instruction, in countries where it is possible. The education of illiterates and young prisoners should be compulsory, and a very special attention should be given to them.

7. FINAL CONSIDERATIONS

The social rights of prisoners mentioned here are obviously subject to the conditions and availabilities of the institutions that correspond to them. In the provision of health, work, and education, the role of professionals who work in those areas is relevant: their interest, motivation, and qualification will define the quality of services provided.

Prisons which ensure all rights foreseen in the relevant norms mentioned here (ordinary, constitutional, and international) do not exist, especially in the Latin American continent, because they usually suffer from the scourge of saturation, and that has devastating effects.

Exactly because those rights are not reached in their literalness and fullness, people talk about citizens of second, third or null category, an expression that fits the conditions of abandonment to which they are usually relegated, allowing some people to ask: To what extent is it possible to guarantee prisoners the recognition and exercise of their human rights? How can social rights be guaranteed at appropriate levels, according to the relevant standards, if the prisons do not have the necessary resources or minimum personnel to do so?

The questions I have made in the previous paragraph are related to problems that seem to be perpetual in a complex area where, in the opinion of many people, little or nothing works. The official discourse tries to answer them affirmatively, in an effort to legitimize the prison; but they are having more and more resonance, warning for the distance between the penitentiary reality, and the ideas on which their centenary proposals are based.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE INTERNATIONAL MONETARY FUND

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I. INTRODUCTION

1. This paper explores the relationship between the economic, social and cultural human rights and the activities of the International Monetary Fund (the Fund). More specifically, it examines to what extent the provisions of the International Covenant on Economic, Social and Cultural Rights (the Covenant) have legal effect on the Fund, to what extent the Fund is obligated to contribute to the achievement of the objectives of the Covenant, and to what extent it may do so under its Articles of Agreement.

2. The Covenant was adopted by the United Nations General Assembly in 1966 and came into force among the countries that had become party to it in 1976. It is presently in force among 145 States, most of which are Fund members.[1] Under the Covenant, the parties undertake to implement its substantive provisions within their own territories, to cooperate internationally towards the progressive full achievement of the substantive rights contained in the Covenant, and to participate in the reporting mechanism established to monitor the implementation of the Covenant.

3. The Covenant is part of a wide network of international instruments, which includes United Nations General Assembly resolutions and declarations and a number of other treaties. On the one hand, the Covenant is linked to the "obligation of States under the Charter of the United Nations to promote universal respect for,

1. It may be noted, however, that some Fund members, including Indonesia, Malaysia, Pakistan, Saudi Arabia, Turkey and the United States are not parties to the Covenant. China signed the Covenant in 1997 and deposited its instrument of ratification on March 27, 2001; the Covenant entered into force with respect to China on June 27, 2001. The United States signed the Covenant in 1977, but has not ratified it.

and observance of, human rights and freedoms."[2] Together with the Universal Declaration of Human Rights and the International Covenant on Political and Civil Rights, it forms the International Bill of Rights. The Universal Declaration of Human Rights states that "every one, as a member of society, is entitled to realization […] of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."[3] On the other hand, the Covenant is linked to the right to development, proclaimed at the 1993 World Conference on Human Rights in Vienna, as this right is defined as the right by virtue of which "every human person and all peoples are entitled to participate in and contribute to, and enjoy economic, social, cultural and political development."[4] Thus, the Covenant is integrated in a wide web of other instruments, and it could be argued that it should not be considered by itself. Nevertheless, the Covenant is also the one global instrument in which economic and social rights have been crystallized in a treaty that is legally binding on the parties to it. For this reason, it is the Covenant that will be considered here in its relations to the Fund.

4. For its part, the Fund was established in 1946 and had been functioning for a number of years when the United Nations' Commission on Human Rights started work on the Covenant. During the elaboration of the Covenant, the Fund was invited to participate and to comment on draft clauses, but it declined the invitation. In its response, the Fund expressed interest in the work of the Commission on Human Rights, but stated that "the limits set on our activities by our Articles of Agreement do not appear to cover this field of work."[5] It is worth noting that the World Bank also declined the invitation to participate in the elaboration of the Covenant. The Bank's response to the invitation was that "since the activities of the International Bank do not bear directly upon the work of the Commission, the Bank does not plan to send a representative

2. Covenant, Preamble, fourth paragraph.
3. Universal Declaration of Human Rights, Article 22.
4. Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of December 4, 1986, Article 1, paragraph 1.
5. UN Economic and Social Council, Co-operation Between the Commission on Human Rights and the Specialized Agencies and other Organs of the United nations in the Consideration of Economic, Social and Cultural Rights, UN Document E/CN.4/534, March 28, 1951, Annex, p.5.

to attend the Commission's forthcoming meeting."[6] By contrast to other specialized agencies whose mandates explicitly or implicitly included the promotion of human rights,[7] the Fund took the position that the questions raised in the elaboration of the Covenant were outside its own mandate. Thus, in the early 1950s, neither the Fund nor the Bank saw the links between their respective activities and the economic, social and cultural rights that would become part of the Covenant.

5. A number of factors, common to the Fund and the Bank, contributed to this view.

- First, at the most general level, the Fund and the Bank saw themselves (and continue to see themselves) as international organizations separate from their members, governed by their respective charters. Unlike States, international organizations are established to achieve limited objectives and they are equipped with financial and human resources to achieve only the objectives assigned to them. This division of labor among international organizations is required not only for reasons of efficiency but also because the members of international organizations have agreed to cooperate within the framework of their respective charters without necessarily sharing other objectives or values outside

6. *Ibid,* p. 4. The United Nations Secretariat seems to have acquiesced to these positions. A report prepared by the Secretary General contained the following statement in connection with the right to work and the question of full employment: "Although the activities of both the […] Fund and the [World] Bank are aimed at making a contribution to the general economic well-being of the world and so to the achievement of full employment, the basic instruments of these bodies have not been drawn up in such a way as to permit any direct connection between their activities and the effective recognition of human rights." UN Commission on Human Rights, *Activities of The United Nations and Of the Specialized Agencies in The Field of Economic, Social and Cultural Rights, Report Submitted by the Secretary General,* UN Doc. E/CN.4/364/Rev.1, January 1952, UN Sales No. 1952. IV.4, para. 30 (1952).

7. The International Labor Organization (ILO), the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Food and Agriculture Organization (FAO) participated actively in the elaboration of the Covenant. The mandate of the first three contains specific references to the promotion of human rights; the constitution on FAO makes no specific reference to rights, but refers to the promotion of "common welfare" through higher nutrition levels and standards of living. *See* Philip Alston, "The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights", 18 *Colum. J. Transnt'l. Law,* 79 at 81, footnote 12 (1979).

these charters. And, in the event that some or all members of an international organization adhere to a treaty containing such other objectives or values, this in itself does not result in these objectives or values becoming part of the organization's mandate unless and until agreement is reached to amend the organization's charter.[8]

- Second, and more specifically, the Fund and the Bank saw themselves as purely technical and financial organizations, whose Articles of Agreement enjoined them (explicitly in the case of the Bank, implicitly in the case of the Fund) from taking political considerations into account in their decisions. Their role as financial institutions was to provide economic assistance, not to dictate political changes.
- Third, as was the case of the Bank, but unlike the United Nations, decision-making power in the Fund was vested in organs whose decisions were taken by weighted voting, rather than on a one-country, one-vote basis. These factors led to concerns over the possibility of inconsistent decisions between the United Nations and the Fund or the Bank.
- Fourth, the importance of maintaining the independence of the two Bretton Woods organizations was further highlighted by the provisions of their respective Articles of Agreement which required that they cooperate with what became the United Nations. The Articles made it clear, however, that arrangements for such cooperation could not indirectly amend the Articles. Any such arrangement that would involve a modification of any provision of the Articles would be affected only after amendment in accordance with the Articles.[9]

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8. For instance, the European Community is not bound by the provisions of the European Convention on Human Rights, although its members are party to the Convention (*see* the advisory opinion of 28 March 1996 of the European Court of Justice on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, reviewed by Giorgo Gaja in *Common Market Law Review*, 1996, p. 973; Jean-Fran□ois Renucci, *Droit européen des droits de l'homme*, 2nd edition, 2001, p. 339; *see also*, decision of 20 February 2001 of the EC Court of first instance, reviewed by J.C. Fourgoux in *Gazette du Palais*, 25-26 avril 2001).

9. Article X of the Articles of Agreement of the Fund, and Article V, Section 8(a) of the Articles of Agreement of the IBRD. As it was finally adopted in 1966, the Covenant contains a 'symmetrical' provision to the effect that "nothing in the present Covenant is to be interpreted as impairing the provisions […] of the

- Fifth, the Relationship Agreements that the Fund and the Bank had entered into with the United Nations in 1947 stated clearly the need, based on their respective Articles of Agreement, for the Fund and the Bank to function as independent international organizations.

6. In addition to these common elements, the Fund's own mandate was even more remote than the Bank's from the issues the Commission on Human Rights would debate. The Fund was not a project lender, and was not involved in sectoral activities; it did not finance health or education. It was a monetary agency, not a development agency. Its financial role was limited to providing foreign exchange to help its members overcome temporary balance of payments problems. In a formal interpretation of its Articles of Agreement in 1946, the Fund's Executive Board had interpreted them "to mean that the authority to use the resources of the Fund is limited to use in accordance with its purposes to give temporary assistance in financing balance of payments deficits on current account for monetary stabilization operations."[10] The Fund had no authority over its members' domestic policies, and economic growth was not a recognized factor in the Fund's decisions. Moreover, the Fund's Articles did not authorize any distinction among the members of the Fund based on their status as developing or otherwise, and access to the Fund's resources was a matter of entitlement, subject to conditions specified in the Articles, leaving little scope for introducing differentiation among members based on economic or social rights considerations.

7. Since the 1950s, the purposes of the Fund have not changed, but its practice and its mandate under the Articles of Agreement have evolved to meet the changing needs of its members. The Fund is still a monetary agency, not a development agency. It does not fund projects, but still provides only balance of payments support, although the concept of balance of payments need is now more flexible than in the past for the use of resources earmarked for developing countries. Also, the Fund now exercises surveillance over certain policies of its

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constitutions of the specialized agencies […] in regard to the matters dealt with in the […] Covenant."

10. Decision No. 71-2, September 26, 1946, *Selected Decisions and Selected Documents of the International Monetary Fund* (25th Issue, December 31, 2000) (hereafter: *Selected Decisions*), p. l29.

members, and special needs of developing countries, particularly the poorest of them, have received recognition.

8. This evolution has been gradual, with the Second Amendment of 1978 being the most important milepost. Beginning in the 1960s the principle of uniformity of treatment of members did not prevent the Fund from adopting different policies on its financial assistance, with specified different types of conditions for different types of balance of payments problems, some of which could be specific to developing countries, such as the stabilization of prices of primary products (Buffer Stock Financing Facility) or export shortfalls due to variations in world market conditions (Compensatory Financing Facility). In 1974, the Fund established the Extended Fund Facility (EFF) as a vehicle for long-term balance of payments assistance (repayable over ten years) to countries whose balance of payments problem required major structural reforms; it was noted in the decision creating the facility that it was "likely to be beneficial for developing countries in particular." Gradually, as industrial countries have "graduated" from Fund assistance, more and more attention has been given in the design of Fund facilities to the needs of developing countries.

9. Among developing countries, those with low per capita incomes require particular attention. They need either concessional loans or outright grants. Until the second amendment of its Articles of Agreement, the Fund was not allowed to provide this type of assistance. However, the appreciation of its gold holdings made it possible to organize a system of sales of gold at the official price, followed by contributions of capital gains generated by the purchases to a Trust Fund managed by the Fund for concessional loans to developing countries with low per capita incomes. With the second amendment, the Fund was authorized to achieve the same result without going through the complicated procedure of sales followed by contributions. Moreover, it was allowed to use capital gains on gold sales also for grants. The resources generated by sales of gold have been supplemented by various contributions from donor countries. The Poverty Reduction and Growth Facility has benefited from this dual financing (gold sales and contributions) and extends concessional loans. The Facility for Heavily Indebted Poor Countries provides grants to enable recipient countries to discharge their indebtedness to the Fund; it is an indirect form of debt forgiveness.

10. Not only has the Fund become more receptive to the needs of developing countries but its role as guardian of the international monetary relations has substantially expanded to oversee its members' domestic economic and financial policies. With the second amendment of the Articles of Agreement, Fund members undertook new obligations that go beyond the conduct of their exchange rate policies. Each member is now required, under the amended Article IV, to "endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances."

11. While the Fund remains a monetary institution responsible for maintaining orderly exchange rates and a multilateral system of payments free of restrictions on current payments and whose financial assistance is only for balance of payments purposes, the cumulative effect of changes in its practice and in its Articles of Agreement has introduced new elements to the relationship between the Fund and the Covenant. There are two aspects to this question. The first is whether the Fund is legally bound to give effect to the provisions of the Covenant in its decisions. The second is whether, and to what extent, the Fund's own Articles of Agreement allow or require the Fund to achieve objectives that are similar (even though not identical) to those of the Covenant. These two aspects will be discussed in turn.

II. APPLICABILITY OF THE COVENANT TO THE FUND

12. There are three reasons for concluding that the Covenant does not apply to the Fund: the Fund is not a party to the Covenant;[11] the obligations imposed by the Covenant apply only to States, not to international organizations; and the Covenant, in its Article 24, explicitly recognizes that "[n]othing in the present Covenant shall be interpreted as impairing the provisions…of the constitutions of the specialized agencies which define the respective responsibilities…of the specialized agencies in regard to the matters dealt with in the present Covenant."

13. Nevertheless, a number of arguments have been put forward to justify the applicability of the Covenant to the Fund. Two main lines of argument have been advanced. Under one approach, the Fund as

11. Similarly, the European Community, not being a party to the European Convention on Human Rights, is not bound by its provisions (see footnote 8, above).

a subject of international law and a specialized agency within the UN system would be bound by general norms of international law, particularly those that are adopted pursuant to the UN Charter. The conclusion would be that the Covenant has a direct effect on the Fund, which is bound to implement its provisions. Under a second approach, the Covenant would not apply directly to the Fund but it would have an indirect effect on the Fund through its members. The members of the Fund that are party to the Covenant must, within the Fund, discharge their obligation of cooperation with other States, whether those other States are party to the Covenant or not. Moreover, if these other States are party to the Covenant, there is an additional duty not to induce them to breach their obligation under the Covenant by adopting measures inconsistent with those obligations. These two, substantially different, approaches will be examined in turn.

A. Direct Effect of the Covenant

14. Two arguments have been advanced in support of a direct effect of the Covenant on the Fund. One argument is based on the relationship of the Fund with the United Nations. The other is that the obligations set forth in the Covenant are mandatory provisions of general public international law and, thus, binding on all subjects of international law, including international organizations. Both arguments would lead to the conclusion that the Fund's Articles of Agreement should be interpreted in a manner consistent with the objective of promoting the rights contained in the Covenant, or deemed to be amended if this was necessary to achieve these objectives. The implications of a positive view of such a direct effect could be far-reaching. Would it mean that the obligations set out in the Covenant would apply to the Fund as if it were a party to the Covenant? For example, would the Fund be required to finance health and education projects while its mission is only to provide balance of payments assistance? Would the Fund have to disregard the principle of uniform treatment, which still governs its general resources (i.e., resources not generated by capital gains on gold sales), to provide special assistance to developing countries? Would the United Nations Committee on Economic, Social and Cultural Rights exercise jurisdiction over the Fund's activities and the decisions of its organs? Once the principle is admitted that the Covenant takes

precedence over the Articles, the whole institutional and legal structure within which the Fund operates can be questioned.

The Link with the United Nations

15. It has been stated that "… there are strong legal arguments to support the position that the IMF is obligated in accordance with international law, to take account of human rights considerations. The first is that the Fund is a United Nations body and must therefore be bound by the principles stated in the U.N. Charter. Among those principles and purposes of the organization is the promotion of respect for human rights. It is not therefore a political objective, but a legally mandated one."[12] A number of comments may be made on this statement. First, the Covenant itself reserves the position of the constitutions of the specialized agencies. The parties agree that "nothing in the […] Covenant shall be interpreted as impairing the constitutions of the specialized agencies which define the respective responsibilities of the various organs of […] the specialized agencies in regard to the matters dealt with in the […] Covenant."[13] Thus the Covenant does not affect the Articles of Agreement of the Fund, including its mission and governance structure. Neither does it affect the rights and obligations of its members set out in the Articles of Agreement.

16. Second, the Fund is not a "United Nations body", but a specialized agency within the meaning of the Charter of the United Nations, which means that it is an intergovernmental agency, not an agency of the United Nations. In accordance with Article 57 of the Charter, the Fund was brought into relationship with the United Nations by a 1947 agreement in which the United Nations recognizes that, "by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is, and is required to function as, an independent organization."[14] Furthermore, Article X of the Fund's Articles of Agreement, while requiring the Fund to cooperate with "any general international organization" [*i.e.*,

12. Philip Alston, "Symposium: 1986 World Food Day and Law Conference: 'The Legal Faces of the Hunger Problem: IX Immediate Constraints on Achieving the Right to Food: The International Monetary Fund and the Right to Food'", 30 *How. L.J.*, 473 at 479 (1987).

13. Covenant, Article 24.

14. Agreement Between the United Nations and the International Monetary Fund, November 15, 1947, Art. I, paragraph 2, reprinted in *Selected Decisions*, p. 651.

the United Nations], specifies that "Any arrangements for such cooperation which would involve a modification of any provision of [the Articles of Agreement] may be effected only after amendment to [the Articles]." Thus the relationship established by the 1947 Agreement is not one of "agency"[15] but one of "sovereign equals".[16] It follows that the Fund's relationship agreement with the United Nations does not require it to give effect to resolutions of the United Nations, such as the resolutions under which the members of the General Assembly adopted the Universal Declaration or the Covenant, or to international agreements, such as the Covenant, entered into by the members of the United Nations.

General Principles of International Law, Obligations *Erga Omnes* and Jus Cogens

17. Commentators have mentioned a number of legal bases for the proposition that the Covenant, or the norms included in it, are applicable to the Fund directly as a subject of international law.[17]

18. Customary International Law One such basis would be the view that the norms contained in the Covenant are now part of general or customary international law. It has been argued that, even in the absence of any consent on the part of an international organization, its freedom to act in the pursuit of its mandated objectives may be constrained by international law norms. Under this argument, such

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15. In order to avoid any ambiguity on this point, a statement was placed in the record of the negotiations stating that "it was understood … that the statement in Article I, paragraph 2, that the Bank (Fund) is a Specialized Agency established by agreement among its member governments carries with it no implication that the relationship between the United Nations and the Bank (Fund) is one of principal and agent." Committee on Negotiations with Specialized Agencies, *Report on Negotiations with the International Bank for Reconstruction and Development and the International Monetary Fund*, United Nations document E564, at 3 (August 16, 1947), quoted in William E. Holder, "The Relationship Between the International Monetary Fund and the United Nations", in Robert C. Effros, ed., *Current Legal Issues Affecting Central Banking*, vol. 4, IMF, p. 16, at p. 18. (1997).

16. Leland M. Goodrich, Edvard Hambro & Anne Patricia Simons, *Charter of the United Nations, Commentary and Documents*, Columbia University Press, New York, p. 421 (1969).

17. On this question, *see generally*, Jean-François Flauss, "La Protection des Droits de l'Homme et les Sources du Droit International, Rapport général", in Société Française pour le Droit International, *Colloque de Strasbourg, La Protection des Droits de l'Homme et l'Évolution du Droit International*, Pédone, Paris, p. 11, specially pages 48-71 (1998).

norms would not operate to change the objectives of the international organization set out in its constituent instrument, but to limit in some way the actions that the organization could legitimately take in pursuit of such objectives.[18] It has been suggested that a similar reasoning should be applied to human rights generally, and that the international financial organizations have in this respect a "duty of vigilance" to ensure that its actions do not have negative effects on the human rights situation in its borrowing members.[19]

19. The applicability of this line of reasoning to the Covenant (or the rights set out in it) would depend initially on a finding that the norms it contains are part of general international law.[20] It has been stated that the Universal Declaration "is now part of the customary international law of nations and therefore binding on all States."[21] Others have gone only so far as to state that *some* human rights have attained such status, and the examples they give are in the

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18. For example, with respect to the use of force by the United Nations, it has been suggested that: "dès l'instant où l'on admet que l'Organisation, comme telle, a le pouvoir d'utiliser la force […] il faut nécessairement en déduire que l'Organisation comme telle a la capacité d'être le destinataire des règles de droit destinées à réglementer l'usage de la force, pour autant que ces règles soient compatibles avec les buts et les principes de l'Organisation et ne soient pas contredites par des dispositions spécifiques de la Charte. " Paul De Visscher, "Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies", Institut de Droit International, 54-I *Annuaire*, p. 34 (1971) quoted in Pierre Klein, *La Responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Brussels, p. 346 (1998).

19. Pierre Klein, "La responsabilité des organisations financières internationales et les droits de la personne", 1999 *Revue Belge de Droit International*, 97, at 113.

20. In addition, if the norms of customary law were to have effect on an international organization, it would be necessary to establish that the activities of the organization overlap the content of the norms. Given the conclusion reached in this paper on the first point, it is not necessary to discuss this second point.

21. Humphrey, "The International Bill of Rights and Implementation", 17 Wm. & Mary L. Rev. 259 (1976), cited in Schachter, "International Law in Theory and Practice", Hague Acad. Intnt'l L., 178 *Recueil des Cours*, 9, at 340 (1982). Schachter comments: "I would not go that far. […]" See Judge Schachter's views in the next footnote. See also, Marc Cogen, "Human rights, prohibition of political activities and the lending policies of Worldbank and International Monetary Fund" in Chowdhury, Denters & de Waart, eds., *The Right to Development in International Law*, 379, at 387 (1988): "the Universal Declaration and the International Covenants represent minimal standards of conduct of all people and all nations. Intergovernmental organizations are inter-state institutions and they too are bound by the generally accepted standards of the world community."

area of political and civil rights.[22] The various pronouncements of the International Court of Justice on human rights would seem to support this second view.[23] The most that can be said in this regard is that it is not generally accepted that the Covenant (or the norms contained in it) form part of general or customary international law.

20. Since the norms contained in the Covenant have not reached the status of norms of general international law, it would be difficult to sustain that they impose themselves to the Fund in some other fashion, either as obligations *erga omnes*, or as part of *jus cogens*. Nevertheless, it may be useful to consider these two points briefly.

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22. *See*, for example, Schachter, *op. cit*.: "[Only] some of the rights recognized in the Declaration and other human rights texts have a strong claim to the status of customary law." Schachter mentions as examples slavery, genocide, torture, mass murders, prolonged arbitrary imprisonment and systematic racial discrimination. See also Jean-François Flauss, "La Protection des droits de l'homme et les sources du droit international, Rapport général, in Société Française pour le Droit International, *Colloque de Strasbourg, La Protection des droits de l'Homme et l'Évolution du Droit International*, Paris, p. 11 (1998). Professor Flauss concludes his survey of positive law of human rights by stating that: "on ne peut pas ne pas être frappé par la très large correspondance de substance existant entre les normes de protection des droits de l'homme reconnues avec certitude par le droit international général et les règles de protection résultant de l'article 3 commun aux quatre Conventions de Genève applicables aux conflits armés internationaux. En d'autres termes, le droit international des droits de l'homme coïncide matériellement, pour l'essentiel, voire pour sa presque totalité, avec les 'principes généraux de base du droit humanitaire'" (id, p. 59). Under Article 3 of each of these Conventions, "[civilians and other non-participants in the hostilities] shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

23. Professor Flauss writes that read together, the advisory opinions and cases in which the ICJ has considered human rights as part of general international law would lead to the conclusion that the ICJ explicitly identifies four human rights: the right not to be held in slavery, the right to be protected from racial discrimination, the right not to be subject to inhuman treatment in case of deprivation of liberty, and the right not to be abusively deprived of liberty. To which Professor Flauss adds, in view of the Advisory Opinion on the Genocide Convention, the right to life, and that the interdiction of inhuman treatment includes acts of torture. Flauss, *Rapport Introductif*, *op. cit*., p. 57, footnote 266.

21. Obligations *Erga Omnes* Under this heading, the view would be taken that certain obligations, including certain human rights obligations, would be owed "to the entire international community."[24] The origin of this theory is to be found in the *Barcelona Traction* case and the distinction the International Court of Justice drew, *obiter dictum*, between the obligations a State owes to the international community as a whole and those arising vis-à-vis another State.[25] A discussion of this complex topic would be well beyond the scope of this paper. Suffice it to state that the scholarly opinion does not seem to have reached a consensus around the idea that human rights other than those enumerated by the International Court of Justice have attained the status of obligations *erga omnes*.[26] The reservation in Article 24 of the Covenant concerning the charters of the specialized agencies would support this conclusion.

22. *Jus cogens* "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[27] As in the case of obligations *erga omnes*, there is no evidence that economic and social rights have reached the status of norms of *jus cogens*.[28] Article 24 of the Covenant leads to the same conclusion.

23. In any event, Article 24 of the Covenant shows that the Covenant was not intended to supersede the charters of the specialized agencies. In order for any norm of the Covenant to become binding on an international organization, the organization would in

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24. John C. Ciorciari, "The Lawful Scope of Human Rights Criteria in World Bank Decisions: An Interpretative Analysis of the IBRD and IDA Articles of Agreement", 33 *Cornell Int'l L. J.* 331 at 357 (2000).

25. *Barcelona Traction, Light & Power Co. Ltd (Belg. V. Spain)*, 1970 *I.C.J.* 3. "Such obligations derive, for example, kin the contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

26. Maurizio Ragazzi, *The Concept of Obligations* Erga Omnes, Oxford, p. 144 (1997).

27. Vienna Convention on the Law of Treaties, Article 53.

28. *See* Schachter, "International Law in Theory and Practice", Hague Acad. Int'l L., 178 *Recueil des Cours*, 9, at 340 (1982); for a more recent discussion, see Maurizio Ragazzi, *The Concept of Obligations* Erga Omnes, Oxford, p. 144 (1997) who writes: "Except for the general acceptance of the peremptory character of the prohibition of aggression and the protection of some, but not all, human rights, the definition of the precise content of *jus cogens* is still uncertain." The author adds (p. 50) that the examples given of norms of *jus cogens* "largely coincide with those of obligations erga omnes given in the *Barcelona Traction* case."

effect need to modify its constituent instrument. To the extent the international organization could not give effect to the norm without doing violence to its constituent instrument, the norm would not prevail over the constituent instrument. With respect to the Fund, the social rights to health or education, for example, lie outside its mandate. Finally, questions would also arise concerning the contents of such an obligation. This issue is discussed below in the context of the discussion of the possible obligation of the Fund not to hinder the implementation of its members' own international obligations. It may thus be concluded that the Covenant is not a treaty that is binding on the Fund, and thus it has no direct effect on the Fund.

B. Indirect Effect of the Covenant

24. Under this view, the members of the Fund that are party to the Covenant would have an obligation to seek the implementation of the Covenant not only in their bilateral relations with other parties, but also through their actions in international organizations. The terms of the Covenant do not limit the duty to cooperate internationally to cooperation with other States parties or with States in general. The duty is general and, if the interpretation made of it by the Committee on Economic, Social and Cultural Rights is shared by the States parties, the duty would include cooperation with international organizations and cooperation within international organizations. The Committee appears to have recently taken the view that States parties to the Covenant have a duty to ensure that the policies and decisions of the international financial organizations of which they are members are in conformity with the obligations of States parties to the Covenant.

25. The manner in which this indirect effect would affect an international organization may vary depending on the country involved. First, all States parties would be under a general obligation to seek, in the international organizations in which they are members, the adoption of policies conducive to the achievement of the rights set out in the Covenant in the territories of all States parties. Such a duty would fall particularly on the States parties that are thought to have some influence on the policies of the international organizations.[29]

29. *See* for example, the Committee's Concluding Observations on Belgium: "The Committee encourages the Government of Belgium, as a member of international organizations, in particular the International Monetary Fund and the World Bank,

Second, a State party receiving technical or financial assistance from an international organization would be under a separate duty to ensure that the program it undertakes with such assistance is consistent with its obligations under the Covenant. Conversely, the international organization would have a duty to ensure that it did not hinder the State party's ability to implement the Covenant. In a few recent instances, the Committee has commented on the need to ensure that a country's obligations under the Covenant "be taken into account" in all aspects of the country's negotiations with international financial institutions "to ensure that economic, social and cultural rights, particularly of the most vulnerable groups of society, are not undermined."[30] These two aspects of the question will be examined in turn.

States Parties' Actions Through the Decision-Making Organs of the Fund

26. It is of course for States parties to ascertain the extent of their obligations of international cooperation, and to decide what action they need to take as members of international organizations to discharge them. Nevertheless, two general comments may be made in this respect. First, a State party's obligation with respect to international cooperation within international organizations is no greater than its obligation to cooperate on a bilateral basis with other States parties. As the State party's obligation under the Covenant is stated in general terms, without any quantified or other criteria,[31]

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to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in article 2.1 concerning international assistance and cooperation." (E/C.12/1/Add. 54, 1 December 2000, para. 31). Similar observations have been made with respect to Italy (E/C.12/1/Add.43, 23 May 2000, para. 20). Since these countries do not make use of the Fund's resources, there is no conditionality to which questions related to human rights could be attached.

30. *See* for example the Committee's Concluding Observations on Morocco: "The Committee strongly recommends that Morocco's obligations under the Covenant be taken into account in all aspects of its negotiations with international financial institutions, like the International Monetary Fund, the World Bank and the World Trade Organization, to ensure that economic, social and cultural rights, particularly of the most vulnerable groups of society, are not undermined." E/C.12/1/Add.55, 1 December 2000, para. 38.

31. *See, for example*, Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights", 9 *Hum. Rts. Q.* 156, at (1987): "… on the basis of

its obligation to cooperate within international organizations and in their relations with international organizations is also a general one, not one that is defined in terms of quantitative or other criteria.[32] Second, the fact that the parties have undertaken certain obligations under the Covenant does not authorize them to disregard their other treaty obligations, including the obligations they have undertaken as members of the relevant international organizations. In their participation in international organizations, the parties must abide by the rules of the organization with regard to its decision-making processes, the limits on the use it may make of its resources, and

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the preparatory work it is difficult, if not impossible, to sustain the argument that the commitment to international cooperation contained in the Covenant can accurately be characterized as a legally binding obligation upon any particular State to provide any particular form of assistance." See also, Mathew C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on Its Development*, Oxford, p. 149 (1995): "[During the drafting of the Covenant,] the general consensus was that developing States were entitled to ask for assistance but not claim it as a legal right. The text of article 11 bears out this conclusion. In recognizing the role of international co-operation in the realization of the rights, it stipulates that it should be based on 'free consent'". The Committee on Economic, Social and Cultural Rights has also stopped short of finding a specific content to the obligation to cooperate. In its General Comment No. 3, the Committee stated: "The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990)". (UN Committee on Economic, Social and Cultural Rights, *The nature of States parties obligations (Art. 2, par.1), General Comment No. 3*, Fifth session, 1990).

32. It has been suggested, however, that States parties whose own resources are insufficient to implement the rights set out in the Covenant in their territories have a duty to request international assistance. See Eric M. G. Denkers, "IMF Conditionality: Economic, Social and Cultural Rights, and the Evolving Principle of Solidarity", in Paul de Waart, Paul Peters & Erik Denters, ed., *International Law and Development*, Nijhoff, p. 238 (1988).

the factors it may take into account in deciding on the uses of its resources.

27. This principle has a number of consequences with respect to the Fund.

- First and foremost, the governing organs of the Fund are not free to impose conditions on the members' access to the Fund's resources if these conditions exceed the Fund's powers. Under the Fund's Articles of Agreement, its members are entitled to have access to its general resources, provided that their use of these resources is in accordance with the Articles of Agreement and the policies adopted under them.[33] The Fund is not free to deny access to its general resources on the part of a member if the member meets the conditions stated in the Articles of Agreement and the policies adopted under them.
- Second, in the formulation of its policies on the use of its general resources, the Fund must be guided by the criteria set forth in the Articles of Agreement. The relevant provision is Article V, Section 3(a), which requires the Fund to "adopt policies on the use of its general resources . . . that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement and that will establish adequate safeguards for the temporary use of the general resources of the Fund." These are the only considerations that may be taken into account by the Fund in the design of its policies on the use of its general resources.
- Third, the key condition of access of members to the Fund's general resources is that the member represents that it has a "balance of payments need" for such resources, which means that the member has a need for the resources because of its balance of payments, its reserve position, or developments in its reserves. Other resources administered by the Fund are also subject to a similar limitation.[34]

33. Article V, Section 3 (b)(i). Although the entitlement ceases when the Fund's holdings of the member's currency reach 200 percent of the member's quota, access beyond that limit may be permitted by the Fund under its policies. This access remains subject to the other rules of the Articles, including Article V, Section 3(a) quoted in the text.

34. Resources under the Fund's Extended Structural Adjustment Facility (ESAF) and now the Poverty Reduction and Growth Facility (PGRF) are separate from the Fund's general resources and access to them is conditioned on the member experiencing "protracted balance of payments problem", which is defined in a more flexible way than the "balance of payments need" of the Articles of Agreement, but

The members of the Fund are not free to give access to its resources for uses not permitted by the Fund's Articles of Agreement, or to divert resources entrusted to the Fund by some of its members to uses other than those stipulated by the donors.

- Fourth, members of the Fund must take into account the requirement that the members' temporary use of the Fund's general resources is granted "under adequate safeguards", to protect the Fund from misuse of those resources and to ensure that they are repaid.[35]
- Fifth, States parties must take into account that the Fund plays a catalytic role in the flow of funds to its developing and transition-economy member countries, and that this requires that the Fund consider the effect of the programs it supports on other member countries. In particular, this requires that the programs that the Fund supports are credible, *i.e.* capable of being successfully implemented, and likely to be implemented, so as to generate the confidence of other sources of funds on which the economy is dependent.

Thus, in their actions in the governing organs of the Fund, the officials selected by the States parties to the Covenant are not free to disregard the provisions of the Articles of Agreement of the Fund, and, in particular, may not divert its resources to uses that are not provided for in the Articles.

Obligations of States Receiving Fund Assistance, and Indirect Obligations of the Fund

28. If the obligations of the Covenant rest on the parties to it, and these obligations include a duty to ensure that the economic programs they undertake with international financial assistance are consistent with their undertakings under the Covenant, there remains to discuss whether there exists any concomitant obligation on the part of the organizations. The duty in question would not be a direct one, stemming from the Covenant, but would be derived

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shares with the latter the fact that it is a macroeconomic test, not one that considers the needs of particular sectors of the economy.

35. Article V, Section 3 (a) of the Articles of Agreement. This requirement does not apply to resources other than the general resources; for instance, grants for debt reduction are made to heavily indebted poor countries under the HIPC Initiative (cf. paragraphs 52-55 below).

from the State party's obligation to implement the Covenant in its territory. Under the terms of the Covenant itself, such a duty would not affect the constituent instrument of the specialized agencies. It would thus leave intact the rights and obligations of the organization and its members as stated in the constituent instrument. It is therefore within the framework of these rights and obligations that the Covenant could have an indirect impact on a specialized agency. 29. For the Fund, these considerations would limit the possible obligation to one that would not do violence to its mandate and to the respective rights and obligations of the Fund and its members as stated in its Articles of Agreement. It would also exclude a positive duty to engage in a specific action or activity, or to provide a specific amount of financial resources to any member or group of members. What then would be the remaining contents of such an obligation? Commentators have suggested various definitions of such a duty. For example, it has been suggested that they have a "duty of vigilance" to ensure that their actions do not produce negative human rights effects,[36] or a duty to "pay due regard" to the Covenant.[37] Others have put the obligation in negative terms, as a duty "not to undermine" the borrowing country's efforts to abide by the human rights conventions to which they are parties.[38] However, there are serious impediments

36. Pierre Klein, "Les Institutions Financières Internationales et les Droits de la Personne", 1999 *Revue Belge de Droit International*, p. 97 at 111-114. The author finds the source of this obligation in the Corfu Channel case, and, extending the principle to international organization, suggests that they "impose on international financial institutions the duty to ensure that their decisions do not produce negative consequences on the human rights situation in the borrowing States."

37. Michael Lucas, "The International Monetary Fund's Conditionality and the International Covenant on Economic, Social and Cultural Rights: An Attempt to Define the Relations", 1992 *Revue Belge de Droit International*, p. 104 at 122. The obligation is based on the author's views of the 'general prosperity' clause of Article I, paragraph (v) of the Fund's Articles of Agreement and the relationship between the Fund and the United Nations.

38. With respect to the World Bank, Bradlow has written: "… at least in those countries that are signatories to human rights conventions, the Bank may have an obligation to ensure that its operations do not undermine the country's efforts to abide by these conventions." He added in a footnote: "Applying this standard will not be easy, given the differing interpretations States may have about how to implement their human rights obligations. A satisfactory outcome to this problem would be facilitated by an explicit Bank human rights policy." Bradlow recognizes that the Fund's influence over human rights is more limited that the Bank's, because (i) it is a monetary, not a development institution; (ii) it operates in a much shorter time horizon. But he adds that the Fund has "some" responsibility to help

to defining a specific duty of the Fund with regard to the Covenant. These impediments can be seen from the perspective of the country involved, and from that of the Fund.

30. With respect to the country itself, it must first be acknowledged that it is the responsibility of each country to make sure that its policies are consistent with its international commitments and, for this purpose, to ascertain the extent of those commitments and the manner in which it will discharge them. This is particularly the case with respect to undertakings that are progressive in nature and broad in scope, such as much of the undertakings set out in the Covenant. Given the considerable discretion States parties have in assessing the efforts they can make at any point in time in gradually achieving economic and social rights under the Covenant, it is the responsibility of the authorities in the country to decide how to include considerations related to the implementation of such rights in the design of the country's economic plans and policies. It follows that it is up to the member to bring up such considerations in its relations with the Fund.

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protect the citizens of its member countries from human rights abuses. "It cannot be indifferent to situations in which human rights abuses have become so serious as to cause monetary consequences." But he acknowledges that there are limits to the Fund's ability to act in this respect: "It should be noted that the Fund faces a more difficult situation in this regard than the Bank. There are three reasons for this. First, as the manager of the international monetary system, the IMF must balance its responsibilities to the citizens of the violating State against its responsibilities to the other stakeholders in the international monetary system. Consequently, it cannot easily impose sanctions on a State that violates human rights if this would have substantial adverse effect on the international monetary system. Second, the IMF has fewer options than the Bank for dealing with human rights abuses. Because the IMF provides financing for general balance of payments support rather than for specific projects, it cannot easily direct the flow of the financing. Consequently, its only option when faced with a serious human rights problem is to either deal with the State purely on the basis of its monetary situation or to impose sanctions on the State. Third, the Articles of Agreement constrain the IMF's ability to use sanctions. The Articles require the IMF to make its financing facilities available to any Member State in "good standing" who is suffering from the type of balance of payments problem that the facility was established to help correct. A member is in "good standing" if it is performing all the obligations of membership in the IMF. These obligations, as stipulated in the Articles of Agreement, do not include human rights performance." Daniel D. Bradlow, "Symposium: Social Justice and Development: Critical Issues Facing the Bretton Woods System: The World Bank, the IMF and Human Rights", 6 *Transnt'l. Law and Contemp. Probs*., 47, at 72-73 (1996).

31. It may be noted that the ability of many countries which desire to make progress in this field may be constrained. First, if one considers only the question of the budgetary allocations that can be made in a crisis situation, it quickly becomes apparent that the choices of the government may be extremely limited. In the face of a shortfall in income, a government may face a number of conflicting claims on what little resources are available, and may not be in a position, in spite of its best efforts and with all the external assistance available, to insulate the poorest segments of its population from the effects of the crisis. Thus, there may be significant limits to the ability of a State party to devote resources to the promotion of the social rights set out in the Covenant, and some temporary regression in the achievement of these rights may be unavoidable.

32. Second, the achievement of improvements in the social conditions called for in the Covenant is not exclusively a matter of increasing government social expenditures. Economic growth, or growth-oriented adjustment, is an indispensable precondition to the redistribution of wealth implied in the Covenant. In turn, economic growth needs to be fostered by a judicious mix of policies involving many different facets of the economy, including, in particular, fostering private investment, both domestic and foreign. In this sense, to judge a country's performance under the Covenant exclusively from the perspective of its spending on social programs would be inappropriate.

33. Third, in assessing the effects of a particular program or policy adopted by a State party against the State's international commitments, it is important to compare the outcome of the program or policy with the alternative of the lack of a program and the lack of external support to the country. Even allowing for the difficulty of making such comparisons, it is possible that, in many cases, lack of a Fund-supported program would have resulted in worse outcomes for the poorest segments of the population than the Fund-supported program provided. While no claim is made that all Fund-supported programs are necessarily the best ones that could be devised under the circumstances, it must be acknowledged that a number of constraints limit the ability of member countries to develop programs that respond adequately to the crisis situation in which the program is developed while at the same time fully protecting the poorest segments of the population.

34. With respect to the Fund, first and foremost, it must be emphasized that the Fund has no general mandate to ensure that its members abide by their international obligations. The extent to which the Fund may consider the international undertakings of its members is defined by the Fund's own purposes. The Fund may view the discharge by its members of certain international obligations as particularly significant. This is the case of the member's financial obligations to the Fund itself, and the Fund has adopted detailed policies to deal with its members' arrears to it.[39] The Fund also considers a member's arrears to other lenders as relevant, and has adopted policies in this regard.[40] Beyond such financial obligations, however, the Fund has neither the mandate nor the capacity to consider all of a member's international commitments. As was mentioned above, it is up to each member to decide for itself which of its international commitments are significant in the design of its programs of adjustment, and how these international commitments are to be interpreted and applied. In particular, it is up to each member to decide how its international commitments regarding economic and social rights, as well as constitutional or other legal requirements, may affect its adjustment program. The Fund cannot substitute itself to the member for this purpose.

35. Moreover, the Fund must also take other considerations into account. In its own decisions to support its member countries' adjustment programs, the Fund must act in conformity to its Articles of Agreements. In its surveillance activities, the policies it adopts must "respect the domestic social and political policies of members,"[41] which constrains the Fund's ability to raise social development issues in this context. While this constraint does not apply to the Fund's policies with respect to the use of its resources, other provisions of the Articles must be taken into account. In particular, in its decisions on the use of its resources, the Fund must take into account a number of factors that are not covered as such by the Covenant, and indeed, that are not related directly to human rights, but which are required to be taken into consideration by its Articles of Agreement. For example, the Fund must be mindful of the effects of a crisis in a particular country not only on the country

39. *See Selected Decisions*, pp. 140-146 and pp. 548-567.
40. Decision No. 3153-(70/95) dated October 26, 1970, *Selected Decisions*, p. 197, and Chairman's summings up at pp. 198 and 199.
41. Article IV, Section 3 (b).

itself, but also on its neighbors in the region and possibly beyond the region. A sudden devaluation of a currency may produce an artificial advantage in terms of price of the concerned country's exports that is not welcomed by other Fund members. It may also render a country's imports more expensive, and reduce the export opportunities of its trading partners. Also, a sudden flight of capital from one country may trigger a similar outflow from other countries unless it is remedied early. Similarly, the Fund must bear in mind that it acts as a catalyst in the transfer of resources to the members making use of its resources. To enhance the flow of funds to its members, the Fund must ensure that the programs it supports are realistic and can reasonably be expected to be completed successfully. Also, the Fund must, under its Articles of Agreement, make its resources available to its members under "appropriate safeguards", intended to provide assurance that the funds will be used as intended, and that they will be repaid on schedule.

36. While the States parties to the Covenant have undertaken certain obligations, and in particular the obligation to achieve progressively certain social rights for their population, the practical implementation of these obligations is subject to a number of constraints that are particularly difficult to overcome for developing countries. For its part, within its mandate and resources, the Fund provides technical assistance and financial resources intended to help its members overcome the balance of payment difficulties that hamper their development efforts. It does so on the basis of its own Articles of Agreement.

CONCLUSION TO PART I

37. The Fund is a specialized agency. The *raison d'otre* of a specialized agency is to enable countries that may have different political systems and do not necessarily share all the same economic, social and cultural values to cooperate together in well-defined areas. The question is whether it is better for the international community to allow this kind of cooperation to continue or whether adherence to common political, economic, social and cultural values should be a condition for membership in specialized agencies. Until now, the former approach has prevailed and it may be expected to prevail as long as the benefits of cooperation outweigh those of exclusion.

III. CONSIDERATIONS RELATED TO ECONOMIC AND SOCIAL HUMAN RIGHTS UNDER THE FUND'S ARTICLES OF AGREEMENT

38. While the Covenant has no legal effect on the Fund, it does not follow that the Fund may not, on the basis of its Articles of Agreement, take into account the relationship between its activities and the achievement of the social rights contained in the Covenant. The contribution of the Fund to the economic preconditions for the achievement of the rights contained in the Covenant is discussed in this part. However, before discussing this topic, it may be useful to consider more fully the broader context in which the rights contained in the Covenant may be achieved. This broader context includes a wider set of economic rights than those contained in the Covenant, and it involves economic considerations as well as legal ones.

39. It may be noted first that the Covenant does not contain all the important rights that need to be exercised in order for individuals to enjoy the social progress that is the objective of the Covenant. There are a number of rights that are essential for the achievement of the social rights set out in the Covenant but are not stated in the Covenant. For example, the right to own property is stated in the Universal Declaration, but it is not included in any of the two Covenants, and thus has remained outside the scope of the human rights monitoring system. Similarly, workers' rights are expressed in the Covenant in terms reflecting the situation of wage-earners who work in their own country and do not have family abroad. Other rights, such as the rights to engage in economic activity and to trade are as important to the realization of the rights specified in the Covenant. These rights provide the very basic tools that all people, including the poor, can use to engage in economic activity and to improve their economic condition. Also, in today's open economy, the right to work in other countries (incomplete as it is), and to remit one's earnings to one's family at home are equally important to a large number of workers. While the provisions of the Covenant may represent a common ground around which members of the United Nations found agreement at a certain point in time, they now appear somewhat removed from the realities of today's internally and externally open economy.

40. Moreover, the social rights set out in the Covenant will not be realized unless certain economic preconditions are met. These preconditions include economic growth, without which no significant

redistribution of wealth can take place. Also, the structural reforms and policies that need to be put in place are not limited to spending on social services. As the Fund's contribution to the 1995 World Summit for Social Development stated,

> Social development requires a strategy of high-quality economic growth, macroeconomic stability, which generates low inflation, and promotion of the agricultural sector, where many of the poor work. A strategy of high-quality growth comprises a comprehensive package of policies encompassing four elements: (i) macroeconomic policies aimed at a stable and sustainable macroeconomic environment; (ii) structural policies aimed at a market-based environment for trade and investment; (iii) sound social policies, including social safety nets to protect the poor during periods of economic reform, cost-effective basic social expenditures, and employment-generating labor market policies; and (iv) good governance through accountable institutions and a transparent legal framework.[42]

41. Within this broad framework, however, the appropriate mix of policy to be applied at any given time by any given government is an elusive matter. Continuous adjustment of policies is an inescapable requirement, and results are never assured. In this context, what the international financial institutions can provide is advice and financial assistance intended to help countries establish (or re-establish, as the case may be) and maintain the economic basis without which the States parties to the Covenant are not in a position to fulfill their undertakings. For its part, the Fund is contributing to the objective of maintaining an international monetary system which provides a framework that facilitates economic growth. It is also pursuing certain economic rights which have a bearing on the achievement of social rights in an open economy, such as unrestricted payments for current international transactions, including family remittances. In providing financial assistance, the Fund has increasingly taken into account the special needs of developing countries, which are the States parties to the Covenant that need international assistance to achieve their commitments under the Covenant.

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42. International Monetary Fund, *Social Dimensions of the IMF's Policy Dialogue, prepared by the Staff of the International Monetary Fund for the World Summit for Social Development, Copenhagen, March 6-12, 1995*, IMF Pamphlet Series No. 47, p. 1.

42. Within this broader framework, certain aspects of the Fund's Articles of Agreement and activities are of special importance to the achievement of the rights set out in the Covenant. These appear under the Fund's responsibilities towards the international monetary system and its surveillance function (A), as well as under the financial assistance it provides to its members (B).[43]

A. Economic Growth as an Objective of Fund Surveillance

43. Economic growth is a necessary precondition for raising the standards of living of peoples, as States parties to the Covenant have undertaken to gradually achieve.[44] Without growth, the right to health, food, or education cannot be further achieved. In this context, the inclusion of references to economic growth in the provisions of the Fund's Articles dealing with the objectives of the international monetary system and the Fund's surveillance responsibilities is significant.

44. Under the second amendment of the Fund's Articles of Agreement, the par value system was abandoned, and, under Article IV, Fund members were authorized to establish the exchange arrangements of their choice but undertook to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. More specific obligations with respect to economic, financial and exchange rate policies were set forth in the same provision. For its part, the Fund was given the responsibility to oversee both the international monetary system in order to ensure its effective operation and the compliance of each member with its obligations under Article IV. In particular, the Fund was given the obligation to exercise "firm surveillance" over the exchange rate policies of members. Also, with the second amendment, growth appears in the Articles of Agreement, both as a purpose of the international monetary system, and as an objective of each member's economic and financial policies.

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43. Another aspect, not discussed here, is the Fund's technical assistance to its members.

44. Good governance may be seen as another precondition, or even as a condition of growth itself. Poor governance (including corruption) may lead to the capture of the fruits of growth by those in power, and it may act as an obstacle to growth itself, in particular by stifling investment.

45. Article IV contains an introductory paragraph in which the objectives of the international monetary system are set out, as follows:

> Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, *and that sustains sound economic growth*, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular […]. (emphasis added)

It is at the request of Executive Directors of the Fund elected by developing countries (supported by others) that the expression "sustains sound economic growth" was added to Section 1. As one commentator has noted, by the introduction of this expression in Article IV, the Articles "explicitly recognized economic growth as one of the criteria for judging the successful functioning of the international monetary system."[45]

46. Each Fund member undertakes to "endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances."[46] In exercising its surveillance over the members' exchange rate policies, the Fund's appraisal "shall take into account the extent to which the policies of the member, including its exchange rate policies, serve the objectives of the continuing development of the orderly underlying conditions that are necessary for financial stability, the promotion of sustained sound economic growth, and reasonable levels of employment."[47] Thus, the Fund's surveillance covers the policies of its members to serve sustained sound economic growth and, in that context, the Fund assesses not only specific policies of its members but also, more generally, their observance of certain standards of "good governance".[48] However, the

45. Margaret Garritsen de Vries, The International Monetary Fund 1972-1978, Cooperation on Trial, Volume II, Narrative and Analysis, IMF, p. 754 (1985).
46. Article IV, Section 1(i).
47. Surveillance Over Exchange Rate Policies, Fund Executive Board Decision No. 5392-(77-63), April 29, 1977, as amended, *Selected Decisions*, p. 10.
48. Guidance Note of July 2, 1997 (EBS/97/125), *Selected Decisions*, p. 31.

scope of the Fund's surveillance is limited by the Articles, which provide that the principles adopted by the Fund for the guidance of its members "shall respect the domestic social and political policies of members."[49] Although issues of social policy often come up in discussions of budget equilibrium, this provision restricts the ability of the Fund to extend its surveillance to deal directly with issues of social policy.

B. Financial Assistance

47. The Fund may provide financial assistance to its members either directly out of its general resources (held in the Fund's General Resources Account), or from other resources.

From the Fund's General Resources

48. The financial assistance the Fund provides through its general resources is rooted in the provision of the Articles of Agreement which states that a purpose of the Fund is "to give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."[50] In addition, Article V, Section 3 requires the Fund to adopt policies on the use of its general resources, including policies on stand-by arrangements, and authorizes it to adopt special policies for special balance of payments problems "that will assist members to solve their balance of payments problems *in a manner consistent with the provisions of this Agreement*…" (emphasis added).[51]

49. Conditionality is the "explicit link between the approval or continuation of the Fund's financing and the implementation of certain specified aspects of the government's policy program."[52] The

49. Article IV, Section 3 (b).
50. Article I (v).
51. Article V, Section 3. By contrast, Article V, Section 12 (f), which applies to the Special Disbursement Account resources, and Article V, Section 2 (b), which is applicable to the administered accounts (ESAF, PRGF) only require that the use of these resources be "consistent with the purposes of the Fund".
52. International Monetary Fund, *Conditionality in Fund-supported Programs – Policy Issues*, February 16, 2001, paragraph 10 (available through the Fund's Internet site).

conditionality attached to the use of the Fund's resources has to be consistent with the provisions of the Articles of Agreement. This limits the types of conditions that may be included to those that can be accommodated under the Articles. A recent survey shows that, while the scope of structural conditionality has been expanded, the majority of structural conditions are concentrated in a relatively small number of sectors that are at the very core of the Fund's involvement in its member countries: exchange and trade systems, and fiscal and financial sectors.[53] Even within this range, there is often tension between 'ownership' of the program and policies that make up the reform program the Fund supports, and the sovereignty of the Fund members. The 1979 Guidelines on Conditionality underscored the principle of parsimony and the need to limit the performance criteria to the minimum number needed to evaluate policy implementation. They also stressed that the Fund should pay due regard to the country's social and political objectives, economic priorities, and circumstances.[54]

50. Within this broad framework, what is the possible linkage between Fund conditionality and economic, social and cultural rights? Two legal bases can be found. The first one is in the purposes of the Fund, which apply to its financial assistance: one of the Fund's purposes is "(v) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments *without resorting to measures destructive of national or international prosperity*" (emphasis added). Under this provision, the Fund has taken the view that its conditionality could include the removal of exchange and trade restrictions, but also the avoidance of measures that may be damaging to the environment or to the welfare of the population. For instance, attention may be given to health and education budgets, safety nets and good governance, including avoidance of corruption. However, this does not mean that the Fund sees itself as trying to substitute itself for the national authorities in determining national priorities. In particular, military expenditures are outside the scope of Fund conditionality pursuant to a decision of the Executive

53. *Ibid*, paragraph 50.

54. *See*, International Monetary Fund, *Conditionality in Fund-Supported Programs, Overview*, February 20, 2001, paragraph 3 (Available through the Fund's Internet site).

Board.[55] More recently, there has been a discernible trend toward a reduction in the Fund's involvement in domestic policies through conditionality. The general criteria would be that the Fund should limit its conditionality to macroeconomic variables and to those structural elements that are critical to macroeconomic stability. The World Bank would be expected to strengthen its role in the other areas where structural adjustment is needed.[56]

51. Another basis for Fund involvement is its assessment, as a condition for its assistance, that the member's program is viable and likely to be implemented. This means that, if a program is so strict that it is likely to generate strong popular opposition, it may not be implemented, and the Fund should not support it. It also means that, if egregious or systematic violations of human rights lead foreign governments or creditors to suspend their financial assistance or other forms of external financing, the program may not be implemented, and the Fund should not support it. Clearly this does not establish a direct link with the objectives of the Covenant. However, to the extent that major violations of economic and social human rights would trigger civil unrest or a lack of foreign financing, there would be at least an indirect link. Whether or not a program may create such problems is a matter of judgment for the Managing Director when transmitting the member's request to the Executive Board and for the Executive Board when deciding on the request.

Special Facilities for Developing Countries

52. Because of the principle of uniform treatment among members, the Fund's general resources must be made available to all members, whether developed or developing, for balance of payments assistance. Other resources of the Fund, however, may be earmarked for balance

55. Concluding Remarks by the Acting Chairman, October 2, 1991, *Selected Decisions*, p. 447, at p. 448.

56. Erik Denters has suggested that the Fund has a duty to "heed requests by members to avoid, as far as possible, 'measures destructive of national prosperity' and to safeguard socioeconomic standards as long as balance of payments support is provided under adequate safeguards." Erik Denters, *Law and Policy of IMF Conditionality*, Kluwer, p. 183 (1996). The author, while recognizing that the Fund is not bound by the Covenant, suggests that Article I, paragraph (v) and its reference to the correction of maladjustments of balance of payments "without resorting to measures destructive of national or international prosperity" provides the legal basis for this duty.

of payments assistance to developing countries. There are two categories of such resources: (a) capital gains on sales of the Fund's gold, once transferred to the Special Disbursement Account, may be used for "balance of payments assistance…on special terms to developing members in difficult circumstances" taking into account "the level of per capita income" (Article V, Section 12(*f*)(ii)); (b) contributions may be made to the Fund, in the form of loans or grants, for financial or technical assistance consistent with the purposes of the Fund to specified countries or groups of countries (Article V, Section 2(*b*)). On the basis of these provisions, certain resources have been generated or contributed for financial assistance to developing countries. This financial assistance is provided by the Fund through concessional lending under the Poverty Reduction and Growth Facility (PRGF) and through debt relief under the Heavily Indebted Poor Countries (HIPC) Initiative.

53. The Fund supports the economic adjustment and reform efforts of its low-income members through the PRGF, which provides loans at an annual interest rate of ½ of 1 percent with repayment periods of 5 ½ - 10 years. The PRGF–which incorporates recommendations from past evaluations of the Fund's concessional lending facility–is designed to make poverty-reduction programs a key element of a growth-oriented strategy. Programs supported by the PRGF are framed around a comprehensive, nationally-owned poverty reduction strategy, the costs of which are fully incorporated into the macroeconomic framework. In the case of HIPC-eligible members, this tightens the link between resources made available by debt relief and additional poverty reduction efforts.

54. The HIPC Initiative is designed to reduce the external debt burden of eligible countries to sustainable levels, enabling them to service their external debts without the need for further debt relief and without compromising growth. Launched in 1996, the Initiative marked the first time that multilateral, Paris Club, and other official and bilateral creditors united to take this kind of comprehensive approach to debt relief. Assistance under the HIPC Initiative is limited to countries that are eligible for PRGF and International Development Association (IDA) loans and that have established strong track records of policy performance under PRGF- and IDA-supported programs but are not expected to achieve a sustainable debt situation after full use of traditional debt-relief mechanisms.

55. A strong track record of policy implementation is intended to ensure that debt relief is put to effective use. Currently, 77 members of the Fund are eligible to receive PGRF loans. While the qualification of these members for the HIPC Initiative is determined on a case-by-case basis, the enhancements to the Initiative could allow as many as 41 Fund members to qualify for assistance.[57]

IV. CONCLUSIONS

56. This paper has considered the relationship between the Fund and the Covenant. The following points have been made regarding the nature and role of the Fund:

- The Fund is a monetary agency, not a development agency. While its mandate and policies have evolved over time, it remains a monetary agency, charged with the responsibility to maintain orderly exchange rates and a multilateral system of payments free of restrictions on current payments.
- The Fund functions essentially at the macroeconomic level, not at the level of individual sectors; its responsibilities in this respect are different from those of the development banks.
- The Fund's resources (including those entrusted to it by donors) can be used for balance of payments purposes, not for project financing.

For its part, the Covenant is a treaty among States which contains obligations addressed to States. Neither by its terms nor by the terms of the Fund's relationship agreement with the United Nations is it possible to conclude that the Covenant is applicable to the Fund. Moreover, the norms contained in the Covenant have not attained a status under general international law that would make them applicable to the Fund independently of the Covenant.

57. The fact that the Covenant does not apply to the Fund does not mean that the Fund does not contribute to the objectives of the Covenant. The Fund's contribution to economic and social human rights is essential but indirect: by promoting a stable system of exchange rates and a system of current payments free of restrictions, and by including growth as an objective of the framework of the international monetary system, as well as providing financial support

57. *See*, International Monetary Fund, *Financial Assistance for the IMF's Poorest Members—An Update*, May 2, 2001, paragraph 3.

for balance of payment problems, the Fund contributes to providing the economic conditions that are a precondition for the achievement of the rights set out in the Covenant.

58. Should the Fund do more to assist its member countries in achieving the objectives of the Covenant? The participation of the Fund in the HIPC initiative and in the PRSP process clearly shows that the Fund has adapted its activities to the needs of its poorest member countries. However, in the final analysis, what it can do is determined by its Articles of Agreement, itself a treaty among its 183 member countries. As has been aptly written,

> "[…] there is a limit to "institutional elasticity", *i.e.,* the extent to which institutions created and still used for other purposes can be "stretched" in order to get them to perform human rights functions when those functions are accomplished *at the expense* of their manifest functions."[58]

59. In a time when the Cold War is over, and the wide ideological divide that had dominated the post-World-War-II period has all but disappeared, it is tempting to brush aside the principle of specialization that has governed the establishment of the specialized agencies and their relationships with the United Nations and among themselves. However, States continue to have differed (and sometimes divergent) views on a number of topics, many of them with human rights implications. The principle of specialization continues to permit States with different views to cooperate among themselves on matters of common interest to them in spite of these differences.

60. In the end, the question may be raised, just how important are these institutional rules that limit the extent to which the Fund can take the Covenant into account? Should they not be bent, or ignored entirely, to put the Fund fully at the service of the higher cause of human progress that the Covenant represents? The answer to this question is to be found in the nature of the Covenant itself. The Covenant is a treaty, a set of legal rules binding on the parties to it. In selecting this form, the drafters of the Covenant relied on the rule of law as the vehicle to bring about more fully the human progress expressed in the Universal Declaration of 1948. International organizations are also subject to the rule of law. Their members,

58. W. Michael Reisman, "Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs, 72 *Iowa L. Rev.* 391, at 395 (1987).

their debtors and their creditors all expect them to carry out their activities at all times in conformity with the rules that apply to them. However, the international financial organizations, including the Fund, are helping their member countries in developing sound frameworks for governance and better legal and judicial systems, all of which highlights the rule of law as a central element of development. If the international organizations are to be successful in this task, they must be credible. To be credible, they must apply the rule of law to their own situation, just as they encourage others to apply it to theirs.

61. Hence, legal considerations do matter, and the Fund is not free to disregard its own legal structure for the sake of pursuing goals that are not its own mandated purposes. If the members of the Fund believe that it should adopt a more direct approach to the integration of human rights considerations in its decisions, they may of course propose an amendment to the Fund's Articles of Agreement. It is the theme of this paper that the Fund already contributes significantly to the achievement of the objectives of the Covenant, while discharging all of its responsibilities towards all of its members.

DOMESTIC ADJUDICATION AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A SOCIO-LEGAL REVIEW

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1. INTRODUCTION: THE RISE OF DOMESTIC ADJUDICATION OF ESC RIGHTS

Viewed in historical perspective, the rise of economic, social and cultural (ESC) rights in comparative legal jurisprudence and litigation strategy is remarkable. For most of the 20thCentury we must strain to find such judgments and decisions although statutory and administrative law has fostered a range of enforceable social entitlements (ANNAN, 1988; KING, 2008). We can only point to particular international bodies such as the International Labour Organization (ILO) Committee on Freedom of Association (FENWICK, 2008) or scattered decisions in national jurisdictions such as Germany, United States and Argentina (ALBISA; SCHULTZ, 2008; ACKERMAN, 2004; COURTIS, 2008). For example, the Federal Constitutional Court of Germany ruled that there was an entitlement to a basic minimum standard of living (*Existenzminimum*) and that universities had to use their maximum available resources in offering places to applicants to medical studies (GERMANY, Numerus *Clausus I Case*, 1972).

The last two decades have witnessed a sea change. ESC rights appeared to have been partly rescued from controversies over legitimacy, legality and justiciability and in many jurisdictions have been accorded a more prominent place in advocacy, discourse and jurisprudence (LANGFORD, 2008b). If we were to speculate on the total number of decisions that have invoked constitutional and international ESC rights, a figure of at least one to two hundred thousand might be in order. Hoffman and Bentes (2008) track more than 10,000 cases in Brazil alone and similar patterns can be seen in Colombia and Costa Rica (SEPÚLVEDA, 2008; WILSON, 2009).

The trend is likely to continue with the adoption by the United Nations (UN) General Assembly in 2008 of a complaints and inquiry procedure under the International Covenant on Economic, Social and Cultural Rights (ICESCR). This Optional Protocol could prompt greater national litigation and constitutional reform by virtue of its requirement that domestic remedies first be exhausted and its role in promoting awareness of the potential justiciability of ESC rights (MAHON, 2008; LANGFORD, 2009).

India is often credited with being the first jurisdiction to develop what we might call a relatively mature ESC rights jurisprudence. Following the emergence in the 1970s of public interest litigation on civil and political rights, the right to life was interpreted broadly to include a range of economic and social rights (DESAI; MURALIDHAR, 2000; INDIA, *Bandhua Mukti Morcha vs. Union of India*, 1984). In its first social rights case in 1980, the Indian Supreme Court ordered a municipality to fulfil its statutory duties to provide water, sanitation and drainage systems (INDIA, *Municipal Council Ratlam vs. Vardhichand and others*, 1980). However, the Supreme Court's decisions and orders have at times been markedly conservative, particularly as regards labour, housing and land rights, creating a certain level of ambivalence over the Indian experience (MURALIDHAR, 2008; SHANKA; MEHTA, 2008).

Later judgments from South Africa's Constitutional Court have captured international attention due to the clarity of the judicial reasoning and reliance on explicit constitutional rights. In the pioneer case of *Grootboom*, a group of residents who were living on the edge of a sportsfield filed a claim that their right to housing was being violated. The Court found that the government authorities had failed take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realisation of the right to housing as its programmes neglected to provide emergency relief for those without access to basic shelter (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000). In subsequent decisions, this Court alone has ordered the roll-out of a programme to prevent mother-to-child transmission of HIV/AIDS (SOUTH AFRICA, *Minister of Health and Others vs. Treatment Action Campaign and Others*, 2002), found the exclusion of migrants from social security benefits unconstitutional (SOUTH AFRICA, *Mahlaule vs. Minister of Social Development*, *Khosa vs.*

Minister of Social Development, 2004a) and, surpassing the timid Indian jurisprudence on urban evictions, made relatively concrete orders in six different cases to prevent urban displacement or access to resettlement (SOUTH AFRICA, *Port Elizabeth vs. Various Occupiers*, 2004b; *Jaftha vs. Schoeman and others*, 2005b; *President of RSA and Another vs. Modderklip Boerdery (Pty) Ltd and Others*, 2005c; *Van Rooyen vs. Stoltz and others*, 2005a; *Occupiers of 51 Olivia Road, Berea Township And Or. vs. City of Johannesburg and Others*, 2008). At the same time, a number of decisions such as *Mazibuko* on the right to water (SOUTH AFRICA, *City of Johannesburg and Others vs. Lindiwe Mazibuko and Others Case*, 2009) give support to critics who say the Court's reasonableness approach is too thin on positive obligations and excessively deferential to the State (PIETERSE, 2007).

These Indian and South African experiences are symbolic of a wider and contemporary trend with the acceleration of litigation in Latin America and South Asia and to a lesser degree in Europe, North America, the Philippines and some African countries (COOMANS, 2006; GARGARELLA; DOMINGO; ROUX, 2006; LANGFORD, 2008b; ICJ, 2007; ODINDO, 2005; MUBANGIZI, 2006). To pick out one of these jurisdictions, the Constitutional Court in Colombia has used the *tutela* procedure to issue thousands of decisions to ensure immediate access to medicines for people living with HIV/AIDS, social security for indigent persons and food subsidies for poor and unemployed pregnant women (SEPÚLVEDA, 2008). The Court also developed the doctrine of an 'unconstitutional state of affairs' to address systemic violations of economic and social rights, such as those involving internally displaced persons or a dysfunctional health system (YAMIN; PARRA-VERA, 2000).

While the focus of this paper is on domestic adjudication, the international dimension should not be ignored. International and regional mechanisms have been utilised in this field and the jurisprudence of these bodies has shaped domestic interpretation of ESC rights (BADERIN, 2007; LANGFORD, 2008b). For example, the decision of the European Committee on Social Rights on exploitative child labour in *International Commission of Jurists vs. Portugal* has had a significant impact on Portuguese law and practice (EUROPEAN COMMITTEE ON SOCIAL RIGHTS, *ICJ vs. Portugal*, 1999). The findings in *SERAC vs. Nigeria* by the African

Commission on Human and Peoples Rights are notable for their articulation of African States' obligations concerning ESC rights and, while largely unimplemented, it has provided a key guiding standard for the continent and follow-up litigation in Nigeria (African Commission on Human and Peoples' Rights, *Purohit and Moore vs. The Gambia*, 2003)[1]. Even the International Court of Justice has entered the arena, holding that the State of Israel had violated the ICESCR and the Convention on the Rights of the Child (CRC) by the construction of the 'security' fence and its associated regime (INTERNATIONAL COURT OF JUSTICE, 2004). Beyond international human rights mechanisms, there has been growing civil society intervention in international investment arbitration disputes together with a use of the World Bank Inspection Panel and OECD multinational enterprises complaints procedures despite their limited powers (PETERSON, 2009; CLARK; FOX; TREAKLE, 2003; CERNIC, 2008).

This sketch is not meant to paint a simple and rosy picture. A significant number of States, many from South-East Asia, Middle East and the West, have declined to constitutionalise the rights with justiciable effect. This is despite the UN Committee on Economic, Social and Cultural Rights (CESCR) boldly urging all States in this direction in its General Comment No. 9 and making specific recommendations to States, such as Canada, United Kingdom and China, in the course of periodic review (UNITED NATIONS, 1998; 2002; 2005; 2006). In other jurisdictions, philosophical objections to the justiciability of ESC rights persist even when justiciable rights are set out in a constitution. Ireland is a good example (NOLAN, 2008). In the *O'Reilly* case, later approved by the Irish Supreme Court, Justice Costello stated that "no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due" if it is to involve a distribution of public resources for the common good (IRELAND, *O'Reilly*, 1989). Eastern European courts have also displayed similar levels of conservatism or what could be seen as neo-judicial activism. I don't mean to suggest that democratic and institutional concerns over the role of the courts

1. For example, in *Gbemre vs. Shell Petroelum and Others* (NIGERIA, 2005) the Nigerian High Court cited the earlier finding by the African Commission on Human and Peoples Rights in *SERAC vs. Nigeria.* and ordered the halting of gas flaring by oil companies on the basis that it violated the Iwherekan community's right to life (including environmental health) and dignity.

should be disregarded. In some cases, or jurisdictions, the pendulum may have swung too far. Doctrines such as separation of powers should set limits for courts but the question for many is where such lines should be drawn and whether jurisprudential, procedural and remedial innovations can assuage these apprehensions in practice.

This paper sets out to provide a largely socio-legal overview or state of play of ESC rights in domestic adjudication by asking a number of questions concerning its origins, content, impact and strategy. The paper partly takes a point of departure in issues that may be of particular relevance for legal practitioners and social movements and does not dwell at length on questions of legal or political theory. Section 2 seeks to identify some of the reasons behind the rise of the jurisprudence and what obstacles continue to confront advocates in many national jurisdictions. In Section 3, the trends in legal jurisprudence are categorically analysed while in Section 4 the emerging evidence of the impact of litigation is briefly discussed. Section 5 outlines some key lessons on litigation strategy, particularly as reported by advocates, and the last section of the paper casts an eye over some strategies that could be effective for movements and organisations in this field.

2. EXPLAINING THE RISE OF ESC RIGHTS ADJUDICATION

A common legal assumption is that the volume of adjudication is a function of the *legal landscape*. The ascendance of the jurisprudence is clearly correlated with the rise in the constitutionalization of ESC rights (SIMMONS, 2009), particularly in Latin America, Eastern Europe, Africa and to a lesser extent in the West. However, ESC rights jurisprudence has not always emerged evenly in these jurisdictions and it has also flowered in jurisdictions with a more restrictive approach to justiciability, for example South Asia.

A second articulation of a single theory is Charles Epp (1998, p. 2-3) who argued that the rise of court-based 'rights revolutions' (for all rights) was predicated on *civil society configuration*. He writes that "sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above". He points to the "deliberate, strategic organizing by rights advocates" which became possible because of the "support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers... and sources of financing." It is clear

in the field of ESC rights that most precedent-setting and large-scale cases have been instigated by social movements, indigenous communities, women's and human rights organisations and groups working on the rights of children, migrants, minorities, persons with disabilities and people living with HIV/AIDS with a considerable degree of coordination and support. These new non-state actors have augmented the traditional trade union movement and have been generally more willing to use courts as a vehicle for social change. In some cases, this movement is made up of 'leftists' moving towards more 'reformist rights-based models' (GARGARELLA; DOMINGO; ROUX, 2006) but it is equally populated by traditional civil and political rights organisations which have increasingly embraced social rights.

However, the explanatory power of this thesis is cast into doubt by cases such as Costa Rica. Litigation has mushroomed in the absence of any significant support structure for legal mobilisation (WILSON, 2009). In Latin America and South Asia, numerous cases have been filed directly by individuals and small communities outside any legal mobilisation support structure. Thus, the use of adjudication to address violations of human rights, including ESC rights, cannot be explained by reference to a single factor. States with similar justiciable guarantees have experienced different trajectories (LANGFORD, 2008b) and Gauri and Brinks (2008, p. 14) point to the strategic calculation by the relevant actors: "Potential litigants, for example, evaluate their legal capabilities and the likely benefit of pressing a demand in the political arena instead (or indeed, of going to the market)".

For those who wish to identify the means by which social rights adjudication can be encouraged, it is important to understand the multiple drivers which have led to its success and failure. Obviously, ensuring the inclusion of constitutional and enforceable rights and a well-funded and organised civil society will heighten its likelihood but it is not decisive and the following two factors appear to be of equal importance.

The first is the *institutional configuration* of the legal system, particularly the availability of courts, their processes, the orientation of adjudicators and the existence of jurisprudence on civil and political rights. Many victims of violations have significant difficulties in simply accessing a court. This is particularly an

acute problem in peri-urban areas and rural areas. A South African study found that only 1 per cent of farm dweller evictions cases involved a judicial procedure despite the constitutional provision that all evictions require a court order (SOCIAL SURVEYS AFRICA; NKUZI DEVELOPMENT ASSOCIATION, 2005). This access gap is compounded by a lack of affordable legal and dedicated legal assistance[2] and judicial corruption. In Cambodia, many have pointed out the futility of court-based strategies due to systemic corruption within the judiciary. Although it is notable that advocates are now experimenting with litigation in that country in the seeming absence of any other alternative remedies or strategies.

Other jurisdictions are characterised by complex and inflexible court processes, with high burden of proof requirements for applicants, an aversion to collective or public interest mechanisms or innovative fact-gathering or remedial procedures (ICJ, 2008). Some of these problems have been addressed. Courts in India, Pakistan, Bangladesh, Sri Lanka and Nepal as well as the Costa Rica and Colombia have developed public interest litigation procedures that more easily facilitate individual and collective claims; e.g., cases can be triggered with a simple application (even a postcard) and courts play a more active procedural role. Constitutions in Argentina, Hungary, Nigeria and elsewhere permit collective complaints while the Colombian Constitutional Court has developed a practice of drawing together similar cases if they believe there is an unconstitutional state of affairs. However, these courts have varied in their ability to cope with the increased workload. Colombian and Costa Rican courts have fared better than their Indian counterparts in processing tens of thousands of cases while the Pakistan Supreme Court tightened its admissibility procedures as a result. The International Commission of Jurists (2008) also note that in civil law systems, the State has procedural advantages over individual complainants. Others argue that traditional civil law systems may be better equipped than common law systems at providing individual applicants with urgent and basic relief. However, orders for immediate relief can allow courts to ignore other potential beneficiaries and resource constraints potentially creating broader ethical, legal and institutional dilemmas

2. While there has been an emerging recognition that legal aid is a human right in the field of ESC rights (GALOWITZ, 2006: DURBACH, 2008) securing it represents something of a lottery. Some countries have adopted legal aid policies that include non-criminal cases but re-allocation or increased funding does not always follow.

(HOFFMAN; BENTES, 2008) unless done in a sophisticated manner (ROACH, 2008).

The orientation or preferences of judges is also decisive. Some take a teleological approach to interpreting ESC rights or standards while others have been remained 'conservative', even in the face of explicit justiciable rights. And a third group of courts seem simply unaware of the existence of human rights standards and jurisprudence. These differences often apply at the intra-national level; judges outside urban areas tend to be less familiar with human rights and are often more conservative. This orientation is not static. In a groundbreaking housing rights case in one country, the applicant and lawyer delivered a number of books on the topic to the judge's home address in advance which seems to have had some impact on the final decision (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000). Moreover, the judiciary is often striving to maintain their legitimacy vis-a-vis the State which often has the power of appointment and ensure they make rulings capable of implementation. Thus, decisions in some cases can only be understood as part of the wider and historical dance between the different organs of the State (ROUX, 2009). This variable of judicial culture is also affected by wider understandings of the nature and scope of human rights. In those countries where ESC rights were not part of the founding constitutional mythology (which particular affects pre-1980 constitutions), these broader social discourses appear to play out in the court room.

Another institutional factor appears to be the presence of civil and political rights jurisprudence. Courts that are comfortable with general human rights legal reasoning and application are more likely to extend it into the field of ESC rights. Well-protected civil and political rights also help create some of the underlying conditions for social rights litigation such as freedom of expression, effective court processes and some attention to the enforcement of remedies. However, the reverse has also been true. Moroka (2003) has pointed out that ESC rights litigation in Nigeria during the years of dictatorship was more acceptable than civil and political rights cases (MORKA, 2003, p. 113) and a similar phenomenon is now observable in China (TANG, 2007).

A final set of explanatory variables relate to the *level of realisation of socio-economic rights* within a States' maximum

available resources. Judicial receptivity to social rights claims, particularly of a positive nature, is usually conditioned by clear evidence of State or private failure. Inhumane suffering in the face of the State unwillingness to fulfil its own legislation and policy has sparked much of the ground-breaking jurisprudence in countries such as South Africa, United States, India and Colombia but may be one reason why litigation has been infrequent in a State such as Norway. As Gauri and Brinks paradoxically note, in the field of socio-economic rights courts often act as "pro-majoritarian actors" in the sense that "Their actions narrow the gap between widely shared social belief and incomplete or inchoate policy preferences on the part of government, or between the behaviour of private firms and expressed political commitments" (GAURI; BRINKS, 2008, p. 28). Therefore, litigation which tackles long-standing and systemic failure may be accorded a greater chance of success when there has been a clear political ineptitude. A different but complementary explanation would be that countries with very high levels of structural social inequality makes the possibility of effective use of representative mechanisms very difficult for marginalised groups and individuals. Courts, if they retain a strong degree of independence, may be less likely to excessively defer to elitist or majoritarian executives and legislatures in such circumstances.

3. SUBSTANTIVE LEGAL AND REMEDIAL ACHIEVEMENTS AND CONCEPTUAL BARRIERS

Turning to the jurisprudence itself, we might note that one of its first 'achievements' has been that its cumulative weight has helped overturn two long-standing philosophical objections to the justiciability of ESC rights. These objections are well expressed by Vierdag who claimed, in a somewhat circular fashion, that: (1) *ESC rights were not legal rights* since they were not inherently justiciable; and (2) *ESC rights were not justiciable* since they involved issues of *policy not law*. In setting out the thesis, he provided the typical and ubiquitous example: "implementation of these provisions [in the ICESCR] is a political matter, not a matter of law" since a Court must engage in prioritisation of resources by "putting a person either in or out of a job, a house or school" (VIERDAG, 1978, p. 69).

These conceptual criticisms now carry less weight. Commentators such as Dennis and Stewart (2004, p. 462) concede that justiciability

is possible even if they are not personally enamoured of it. This is because many judges have dismissed the first argument on the basis that the inclusion of ESC rights in constitutional bills of rights and international law means, ipso facto, that the rights are legal: as one court stated, "Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only ... and the courts are constitutionally bound to ensure that they are protected and fulfilled". In addressing the law and policy divide expressed in the second objection, many courts have move beyond more abstract considerations to adopt or adapt existing legal principles in particular cases. The South African Constitutional Court thus invoked a classic common law gradualist approach and stated in *Grootboom*, "The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case" (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000).

Two other philosophical and legal objections are more persistent and arguably provide the basis for determining the limits or the shape of ESC rights adjudication. The first is the contention that adjudication is *democratically illegitimate,* a claim not necessarily confined to socio-economic rights (WALDRON, 2006; BELLAMY, 2008). Judicial review of human rights, particularly the striking down of legislation, remains controversial in some quarters. ESC rights have traditionally been viewed as additionally problematic on account that it requires the legislature and executive to legislate, spend or adopt particular spending and policy priorities. This concern with the implications for the doctrine of separation of powers, one species of the democratic concern, led one court to state that "if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role" (IRELAND, *Sinnot*, Justice Hardimann, para. 375-377, 2001)[3].

The idea that democracy is threatened by human rights adjudication has been much debated in political science and legal theory and some arguments against this objection can be found in FABRE, 2000; GARGARELLA, 2006; BILCHITZ, 2007. The

3. However, the Court's stance has more recently slightly softened (NOLAN, 2008).

arguments often draw on traditional democratic theory (e.g., that judicial review of social rights complements parliamentary democracy by taking account of minorities and enables citizens and residents to effectively participate in democratic process due to adequate access to education and nutrition etc.), press substantive arguments (e.g., ESC rights need to be protected as fundamental rights on par with civil and political rights) or seek to highlight the distinctly legal and deliberative role of the judiciary (its accountability not policy-making function and its ability to provide a forum for individuals to engage with the State on basic rights in a more considered fashion). These considerations often appear, although with different results, in the jurisprudence. The Swiss Federal Court partly justified its derivation of a right to minimum subsistence from a range of civil and political rights on democratic and substantive grounds: "The guaranteeing of elementary human needs like food, clothing and shelter is the condition for human existence and development as such. It is at the same time an indispensable component of a constitutional, democratic polity" (SWITZERLAND, *V. vs. Einwohnergemeinde X. und Regierungsrat des Kantons,* para. 2(b), 1995). And it drew its legal borders narrowly, stating that they will only intervene if the State has first demonstrably failed to provide a minimum level of social assistance for an adequate standard of living and all persons residing within its territory (SWITZERLAND, *V. vs. Einwohnergemeinde X. und Regierungsrat des Kantons,* para. 2(b), 1995).

The second persistent objection is *institutional*; that adjudicators are not suited to the task since not only do they lack the requisite expertise and information on economic and social questions but they are not in a position to resolve the competing policy considerations and consequences that would flow from their decisions. These are of course real constraints. But it is arguable that they are largely relative and not absolute. Every area of law requires some level of specialist expertise and adjudicatory institutions have responded to the challenge of information by using specialist bodies and expert witnesses as well as accepting submissions from *amicus curiae* interventions, a phenomenon that has been embraced in ESC rights adjudication. Scott and Macklem (1992) thus treat this problem in a positive light arguing that social rights adjudication plays a valuable function in bringing forth information into the public domain that may not be traditionally available to legislature - concrete violations of rights, particularly of marginalised groups.

Horowitz (1977) argues that the force of this argument is partly blunted by the fact that courts tended to be backward-looking as well, in terms of using precedents as existing evidence.

The seemingly real challenge is the 'polycentric' dilemma as termed by Lon Fuller (1979), who argued that the judiciary cannot and should not deal with situations in which there are complex repercussions beyond the parties and factual situation before the court. Critics of social rights adjudication typically fear that a decision providing more funding to housing, for example, could imperil funding for health or the police (VIERDAG, 1978). The problem with this argument is that almost every area of adjudication involves polycentric questions (KING, 2008). However, this objection has led to judicial innovation as opposed to either activism or resignation. The first is to keep close to clearly defined legal principles such as reasonableness or to adapt procedure and remedies (CHAYES, 1976; ROACH, 2008). For example, the order of the Canadian Supreme Court in *Eldridge vs. British Columbia*, which involved the provision of interpretive services to deaf patients in hospitals, provided that: "A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.' (CANADA, *Eldridge vs. British Columbia*, 1997).

3.1. Removal and restrictions of rights

In some jurisdictions, many ESC rights cases have generally mirrored traditional civil and political rights claims. This has been the case in long-standing labour rights claims around union freedoms and unfair dismissals although courts have increasingly reviewed legislation in this area. In *Aquino*, the Supreme Court of Argentina struck down a 1995 law which severely circumscribed compensation for employment injury on the basis that it would violate a wide range of international standards, including the ICESCR (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 2004). More recently, there has been a significant increase in cases concerning denial of access to health care, education and social security, forced evictions and removal of basic services or interference with the exercise of cultural rights,

particularly of indigenous peoples (see overview in LANGFORD, 2008b). In many cases courts are requiring both substantive justification and procedural due process before vital social and economic interests are affected. For example, the Colombian Constitutional Court halted exploitation of natural resources on indigenous territories on the basis of violations of rights of indigenous peoples to ancestral territories as well as rights to ethnic and cultural diversity and cultural identity (SEPÚLVEDA, 2008, p. 158). Some cases have involved a direct overlap with civil and political rights. The Supreme Court of Bangladesh (Bangladesh, *Bangladesh Society for the Enforcement of Human Rights and Others vs. Government of Bangladesh and Others*, 2000) has ruled that the forced eviction of a large number of sex workers and their children violated their right to life, which included the right to livelihood and their right to be protected against forcible search and seizure of their home.

While these cases may appear conceptually straightforward, it is notable that they challenge powerful interests in terms of state authority and economic expectation. The result is that the jurisprudence is not always consistent. The *Narmada Dam* case in India is a good example of court being reluctant to enforce its own order for the provision of compensation or alternative likelihoods to those who have been displaced (INDIA, *Narmada Bachao Andolan vs. Union of India*, 2000). The jurisprudence also seems to be affected by two other factors. The first is the character of the complainants. If violations affect groups that are considered illegal under national law - for example, people living and working in the informal economy - then the response of the judiciary in some countries can sometimes be less sympathetic while in other countries it may be the reverse if this group is viewed by the courts and society as being in greater need of protection. Second, and relatedly, it is noticeable that where ESC rights are explicitly incorporated in the constitution, the nature of orders are sometimes firmer. In South Asian jurisprudence, alternative accommodation in the case of forced eviction has often been framed as a remedial recommendation (INDIA, *Olga Tellis vs. Bombay Municipal Corporation*, 1985) but in a series of cases in South Africa, where the right to housing and protection against forced eviction are constitutionally recognised, courts have required higher levels of justification for eviction and creation of homelessness (SOUTH AFRICA, *Port Elizabeth vs. Various Occupiers*, 2004b): "In general terms, however, a court should be reluctant to grant

an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme" Therefore, litigation strategy will need to take account of the balance of power, law and prevailing moral norms which can significantly sway middle class and conservative judiciaries.

These substantive and procedural tests are being adopted to protect not only the assets, resources, positions and organising space of individuals, communities and associations but the maintenance of government programmes and services. At the international level, this type of case is commonly categorised as a 'retrogressive measure' and requires explicit consideration of the available resources of a state in addition to other substantial and procedural considerations (UNITED NATIONS. 1990). In Portugal, the government decision to remove the National Health Service and increase the qualifying age of a minimum income benefit was found to be retrogressive, violating the right to health and social security respectively (PORTUGAL, *Decision (Acórdão) nº39/84*, 1984a; *Decision (Acórdão) nº 509/2002*, 1984b). However, such cases are not numerous and it is important to explore why this is the case: is it the problem of having 'ample proof' in a short and often politically charged time period? Is it that courts are more likely to provide governments significant deference if claims are made that a country has entered recession for example or needs to try a new economic model? Or is it that advocates are only beginning to move into this area? Witness the recent creative argument in the South African case of *Florence Mahlangu vs. The Minister for Social Development* where advocates argued that the failure to extend a child grant to 15-18-year olds violated the principle of progressive realisation.

3.2. Restraining the power of private actors

ESC rights litigation has increasingly tackled the actions of non-State actors, from multinational corporations[4] to new service providers under public-private partnerships through to family members and traditional leaders. The human rights legal framework

4. Domestic challenges to the activities of large or transnational corporations have met with some success while attempts at transnational litigation (suing a multinational in their home state) have led to many settlements but no judgments (JOSEPH, 2008).

is obviously heavily State-centric but some constitutions and laws provide for complaints to be made directly against private actors while some adjudicatory bodies have focused on the State's role of protection. In relation to the former, many cases concern the right to work where the role of private actors is significant in market economies. The Colombian Constitutional Court found that this right was violated by an employer who dismissed an employee after being tested HIV-positive and payment of compensation was ordered (COLOMBIA, *SU-256*, 1996). In *Slaight Communications*, the Canadian Supreme Court held that the decision of a private labour arbitrator must be in conformity with the Canadian Charter, which is to be interpreted as far as possible with rights contained in the ICESCR (CANADA, *Slaight Communications Inc. vs. Davidson*, 1989). In *Vishaka vs. State of Rajasthan,* a case concerning sexual harassment at the work place, the Indian judiciary drew on CEDAW to develop binding guidelines which would remain in force till such time the Parliament enacted an appropriate law (INDIA, *Vishaka and others vs. State of Rajasthan and others*, 1997).

With regard to the latter form, the obligation to protect, we can find examples such as the first complaint decided by the Committee on the Elimination of Discrimination Against Women. In *A.T. v Hungary* (UNITED NATIONS, 2003), the Committee made extensive recommendations in a case concerning domestic violence including reform of legislation and provision of social and housing support services. In *Maya Indigenous Communities*, the Inter-American Commission (IACHR) found Belize had violated the equality and property rights of Maya people by granting logging and mining concessions without their consent and any consultation process (IACHR, *Maya Indigenous Communities of the Toledo District vs. Belize*, 2005). In *Tatad vs. Secretary of the Department of Energy*, the Philippines Supreme Court struck down a deregulation law that would have permitted the three major oil companies to avoid seeking permission of the regulator to increase prices. Citing the right to electricity, the Court warned that higher oil prices threaten to "multiply the number of our people with bent backs and begging bowls", with the Court declaring that it could not "shirk its duty of striking down a law that offends the constitution" despite the law constituting an "economic decision of Congress" (PHILIPPINES, *Tatad vs. Secretary of the Department of Energy*, 1997). The Court pointed out though the way in which

the Government could achieve the same result through legislative amendment, which it promptly did.

However, numerous obstacles exist in this area. First, horizontal-based litigation tends to be contractual and tort-based, which may be sufficient, but only occasionally are constitutional or statutory ESC rights norms (e.g., discrimination law) used to ensure that such laws or principles always protect human rights. Second, privatisation processes seemed to be challenged less frequently than imagined although one can now point to additional cases in Egypt and Sri Lanka, where privatisation of health and water services has been halted partly on account of litigation (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 2004). This may be explained by the speed and secrecy with which these processes move and the difficulties in raising substantive arguments. Since human rights are generally viewed as neutral as to choose of economic system, one requires evidence that privatisation will harm economic and social rights, and this is usually only available after the event has happened. However, some movements and even governments have used more creative arguments loosely based on the obligation to protect to forestall privatisation through litigating for minimum standards that would make for-profit provision difficult (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 2004) or challenging the process on participation and other procedural grounds (SOUTH AFRICA, *Nkonkobe Municipality vs. Water Services South Africa (PTY) Ltd & Ors*, 2001b).

Third, remedial orders can be more difficult to craft. In South Africa, evictions by landlords and property owners are increasingly being challenged on the basis that rights to housing are being violated but private actors complain that their right to property is not being respected and that housing rights obligations should fall on the State. The solution in a growing number of cases is to join the Government as a third party so that it is forced to explain progress in its housing programme and provide alternative accommodation in the event of an eviction (SOUTH AFRICA, *Blue Moonlight Properties 39 Pty (Ltd) vs. The Occupiers of Saratoga Avenue and the City of Johannesburg*, 2008) or, in one case, pay compensation to the property owner (SOUTH AFRICA, *President of RSA and Another vs. Modderklip Boerdery (Pty) Ltd and Other*, 2005c). Fourth,

human rights protection is not always extended if the laws restrict duties to public actors. For example, the test for whether a private provider is a public authority in the United Kingdom, and hence falls under the Human Rights Act, has been conservatively interpreted (ENGLAND, *Donoghue vs. Poplar Housing and Regeneration Community Association Ltd*, 2002a). However, in the Canadian case of *Eldridge*, the Court found that hospitals, although non-governmental, were providing publicly funded healthcare services and delivering a comprehensive healthcare program on behalf of the Government, and were thus constrained by equality rights set out in the Canadian Charter (CANADA, *Eldridge vs. British Columbia*, 1997).

3.3. Compelling State action to fulfil the rights

As discussed, the idea of a court ordering States or other actors to take positive action has been at the heart of the controversy over the justiciability of ESC rights. The emerging legal jurisprudence has provided a range of practical responses to these dilemmas, largely mirroring a move within civil and political rights to embrace positive obligations (European Court of Human Rights, *Airey vs. Ireland*, 1979). In broad brush terms, many adjudicators have tended to enforce some or all of the two key State obligations identified by the CESCR in General Comment No. 3 (UNITED NATIONS, 1990)[5]. These are the duty to *take adequate steps* towards the progressive realisation of the rights within available resources and the duty to immediately achieve of a *minimum level* of the right, with the state bearing the burden of proof if it claims the latter cannot be achieved on account of deficient resources.

Colombia is an example of a jurisdiction that has adopted and enforced both. The Constitutional Court has recognised that obligations concerning ESC rights are progressive in character (COLOMBIA, *SU-111/97*, 1997) but has stressed that the State at the very least 'must devise and adopt a plan of action for the implementation of the rights' (COLOMBIA, *T-595/02*, 2002; *T-025/04*, 2004). Equally, and far more often, the Court together with lower courts makes orders under its *tutela* procedure for immediate enforcement of 'minimum conditions for dignified

5. Although the difference between them is not always easy to discern (FINLAND, Child-Care Services Case, 1999).

life' for an individual, which is based on the right to life, dignity and security and increasingly in connection with ESC rights. This dualistic approach is evident in Finland, where authorities have been faulted for failing to *take sufficient steps* to secure employment for a job seeker and *immediately provide* child-care for a family (FINLAND, *Employment Act Case*, 1997; *Child-Care Services Case*, 1999; *Medical Aids Case*, 2000)[6]. The New York state courts have both struck down the design of school financing on the grounds that it fails to provide adequate education and found 'a positive duty upon the state' to provide welfare payments to anyone considered indigent under the state's 'need standard' (UNITED STATES OF AMERICA, *Tucker vs. Toia*, 1997).

Other courts have taken only one of these paths. The South African Constitutional Court has opted only for the former, in the form of a reasonableness test, and rejected the idea of immediate enforcement of a minimum core (BILCHITZ, 2002, p. 484; BILCHITZ, 2003, p. 1; Liebenberg, 2005, p. 73). The apex courts of Hungary and Switzerland have taken the reverse position. They have largely declined to accept any role in examining whether the Government has sufficiently taken steps to realise constitutional social rights - the former merely requiring that such a law or programme exist (HUNGARY, *Decision 772/B/1990/AB*, 1991) - and they instead only look to whether a minimum of the right is met (HUNGARY, *Decision 32/1998 (VI.25) AB*; *Decision No. 42/2000*). Interestingly, this minimum core approach is particularly evident in jurisdictions where social interests are judicially protected through civil rights and have thus drawn on the German doctrine of a *Existenzminimum* (HUNGARY, *Case No. 42/2000 (XI.8)*, 2000; GERMANY, *BverfGE 40, 121 (133)*, 1975; IACHR COURT, *Five Pensioners' Case vs. Peru*, 2003; SWITZERLAND, *V. vs. Einwohrnergemeine X und Regierunsgrat des Kantons Bern*, 1995).

In most jurisdictions, concerns over democratic legitimacy and institutional competency appear to shape many judgments. In some cases, courts use these markers to develop a seemingly coherent doctrine that can be applied in different cases - the Colombian and South African courts providing different sets of criteria for their respective tests. At the same time, one can also observe the arbitrary

6. For English summaries of a wide range of cases see <www.nordichumanrights.net/tema/tema3/caselaw/>.

use of these concerns by courts to dismiss difficult cases and avoid a proper accounting of the relevant obligations and how they apply in a particular case (COURTIS, 2008, p. 175). It is thus difficult to predict sometimes where a court will draw line, particularly in cases which involve allocation of resources. However, the jurisprudence suggests that Courts are more likely to intrude in such cases according to the (1) *seriousness* of the effects of the violation; (2) *precision* of the government duty; (3) *contribution* of the government to the violation; and (4) *manageability* of the order for the government in terms of resources (LANGFORD, 2005, p. 89).

It is also important to recognise that some of the required action may simply involve recognition of underlying rights, such as requiring States to recognise and protect land tenure or labour rights (EIDE, 1995, p. 89). The Inter-American Court of Human Rights (IACHR COURT) found that Nicaragua had violated the right to judicial protection under Article 25 of the Inter-American Convention on Human Rights by failing to legislate and ensure that the lands of Indigenous peoples were demarcated and titled (IACHR COURT, *The Mayagna (Sumo) Indigenous Community of Awas Tinga v. Nicaragua,* 2001; EUROPEAN COMITTEE ON SOCIAL RIGHTS, *ICJ v. Portugal*, 1999; CANADA, *Dunmore vs. Ontario (Attorney General)*, 2001a). In the *Vishaka* case discussed above, the Indian Supreme Court issued binding guidelines on sexual harassment (INDIA, *Vishaka and others vs. State of Rajasthan and others*, 1997). However, broad-ranging orders for positive recognition of underlying rights from domestic courts tend to be rare given the concern that they may be intruding on the policy domain of the legislature. In many cases, the positive recognition tends to be more context specific - for example recognising tenure rights of marginalised communities. Even a Court like the Hungarian Constitutional Court which has the explicit power to find a 'failure to legislate' has not used it. However, courts in India and Colombia have not been shy in making sweeping orders where they have found systematic violations.

3.4. Equality rights

The invocation of equality rights in the field of ESC rights has a long pedigree in cases such as *Brown vs. Board of Education* (UNITED STATES OF AMERICA, *Brown vs. Board of Educatio*n, 1954) and anti-

discrimination legislation. In other jurisdictions, the phenomenon is more recent. The jurisprudence covers a wide range of prohibited grounds to include not only the express characteristics mentioned in international instruments (i.e., race and colour, sex, language, religion, national or social origin, property, birth) to include others such as age, disability, nationality, sexual orientation[7]. For example, the Court of Appeal of Versailles, France, annulled a provision of a collective agreement between labour and management on the grounds that it prohibited the recruitment of people after the age of thirty-five (FRANCE, *Recueil Dalloz*, 1985). There is of course a danger, as the UN Human Rights Committee implicitly suggests, in placing too much emphasis on finding the specific suspect grounds as opposed to looking for the arbitrariness of the classification (UNITED NATIONS HUMAN RIGHTS COMMITTEE, *Karel Des Fours Walderode vs. the Czech Republic*, 2001). The use of 'comparators' in many national courts may not always be appropriate in the case of ESC rights, and they can be particularly difficult to find in cases of structural-based segregation of different groups or discrimination against women on the basis of pregnancy.

Most cases have involved direct discrimination but there are a number where indirect discrimination on the basis of prohibited grounds has been found (JAYAWICKRAMA, 2002). Bulgarian courts, for instance, have held that the predominant placement of Romani children in schools for children with disabilities amounted to racial discrimination (EUROPEAN ROMA RIGHTS CENTRE, 2005) and the European Court of Human Rights held the same against Czech Republic (EUROPEAN COURT OF HUMAN RIGHTS, *D.H. and Others vs. Czech Republic*, 2008). In *Kearney vs. Bramlea Ltd,* the use of income criteria to assess tenant applicants was found to be unjustified (on the basis that it took no account of a person's real willingness and ability to pay) and constituted discrimination on a number of grounds, including race, sex, marital status, age and receipt of public assistance since it disproportionately affected those groups (CANADA, *Shelter Corporation vs. Ontario Human Rights Commission,* 2001b).

The question of whether equality rights or guarantees possess a substantive character and contain positive obligations to eliminate

7. This trend is also evident in international jurisprudence on the ground of 'other status' (UNITED NATIONS, 2009).

discrimination has exercised the attention of some courts. In Pakistan, the Supreme Court has enunciated the principle quite boldly during a flowering of public interest litigation. In *Fazal Jan vs. Roshua Din*, they held that the constitutional right to equality imposed positive obligations on all State organs to take active measures to safeguard the interests of women and children (PAKISTAN, *Fazal Jan vs. Roshua Din*, 1990). In Canada, the Supreme Court rejected the British Columbian provincial government's arguments that the right to equality did not require governments to allocate resources in healthcare in order to address pre-existing disadvantages of particular groups such as the deaf and hard of hearing (CANADA, *Eldridge vs. British Columbia*, 1997, para. 87). Brazilian courts have held that the right to health of children requires a higher level of prioritisation and that to "submit a child or adolescent in a waiting list in order to attend others is the same as to legalise the most violent aggression of the principle of equality" (BRAZIL, *Resp 577836*, 2003). However, other courts, for example in South Africa and Hungary, have been cooler to the idea of prioritising children's rights in the socio-economic arena.

One continuing quandary is whether adjudicatory bodies can 'equalise down' in order to achieve equality in respect of a social interest or right. In Canada, the Supreme Court has issued positive remedial orders in equality rights cases, extending or increasing social assistance, pension benefits and security of tenure. But it has not ruled out the possibility that it can equalise down. In *Khosa vs. Minister of Social Development* (SOUTH AFRICA, 2004a), the Constitutional Court of South Africa adopted a formula of equalising up and including permanent residents in social assistance schemes. However, the Court noted that the presence of the right to social security in the constitution was a factor in considering the unreasonableness of the exclusion of permanent residents, a factor not present in all constitutions.

3.5. Remedial achievements

A significant accomplishment in the field has been to open up the remedial perspective beyond traditional private law remedies such as compensation, restitution and declarations of invalidity or wrongdoing. A number of trends can be observed. First, some courts have issued orders requiring States to follow a course of action in

remedying a wrong, occasionally with supervisory jurisdiction. In Argentina, courts were deeply involved in ensuring that the authorities complied with their plan and budget to provide a vaccine against "Argentine Hemorrhagic Fever" which threatened 3.5 million residents (FAIRSTEIN, 2005; ARGENTINA, *Viceconte, Mariela vs. Estado nacional - Ministerio de Salud y Acción Social s/amparo ley 16.986,* 1998). Surveying the emerging jurisprudence, Roach and Budlender (2005) argue that courts tend to take this course of action when authorities or other defendants are *unwilling* or *unable* to implement orders. In many ways, the US Supreme Court's innovative remedial orders in *Brown vs. Board of Education II*, which concerned desegregation of schooling, (UNITED STATES OF AMERICA, 1955) have been recognised as a forerunner of this new remedial space (CHAYES, 1976, p. 1281).

Second, there has been the development of more 'dialogic' and 'interim' remedies. One example is the increased use of a *delayed* declaration of invalidity where courts find a violation but delay the effect of the order so as to allow the government time to find a method to remedy the legislative or policy defect (CANADA, *Eldridge vs. British Columbia,* 1997). The Nepal Supreme Court in *Mira Dhungana vs. Ministry of Law* declined to declare unconstitutional a law which gave a son a share of his father's property from birth but not a daughter (at least until she was 35 and remained unmarried) and instead required the State within one year to review the legislation after consulting with interested parties, including women's organisations. This dialogic aspect is also evident in the increased use by courts (and much earlier by international bodies) of the adjudicatory space as a place for dialogue with parties, including urging them to find solutions before a judgment is given (SOUTH AFRICA, *Occupiers of 51 Olivia Road, Berea Township And Or. vs. City of Johannesburg and Others*, 2008). Another strategy is recommendations. For instance, Indian and Bangladeshi courts have sometimes adopted this approach instead of making orders for alternative accommodation in the case of forced evictions, but this has been criticised for depriving applicants of any relief in practice (BANGLADESH, *Ain o Salish Kendra and others (ASK) vs. Government and Bangladesh and others*, 2001). More dexterous approaches can be seen by those adjudicatory bodies that have used two-track remedies. The Indian Supreme Court in cases on environmental health and food rights have issued continuing series

of interim orders before they come to any final order. For instance, authorities were forced to report back on orders that the court made for extending and efficiently implementing food ration schemes (INDIA, *People's Union for Civil Liberties vs. Union of India,* 2001; INDIA, *People's Union for Civil Liberties vs. Union of India,* 2004). Careful use of interim orders can be one way to avoid critique that more systematic orders of courts provide nothing for victims in the short-term (ROACH, 2008, p. 46).

Third, advocates have been creative in securing follow-up orders for ensuring remedies are implemented. In Argentina, India and South Africa, advocates have used criminal and contempt proceedings to ensure compliance with decisions (HEYWOOD, 2003, p. 7; SWART, 2005, p. 215). In one South African case, a judge ordered that a Minister be arrested if the police did not restore an informal settlement within 24 hours after earlier demolishing it. In India, the Supreme Court threatened contempt of court proceedings if a schedule for conversion of motor vehicles to cleaner fuels was not complied with (INDIA, *M.C. Mehta vs. Union of India,* 1998).

4. ACHIEVING IMPACT?

One of the strongest objections to ESC rights adjudication is that it cannot fulfil the expectations of delivering individual and transformative social justice. These instrumental critiques vary in nature and many are equally applicable to civil and political rights litigation. Some point to the weakness of courts in enforcing their judgments - and every jurisdiction seems to have at least one notable case that falls in this category. Other critiques are more political in nature - with claims that litigation can distract attention from building new coalitions for social change and that the middle classes are more adept and successful at using the courts to enforce ESC rights than the poor (BELLAMY, 2008; ROSENBERG, 1991). Determining the actual impact of litigation in practice is a complex exercise as it is dependent on the selection of the benchmark for success, the isolation of different causes and comparison with alternative strategies. This methodological challenge has resulted in vastly differing conclusions for the same case. Rosenberg (1991) measured the impact of US Supreme Court judgments by determining whether they met the expectations expressed in the public statements of lawyers before a case, which Feeley (1992, p. 745) found to be unreasonable on

the basis that the real expectations of the applicants may have been more modest.

In response to this critique, three things can be said. First, there is emerging evidence that many, but certainly not all, cases have had a direct and indirect impact, such as setting judicial precedents, influencing legal and policy developments, catalysing social movements and raising awareness and even in the event of a loss, demonstrating the lack of legal protection (LANGFORD, 2008b). In an quantitative study of five developing countries, Gauri and Brinks (2008) were "impressed by what courts have been able to achieve" summarising that "legalizing demand for SE [socioeconomic] rights might well have averted thousands of deaths" and "enriched the lives of millions of others". Cases can certainly be found which give credence to the critics. The recent *Chaoulli* decision in Canada on the right to access private health insurance, is perhaps one example of this and one notices a greater prevalence of stronger positive orders in cases that include the middle class as beneficiaries. However, it is possible to point to a large number of decisions which have been made in defiance of middle-class property owners (SOUTH AFRICA, *Minister of Public Works vs. Kyalami Ridge Environmental Association*, 2001; SOUTH AFRICA, *Blue Moonlight Properties 39 Pty (Ltd) vs. The Occupiers of Saratoga Avenue and the City of Johannesburg*, 2008) or those which involve broad coalitions of different groups - often in the area of health and education where the need for or existence of universal policies assists the process of coalition-building.

It is important to point out that it is not always a judicial order that leads to impact - in some cases it is the threat of or the commencement of litigation that triggers a change in policy or the reaching of a settlement. Even if they don't appear on the formal record, these cases need to be brought into the equation. In the case of Nigeria where judgments can take decades to be delivered, Felix Morka (2003) records that social rights litigation was used as a community mobilisation tool and a platform for making initial contact and negotiating with Government and powerful non-State actors, such as multinational oil companies who have been otherwise impervious to dialogue.

Second, in considering impact, one needs to consider unintended consequences, both positive and negative. Initial high-profile cases

in Argentina and South Africa were only partly implemented but significantly advanced the law or legal culture, providing the building blocks for more successful litigation in the future. Other results can be negative and Rosenberg (1991) points to the complacency in policy advocacy that successful court decisions can bring while Williams (2005) and Scheingold (2004) note the increasing backlash by conservative groups in the United States to the use of progressive rights-claiming strategies. Too many losses for a government can also make courts more vulnerable to both political pressure and pro-executive judicial appointments, as the Hungarian experience demonstrates.

Third, in thinking about impact, one should ask where does the fault lie where no substantive impact can be found. Was is litigation or the context? In other words, in critiquing litigation, one needs to consider whether alternative strategies were available, such as mobilisation, lobbying or negotiation, or whether adjudication was really just the last and final resort for the victims. Or can the blame for a poor judgment or implementation be really placed at the feet of the adjudicatory system if the litigants and advocates made key errors in their legal and non-legal strategies?

5. LESSONS LEARNED ON LITIGATION STRATEGY

The rise of ESC rights litigation together with its practical successes and failures has led to a growing reflection on effective strategy (see ICJ, 2008; GARGARELLA; DOMINGO; ROUX, 2006; LANGFORD, 2003). We can summarise a number of them as follows:

5.1. Broader advocacy strategy - social movements and communities

Many view the presence of 'broader advocacy' as critical, particularly for cases that involve public interest or marginalised groups. Social mobilisation, community organisation, awareness and media campaigns, and political lobbying, are thus seen as indispensable for successful litigation. It provides ownership of the strategy, supports the preparation of evidence, provides wider legitimacy to the claim and helps ensure that orders or settlement agreements are implemented. There are a significant number of cases where large-scale movements were mobilised behind cases,

such as the social benefits cases in Hungary the *TAC* case in South Africa and the right to education cases in Kentucky, Texas and New York. Although, some have been less successful even when hewing to this model, such as the Narmada dam case in India.

However, it is important to avoid dogmatism on this point. High-profile campaigns may be less helpful if the litigants have been victims of deeply held community prejudices. The quiet nature of court proceedings may allow such individuals to more effectively assert their rights and permit indecisive governments to defer to the courts in order to make unpopular decisions. In other cases, one can observe that social movements have been born out of successful judgments, such as the right to food movement in India (MURALIDHAR, 2008).

Successful litigation strategies also tend to assign an important role to the claimants or victims, which is crucial for empowerment, arguable a long-term impact indicator in itself. In Canada, the Charter Committee on Poverty Issues developed a model of accountable litigation, whereby low-income representatives sit on the committee's board. In India, one lawyer, after two decades of public interest litigation now refuses to take a case unless a community is directly involved. However, large-scale cases can raise particular difficulties in negotiating with clients. While legal firms in the USA, UK and Australia have developed management systems for such cases, the practice is comparatively rare.

5.2. Case and procedural selection

Many advocates advise incorporating long-term strategies in the selection of initial cases. For instance, it is suggested that it is better to begin with modest cases before moving to more ambitious ones. At the same time, under-ambitious cases can stultify the future development of the law. Three categories of case selection tend to be successful in the early stages: litigation that starts from claims resembling a traditional defence of civil and political rights, egregious violations or clear failures of governments to implement their own programmes; and modest claims that leave open the possibility for future development of jurisprudence. A second group of decisions revolve around the type of procedure to be used, particularly when there is a possibility of both individual and collective litigation. Some advocates and commentators legitimately warn against collective

complaints since NGOs and lawyers may co-opt litigation strategy (PORTER, 2004) or it may remove the possibility of international remedies since individual remedies have not be exhausted (MELISH, 2006). However, collective procedures can be particularly useful when individual victims fear or are likely to be harassed for participating in the case or where victims are dispersed (FAIRSTEIN, 2005). One possible solution, which is used in some jurisdictions, is to include both individuals and organisations as litigants.

5.3. Legal, factual and remedial arguments

Successful cases are usually marked by close attention to quality legal arguments. However, the types of submissions tend to vary considerably between jurisdictions and it is obviously difficult to classify them precisely. For example, international human rights treaties and international and comparative jurisprudence have been particularly influential in some countries but less so elsewhere. Likewise, some cases have benefited from very narrow legal arguments while more expansive arguments have been crucial in others. Nonetheless, the fact that ESCR-Net's comparative case law database of a mere 100 cases registered 72,000 hits across the world within two years signals the strong and growing interest in comparative learning.

Organisations and movements that carry a more long-term vision tend not to rely solely on human rights norms alone but also devote sufficient energy to developing legislation that would enhance legal strategies. For example, housing rights groups in the US campaigned for a new federal law that provides a range of specific and concrete rights for homeless persons. This was then followed up by litigation for enforcement when it went unimplemented[8]. However, while this approach is usually the ideal, including from a political perspective, it may not always be available, particularly when groups are highly marginalised or there is little political will to implement existing legislation.

Some ESC rights cases raise complex evidential issues. One notable example is the *Kearney* case in Canada, where advocates quantitatively demonstrated that the minimum income criteria for the rental market was based on flawed assumptions - most low-

8. See http://www.nlchp.org/about_us.cfm. Last accessed on: 19 October, 2009. RESUMOS

income tenants could actually afford higher rents and maintain a low default ratio even in the face of economic difficulty. Properly defined and measured statistics have thus sometimes been the deciding factor in a case. But others are beginning to raise concerns that some courts are placing too much emphasis on the development of quantitative evidence.

Weak or inappropriate remedies are often cited by advocates as a key obstacle in securing implementation of successful decisions. While it may be stating the obvious, developing a careful strategy for remedies should accompany the decision to litigate, and inform wider campaigning and the way in which the case is shaped. While courts appear willing to provide remedies that match the violations, ensuring court supervision of the orders can be critical in guaranteeing the effectiveness of the orders. Decisions in environment cases in India and school segregation cases in the US have taken years to implement and have required constant recourse to the courts.

5.4. Preparing for enforcement

A seeming weakness in many legal strategies is that there is no preparation to enforce a successful settlement or adjudicatory decision. As noted above, a wider advocacy strategy and mobilisation can ensure there are financial, human and technical resources and a will 'beyond lawyers' to implement decisions. Advocates frequently note that implementation can take as much, if not more, work as obtaining an order in the first place. It may also take skills which are beyond the claimants and the parties, necessitating the deployment of mediating individuals or community workers. Claimants and advocates therefore need to plan the follow-up from the beginning and be supported by sufficient resources for this role.

6. CONCLUSION

This comparative survey of ESC rights adjudication reveals a field in flux between nascence and maturity. For many states in the world, ESC rights litigation remains a small and insignificant part of the landscapes of human rights, social justice campaigning and jurisprudence. However, in a context of poverty and social inequality, the combination of rights awareness, the spread of litigation strategies and the increasing independence of the judiciary has led to ESC rights litigation in countries as diverse as China, Egypt,

Namibia and the United States. In the not insignificant minority of jurisdictions, a certain level of maturity is being reached in both jurisprudence and debates over appropriate litigation strategy even if there is not uniformity amongst all actors involved particularly over legal doctrine or enforcement.

In historical perspective it is noteworthy that many of the traditional assumptions concerning ESC rights as non-legal and non-justiciable have been rendered doubtful in a short period of time. Domestic courts have made orders across the spectrum of obligations of States to realise ESC rights, from the prevention of harm, to the finding of discrimination to orders to ensure access to basic services and medicines. This jurisprudence does not dispense with objections that ESC rights adjudication is democratically illegitimate or institutionally fraught with complexity but it provides a more grounded context for these debates and their judicial resolution.

For those who wish to encourage the development of ESC rights adjudication as a field of both law and practice, the key is to build on both the causes of jurisprudential developments and the lessons learned in ensuring successful litigation. It means ensuring there is awareness of many under-utilised justiciable avenues, undertaking the long struggle of improving them elsewhere, building national and transnational alliances with different human rights groups, social movements and communities and focusing on cases which are concrete, burning and reveal political failure. It demands wisdom in avoiding excessive or overly ambitious use of the courts that demobilise the possibilities of political action or gradual development of jurisprudence and at the same time robustly exercising the fundamental human right to a remedy and ensuring that ESC rights become embedded in legal jurisprudence and by extension the political and policy space of nation-States.

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ANALYSING THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS JURISPRUDENCE OF THE AFRICAN COMMISSION: 30 YEARS SINCE THE ADOPTION OF THE AFRICAN CHARTER

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1. INTRODUCTION

27 June 2011 marked the 30th anniversary of the adoption of the African Charter on Human and Peoples' Rights (African Charter or ACHPR).[1] The African Charter is widely known as the first international human rights treaty to protect the three 'generations' of human rights, including civil and political rights; economic, social, and cultural (ESC) rights; and group and peoples' rights, in a single instrument, without drawing any distinction between the justiciability or implementation of the three 'generations' of rights. Despite this achievement, only a modest number of ESC rights were explicitly included in the African Charter due to a 'minimalist' approach adopted during its drafting, which, at the time, was in line with the notion 'to spare […] young states too many but important obligations'.[2] Thus, the African Charter only explicitly recognises the following individual ESC rights: the right to property (Article 14); the right to work under equitable and satisfactory conditions (Article 15); the right to enjoy the best attainable state of physical

1. OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), ratified by 53 Member States of the African Union. For a discussion see generally Evans, M.D. and Murray, R. (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2006*, Cambridge University Press, Cambridge, 2nd ed, 2008; and Ouguergouz, F., *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human for Human Dignity and Sustainable Development in Africa*, Kluwer Law International, The Hague, 2003.

2. See Rapporteur's Report on the Draft ACHPR, OAU Doc CAB/LEG/67/Draft Rapt. (II) Rev.4, para. 13; Viljoen, F., *International Human Rights Law in Africa*, OUP, Oxford, 2007, p. 238.

and mental health (Article 16); the right to education (Article 17(1)); and, the protection of the family and cultural rights (Articles 17(2) and (3), 18(1) and (2) and 61). The Charter also protects some group rights in Articles 19–24, including the rights to self-determination, free disposal of wealth and natural resources, economic, social and cultural development, national and international peace and security, and a general satisfactory environment. Most of these rights may be seen, at least in part, as collective ESC rights.

Among the individual ESC rights, which are fundamental for human survival and for living a life of dignity, explicitly protected in the International Covenant on Economic, Social and Cultural Rights (ICESCR),[3] but not explicitly included in the African Charter are the right to an adequate standard of living, including adequate food, clothing and housing; social security; and the right to the continuous improvement of living conditions. Further the rights to rest, leisure, reasonable limitation of working hours, periodic holidays with pay, remuneration for public holidays and the right to form and join trade unions are not explicitly protected.[4] The rights to water and sanitation are also not explicitly protected in the Charter. Relatively more detailed ESC rights are protected in later African human rights treaties protecting specific more vulnerable groups – children, women, the youth and internally displaced persons – in particular the African Charter on the Rights and Welfare of the Child;[5] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol);[6] the African Youth

3. 993 UNTS 3, entered into force 3 January 1976, Articles 6–15. The vast majority of African UN Member States (48 States) have ratified the ICESCR.
4. *Idem*.
5. OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999. See, for example, Articles 11 (right to education); 12 (leisure, recreation and cultural activities); 14 (right to health); 15 (protection against child labour); 18 (protection of the family); and 21 (protection from harmful social and cultural practices).
6. Adopted by the 2nd Ordinary Session of the African Union Assembly, Maputo, 11 July 2003, entered into force 25 November 2005, *available at*: www.achpr.org/english/_info/women_en.html. The Protocol protects ESC rights in Articles 12 (education and training); 13 (economic and social welfare rights); 14 (health and reproductive rights); 15 (food security); 16 (adequate housing); and 17 (positive cultural context). The Protocol provides for special protection for elderly women, women with disabilities and women in distress in Articles 22–24.

Charter;[7] and the African Union (AU) Convention for the Protection and Assistance of Internally Displaced Persons.[8]

Thus, so far, in its growing 'case law' the African Commission on Human and Peoples' Rights (African Commission) has most frequently dealt with civil and political rights such as the right to fair trial, freedom of speech and freedom from torture, inhuman and degrading treatment.[9] This is partly because most communications brought before the Commission by civil society actors, such as NGOs, have mostly raised issues relating to civil and political rights. Only a few ESC rights cases have been brought before the Commission. This is despite the fact that many individuals and more vulnerable groups in Sub-Saharan Africa, particularly the inhabitants of rural and deprived urban areas; landless persons; women; children; households headed by women; families living with HIV/AIDS; persons with disabilities; refugees and internally displaced persons, still live in (extreme) poverty.[10] This leads to wide spread denials and violations of ESC rights. For example, in 2009 in the Democratic Republic of Congo (DRC) 75 percent of the population lived in extreme poverty, 83 percent of the population had no access to safe drinking water, while 70 percent had no access to hygienic sanitation facilities and only 1 percent of the population had access to electricity.[11]

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7. Adopted by the African Union Assembly in July 2006, *available at*: www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf. The Charter protects several rights including property (Article 9); education (Article 13); freedom from poverty (Article 14); employment (Article 15); health (Article 16) and culture (Articles 20 and 25).

8. Adopted by the Special Summit of the Union held in Kampala, 23 October 2009, *available at*: www.au.int/en/sites/default/files/AFRICAN_UNION_CONVENTION_FOR_THE_PROTECTION_AND_ASSISTANCE_OF_INTERNALLY_DISPLACED_PERSONS_IN_AFRICA_(KAMPALA_CONVENTION).pdf. Under Article 3(b) States undertake to: 'Prevent political, social, cultural and economic exclusion and marginalisation, that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion'.

9. By November 2010 the Commission had published around 150 decisions of which slightly less than half were inadmissibility decisions. Decisions of the African Commission are reported in the *Activity Reports of the African Commission for Human and Peoples' Rights*, *available at*: www.interights.org/ACHPR_reports/index.htm.

10. See UNDP, Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development (New York, UNDP, 2010) pp. 86, 97–98.

11. CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (16 December 2009), para. 29.

While life expectancy at birth in the year 2010 in some non-African States (such as Norway, Australia, Canada, Sweden, Japan, Switzerland, France, Iceland and Spain) was over 80 years, in several States that are party to the African Charter (such as Angola, Central African Republic, Chad, DRC, Guinea-Bissau, Lesotho, Mali, Nigeria, Sierra Leone, and Zimbabwe) it was below 50 years.[12] Fifty percent of the 536,000 women who die every year due to complications during pregnancy, childbirth or the six weeks following delivery occur in Sub-Saharan Africa, with unsafe abortion as one of the major causes.[13] Despite this poor state of ESC rights in Africa, the African Commission has given prominence to civil and political rights as evident in the Commission's promotional activities. For example, in two general resolutions about the 'human rights situation in Africa' adopted in 1994 and 1999 the Commission expressed concern mainly on 'civil and political' rights.[14] The Commission's recent (March 2011) resolutions on the 'human rights situation' in North Africa in particular in Algeria,[15] Libyan Arab Jamahiliya,[16] and Tunisia[17] do not refer specifically to respect for ESC rights. Nonetheless, the Commission has developed some useful jurisprudence on ESC rights in the thirty years of the Charter African Charter (1981–2011) and 25 years since the African Charter entered into force on 21 October 1986.

This article reviews the evolution and impact of the African Commission's jurisprudence on ESC rights under the African Charter. The article adopts the following structure. Section 2 provides an overview of ESC rights explicitly protected in the African Charter and the interpretation of these rights by the African Commission. It also considers the impact of the Commission's jurisprudence. Section

12. UNDP, *op. cit*. note 10, pp. 143–146.
13. United Nations, *The Millennium Development Goals Report 2009*, New York, United Nations, 2009, p. 26.
14. See Resolution on the situation of Human Rights in Africa, ACHPR / Res.14(XVI)94, (1994); Resolution on the Human Rights situation in Africa, ACHPR /Res.40(XXVI)99, (1999). However, the 1994 Resolution acknowledged that 'the human rights situation in many African countries is characterised by the violations of economic, social, cultural, civil and political rights' and called upon 'all African Governments to adopt legislative and other measures to protect vulnerable groups of society, in particular women and children, against the consequences of the persistent economic crisis in Africa'.
15. ACHPR/Res.180(Ext.OS/IX)2011 (1 March 2011).
16. ACHPR/Res.181(Ext.OS/IX)2011 (1 March 2011).
17. ACHPR/Res.178(Ext.OS/IX)2011 (1 March 2011).

3 considers the African Commission's emerging jurisprudence on State obligations with respect to ESC right and also considers the Commission's approach to the non-State actor obligations under the African Charter. Section 4 makes several concluding observations.

2. CLARIFYING THE NORMATIVE CONTENT OF ESC RIGHTS UNDER THE AFRICAN CHARTER

This section begins by making a brief consideration of the provisions of the African Charter protecting ESC rights. It is observed that these provisions are broadly framed and require innovative interpretation to enable State Parties to the African Charter to implement ESC rights. The section then considers the jurisprudence of the African Commission on ESC rights developed before 2001. It is observed that the Commission's jurisprudence before 2001, as reflected in its decisions, despite finding violations of ESC rights, generally tends to be very fact specific. The Commission thereby failed to develop the normative content of ESC rights under the African Charter. This was due to the failure of the African Commission to give due attention to the interpretation of the relevant provisions protecting ESC rights. The section ends by examining the Commission's jurisprudence from 2001 up to 2010 noting that the Commission has increasingly paid attention to developing the general normative content of ESC rights under the African Charter mainly through the use of international human rights law. However, more consistency is still required.

2.1. Overview of ESC Rights Explicitly Protected in the African Charter: The Vague Formulation of ESC Rights

Although the African Charter protects ESC rights, it does so in very general and extremely vague terms. For example, regarding the right to property, Article 14 provides that '[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. Apart from the fact that the content of the right to property and its beneficiaries are not defined in Article 14, the permissible restrictions – references to 'public need' or the 'general interest of the community' – are broadly framed. There is no explicit mention of 'prompt, effective

and adequate compensation' prior to the compulsory deprivation of property.

Similarly, in protecting the right to work Article 15 simply provides: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work'. It does not define the content of 'equitable and satisfactory conditions. Does this include, for example, the rights to rest, leisure, reasonable limitation of working hours, periodic holidays with pay, remuneration for public holidays and the right to form and join trade unions including the right to strike?

Article 16, which protects the right to health, reads: 'Every individual shall have the right to enjoy the best attainable state of physical and mental health'. It then obliges State Parties to take the 'necessary measures' to protect the health of their people and to ensure that they receive medical attention when they are sick. Clearly, Article 16 neither defines the content of the right to the 'best attainable state of physical and mental health' nor does it indicate the specific measures States are required to undertake to implement this right.

Article 17(1), which protects the right to education, only provides: 'Every individual shall have the right to education'. Unlike Article 13 of the ICESCR, which elaborates on the content of the right to education, the content of the right to education in the African Charter that 'every individual' is entitled to enjoy was not defined at all. The general character of this provision leaves more questions than answers. Does Article 17 guarantee access to pre-school education, the right to free and compulsory primary education to all, a right to have secondary education generally available and accessible to all and a right to the accessibility of higher education on the basis of capacity? The objectives of education are also not stated. Clearly then, such a general formulation of the right to education requires interpretation by the Commission (and the African Court) to enable States to give effect to their obligations.

With respect to cultural rights Articles 17(2) of the African Charter provides that: 'Every individual may freely, take part in the cultural life of his community'. The scope of 'cultural life' that 'every individual' may make a choice to take part in is not defined. In sum, all the above provisions on ESC rights lack specificity and require innovative interpretation in the light of present-day conditions

to enable State Parties to understand their obligations under the African Charter. Creativity and dynamism in the Commission's interpretation of the African Charter giving meaning to ESC rights are essential if States are to give effect to the object and purpose of the African Charter, which is to 'promote and protect human and peoples' rights and freedoms' effectively in Africa.[18] This creative interpretation would contribute considerably to the clarification and development of ESC rights. In turn this would enable States Parties to implement the relevant ESC rights. Indeed, the broad and vague wording was designed to permit a degree of 'flexibility' in the application and subsequent interpretation of the African Charter by the competent bodies.[19]

2.2. The interpretation of ESC Tights by the African Commission

The African Commission met for the first inaugural session on 2 November 1987. The Commission did not have a permanent Secretariat after its inauguration and only became fully functional in June 1989. It comprises 11 commissioners, elected by the Assembly of Heads of State and Government for six-year terms and serving in their personal capacity.[20] The Commission, as a part-time body, meets for two annual sessions of fifteen days each, in addition to which extraordinary sessions may be held. The specific functions of the Commission are to promote human and peoples' rights; to ensure the protection of human and peoples' rights; and to provide authoritative interpretation of the African Charter and its Protocol on the Rights of Women.[21]

There are two main ways through which the Commission can directly develop the normative content of ESC rights under the African Charter. The first method is for the Commission to provide an interpretation of the African Charter clarifying the scope of ESC rights in accordance with Article 45(3) of the African Charter. This Article states that one of the functions of the Commission is to interpret all the provisions of the Charter at the request of a

18. African Charter, *supra* note 1, preamble, para. 11.
19. See Report of the Rapporteur, OAU Ministerial Meeting on the Draft African Charter on Human and Peoples' Rights, Banjul, The Gambia, 9–15 June 1980, OAU Doc. CAB/LEG/67/3/Draft RPT.rpt (II), para. 13.
20. African Charter, *supra* note 1, Articles 31–34.
21. *Ibidem*, Article 45; African Women's Protocol, *supra* note 6, Articles 26(1) and 32.

State Party, an institution of the African Union (AU) or an African organisation recognised by the AU. Although, as noted above, most of the provisions of the African Charter protecting ESC rights are stated in very general terms, no State Party to the Charter, AU institution or an African organisation recognised by the AU has (as of 27 June 2011) ever requested the Commission to interpret any of the Charter's provisions on ESC rights.[22] This is not surprising given the lack of interest in implementing ESC rights by many African States. For example, in spite of the significant economic growth and huge natural wealth in some African States and the international development aid that has been provided, the amount of resources allocated to social services and public infrastructure is far from adequate.[23] Arguably, in interpreting the Charter the Commission may on its own motion make resolutions, statements, general comments, concluding observations on State Party reports, principles or guidelines clarifying the content of the rights protected in the Charter.[24]

The second method is for the Commission to clarify the normative content of ESC rights through the consideration of complaints ('communications'). Complaints alleging human rights violations may be submitted to the Commission from States and non-State actors (NSAs) including individuals and non-

22. At the time of writing this competence had been used only on one occasion resulting into an Advisory Opinion which concluded that the draft of the UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, UN Doc. A/RES/47/1 (2007), was compatible with the African Charter. See Advisory opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission at its 41st ordinary session, Accra, Ghana, May 2007, *available at*: www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf.

23. See, for example, Concluding Observations of the Committee on Economic, Social and Cultural Rights for *Angola*, UN Doc. UN Doc. E/C.12/AGO/C/O/3/CRP.1 (18 November 2008), para. 26; *Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (16 December 2009), para 16; *Chad*, UN Doc. E/C.12/TCD/CO/3UN Doc. (16 December 2009), para. 23.

24. See e.g. Resolution on Economic, Social And Cultural Rights in Africa, ACHPR/Res.73(XXXVI)04, (2004); Guidelines for National Periodic Reports, in *Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988–1989*, ACHPR/RPT/2nd, Annex XII; Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Draft Principles and Guidelines), adopted by the African Commission at the 48th session, in November 2010, *available at*: www.achpr.org/english/other/Draft_guideline_ESCR/Draft_Pcpl%20&%20Guidelines.pdf.7

government organisations (NGOs) without States having made a separate declaration to this effect.[25] Complainants are not required to be victims or to show that they act with the explicit consent of victims.[26] Complainants are also allowed to bring an *actio popularis* (a complaint in the public interest).[27] However, inter-State communications are less effective because States have not alleged violations under other human rights treaties providing for inter-State complaints.[28] This practice of not using the available inter-State complaints indicates that States are generally reluctant to submit communications alleging violations in other States even in cases of massive violations of ESC rights. This is possibly because of the perception that claiming violations in other States is an 'unfriendly act' in international relations and constitutes interference in the 'domestic affairs' of other States. States are also well aware that they generally lack a clean human rights record and as such they should not question another State's human rights compliance. Accordingly, inter-State communications within the African regional human

25. African Charter, *supra* note 1, Articles 47–55. A separate declaration is required accepting individual and NGO applications before the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), Articles 34(6) and 5(3); *In the Matter of Michelot Yugogombaye vs The Republic of Senegal*, Application No. 001/2008 (15 December 2009); Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, *available at*: www.africa-union.org/root/au/documents/treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf, Article 8(3).

26. African Charter, *supra* note 1, Article 56(1) requires communications to 'indicate their authors' without requiring that the authors have to be the victims or act on behalf of the victims.

27. Communication 155/96, *infra* note 63, para. 49 The Commission thanked 'the two human rights NGOs who brought the matter under its purview: The Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter'.

28. See e.g. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, UN Doc. A/39/51 (1984), entered into force 26 June 1987, Article 21; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA res. 45/158, UN Doc. A/45/49 (1990), entered into force 1 July 2003, Article 74; International Convention on the Elimination of All Forms of Racial Discrimination, GA res. 2106 (XX), UN Doc. A/6014 (1966), entered into force 4 January 1969, Articles 11–13; and International Covenant on Civil and Political Rights, GA res. 2200A (XXI), UN Doc. A/6316 (1966), entered into force 23 March 1976, Articles 41–43.

rights system have been rarely used.[29] Thus, most communications before the Commission claiming violations of ESC rights, and indeed all other human rights, have been submitted by NSAs – individuals and non-governmental organisations (NGOs).[30] The increasing role of NGOs in the African human rights system can be discerned from the increasing number of NGOs with Observer Status before the African Commission.[31] The most important communications on ESC rights are briefly reviewed below with a view to identifying the approach of the Commission to ESC rights and the impact of the Commission's approach to the protection of ESC rights in Africa.

2.2.1. Pre-2001 Decisions

The Commission started to make public its decisions on communications brought before it in 1994. In jurisprudential terms, decisions of the African Commission on ESC rights made before 2001 did not adequately develop the normative content of ESC rights protected under the African Charter. This failure to develop norms also generally applied to the civil and political rights jurisprudence of the Commission pre-2001. The Commission's decisions generally failed to delineate the freedoms and entitlements arising from specific rights protected in the African Charter. The approach of the Commission to ESC rights cases before 2001 can be observed from the cases summarized below which dealt with some aspects of the rights to property, health, education and work. The cases considered below provide a sample of the Commission's approach to cases involving claims of violations of ESC rights.

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29. To date the only inter-State communication before the Commission is *Democratic Republic of Congo vs Burundi, Rwanda and Uganda*, Communication No. 227/99 (2003), 20th Activity Report. The other complaint brought by a State was filed by Libya against the US for stationing troops in Zaire and Chad. It was dismissed without recording it because the US was not a State Party to the African Charter.

30. See Activity Reports of the African Commission for Human and Peoples' Rights, supra note 9.

31. See Final Communiqué of the 48th Ordinary Session of the African Commission on Human and Peoples' Rights Held in Banjul, The Gambia from 10 to 24 November 2010, para. 41, noting that by November 2010 the total number of NGOs with Observer Status before the African Commission was four hundred and eighteen (418).

2.2.1.1. Right to Property

In several communications the Commission has found a violation of the right to property under Article 14 without indicating the scope of this right. For example, in *John K. Modise vs Botswana* the complainant had been deported four times from Botswana. He claimed a violation of the right to property under Article 14 alleging to have suffered heavy financial loses, since the government of Botswana confiscated his belongings and property.[32] The government of Botswana did not refute this allegation. In these circumstances, the Commission found 'the above action of the government of Botswana an encroachment of the Complainant's right to property guaranteed under Article 14 of the Charter'.[33] There was no attempt to clarify the normative content of the right to property.

Indeed, only some examples of the right to property can be derived from the Commission's case law. In *Malawi African Association and Others vs Mauritania*, land was considered 'property' for the purposes of Article 14 of the Charter.[34] Although in later cases, the Commission stated that the 'right to property necessarily *includes* a right to have access to property of one's own and the right not for one's property to be removed',[35] invaded or encroached upon.[36] This inclusive (non-exhaustive) statement of the right to property was broadly framed. In any case, it failed to define what is meant by 'property'. The precise scope of the right to property remained unclear. In particular it was uncertain whether the right to property entailed a right of everyone to own private property or was it limited to the protection from arbitrary deprivation of private property. Even

32. Communication No. 97/93 (2000), 14th Activity Report.
33. *Idem*, para. 94.
34. Communications Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), 13th Activity Report, para. 128, stating: 'The confiscation and looting of the property of black Mauritanians and the expropriation or destruction of their land and houses before forcing them to go abroad constitute a violation of the right to property as guaranteed in article 14'.
35. *Media Rights Agenda and Others* vs *Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), 12th Activity Report, para. 77 (emphasis added).
36. *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda* vs *Nigeria*, Communication Nos. 140/94, 141/94, 145/95 (1999), 13th Activity Report, para. 55.

in its more recent decisions on the right to property, the commission did not examine the normative content of the right to property.[37]

2.2.1.2. Rights to Health and Education

With respect to health and education, in *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs Zaire* it was alleged, *inter alia*, that the mismanagement of public finances, the failure of the Government to provide basic services, the shortage of medicines, and the closure of universities and secondary schools for two years was a violation of the African Charter.[38] The Commission simply stated as follows:

> 47. Article 16 of the African Charter states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people. The failure of the Government to *provide* basic services such as safe drinking water and electricity and the shortage of medicine as alleged in communication 100/93 constitutes a violation of Article 16 (emphasis added).
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> 48. Article 17 of the Charter guarantees the right to education. The closures of universities and secondary schools as described in communication 100/93 constitutes a violation of Article 17.

The Commission then held, without legal reasoning, that the facts constituted 'serious and massive violations' of several provisions in the African Charter, including Article 16 and 17. While these findings were commendable in so far as they applied the notion of 'serious' violations to ESC rights, which has been traditionally used with respect to civil and political rights, it can be noted that the

37. See *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe* vs *Republic of Zimbabwe*, Communication No. 284/2003 (2009), 26th Activity Report, Annex 3, para. 179. The Commission simply stated that 'The confiscation of the Complainants' equipment and depriving them of a source of income and livelihood is also a violation of their right to property guaranteed under Article 14' without articulating the normative content of the right to property. See also *Association of Victims of Post Electoral Violence & Interights vs Cameroon*, Communication No. 272/2003, 27th Activity Report, Annex 3, paras. 33-36.

38. *Communications Nos. 25/89, 47/90, 56/91, 100/93 (1996)*, 9th Activity Report. This decision was taken at the 18th Ordinary Session, Praia, Cape Verde, October 1995.

Commission merely restated the relevant provisions of the African Charter, Articles 16 and 17. These Articles do not provide details as to the content of the rights to education and health. It would have been preferred to first identify the normative content of such very general provisions before concluding that these provisions had been violated. However, the Commission did not interpret these provisions. Thus, apart from stating that the acts/omissions stated above constituted violations of the rights to health and education, the normative content of the rights to health and education under Articles 16 and 17 remained unclear.

Later decisions made in the period 1997–2000 such as *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others* vs *Angola*;[39] *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation* **vs** *Nigeria*;[40] and *Malawi African Association and Others* vs *Mauritania*;[41] did little to address the normative content of the relevant provisions on ESC rights in the African Charter.

For example, the decision in *International Pen and Others* vs *Nigeria* found a violation of the right to health under Article 16 of the African Charter without identifying the content of the right. In this case it was alleged that Mr. Ken Saro-Wiwa, a writer, Ogoni activist and president of the Movement for the Survival of the Ogoni People, was arrested in 1994 and was severely beaten during the first days of his detention and was held for several days in leg irons and handcuffs. He was also denied access to hospital treatment and the medicine he needed to control his blood pressure. He was held in very poor conditions. In these circumstances, the Commission found that:

> The responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities. The state has a direct responsibility in this case. Despite requests for hospital treatment made by

39. Communication No. 159/96 (1997), 11th Activity Report. Taken at the 22nd Ordinary Session, Banjul (Gambia), on 11 November 1997.
40. Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998), 12th Activity Report. Done at Banjul, 31st October 1998.
41. Communication Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000), 13th Activity Report. Done at Algiers, 11 May 2000.

> a qualified prison doctor, these were denied to Ken Saro-Wiwa, causing his health to suffer to the point where his life was endangered. The government has not denied this allegation in any way. This is a violation of Article 16.[42]

While it is clear from the foregoing that the denial of prisoners (who are vulnerable or marginalised section of the population) access to hospital treatment or access to doctors while one's health is deteriorating is a violation of the right to health under Article 16 of the African Charter, the nature and scope of prisoners' right to health was not clearly discerned.[43]

In *Malawi African Association and Others* vs *Mauritania* the African Commission had another opportunity to clarify the scope of prisoners' right to health but did not do so. In this case, the government detained members of black ethnic groups in Mauritania after the government was criticised by members of the black ethnic groups for marginalising black Mauritanians. Prisoners were detained in the worst conditions. They only received a small amount of rice per day, without any meat or salt. Some of them had to eat leaves and grass. The prisoners were forced to carry out very hard labour day and night, and they were chained up in pairs in windowless cells. They only received one set of clothes and lived in very bad conditions of hygiene. They were regularly beaten by their guards and kept in overcrowded cells. They slept on the floor without any blankets, even during the cold season. The cells were infested with lice, bedbugs and cockroaches, and nothing was done to ensure hygiene and provision of health care. As a result, some had died in detention. In finding a violation of Article 16 on the basis of the facts above, the Commission stated:

> The State's responsibility in the event of detention is even more evident to the extent that detention centres are of its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of the competent public authorities. Some prisoners died as a result of the lack of medical attention. The

42. Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998), 12th Activity Report, para 114. See also Media Rights Agenda, Constitutional Rights Project vs Nigeria, Communication Nos. 105/93, 128/94, 130/94, 152/96, 12th Activity Report, para. 88.

43. For a discussion of prisoner's right to health see Lines, R., 'The Right to Health of Prisoners in International Human Rights Law', *International Journal of Prisoner Health*, Vol. 4, No. 1, 2008, pp. 3–53.

> general state of health of the prisoners deteriorated due to the lack of sufficient food; they had neither blankets nor adequate hygiene. The Mauritanian State is directly responsible for this state of affairs and the government has not denied these facts. Consequently, the Commission considers that there was violation of article 16.[44]

Thus, a violation of the right to health was established on the facts based on State responsibility for detention centres without defining the content of the right to health of prisoners. Therefore, the scope of the prisoner's right to health under the African Charter remains unclear. This is despite the fact that prisoners in some African States still face several difficulties, impacting negatively on their right to health, including overcrowding, poor hygienic and sanitary conditions, lack of sleeping space, food and water, the absence of adequate health care, including for pregnant women and HIV/AIDS and tuberculosis patients, as well as the absence of specialized facilities for prisoners and detainees with disabilities.[45]

2.2.1.3. Mass Expulsion of Non-nationals and ESC Rights

In *Union Inter Africaine des Droits de l'Homme* case it was alleged that the Angolan government rounded up and expelled West African nationals (Senegalese, Malian, Gambian, Mauritanian and others) on its territory between April and September 1996. Those affected lost their belongings. The Commission observed that: 'Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations "constitute a special violation of human rights"'.[46] It was further noted that:

> This type of deportations [sic] calls into question a whole series of rights recognised and guaranteed in the Charter; such as the right to property (article 14), the right to work (article 15), the right to education (article 17 paragraph 1) and results in the violation by the State of its obligations under article 18 paragraph 1 which stipulates that "the family shall be the natural unit and basis of society".[47]

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44. Communication Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (2000), 13th Activity Report, para. 122.
45. See e.g. Committee against Torture, *Concluding Observations: Ethiopia*, UN Doc. CAT/C/ETH/CO/1 (November 2010), para. 26.
46. *Communication No. 159/96 (1997)*, 11th Activity Report, para. 16.
47. *Ibidem*, para. 17.

However, the Commission did not indicate the content of the rights to property, work and education and how such rights were called into question. It concluded that the deportation of the West African nationals from Angola constituted a violation of articles 2 (non-discrimination), 14 (right to property) and 18 (protection of the family) of the African Charter without interpreting the normative content of these rights.[48] It also remained unclear why there was no finding that the other ESC rights explicitly protected in the Charter, in particular the rights to work and education, were also violated yet in another case the Commission stated that: 'By forcibly expelling the two victims from Zambia, the State has *violated* their right to enjoyment of *all the rights* enshrined in the African Charter'.[49] In short, beyond the fact that mass expulsion of non-nationals is discriminatory on the basis of origin, the decision is of limited jurisprudential value to the normative content of the relevant ESC rights under the African Charter.

2.2.1.4. Right to Work

In *Annette Pagnoulle (on behalf of Abdoulaye Mazou) vs Cameroon*,[50] the complainant, Mr. Mazou was a magistrate who was sentenced to 5 years imprisonment by a military tribunal without trial, without witnesses, and without a right to defend himself for hiding his brother who was later sentenced to death for an attempted coup d'état. After his release he was not reinstated in his former professional capacity as a magistrate even after the government granted amnesty to all persons sentenced to a punishment of imprisonment and/or fine. The Commission found that by not reinstating Mr. Mazou in his former position after the Amnesty Law, the government violated his right to work under Article 15 of the African Charter, because it has prevented Mr. Mazou to work in his capacity of a magistrate 'even though others who have been

48. In addition, the Commission found violations of Article 7 (1)(a), and Article 12 (4) and (5). Article 7(1)(a) deals with the right to an appeal to competent national organs, while Article 12(4) provides that 'A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law'. Article 12(5) prohibits mass expulsion of non-nationals.
49. *Amnesty International* vs *Zambia*, Communication No. 212/98 (1999), 12th Activity Report, para. 52 (emphasis added).
50. Communication No. 39/90 (1997), 10th Activity Report.

condemned under similar conditions have been reinstated' (para. 29). While the Commission's decision could be understood to imply that Article 16 protects the right not to be deprived of employment unfairly or in a discriminatory manner, it is silent on the normative content of the right to work. Does the right to work include an absolute and unconditional right to obtain employment or is it limited to the right of every human being to decide freely to accept or choose work?

2.2.1.5. Impact of the Commission's Pre-2001 ESC Rights Jurisprudence

The impact of the African Commission's pre-2001 jurisprudence on ESC rights was to establish that ESC rights are justiciable, in the sense that individuals and groups who claim to be victims of violations of these rights can file complaints before an impartial (quasi)-judicial body and request adequate remedies or redress if a violation has occurred or is likely to occur. The Commission clearly demonstrated that State compliance with human rights obligations relating to ESC rights (e.g. property, health, education, work) under the African Charter are subject to (quasi)-judicial review. By finding specific violations of ESC rights the Commission demonstrated that the African Charter requires African States to comply with their obligations to respect, protect and fulfil ESC rights at a domestic level in the same way as they are required in the case of civil and political rights. In this respect, the Commission's jurisprudence reinforced the principle of the interdependence of all human rights.

The impact of the African Charter and the Commission's jurisprudence on ESC rights at the domestic level may be seen from the fact that some aspects of ESC rights were protected within African national written constitutions before 2001. For example rights relating to property were protected in all 53 African constitutions; 46 constitutions protected the rights related to work; 29 constitutions recognised explicitly the right to freedom from slavery and forced labour; 45 constitutions protected the right to education; 41 constitutions recognised a right to culture; 39 constitutions recognised the right to health in various formulations; 29 constitutions recognised the right to social security; 12 constitutions recognised the right to housing and shelter; 8 constitutions protected the right

to food and nutrition; and 6 constitutions recognised the right to ('clean and safe' or 'sufficient') water.[51]

While in some pre-2001 African constitutions (e.g. South Africa 1996) ESC rights were protected in the justiciable bill of rights, some constitutions (Lesotho 1993, Nigeria 1999, Sierra Leone 1991, and Sudan 1998) recognised ESC rights only as directive principles of State policy perceived as non-justiciable. In some constitutions (Eritrea 1997, Ethiopia 1995, The Gambia 1996, Ghana 1992, Guinea-Bissau 1984, Liberia 1986, Malawi 1994, Namibia 1990, Tanzania 1977, Uganda 1995, and Zambia 1991) some ESC rights were recognised in the bill of rights while others were only recognised as principles of State policy. The recognition of ESC rights in national constitutions provides a useful starting point to hold States accountable at the domestic level.

However, it should be noted that the Commission's pre-2001 jurisprudence shows that the African Commission found violations of specific ESC rights such as the rights to property, education, health and work but paid little attention to developing the normative content of the relevant rights. None of the pre-2001 decisions drew inspiration from international human rights law in order to interpret and develop the content of the African Charter's general provisions on ESC rights. This is despite the fact that Article 60 of the African Charter expressly provides that '[t]he Commission shall draw inspiration from international law on human and peoples' rights', particularly from the provisions of various African instruments on human and peoples' rights, the United Nations (UN) Charter, the Constitutive Act of the African Union (formerly the Charter of the Organisation of African Unity), the Universal Declaration of Human Rights, other instruments adopted by the UN and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the UN specialised agencies of which the parties to the African Charter are members. The failure to develop the normative content of ESC rights meant the content of such rights remained vague. This led to the perception that ESC rights were mere principles and values, rather than human rights, and that most of these rights were not

51. See Heyns, C. and Kaguongo, W., 'Constitutional Human Rights Law in Africa', *South African Journal on Human Rights*, Vol. 22, No. 4, 2006, pp. 673–717.

justiciable. Domestic courts did not rely on the Commission's jurisprudence.

2.2.1.6. Why Did the Commission Refrain from Developing the Normative Content of ESC Rights in its Pre-2001 Decisions?

Several reasons can be advanced to explain the Commission's approach to ESC rights before 2001. First, when the Commission commenced its work it had several limitations impacting on the quality of its decisions including those on ESC rights. Such limitations included the lack of expertise on the part of the Commission in dealing with cases involving violations of ESC rights, the lack of legal officers with expertise on ESC rights and the Commission's initial reluctance to pay greater attention to ESC rights.[52] Even before the Commission was inaugurated, Prof. Umozurike, who later became the Commission's Chairperson, stated that 'it seems likely that the Commission will be more concerned with civil and political rights' noting that 'should it venture into economic and social ones, it would find too many problems in too many countries to cope with'.[53] Thus, developing jurisprudence on ESC rights and their enforcement was not a priority. This occurred within a broader context in which ESC rights tended to be marginalized as human rights in international human rights law and practice.

Second, the Commission also generally avoided dealing in-depth with the few cases before it (whether on issues relating to civil and political rights or ESC rights) because of the dominant perception, at the time, that: 'the main goal of the Commission's procedure is to initiate a positive dialogue, resulting into an amicable resolutions between the complainant and the state concerned'.[54] If the Commission's main goal was to initiate a 'positive dialogue',

52. See Umozurike, U.O., 'The Protection of Human Rights under the Banjul (African) Charter on Human and Peoples' Rights', *African Journal of International Law*, Vol. 1, No. 1 1988, pp. 65-83, at p. 81; Umozurike, U.O., 'The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness', *Annual Survey of International & Comparative Law*, Vol. 13, 2007, pp. 179–190, at p. 185.

53. Umozurike, U.O., 'The African Charter on Human and Peoples' Rights', *American Journal of International Law*, Vol. 77, No. 4, 1983, pp. 902–912, at p. 911.

54. See Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah vs Zaire [DRC], Communications Nos. 25/89, 47/90, 56/91,100/93(1996), 9th Activity Report, para 39.

developing the normative content of rights through detailed (quasi)-judicial decisions was not considered as necessary to achieve the Commission's perceived main goal.

Third, civil society actors including individuals and NGOs did not bring several communications before the Commission alleging ESC rights violations. Even in the few cases brought before the Commission, submissions were not comprehensive. For example, there were no communications alleging violations of the rights to adequate food, adequate housing, and social security.

Finally, the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence.[55] In fact, the UN system, particularly the UN Committee of Economic, Social and Cultural Rights (CESCR), in the 1990s was just developing the normative content of ESC rights and the nature of State obligations.[56] Expert guidelines on violations of ESC rights were only made in 1997.[57] These had not been applied in specific cases at either national or international levels.

2.2.2. Decisions from 2001

It is important to note that most decisions of the Commission on ESC rights decided on the merits from 2001 have relied increasingly on international human rights law to develop the normative content of some ESC rights under the African Charter. The decisions became longer with more elaborate reasoning. Some illustrative examples are considered below.

2.2.2.1. The Right to Property

After 2001, the Commission has interpreted the scope of the right to property in the African Charter by stating that it encompasses two main principles.[58] The first principle, which is of a

55. See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, (ACHPR/IWGIA, 2005).

56. The CESCR clarified the scope of several substantive rights such as the right to adequate housing, the right to adequate food and the right to education in the 1990s. See CESCR, *General Comments* 4, 7, 12 and 13.

57. See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, *Human Rights Quarterly*, Vol. 20 No. 3, 1998, pp. 691–704.

58. See Interights, Institute for Human Rights and Development in Africa, and Association Mauritanienne des Droits de l'Homme vs Islamic Republic of

general nature, provides for the principle of ownership and peaceful enjoyment of property.[59] The role of the State is to *respect* and *protect* this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.[60] The second principle provides for the possibility, and conditions of deprivation of the right to property.[61] Article 14 of the Charter recognises that States are in certain circumstances entitled, among other things, to control the use of property in accordance with the 'public or general interest', by enforcing such laws as they deem necessary for the purpose.[62] The confiscation of private property without a showing of a public or general interest of the community would be arbitrary and in violation of Article 14.

2.2.2.2. The Right to Health and the Right to a Clean Environment

In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* vs *Nigeria*[63] (SERAC case) the complainants alleged that the Nigerian government violated the right to health and the right to a clean environment as recognized under Articles 16 and 24 of the African Charter by failing to fulfil the minimum duties required by these rights.[64] This, the Complainants alleged, the government did by: (i) directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population; (ii) failing to protect the Ogoni population from the harm caused by the Nigerian National Petroleum Company (NNPC) in a consortium with Shell Petroleum Development Corporation (SPDC) but instead using its security forces to facilitate

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Mauritania, Communication 373/2009 (formerly 242/2001), (2010), 28th Activity Report, para. 44.

59. *Idem*.

60. *Ibidem*, para. 43.

61. *Ibidem*, para. 44.

62. *Idem*.

63. Communication 155/96, (2001), 15th Activity Report, Annex V. Done at the 30th Ordinary Session, held in Banjul, The Gambia from 13–27 October 2001. For a comment on this case see Shelton, D., 'Decision Regarding Communication 155/96: Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria', American Journal of International Law, Vol. 96, No. 4, 2002, pp. 937–941.

64. Article 24 of the African Charter reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

the damage; and (iii) failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations. Unlike in the previous cases, the Commission commented on the normative content of the right to a healthy environment under Articles 16 and 24 by stating as follows:

> 52. The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Nigeria is a party, requires governments to take necessary steps for the improvement of all aspects of environmental and industrial hygiene. The right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) of the African Charter and the right to a general satisfactory environment favourable to development (Article 16(3)) already noted obligate governments to desist from directly threatening the health and environment of their citizens. The State is under an obligation to respect the just noted rights and this entails largely non-interventionist conduct from the State for example, not from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual.
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> 53. Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

Applying the above standards to the facts of the case, the Commission concluded that although Nigeria had the right to produce oil, it had not protected the rights of the Ogoni under Article

16 and 24. Thus, the Commission read the rights to health and to a clean environment together.

In a decision adopted in 2009, the *Centre on Housing Rights and Evictions vs The Sudan*,[65] (COHRE case) the Commission further elaborated on the scope of the right to health under Article 16 by relying on the interpretation of the right to health in international law. In this communication, the complainants alleged gross, massive and systematic violations of human rights by the Republic of Sudan (involving destruction of homes, livestock and farms as well as the poisoning of water sources) against the indigenous Black African tribes in the Darfur region of Western Sudan, in particular, members of the Fur, Marsalit and Zaghawa tribes. It was claimed that the Republic of Sudan was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region in violation of Article 16. The Commission gave the right to health meaningful content by relying on the normative definition of the right to health as spelt out by the UN Committee on Economic, Social and Cultural Rights in General Comment No. 14 on the 'The right to the highest attainable standard of health'.[66] The Commission stated that:

> 209. In its General Comment No. 14 on the right to health adopted in 2000, the UN Committee on Economic, Social and Cultural Rights sets out that, 'the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and portable water, an adequate supply of safe food, nutrition, and housing […]'. In terms of the General Comment, the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on States – to respect, fulfil and protect the right. In terms of the duty to protect, the State must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.
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> 210. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. According to General Comment 14, 'states should

65. Communication Nos. 279/03 & 296/05 (2009), 28th Activity Report. Adopted during the 45th Ordinary Session, held between 13–27 May 2009, Banjul, The Gambia. The decision was not made public until July 2010.
66. UN Doc. E/C.12/2000/4, (11 August 2000).

> also refrain from unlawfully polluting air, water and soil, […] during armed conflicts in violation of international humanitarian law […]. States should also ensure that third parties do not limit people's access to health-related information and services, and the failure to enact or enforce laws to prevent the pollution of water […] [violates the right to health]'.

Applying this understanding of the right to health – as extending to healthcare and the underlying determinants of health – to the facts, the Commission found that 'the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of Article 16 of the Charter'.[67] It is likely that in appropriate communications in the future the Commission will continue to rely on the General Comments of the UN Committee on Economic, Social and Cultural Rights to interpret ESC rights under the Charter as it did in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* vs *Kenya*,[68] *SERAC* and *COHRE* cases.

2.2.2.3. Examples of Implied Rights: Housing, Food, Social Security, Water and Sanitation

In the *SERAC* Case the Commission further innovatively interpreted the Charter through implying other rights not expressly protected in the Charter. This was done by reading into the Charter the rights to adequate housing and food. The Commission stated that although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health (Article 16), the right to property (Article 14), and the protection accorded to the family (Article 18(1)) forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected.[69] It concluded that the 'combined effect of Articles 14, 16 and 18(1) reads into the

67. Communication Nos. 279/03 & 296/05, *supra* note 65, para. 212.
68. Communication No. 276/2003, (2009), 27th Activity Report, para. 200 citing with approval *General Comment No. 4: The Right to Adequate Housing*, UN Doc. E/1992/23, annex III at 114 (1991), para. 18; and *General Comment No. 7: Forced Evictions and the Right to Adequate Housing*, U.N. Doc. E/1998/22, annex IV at 113 (1998), para. 14.
69. Communication 155/96, supra note 63, para. 60.

Charter a right to shelter or housing'.[70] This entails the obligation to refrain from, and protect against, forced evictions from home(s) and land; and ensuring access to adequate housing which includes access to safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.[71]

With respect to the right to food, it was argued that it is implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22). The Commission accepted that the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.[72] It then stated that the 'African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens'.[73] The right to food entails a State obligation to ensure that individuals including members of vulnerable and disadvantaged groups in a State's jurisdiction are free from hunger and are ensured food security and sufficient, accessible and quality food culturally acceptable.[74] By its violation of the rights protected in Articles 4, 14, 16, and 18(1) of the African Charter, the Commission found that the Nigerian government trampled upon not only the rights explicitly protected but also upon the rights to adequate housing and food implicitly guaranteed.

Other ESC rights implied in the African Charter include the rights to social security, water and sanitation.[75] The right to social security is derived from a joint reading of Articles 4, 5, 6, 15, 16, and 18 of the African Charter that protect the rights to life, dignity, liberty, work, health, protection of the family, the aged and persons with disabilities. The right to water and sanitation is derived from the joint reading of Articles 4, 5, 15, 16, 22, and 24 protecting the rights to life, dignity, work, health, economic, social and cultural development and the right to a satisfactory environment.

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70. *Ibidem*.
71. Draft Principles and Guidelines, *supra*. note 24, para. 64.
72. *Ibidem*, para. 65.
73. *Idem*.
74. Draft Principles and Guidelines, *supra*. note 24, para. 70.
75. *Ibidem*, paras. 65–67, 71–75.

It should be noted that the Commission might be criticised for creating additional rights in the Charter which States never consented to (and thus compromise legal certainty or rule of law). However, it is in line with the Commission's Reporting Guidelines which require States to report on rights not explicitly protected in the Charter (e.g. the right to an adequate standard of living;[76] the right to social security;[77] and rights to rest, leisure, limitation of working hours, and holiday with pay, and trade union rights[78]). Moreover, these rights are protected in other international human rights treaties such as the ICESCR to which the vast majority of African States are parties without reservations. The rights to adequate food and housing are also protected in other African human rights instruments.[79] This approach of implying rights in the African Charter found support in the Statement on Social, Economic and Cultural Rights in Africa, adopted on 17 September 2004, in Pretoria, South Africa.[80] This Statement which has since been adopted by the Commission,[81] asserts that the ESC rights 'explicitly provided for under the African Charter, read together with other rights in the Charter, such as the right to life and respect for inherent human dignity, imply the recognition of other economic and social rights, including the right to shelter, the right to basic nutrition and the right to social security'.[82] The effect of this interpretation is to read into the African Charter all ESC rights not stated in the Charter. In the *COHRE* case the Commission reaffirmed that Article 16 of the African Charter protects implicitly the rights to adequate food and housing, including the prohibition on forced evictions, and also guarantees the right to water. All these are underlying determinants

76. Guidelines for National Periodic Reports, *supra* note 24, paras II.A.31–34.
77. *Ibidem*, para. II.18.
78. *Ibidem*, paras. 9, 10, and 17.
79. See e.g. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *supra* note 6, Articles 15 and 16.
80. For the text see *African Human Rights Law Journal*, Vol. 5, No. 1, 2005, pp. 182–193. See also Khoza, S., 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Hold a Seminar in Pretoria', African Human Rights Law Journal, Vol. 4, No. 2, 2004, pp. 334–343.
81. Resolution on Economic, Social and Cultural Rights in Africa, ACHPR / Res.73(XXXVI)04 (2004).
82. Statement on Social, Economic and Cultural Rights in Africa, *supra* note 80, para. 10. See also Draft Principles and Guidelines on Economic, Social and Cultural Rights, *supra* note 24, paras. 64–75 (implying rights to housing, social security, food, water and sanitation in the African Charter).

of health. No State has challenged 'implied' rights in the Charter suggesting that the Commission's approach reflects a contemporary reading of the African Charter which is consistent with international human rights law.

2.2.2.4. The Right to Education

The Commission decisions to-date have not addressed to scope of the right to education under Article 17(1) of the African Charter. For example, in *Kevin Mgwanga Gumne et al vs Cameroon* the complainants alleged that Cameroon violated Article 17 of the Charter, because it was destroying education in the Southern Cameroons by underfunding and understaffing primary education.[83] It was also alleged that Cameroon imposed inappropriate reform of secondary and technical education. It was further alleged that the State discriminates Southern Cameroonians in the admission into the *Polytechnique* in Yaoundé, and refused to grant authorisation for registration of the Bamenda University of Science and Technology, thereby violating Article 17 on the right to education. The African Commission found that there was no violation of the right to education under Article 17(1) of the African Charter, without elaborating on the content of this right, because the 'Complainants did not substantiate the allegations'.[84] This was a missed opportunity to clarify the scope of the right to education under the African Charter.

However, the scope of the right to education under Article 17 of the African Charter was clarified by the African Commission in its Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter.[85] The Commission indicated that the right to education includes the right of all children to free and compulsory primary education; to make secondary (including technical and vocational) education available and accessible to all; to make higher and tertiary education equally accessible to all, on the basis of capacity; to ensure accessible and affordable adult education; the prohibition on the use of corporal punishment; to ensure that all educational programmes are of a high quality and appropriate to the

83. Communication 266/2003, (2009), 26th Activity Report, Annex IV, para. 145.
84. *Ibidem*, para. 149.
85. Draft Principles and Guidelines, *supra*. note 24, para. 57.

needs of society; and to ensure academic freedom in all schools and institutions of higher learning.[86]

2.2.2.5. The Right to Cultural Life

With respect to the right to the right to cultural life under Article 17(2), the African Commission has understood culture to include 'cultural diversity' by stating that:

> […] Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics.[87]

If Article 17(2) of the African Charter is interpreted in light of Article 15 of the ICESCR, 'cultural life' should be interpreted as encompassing, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.[88] Although the right to take part in cultural life of the community includes 'the inalienable right [of any people] to organise its cultural life in full harmony with

86. *Ibidem*.
87. Communication No. 276/2003, *supra*. note 70, para. 241.
88. Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to Take Part in Cultural Life*, UN Doc. E/C.12/GC/21 (21 December 2009), para 13.

its political, economic, social, philosophical and spiritual ideas',[89] cultural practices must be consistent with international norms on human and peoples' rights.[90] Thus, participation in cultural life under Article 17(2) of the African Charter cannot be invoked to infringe upon human rights guaranteed by international law, or to limit their scope. By implication States are obliged to eradicate all forms of harmful cultural practices such as female genital mutilation which violate human rights.[91]

Thus, States have the duty to tolerate cultural diversity or multiculturalism and to introduce measures that protect identity groups different from those of the majority/dominant group in accordance with international human rights law. The Commission has thus interpreted Article 17(2) as requiring governments to take measures 'aimed at the conservation, development and diffusion of culture', such as promoting 'cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; […] promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population'.[92]

2.2.2.6. Impact of the Commission's Post-2001 ESC Rights Jurisprudence

The Commission's jurisprudence on most ESC rights from 2001 has generally been helpful in developing the normative content of these rights and in clarifying the nature of State obligations, remedies for violations of ESC rights and limitations to and derogations from ESC rights under the African Charter (as shown in sections 3 and 4 below). As the examples considered above demonstrate, the Commission has been able to develop the normative content of some ESC rights in its decisions on merits concerning some ESC rights e.g. the right to property, health and participation in cultural life. In addition, as noted above, the Commission's jurisprudence has led to reading 'new' ESC rights into the Charter in particular the rights to

89. See Cultural Charter for Africa, adopted 15 July 1976, entered into force 19 September 1990, preamble.
90. See African Charter, *supra*. note 1, Articles 60 and 61.
91. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *supra* note 6, Article 5.
92. Guidelines for National Periodic Reports, *supra* note 24.

adequate food and housing, rights that were not explicitly included in the text of the African Charter. As a result of these developments the Commission has been able to develop principles and guidelines on ESC rights consolidating the normative standards on ESC rights.

The jurisprudence of the African Commission on ESC rights has also had an impact at the sub-regional level in Africa as reflected in the decisions of African sub-regional institutions giving prominence to the justiciability of ESC rights. For example, in the *Socio-Economic Rights and Accountability Project (SERAP)* vs *Federal Republic of Nigeria and Universal Basic Education Commission*,[93] the plaintiff claimed before the Economic Community of West African States Community Court of Justice (ECOWAS Court) a violation of the right to education under Article 17 of the African Charter due to alleged lack of adequate implementation of Nigeria's Compulsory and Basic Education Act 2004 and the Child's Rights Act, 2004. The ECOWAS Court considered whether it had the jurisdiction to adjudicate a claim involving an alleged violation of the right to education under Article 17 of the African Charter. Relying on Article 9(4) of the Supplementary Protocol to the Treaty establishing the ECOWAS Court[94] and Article 4(g) of the Revised Treaty of ECOWAS,[95] the Court held that 'it is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this Court'.[96] The Court dismissed the government's contention that education is 'a mere directive policy of the government and not a legal entitlement of the citizens', concluding that the contention of the government that 'the right to education is not justiciable as it falls within the directive principles of state policy cannot hold'.[97] The decision is in line with the jurisprudence of the African Commission which establishes that all rights under the African Charter including ESC rights are justiciable.

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93. Suit No. ECW/CCJ/APP/0808 (27 October 2009).
94. Article 9(4) of the Supplementary Protocol grants the Court jurisdiction to determine cases of violations of human rights in Member States of ECOWAS.
95. Revised Treaty of ECOWAS, *available at*: www.comm.ecowas.int/sec/index.php?id=treaty&lang=en. Article 4(g) of the Revised Treaty of ECOWAS affirms and declares the adherence of ECOWAS Member States to the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.
96. Suit No. ECW/CCJ/APP/0808, *supra* note 93, para. 20.
97. *Ibidem*.

The ECOWAS Court has also relied on the jurisprudence of the African Commission to allow public interest litigation which enables NGOs to file complaints against human rights violations, including ESC rights violations, before the ECOWAS Court. This has been done without the need for any specific mandate from the people affected. For example, in *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP)* vs *President of the Federal Republic of Nigeria & Ors*,[98] the ECOWAS Court relied on the decision of the African Commission in *SERAC* vs *Nigeria*[99] and stated:

> Taking into account the need to reinforce the access to justice for the protection of human and people rights in the African context, the Court holds that an NGO duly constituted according to national law of any ECOWAS Member State, and enjoying observer status before ECOWAS institutions, can file complaints against human rights violation in case that the victim is not just a single individual, but a large group of individuals or even entire communities.[100]

At a domestic level, several African States increasingly protect ESC rights either in ordinary legislation or in national constitutions.[101] For example, Nigeria has given effect to the domestication of the African Charter by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[102] which empowers the Nigerian courts to enforce or give remedies under the provision of the African Charter. In States which protect ESC rights in national constitutions ESC rights are protected either as directive principles of State policy and/or as part of the Bill of Rights. Recent constitutions in Africa protect justiciable ESC rights demonstrating the trend towards more recognition of the priority to be accorded to these rights. For example, the Constitution of the Republic of Angola 2010 protects several ESC rights in the justiciable Bill of Rights including the rights to work (Article 76), health and social protection (Article 77), education and culture (Article 79), and the right to housing (Article 85).

98. Suit No. ECW/CCJ/APP/08/09 (20 December 2010).
99. Communication 155/96, *supra*. note 63, para. 49.
100. *Idem*, para. 61.
101. Viljoen, *op. cit*. note 2, 568–585.
102. Chapter 10, Laws of the Federation of Nigeria 1990.

In a similar manner the Constitution of Kenya 2010 protects a wide range of ESC rights in Article 43 as follows:

> (1) Every person has the right –
>
> (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
>
> (b) to accessible and adequate housing, and to reasonable standards of sanitation;
>
> (c) to be free from hunger, and to have adequate food of acceptable quality;
>
> (d) to clean and safe water in adequate quantities;
>
> (e) to social security; and
>
> (f) to education.
>
> (2) A person shall not be denied emergency medical treatment.
>
> (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependents.

Likewise, the Transitional Constitution of the Republic of South Sudan, 2011 protects in the Bill of Rights the right to property (Article 28), education (Article 29), healthcare (Article 31) and housing (Article 34). Article 9(2) states that: 'The rights and freedoms of individuals and groups enshrined in this Bill shall be respected, upheld and promoted by all organs and agencies of Government and by all people.

The South African Constitution is also very well known for its protection of ESC rights as justiciable rights.[103] It requires the State to take 'reasonable' legislative and other measures to achieve the 'progressive realisation' of several ESC rights '*within* available resources'. This standard of 'reasonable' measures has been elaborated upon by the South African Constitutional Court in key ESC rights cases.[104] At least in part, all the above developments are an attempt

103. See Constitution of South Africa 1996, Sections 24–29 protecting healthy environment, land and natural resources, housing, healthcare, food, water, social security, and education.

104. See e.g. Soobramoney vs Minister of Health (Kwazulu-Natal) (CCT32/97); 1998 (1) SA 765 (CC)(27 November 1997); Government of the Republic of South Africa and Others vs Grootboom and Others (CCT11/00) 2001 (1) SA 46 (4 October

to give effect to at a domestic level to the protection of ESC rights under the African Charter, as elaborated by the African Commission.

2.2.2.7. Why Has the Commission Developed its Approach to the Normative Content of ESC Rights in its Decisions from 2001?

There are several reasons for the change in the Commission's approach to ESC rights communications. First, the approach of the Commission has been influenced by developments in the international discourse on ESC rights including the trend towards increasing justiciability of ESC rights. Since 1999 the CESCR has, through several General Comments, developed the normative content of ESC rights and the corresponding State obligations, including the right to adequate food, education, health, water, work and social security. Some of these rights have also been the subject of adjudication before domestic jurisdictions. Thus, the Commission has benefitted from these developments in the clarification of normative international standards as reflected in its increased use of international human rights law to interpret the general provisions of the African Charter. The approach of the Commission is in line with the developments towards increased justiciability of ESC rights at both the international and domestic levels. To be sure, the emerging consensus that the idea that ESC rights, as a whole category, are not fit for (quasi)judicial adjudication is 'seriously misguided'.[105]

Second, a more detailed approach to ESC rights may be attributed to several other factors with a direct impact on the Commission's work including 'Commissioners who were prepared

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2000); Minister of Health and Others vs Treatment Action Campaign and Others (No 1) (CCT9/02) 2002 (5) SA 703(5 July 2002); Khosa and Others vs Minister of Social Development and Others, Mahlaule and Another vs Minister of Social Development (CCT 13/03, CCT 12/03) 2004 (6) SA 505 (CC) (4 March 2004); Mazibuko and Others vs City of Johannesburg and Others (CCT 39/09) 2010 (4) SA 1 (CC) (8 October 2009).

105. See e.g. International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, Geneva, International Commission of Jurists, 2008, 103. See also Ssenyonjo, M., 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law', *The International Journal of Human Rights*, Vol. 15, No.6, 2011, pp. 969–1012.

to articulate reasons more clearly, by better secretarial support,[106] and through improved contribution of pleadings by the parties' as well as the greater and increasingly critical engagement of States.[107] Furthermore, NGOs with a focus on ESC rights have been essential in bringing ESC rights cases before the Commission and further improving the quality of legal arguments before the Commission in favour of ESC rights. Such NGOs include the Social and Economic Rights Action Center (SERAC);[108] the Center for Economic and Social Rights and the Socio-Economic Rights and Accountability Project.[109]

Finally, the adoption of the AU Constitutive Act on 11 July 2000, which replaced the 1963 Charter of the Organisation of African Unity (OAU Charter),[110] placed more emphasis on the promotion and protection of human rights in accordance with the African Charter and other relevant human rights instruments.[111] This includes the promotion and protection of ESC rights. The Commission has therefore given more focus to ESC rights since its 36th Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal, when the Commission adopted Resolution 73 specifically on 'Economic, Social and Cultural Rights in Africa'.[112] One of the decisions coming from Resolution 73 was the establishment of a Working Group composed of members of the African Commission and NGOs with a mandate to develop and propose to the African Commission 'draft principles and guidelines on economic, social and cultural rights'. The Working Group developed two documents: (1) a compilation of Principles and Guidelines on Economic, Social

106. At the time of writing a small full-time secretariat but inadequately resourced, based in Banjul, the Gambia, and headed by a Secretary, provides continuity and administrative support to the Commission. It does the necessary legal research and prepares draft decisions for the commissioners.

107. Viljoen, *op. cit*. note 2, 354.

108. See e.g. Social and Economic Rights Action Center (SERAC) vs Nigeria, Communication 370/09.

109. See e.g. Socio-Economic Rights and Accountability Project vs Libya, Communication 378/09; Socio-Economic Rights and Accountability Project (SERAP) vs the Federal Republic of Nigeria, Communication 338/07. The Case was declared admissible by the Economic Community of West African States (ECOWAS) Court of Justice in Socio-Economic Rights and Accountability Project (SERAP) vs Federal Republic of Nigeria and Universal Basic Education Commission, No. ECW/CCJ/APP/0808.

110. 479 UNTS 39, entered into force 13 September 1963.

111. See the Constitutive Act of the African Union, CAD/LEG/23.15, entered into force 26 May 2001, preamble, Article 3(e) and (h), Article 4 (g)-(p).

112. ACHPR/Res.73(XXXVI)04, (2004).

and Cultural Rights and (2) a compilation of Reporting Guidelines on Economic, Social and Cultural Rights in Africa adopted by the Commission with amendments in November 2010.[113] These Guidelines consolidate the jurisprudence of the African Commission on ESC rights and would guide States in complying with their reporting obligations on ESC rights under the African Charter.

3. STATE AND NON-STATE ACTOR OBLIGATIONS UNDER THE AFRICAN CHARTER

The purpose of this section is two-fold. It reviews the African Commission's emerging jurisprudence on State obligations with respect to ESC rights. It also considers the Commission's approach to the question of whether NSAs (non-parties to the African Charter) have any human rights obligations under the African Charter, and in particular to respect ESC rights.

3.1. Clarifying State Obligations

There are four aspects of State obligations considered below. First consideration is made of the tripartite typology of State obligations under 'respect, protect and fulfil' as applied by the African Commission. Second, the notion of 'progressive realisation' of ESC rights subject to available resources is considered in the context of the African Charter. Third, the obligation to eliminate discrimination is outlined. Finally, the extraterritorial application of the African Charter is considered.

3.1.1. Respect, Protect and Fulfil

The general obligation of State Parties to the African Charter as stated in Article 1 of the Charter is to 'recognise the rights, duties and freedoms' enshrined in the Charter and to 'undertake to adopt legislative or other measures to give effect to them'. This is not explicitly subjected to progressive realisation. Thus, State Parties are obliged to 'recognise' immediately ESC rights by adopting legislative or other (non-legislative) measures to produce the result of preventing all violations of the African Charter. This obligation was clarified by the African Commission in *The Social and Economic Rights Action*

113. See Report of the 48th Ordinary Session of the African Commission on Human and Peoples' Rights (10–24 November 2010, Banjul, The Gambia), para. 244.

Center and the Center for Economic and Social Rights vs Nigeria.[114] In this case, which dealt with gross human rights violations (by Shell, acting in collaboration with the government of Nigeria) in the oil-rich Ogoniland region of Nigeria, the African Commission stated that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to 'respect, protect, promote, and fulfil' these rights.[115] This typology of State obligations has been explained by the Commission as follows:

> At a primary level, the obligation to *respect* entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. At a secondary level, the State is required to ensure others also respect their rights. This is what is called the State's obligation to *protect* right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework of an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to *promote* the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures. The last layer of obligation requires the State to *fulfil* the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights.[116]

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114. Communication 155/96, supra note 63.

115. *Ibidem*, paras. 44–47. However, this analysis is not always applied consistently by the Commission. For example, in the *COHRE* case, *supra* note 65, para. 191, the Commission stated the 'State has an obligation under Article 14 of the African Charter not only to *respect* the "right to property", but also to *protect* that right'. No reference was made to the State obligation to *promote* and to *fulfil* the right to property. The obligation to *promote* was only made with reference to 'cultural rights' in para. 248.

116. *Zimbabwe Human Rights NGO Forum* vs *Zimbabwe*, Communication 245/2002, Annex III, (2006), 21st Activity Report at 54, para. 152.

The Commission found that the killing and destruction by government forces and agents of the State-controlled oil company violated Nigeria's duty to 'respect' the right to life and dignity, the right to health, property, and the 'implied' rights to shelter and food, as well as the right to economic, social, and cultural development of the Ogonis. Thus, all substantive ESC rights (explicitly and implicitly) protected under the Charter entail the above duties on the State subject to available resources.

3.1.2. Progressive Realisation

Although the African Charter does not explicitly subject State obligations under the Charter to the notion of 'progressive realisation' subject to 'available resources', the Commission read this into Article 16 of the Charter in *Purohit and Moore vs The Gambia* (*Purohit* case).[117] In this communication, while interpreting State obligations with respect to the right to health under Article 16 of the African Charter, the African Commission recognised that 'African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right'.[118] Accordingly, the Commission held that State Parties to the African Charter have to take 'concrete and targeted steps', while taking full advantage of their *available resources*, to 'ensure' that the right to health is fully realised in all aspects without discrimination of any kind.[119] This confirms the view of the UN Committee on Economic, Social and Cultural Rights expressed in several General Comments.[120] Since the African Charter does not explicitly make the 'fulfilment' of its rights dependent on 'available resources', it may be questioned whether the reference to available resources in the *Purohit* case was influenced by the specific wording of Article 16 (which provides for the 'best attainable' state of health and 'necessary measures') or whether it applies generally to all other rights. While this is not clear from the Commission's decision, it has been argued that the reference to available resources was not a general statement

117. Communication No. 241/2001, (2003), 16th Activity Report, Annex VII.
118. *Ibidem*, para. 84.
119. *Idem*.
120. See CESCR, *General Comments*, *available at*: www2.ohchr.org/english/bodies/cescr/comments.htm.

about the duty to 'fulfil' rights and should therefore not, on the basis of this decision, be applied to the 'unqualified' right to education.[121]

However, in practice it remains a fact that the problem of poverty renders African countries incapable of not only providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of the right to health, but also other rights including ESC rights (such as education, adequate housing, and social security) as well as civil and political rights (such as the provision of adequate legal aid, establishing sufficient courts, re-education of police, training of lawyers and judges essential for a fair trial). Thus, the progressive realisation of all human rights subject to available resources is inevitable for many African States. In this respect Article 13(3)(a) and (b) of the African Children's Charter while obliging States to 'provide free and compulsory basic education', requires States to merely 'encourage the development of secondary education in its different forms and to *progressively* make it free and accessible to all' (emphasis added). The Commission's guidelines on State reports have also taken a realistic approach indicating that ESC rights have to be realised 'progressively'. For example, States are required to report about measures 'for the *progressive* implementation of the principle of compulsory education free of charge'[122] and on how social security benefits are extended to 'further groups of the population'.[123]

Progressive realisation is necessarily linked to the available resources for State parties to the African Charter, which 'are developing countries with scarce resources'.[124] Thus, a State Party to the African Charter is only under 'obligation to invest its resources in the best way possible to attain the progressive realisation of […] economic, social and cultural rights'.[125] It follows that a State is not required to do more than what its available resources permit. Of course, a State would be required to develop existing resources

121. Viljoen, supra note 2, 240. Article 17(1) of the African Charter simply states: 'Every individual shall have the right to education'.
122. Guidelines for National Periodic Reports, *supra* note 14, para II.B.58 (emphasis added).
123. *Ibidem*, para. II.19.
124. *Kevin Mgwanga Gumne et al* vs *Cameroon*, Communication 266/2003, (2009), 26th Activity Report, Annex IV, para. 206.
125. *Idem*.

and to use available resources in the 'best way possible' (i.e. to the maximum) to enhance the realisation of ESC rights.[126]

3.1.3. Elimination of Discrimination

State Parties to the African Charter have a general obligation to eliminate discrimination, formally (in law) and substantively (in practice) since non-discrimination is a 'fundamental principle' in international human rights law essential to the exercise and enjoyment of all human rights including ESC rights.[127] In this regard, Article 2 of the African Charter emphatically stipulates that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Relying on comparative human rights law, the Commission has stated that a violation of the principle of non-discrimination arises if equal cases are treated in a different manner; and such a difference in treatment does not have an objective and reasonable justification; and if there is no proportionality between the aim sought and the means employed.[128] The Commission has further stated that to determine whether one has been the victim of discrimination or not, the allegation has to be weighed against the three tests set above:

> Was there equal treatment? If not, was the differential treatment justifiable? Was the aim of the difference in treatment proportionate to the aim sought and means employed? These three benchmarks are cumulative requirements and hence the non-compliance with any of the three requirements makes a treatment discriminatory.[129]

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126. *Idem*.
127. *Kenneth Good* vs *Republic of Botswana*, Communication 313/05, (2010), 28th Activity Report, Annex IV, para 218.
128. *Ibidem*, para. 219, citing *Marckx* vs *Belgium* (6833/74) [1979] ECHR 2 (13 June 1979); *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para. 57; Human Rights Committee, *General Comment No. 18: Non-Discrimination*, UN Doc. UN Doc. HRI/GEN/1/Rev.1 at 26 (1994), para. 13.
129. Kenneth Good vs Botswana, supra. note 127, para. 222.

It can be discerned from the Commission's jurisprudence that State Parties to the African Charter have a general obligation not only to refrain from discrimination on the prohibited grounds[130] but also to take temporary special measures in favour of marginalised groups, which suffer historical or persistent prejudice in order to attenuate or suppress conditions that perpetuate discrimination.[131] As the Commission has clearly stated, 'in certain cases, positive discrimination or affirmative action helps to redress imbalance'.[132]

It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise by everyone, on an equal footing, of all the rights and freedoms protected in the African Charter.[133] It is not limited to the specific grounds listed above in Article 2 but also includes another general ground – 'other status' – given that the 'nature of discrimination varies according to context and evolves over time'.[134] Thus, the Commission has accepted that 'other status' includes 'disability, age or sexual orientation',[135] grounds of discrimination not explicitly mentioned in Article 2. There seems to be no good reason why 'other status' should also not

130. See e.g. Communication No. 159/96, supra. note 39.

131. Communication No. 276/2003, *supra* note 68, para. 196. Article 18(4) of the African Charter specifically states: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

132. Communication No. 276/2003, *supra* note 68, para. 196.

133. Communication No. 245/2002, *supra* note 116, para. 170. For similar definitions see International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 UNTS 195, *entered into force* 4 January 1969, Article 1; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), UN Doc. A/34/46, entered into force 3 September 1981, Article 1; and International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, UN Doc. A/61/49 (2006), *entered into force* 3 May 2008, Article 2. See also the Human Rights Committee, *General* Comment *No. 18*, paras. 6 and 7; and the Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, para. 7.

134. Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, para. 27.

135. Communication 245/2002, *supra* note 116, para. 169. However, the Commission refused to grant observer status to the Coalition of African Lesbians allegedly 'because the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter'. See 28th Activity Report, para. 33.

include grounds such as marital and family status, gender identity, health status, place of residence, economic and social situation.

3.1.4. Extraterritorial Obligations

Although the realisation of ESC rights under the African Charter essentially has a State territorial scope, it is important to note that State obligations under the African Charter may have extraterritorial application. This is because unilateral or joint acts or omissions of States increasingly have effects, positively or negatively, on the progressive realisation of ESC rights in other States. Despite this reality, the African Commission (just like other international bodies monitoring ESC Rights e.g. the Committee on Economic, Social and Cultural Rights)[136] has never clarified the notion of extraterritorial scope of State Party obligations under the African Charter. When, for example, would a State have a duty to a person in another State to take positive actions to fulfil his or her rights? And when could that person's ESC rights violations be held to come within the responsibility of another State?

When States impose measures (such as economic sanctions) on another State which inhibit the ability of the targeted State to meet its human rights obligations, it is incumbent on such States to *respect* ESC rights of vulnerable groups in the affected State.[137] In this respect the African Commission has accepted that even when States acting collectively impose sanctions/embargoes on another State for legitimate reasons (e.g. to address a threat to regional or international peace, stability and security) such sanctions/embargoes must not be 'excessive and disproportionate', 'indiscriminate' or 'seek to achieve ends beyond the legitimate purpose'.[138] As the African Commission has observed:

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136. See Coomans, F., 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' *Human Rights Law Review*, Vol. 11 No. 1, 2011, pp. 1–35.

137. CESCR, General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/C.12/1997/8 (1997), para. 8.

138. Association Pour la Sauvegarde de la Paix au Burundi vs Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia, Communication No. 157/96 (2003), 17th Activity Report, para. 75.

> Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of.[139]

The above makes sense since clearly the inhabitants of a given State do not forfeit their basic ESC rights by virtue of any determination that their leaders have violated norms relating to international peace and security. Therefore, every State Party to the African Charter has to undertake an impact assessment to determine the possible consequences of its policies such as foreign trade policies and agreements on the enjoyment of ESC rights in the affected States.

3.2. Towards Obligations for Non-state Actors

Human rights violations could emanate from the State or from non-State actors (NSAs). In the absence of the imposition of direct human rights obligations on NSAs for human rights violations in the African Charter, the African Commission has emphasised the State duty to 'protect' against human rights violations by NSAs.[140] The Commission has taken a broad definition of NSAs as including 'individuals, organisations, institutions and other bodies acting outside the State and its organs'.[141] According to the Commission NSAs:

> are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.[142]

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139. *Idem*.
140. Commission Nationale des Droits de l'Homme et des Libertes vs Chad, Communication 74/92 (1995), 9th Activity Report; Association of Victims of Post Electoral Violence & Interights vs Cameroon, Communication 272/2003, 27th Activity Report, Annex 3.
141. Zimbabwe Human Rights NGO Forum vs Zimbabwe, supra note 116, para. 136.
142. *Ibidem*.

The Commission has recognised the fact that 'States as well as non-state actors, have been known to *violate* the right to life'.[143] Such violations are certainly not restricted to the right to life but extend to other human rights. For example, discrimination is frequently encountered from individuals and entities in the private sphere such as in families, workplaces, and other sectors of society. NSAs in the private housing sector (e.g. private landlords and private credit providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or other status while some families may refuse to send female children to school or higher education.[144]

Accordingly, every State Party to the African Charter is obliged to protect persons 'within its jurisdiction' from human rights violations by NSAs.[145] The reference to '*jurisdiction*' is significant because it extends State obligations to protect against human rights violations by NSAs both to territories over which a State Party has sovereignty and to those over which that state exercises territorial jurisdiction. Thus, State responsibility under the African Charter can, for example, be incurred by a State's omissions to regulate the conduct of NSAs which lead to human rights violations outside a State's territory. This implies that a State can be found to be in violation of its obligations under the African Charter for actions taken by it extraterritorially, in relation to anyone within the power, effective control or authority of that State, as well as within an area over which that State exercises effective overall control.

This recognition is crucial because it raises the question of how NSAs should be held accountable for direct violations of human rights treaties. The approach of the Commission has been to attribute responsibility for human rights violations by NSAs to the State. For example, in *Zimbabwe Human Rights NGO Forum vs Zimbabwe*[146] the Commission noted that an act by a private individual (or non-State actor) and therefore not directly imputable to a State, can generate responsibility of the State, not because of the act itself, but because of the lack of 'due diligence' on the part of the State to prevent the violation or for not taking the necessary steps to provide the victims with reparation. The Commission explained that

143. Communication Nos. 279/03 & 296/05, *supra* note 67, para. 148.
144. CESCR, *General Comment No. 20*, para. 11.
145. Communication Nos. 279/03 & 296/05, *supra* note 67, para. 148.
146. Communication 245/2002, *supra* note 116, para. 143.

under the 'due diligence' obligation, 'States must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law'.[147] The Commission concluded that what would otherwise be wholly private conduct is transformed into a constructive act of State, 'because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]'.[148] It asserted that a failure to exercise 'due diligence' to prevent or remedy violation, or a failure to apprehend the individuals committing human rights violations gives rise to State responsibility even if committed by private individuals.[149]

Similarly, in the *Centre on Housing Rights and Evictions* vs *The Sudan*,[150] the Commission stated that it agreed with the UN Committee Against Torture in *Hijrizi* vs *Yugoslavia* that forced evictions and destruction of housing carried out by NSAs amount to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights.[151] Relying on the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinhero Principles),[152] the Commission confirmed that 'States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors'.[153]

Recent human rights treaties in Africa have taken into account the Commission's jurisprudence on the State responsibility to 'ensure' accountability of NSAs. For example, Article 3 of the AU Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) oblige States to:

a. Ensure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law;
b. Ensure the accountability of non-State actors concerned, including multinational companies and private military or

147. *Ibidem*, para. 145.
148. *Ibidem*, para. 144.
149. *Ibidem*, para. 145.
150. Communication Nos. 279/03 & 296/05, (2009), *supra* note 65.
151. Communication No. 161/2000, UN Doc. CAT/C/29/D/161/2000 (2 December 2002); COHRE case, *supra* note 66, para. 159.
152. UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005), Annex, para. 5.4.
153. COHRE case, (2009), *supra* note 65, para. 203.

security companies, for acts of arbitrary displacement or complicity in such acts;

c. Ensure the accountability of non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement.

States may discharge the above obligation by enacting legislation to apply human rights obligations against NSAs so that suits can be brought directly against such actors in national courts. For example, the ancient US statute, the Alien Tort Claims Act 1789 (ATCA), which confers upon US federal district courts original jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations' wherever it may have taken place, has led to some significant litigation.[154] In one case against Shell for complicity in human rights violations in Nigeria, Shell settled the case for a sum of US$ 15.5 million in 2009.[155] However, it should be noted the emphasis on State obligations to ensure the accountability of NSAs is inadequate in the era of globalization because of three main reasons.

First, NSAs (in particular multinational companies, many of which have multimillion projects) in the era of globalisation operate from multiple jurisdictions, which will not always ensure that they are held accountable for human rights violations. Indeed, developing States in Africa competing for foreign direct investment have shown limited inclination to develop accountability for corporate abuses of ESC rights. Second, the privatisation of sectors such as health, education, prisons and the supply of water, gas and electricity place more public or governmental functions into the hands of NSAs in a large number of countries. This has increased the potential of NSAs to violate human rights especially of vulnerable groups such as poor women as long as governments do not hold them accountable.[156] Third, Africa has experienced a growth in the number and proportion of internal armed conflicts and, in some cases, some organised armed groups control or aspire to control territory and the populations therein.

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154. 28 USC 1350.

155. See Pilkington, E., 'Shell Pays Out $15.5m over Saro-Wiwa Killing', *The Guardian*, 9 June 2009, *available at*: www.guardian.co.uk/world/2009/jun/08/nigeria-usa.

156. See e.g. Brown, R., 'Unequal Burden: Water Privatisation and Women's Human Rights in Tanzania', *Gender and Development*, Vol. 18, No. 1, 2010, pp. 59–67.

In the above context, while the State-based approach is commendable in reaffirming the State obligation to protect against human rights violations by NSAs against vulnerable groups such as IDPs, its effectiveness depends on the ability of a particular State to hold NSAs responsible for human rights violations at a domestic level. However, this is not always possible such as in situations of internal armed conflicts leading to the fragmentation of States as NSAs take control of territory and populations. For example, the Transitional Federal Government of Somalia is currently unable, on its own, to ensure accountability for human rights abuses against civilians (including indiscriminate attacks against civilians leading to significant displacement of the population) by non-State armed opposition groups, principally Al-Shabaab and Hizbul Islam, without the international concerted efforts to tackle decades of impunity in Somalia.[157]

Where a State is unable to hold NSAs responsible for human rights violations, it is not only desirable but also essential to hold such actors directly responsible for violations of the African Charter. This can be realised by imposing direct legal obligations on NSAs to complement existing State obligations by way of a Protocol to the African Charter. Under the Protocol NSAs in Africa should increasingly support and respect human rights and make sure that they are not complicit in human rights abuses. It is likely that such a protocol will be ratified by NSAs to protect reputation, gain international legitimacy, enhance attractiveness to employees, and reduce risk of disruption through protests. In this context, it might be possible to bring actions directly against the relevant NSAs and seek appropriate remedies directly against these actors. While individuals and small businesses would still be excluded, it is still possible to hold individuals, even when acting as part of the organs of the State, independently responsible for certain actions such as international crimes (e.g. war crimes, crimes against humanity and genocide) amounting to serious violations of the African Charter. This could be done by empowering the African Court with jurisdiction to prosecute

157. See Bari, S., *Report of the Independent Expert on the Situation of Human Rights in Somalia*, A/HRC/13/65 (23 March 2010), para. 105; Kelly, K., 'Al-Shabaab a Threat to East African Countries', *The East African*, 17 September 2010.

international crimes in Africa which would be complementary to national jurisdictions.[158]

4. CONCLUSION

Despite the initial reluctance to develop the normative content of ESC rights under the African Charter and the corresponding human rights obligations for States and NSAs, by and large, the jurisprudence of the African Commission since 2001 has displayed advances in the field of ESC rights. Although long delays have generally continued to characterise the Commission's complaints' procedure, the Commission has made a generous and progressive interpretation of the African Charter which confirms that ESC rights are justiciable, subject only to restricted limitations. In the words of the Commission: 'any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible'.[159] According to the Commission, Article 27(2) of the African Charter provides the only 'legitimate reasons' for the general limitation of the rights and freedoms under the Charter.[160] The Commission has also held that the rights protected under the African Charter including ESC rights are non-derogable during emergencies or special circumstances.[161]

The Commission has read into the Charter some important ESC rights in particular the rights to adequate housing, food, social security, water and sanitation; and adopted the Pretoria Statement on Social, Economic and Cultural Rights in Africa in 2004 and the Draft Principles and Guidelines on ESC Rights in 2010 elaborating

158. See AU Assembly's Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/13(XIII), 13th Ordinary Session, 1–3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya, para. 5.

159. *COHRE Cas*e, *supra* note 65, para. 214.

160. Communication Nos. 279/03 & 296/05, (2009), *supra* note 65, para.165. Article 27(2) provides that the rights and freedoms of each individual 'shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

161. See e.g. *Commission Nationale des Droits de l'Homme et des Libertes* vs *Chad*, Communication No. 74/92, (1995), 9th Activity Report, para. 21; *Malawi African Association and Others* vs *Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, (2000), 13th Activity Report, Annex V, para. 84; and *Centre on Housing Rights and Evictions* vs *The Sudan*, Communication Nos. 279/03 & 296/05, *supra* note 65, paras. 165 and 167.

the substantive provisions of the Charter on ESC rights. In this process the Commission has expanded the scope of ESC rights under the African Charter. However, the current discrepancy between the explicit wording of the Charter and its interpretation by the Commission leaves the Charter exposed as an 'outdated document in need of revision to ensure that it actually says, loud and clear, what it has been interpreted by the Commission to say'.[162]

The Commission has found violations of ESC rights in almost all admissible cases. Its decisions have evolved from less detailed decisions finding violations without elaborating on the normative content of ESC rights into fully reasoned decisions drawing on international human rights jurisprudence. Increasingly, the Commission has made detailed 'recommendations' as remedies for victims of ESC rights violations directed at States found in violation of ESC rights.[163] Its recent practice further requires States to report on the implementation of its 'recommendations' within a defined period of time. This is included in the Commission's Activity Reports. This development is a significant step forward towards a more effective mechanism for the adjudication of ESC rights violations. It is hoped that the African Court would complement the Commission's protective mandate in the future to develop a coherent body of ESC rights jurisprudence in Africa. The potential benefit of the supplementary role of the African Court was demonstrated in March 2011 when the Court, responding to a referral by the Commission, ordered provisional measures against Libya.[164]

The Commission's jurisprudence emphasises that ESC rights are indivisible, interdependent and interrelated with other human rights. As the Commission stated 'there is no right in the African Charter that cannot be made effective'.[165] In this respect, the Commission has lived up to the expectation of the African Charter which, in the Commission's own words:

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162. See Heyns, C., 'The African Regional Human Rights System: The African Charter', *Penn State Law Review*, Vol. 108, No. 3, 2003–2004, pp. 679–702, at p. 691.

163. See e. g. Communication Nos. 279/03 & 296/05, *supra* note 65, para. 229.

164. See *African Commission on Human and Peoples' Rights* vs *Great Socialist People's Libyan Arab Jamahiliya*, Application No. 004/2011, *available at*: www.african-court.org/fileadmin/documents/Court/Cases/Order_for_Provisinal_Measures_against_Libya.PDF.

165. Communication 155/96, *supra* note 63, para. 68.

> […] departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three "generations" of rights: civil and political rights; economic, social, and cultural rights; and group and peoples' rights.[166]

This provides a potential legal vehicle to challenge policies contributing to human rights violations in Africa, such as poverty and inappropriate resources allocation. The real challenge remains how to implement ESC rights. It is now up to NGOs, National Human Rights Institutions, activists, lawyers, universities and other members of civil society to support the Commission's jurisprudence on ESC rights and further explore coherent and strategic ways and means in which ESC rights may become a reality in the lives of individuals and groups in order 'to achieve a better life for the peoples of Africa'.[167] This may be achieved through, *inter alia*, coordinated efforts to enhance the interaction among all the actors concerned, including the various components of civil society by increasing public awareness of ESC rights, advocating for legislative reform, increased budgetary allocation to ESC rights and the effective use of available resources, as well as increased litigation of strategic ESC rights cases at national and international levels.

It is clear from the Commission's decisions that States are obliged to 'respect, protect, promote and fulfil' *all* ESC rights explicitly protected in the Charter and those implied in the Charter. It can also be arguably stated that the State obligation to 'fulfil' ESC rights under the Charter is subject to 'available resources' (within a State and from international assistance/cooperation) given that many African States are generally faced with the problem of poverty. In order to implement State obligations as developed in the Commission's jurisprudence under the African Charter ESC rights should not be relegated to non-justiciable directive principles of State policy in the domestic law of all African States parties to the African Charter.

Given that the African Charter complements human rights protection at the domestic level where the rights protected in the Charter should be realised, African States should ensure that the ESC rights protected in the African Charter are given full legal effect

166. *COHRE Case*, *supra* note 65, at para. 149. See also the African Charter, *supra* note 1, Preamble, para. 7.
167. African Charter, *supra* note 1, Preamble.

in domestic law, that the Charter rights are made justiciable, and that effective remedies (e.g. compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, and public apologies) are available for victims of all violations of ESC rights at the domestic level. In this respect, it is essential to adopt domestic legislation to give ESC rights the same level of protection given to civil and political rights since this is indispensable in complying with State obligations under Articles 1 and 2 of the African Charter.[168] The direct incorporation of international human rights treaties into domestic law would enhance the legal protection of human rights. The Transitional Constitution of the Republic of South Sudan, 2011 provides a recent good example. Its Article 9(3) provides that: 'All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified or acceded to by the Republic of South Sudan shall be an integral part of this Bill [of Rights]'.

168. See e.g. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9, Laws of the Federation of Nigeria, 2004. Section 1 of this Act provides that the provisions of the African Charter shall 'have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'. See also *Socio-Economic Rights and Accountability Project* vs *Nigeria*, Communication 300/2005, paras. 65–69, (2008), 25th Activity Report.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS - FROM HESITANT RECOGNITION TO EXTRATERRITORIAL APPLICABILITY

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Many years ago, the final declaration of the World Conference on Human Rights (1993) in Vienna not only reinforced the universality of human rights, it also acknowledged the indivisibility, and thereby the coherence and interdependency of the various human rights. Since then we have seen an unmistakable increase in the significance of the long-neglected economic, social and cultural human rights (ESCR). This paper will cursorily follow up on the change in significance over the past few decades. Before this, however, it will deal with the problem of talking about three generations of human rights.

1. THE MISLEADING NOTION OF DIFFERENT HUMAN RIGHTS "GENERATIONS"

For a long time, the notion of different "generations" of human rights has established itself in human rights literature and teaching. According to this, rights of the "first generation" are the "classical" civil and political freedoms which have been formulated since the latter part of the 18th century. These include today, for example, the prohibition of torture, justice-related rights (such as equality before the law, the presumption of innocence, fair trials, etc.), the right to the freedom of religion or belief, opinion, assembly and association, as well as the participation in the administration of public affairs and the right to vote. The emergence of the rights of the "second generation" on the other hand is often linked to the economic and social rights which developed on the national level in the course of the "social question" of the latter part of the 19th century. Today they comprise, amongst others, the right to work, just and favorable working conditions, social security, health, adequate housing, food, clean drinking water and sanitation, as well as the right to

freely participate in cultural life. Rights of the third generation are considered to be barely codified, increasingly collective rights, such as the right to development which only emerged in the course of the global expansion of industrial capitalisation and following the decolonialisation of further parts of the "third world" (Felice 2009). However, talking about human rights generations is problematic for a number of reasons:

First of all, a clear contemporary chronology of the emergence of human rights is assumed; an assumption which must be questioned to certain degree. It is true that most of the economic, social and cultural rights cannot be found in the influential civil rights documents of the latter part of the 18th century, but, for example, although it is considered to be a "classical freedom" from the outset and is generally attributed to the civil rights, the right to own property can, from a content point of view, be classed as an economic right. Also, the early established prohibition of slavery, which goes back to the international anti-slavery movement (Grant 2010), demonstrates close links to the right to (freely chosen and accepted) work. Ultimately slavery, servitude and forced labour, all of which even today still remain reality for the lives and work of millions of people[1] are most abhorrent forms of economic exploitation of human labour.

First and foremost, however, the chronology of different "generations" of rights can, if at all, only refer to the development of rights on the national state level, but not to the entrenchment of universal human rights in international law. Notwithstanding the sometimes-universalistic choice of term, the constitutional codification of civil and political rights and later also the economic and social rights concerns not human rights in the narrow sense, i.e. those which are afforded to all persons, but instead usually only those civil rights which were attached to national citizens only. Even more, for a long-time entire population groups in the respective states were excluded from civil rights, including indigenous peoples, certain ethnic groups, those without means, and women.

Apart from the earlier attempts at internationalisation and universalisation (of, for example, working rights within the framework

1. See, for example the corresponding reports of the International Labour Organisation (available at www.ilo.org) and of the UN special rapporteur for contemporary forms of slavery (available at www2.ohchr.org).

of the Internal Labour Organization, ILO), a *comprehensive* internationally recognised codification of civil, political, economic, social and cultural human rights with universal applicability did not take place until the second half of the 20th century. On the level of the United Nations, civil and political rights as well as economic, social and cultural rights were entrenched in the Universal Declaration of Human Rights (UDHR) and later in two separate pacts, namely the International Covenant on Economic, Social and Cultural Rights (IESCR) of 1966 and the International Covenant on Civil and Political Rights (ICCPR) from 1966, both of which came into force in 1976. More recent UN human rights core conventions, such as the Convention on the Elimination of Discrimination against Women as well as the Convention on the Rights of the Child and the Convention of the Rights of Persons with Disabilities incorporate both kinds of right.

Ultimately the notion of human rights generations often goes hand in hand with a problematic weighting, whereby the classical civil and political rights are portrayed as the actual, basic human rights and as such are given priority over the economic, social and cultural rights. This view is based on the meanwhile outdated perception that only the civil and political rights amount to basic "negative rights" which must merely be respected by the state, whereas the economic, social and cultural rights are always resource-dependent "positive rights", even luxury rights, which always required comprehensive activities on the part of the state. The dichotomy between negative rights here and positive rights there was for many decades characteristic of human rights discourse and was largely responsible for the fact that ESC rights were seen rather as a political goal than as "genuine" human rights, a view which was further reinforced for ideological reasons in the context of the East-West conflict.

Interestingly, the impetus for incorporating the ESC rights in the UDHR came by no means originally solely or mostly from the socialist states, as is commonly assumed, and is therefore certainly not a socialist "legacy". Instead it was rather the case that in respect of the ESC rights the authors of the UDHR had in mind the terrible experiences of the Nazi regime, for example the systematic discrimination, coercive measures and indoctrination in the areas of work, living, health, education, or cultural participation, from which many millions of people had suffered.

Moreover, in the run-up to the establishing of the United Nations, US President Franklin D. Roosevelt had provided the economic and social rights with a non-material impetus when in 1941 he defined the freedom from want as one of the "four freedoms" which were to serve as the basis for a new world order following the second world war (cf. Borgwart 2009). This impetus continued to have an effect although whilst drafting the UDHR the Truman administration (1945-1953) increasingly distanced itself from the ESC rights.

A little-known fact is also that especially the Latin American submissions had significantly influenced the introduction of the ESC rights into the Universal Declaration of Human Rights (cf. Morsink 1999). Indeed, the Latin American States really played a leading role in the introduction of these rights into the UDHR (Amos 2010: 147) undertaking to bridge the gap between civil, political, economic, social and cultural rights, all of which were already contained in the "American Declaration of the Rights and Duties of Man" of 1948.

However, when the decision was made to adopt two internationally legally binding pacts, all those positions which originated from the essential differences between the two "types" of human right prevailed. Prior to, during and following the drafting of the ICCPR and the IESCR of 1966 the international law and political debates in the United Nations were defined by quite contrary views of human rights between the East and the West and time and again fundamental differences between the two "types" of right were asserted with ideological poignancy.

In short, the West, and above all the USA, demanded from socialist states individual civil and political rights.[2] The Soviet Union on the other hand considered the domestic implementation of human rights to be a sovereign matter for the states and rejected any intervention from outside. Whilst it deprived its own (and also the foreign) population of fundamental civil and political rights, for ideological reasons and for the purpose of propaganda it campaigned for economic and social rights despite the fact that this did not lead to any "subjective," actionable legal status of individual human rights in respect of a person's own state. Individual enforceable

2. Ironically, the USA as the Western leading power discriminated openly against African-Americans in their own country well into the 1960s and during the East-West conflict supported the allied anti-communist dictatorships of the "third world", which infringed civil and political human rights as well as social, economic and cultural human rights on a large scale.

claims could also not be derived from the ESC rights and indeed it was up to the state to grant these rights in the form of social benefits. In this way ultimately a collective human rights understanding was propagated that diluted the individual and defensive rights core of all human rights.

In addition to this decolonalised or decolonalising states in the "third world" campaigned for economic, social and cultural rights, but linked them with the collective right of self-determination, with criticism of an incredibly unjust world economic order, and with international demands for access to economic development resources. The rhetoric of the indivisibility of human rights and the emphasis of the ESC rights – for example at the first international conference for human rights in 1968 in Tehran (cf. Whelan 2010: 144 et seq.) – was as a result incorporated in the overarching topic of anti-colonialism and a just world order. In this sense the discussion surrounding human rights was not only characterised by the East-West conflict, but also influenced by the North-South conflict.

This all had consequences for the interpretation of the ESC rights in the West, which for a long time there were perceived as individually non-actionable collective rights – a view no longer held today, but which could still be found in human rights teaching materials for a long time. Likewise, the systematically non-convincing dichotomy between civil and political "negative rights" on the one hand and economic, social and cultural "positive rights" on the other firmly established itself in politics over a period of decades. As such, for decades the UN social pact led a shadowy existence.

2. ESC RIGHTS ON THE UPTURN

Despite the passing (1966) and coming into force (1976) of the IESCR is binding under international law on the Member States, the economic, cultural and social human rights have only really seen an increase in significance since the 1990s. A prerequisite for this was the end of the East-West conflict which though it did not contribute towards a depoliticisation, almost certainly did contribute towards a de-ideologisation of the human rights debate and opened up political space to once more take up the discussion surrounding economic, social and cultural human rights in international and transnational human rights forums and to relate it to social problem situations throughout the world.

Together an increasing number of advocates of ESC rights in the institutions for global and regional human rights protection, at universities, and in human rights and development organisations played a part in getting the ESC rights onto the public agenda and them gaining in significance. They sought to substantiate the normative meaning of these rights, which had traditionally been dismissed as vague and non-specific, and to provide the ESC rights with a clear legal profile and stronger commitments in international law.

Of key importance were and are the interpretation guidelines of the corresponding UN treaty committees. With the support of and encouraged by experts at universities and in human rights organisations,[3] above all the UN Committee on Economic, Social and Cultural Rights established in 1987 contributed significantly towards substantiating the content of the ESC rights and the state obligations resulting from them. In particular the General Comments of the Committee were positively received and attained considerable authority, both at a civil society and an international level. They determined not only the communication between the committee and the respective governments, but were also taken up by other UN committees and UN specialised agencies which took greater notice of the social human rights, thereby utilising the interpretation guidelines of the UN committee for ESC rights.

Further helpful impetus came from individual UN special rapporteurs who - partly in cooperation with civil society organisations – made use of their independent mandate to promote the understanding of ESC rights, for example the rights to food, education, adequate housing or later the rights to clean drinking water and sanitation.

At the same time intensive, ultimately successful international negotiations and transnational campaigns for the introduction of individual complaints procedures for ESC rights at the UN level animated the debate on the traditionally disputed justiciability of

3. Particularly worthy of note are two international conferences jointly hosted by the University of Maastricht and the International Commission of Jurists in 1987 and 1997. From these arose the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) and the Maastricht principles on the Infringement of Economic, Social and Cultural Rights (1997). The drafting of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) followed on from this tradition.

these rights. It is also important to note the interpretation of rights by and the decision-making practice of regional human rights supervisory bodies in the context of the European, Inter-American and African human rights protection, insofar as these directly or indirectly concerned the protection of ESC rights.[4] Just as important for the inclusion of social fundamental rights is a series of more recent constitutions, for example in some South American states or in South Africa, as well as the progressive case law of national courts for the protection of ESC rights in individual states (cf. Gauri/Brinks 2008).

Especially at the civil society level, serious social injustices were increasingly being looked on in human rights terms and the overcoming of such problems demanded. After a number of organisations – for example the *Habitat International Coalition* (HIC), a worldwide alliance of NGOs, social movements and specialists, which had been founded already in 1976 and campaigned for the right to housing, or also the *FoodFirst Information Action Network* (FIAN), established in 1986, which campaigned for the right to food – had already campaigned very early on for ESC rights and input their expertise into the debate, in the meantime a large number of human rights organisations around the world have additionally started working on economic, social and cultural rights. Even traditional human rights organisations which were originally limited to basic civil and political rights have been taking up infringements of ESC rights for many years and making them public through the media. In particular it should be highlighted that also *Amnesty International* - took on individual ESC rights, clearly visible, for example, in its *"Demand dignity campaign"*.

It also proved helpful that – following considerable initial difficulties – the development cooperation proved to be compatible with ESC rights, and that actively supported by international human rights organisations and transnational human rights networks, development policy issues were increasingly being presented in the language of human rights. In the meantime, the specific and express promotion of ESC rights is a fixed component of multilateral and bilateral, state and non-state development cooperation. Numerous development organisations now adopt a human-rights-

4. See, for example, Koch (2009); De Schutter (2009); Fáundez Ledesma (2005); Suárez Franco (2010); Nolan (2009); Murray (2009).

based approach or are at least campaigning to draw more attention to the ESC rights in the framework of development cooperation.[5] Development policy campaigns concerning the rights to food, water, health, housing or education are a clearly visible expression of this effort. The change in perspective from a needs-based to a rights-based approach in development cooperation provided the ESC rights with a considerable impetus. Particularly as regards the developing countries it also became clear just how important it is to consider the extraterritorial level of commitment and to demand that international organisations and transnational companies take responsibility for human rights.

However, the resistance to the ESC rights has by no means been overcome. Positions can still be found that view the economic, social and cultural rights as political targets without clear legal obligations and without the possibility of individual judicial enforcement. Sometimes also the danger is seen of "inflating" human rights claims and of an exuberant juridification of politics which goes hand in hand with a devaluation of "classical" human rights and the undue limitation of the decision-making scope of (democratically legitimated) political decision-makers. The objections which are occasionally fuelled by (far too) wide-reaching human rights demands from the civil society (not everything which is socio-politically sensible and desired is also necessary in human rights terms) can, however, be countered by way of an appropriate substantiation and interpretation of the ESC rights.[6]

On an international level, above all the USA stands out among the critics. *"By the 1990s, the United States had become the chief opponent of economic and social rights on the international stage"* (Albisa 2009: 176). In the official domestic and foreign policy of the USA, economic and social rights still only possess *"a second-class, outsider status"* (Lewis 2009: 100), and are, albeit also more and more hesitantly and partly strongly opposed by numerous US academics, not viewed as real human rights (Riedel 2008: 78). Howard-Hassmann/Welch (2006: 13) observe with disappointment

5. See, for example, Selchow/Hutter (2004); Krennerich (2008); Kämpf/Würth (2010).

6. The author has endeavoured to present the substantive content of the individual ESC rights, making use of the commentaries, decisions, reports and recommendations of human rights committees, as well as a number of other sources, and to illustrate these with the help of examples; see Krennerich (2013).

that after over 60 years the at one time visionary approach of Franklin D. Roosevelt has barely any influence on the political culture of the USA at all.

3. PROGRESS IN THE INTERPRETATION OF ESC RIGHTS AND STATE OBLIGATIONS

The increase in significance of the ESC rights in the past two decades was due less to the entrenchment of new rights than it was to the "rediscovery" and "reinterpretation" of already existing rights. Through the substantiation and further development of their content, especially at the UN level, the understanding of these rights has changed in several respects: the reinterpretation concerned the nature and substantive content of the existing rules as well as the questions as to who are the bearers of the ESC rights and who do they obligate in what way. At the same time proof of the material justiciability of these rights was given, that is of their suitability, in principle, to be examined (effectively) judicially by grievance committees and courts, even though appropriate procedures have still to be developed.

The traditional view that the nature of ESC rights is fundamentally different to that of the civil and political rights - as these are merely positive rights - has been called into question and revised over the past few years. Also, the ESC rights are oriented towards freedom, are aimed at the autonomous self-fulfillment of the person, and work towards the realisation of a social order in which together with others the individual persons can develop themselves freely with self-determination. On the one hand the ESC rights create a social freedom for a self-determined way of life for the people, which neither the state nor third parties may unreasonably restrict. The ESC rights thereby enable the individual persons to protect themselves from exploitation, inhuman working conditions and damage to their health, to feed themselves, to preserve a safe living environment, to being educated and to not be prevented from exercising their own culture or be excluded from cultural life. On the other hand, the legal, institutional, procedural and material prerequisites must be met in order that the people can in fact act autonomously and lead a self-determined life in the community with others. This includes active measures, for example against extreme

poverty, insufficient education, unemployment, inhuman working conditions, illnesses, housing shortages and social exclusion.

Thus, the ESC rights go together with "negative" and "positive" freedoms, and are freedom rights in the truest sense of the word. At the same time the ESC rights – like all other human rights – are linked to the requirement that they apply to all people equally and as such represent equality rights. This is not about socially levelling down the differences between the ways of life of the people. In the forefront is more the requirement that all persons should have the equal opportunity to find and realise their own "particular" way of life in freedom – for themselves and in community with others (Bielefeldt 2011: 123). It corresponds to the solidarity nature of the ESC rights and other human rights that their implementation is always dependent on social interaction, solidarity and the protection against social exclusion. Conversely the ESC rights inevitably leave their marks on the community: when the people make use of their human rights, respect those of their fellow citizens, and the state respects, protects or creates the corresponding areas of freedom, also the community changes in that the people - in an ideal situation – live and act jointly with others as socially and politically autonomous persons. In short: all human rights, and that includes the ESC rights, are to be understood as freedom, equality and solidarity rights.

As such supposed essential differences and abstract hierarchisation between the human rights are obsolete. It is true that the indivisibility of the human rights does not mean that dependent on the context and perspective individual human rights aspects cannot be ascribed empirically different significance, but abstract weightings between important and less important human rights are highly problematic and cannot establish a priority of civil and political rights over ESC rights (cf. Krennerich 2010).

In the course of the lively discussion surrounding the ESC rights in the past few years, a number of traditional reservations towards the ESC rights were shown to be just as untenable, for example the assertion that the ESC rights are far too vague in comparison with the civil and political rights, and that they are not adequately determinable. Even though the legal profile of these rights needs to be sharpened in future grievance and court proceedings, the ESC rights have been substantiated to a notable extent. The categories of availability, accessibility, acceptability and adaptability, which

were made popular by the former UN special rapporteur on the right to education, Katharina Tomaševski,[7] proved helpful when it came to interpreting the substantive content of these rights. The UN committee for ESC rights applied these or similar categories to numerous other ESC rights and substantiated these in its General Comments and reports. The interpretation efforts of the committee were supplemented by reports, decisions and recommendations of other international and regional human rights organs as well as in places by the decision-making practice of national courts.

At the same time also the international law obligations of the states in respect of the implementation of the ESC rights were substantiated. Of increasing importance were the three duties "respect-protect-fulfil," originally following on from Henry Shue (1980) and characterised by Asbjørn Eide,[8] which were taken up, used and widely propagated by the UN committee for ESC rights. According to this the states are obliged to not hinder individual people in the exercising of their rights (obligation to respect), to protect individuals from the interference by third parties in their rights (obligation to protect) and to enable the exercising of the human rights by taking positive action (obligation to fulfil). Human rights violations occur then if the state inadmissibly prevents or hinders the people from exercising their respective rights or also if, despite possibilities existing, it obviously fails to undertake anything or undertakes too little to protect and guarantee human rights.

Contrary to the traditional view, such duties can also go together with individual defensive, protection and positive rights which can be actionable depending on the case. Most likely to be accessible to an (effectively) judicial examination are state interventions in the ESC rights and acts of discrimination. This can be the case, for example, when state authorities arbitrarily evict the people of their country from their homes or deny them access to state education and health facilities, to name just a few of many examples. But also, omissions of the state can amount to a human rights violation, for example if the state knowingly, and despite the existence of possibilities to intervene, for example allows third parties to exploit,

7. See, for example, UN Doc. E/CN.4/1999/49, 13th January 1999; E/CN.4/2000/6, 1st February 2000; E/CN.4/2001/52, 11th January 2001; E/CN.4/2002/60, 7th January 2002.
8. See UN Doc. E/CN.4/Sub.2/1984/22, 3rd July 1984; E/CN.4/Sub.2/1999/12, 28th June 1999.

evict or discriminate against the people, or otherwise hinder them from exercising their rights.

Difficult, but not impossible is an (effectively) judicial examination in cases where the state has to take comprehensive measures to overcome hunger, education deficiencies, housing shortages and other social problems. The states have a large scope for political discretion and action when it comes to deciding how they want to deal with the problems. Moreover, many social problems cannot be resolved overnight – especially where resources are scarce. However, a scarcity of resources cannot serve as an excuse for not acting. The states are then obliged to progressively implement the ESC rights and must take specific, targeted measures, exhausting their possibilities to as far as possible make progress with the implementation of the ESC rights. Above all, however, there are always aspects of the ESC rights which can be implemented directly, in particular the aspects of respect and protection.

The three duties have become significantly more important in legal dogma terms over the past few years. Besides the UN committee for ESC rights in the meantime also other global and regional human rights institutions, national courts of individual states, and a large number of human rights experts at universities and in NGOs are referring to the three levels of obligation when dealing with ESC rights. However, the three duties have not established themselves as terminology when interpreting the civil and political rights. But it is not actually such a big change: ultimately the obligations tie in with the well-known distinction between "negative" and "positive" duties to act. What is new, however, is that in respect of the ESC rights not only guarantee duties but also in particular protection and omission duties are mentioned, and conversely with civil and political rights protection and guarantee duties which go beyond the duties to respect are being asserted.

The three duties make it clear that even though they place a greater emphasis on the resource-dependent positive components than civil and political rights do, ESC rights are not in fact merely expensive positive rights. Similarly, they call into question the traditional view that the implementation of civil and political rights does not require any state measures and resources. Evidently also the implementation of these rights is not cost free. We can consider the national measures taken to prevent torture and inhuman or

degrading treatment or punishment as demanded by the optional protocol to the UN torture protocol which came into force in 2006. Or to make it even clearer: in many developing or transition countries the constitutional and political institutions (independent courts, ombudsmen, electoral commissions, etc.) still even have to be established with considerable effort and using considerable resources before the people can make effective use of their civil and political rights.

As such the following applies to both and civil and political rights and to economic, social and cultural rights: *"They both impose negative and positive duties which sometimes require significant resources and sometimes do not, and which can sometimes be implemented immediately and sometimes not"* (Felner 2009: 407).

4. EXTRATERRITORIAL OBLIGATIONS OF THE STATES AND OBLIGATIONS BEYOND THE STATE

In the past few years the discussion surrounding the ESC rights has in many respects gone beyond the classical construction of international law human rights protection, according to which the states as parties to international conventions are mutually obliged to implement the human rights in respect of those persons under their sovereign jurisdiction.

In the light of the trans-border effects of state activity, first of all the question arises whether the governments and other organs of state must only respect, protect and guarantee the human rights "at home", or also abroad. To what extent are the states as international actors obligated in respect of human rights? It is here that the discussion surrounding the "extraterritorial state obligations" picks up. Especially advocates of the ESC rights started off the debate on the extraterritorial state obligations, which has since picked up speed considerably.

Each state still has the primary responsibility for implementing the human rights in its own country; however, it can either be significantly hindered or supported in doing so by the bilateral and multilateral actions of other states. We can therefore be curious as to what significance the "Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights" (2011) will develop and whether the *comprehensive* recognition of these obligations will prevail. That is anything but what

was agreed on. Certainly, there is increased acknowledgement that states may not themselves infringe the human rights in the course of their bilateral and multilateral relations; however, extraterritorial protection and guarantee obligations which go beyond this are still disputed and corresponding demands are still being met with a tremendous amount of political and judicial resistance.

Continually moving in international law and at the same time controversial is, second, the human rights commitment of international and supranational organisations. Binding coercive measures by the UN Security Council are just as much under scrutiny as, for example, trade agreements of the European Union (cf. Paasch 2011). Also, much discussed and criticised are the human rights effects of the activities of international financial institutions such as the World Bank (e.g. McBeth 2010) or the trade and patent regulations of the World Trade Organisation (cf. Hestermeyer 2007). As such this begs the question whether international organisations are bound by human rights, even if they have not acceded to human rights conventions. Corresponding obligations can either be indirectly derived from the extraterritorial obligations of the states involved, which are represented in the international organisations, or directly where social human rights are already protected by customary law, something which would have to be examined in each case. In addition, internal organisation guidelines and regulations – such as, for example, the *Safeguard Policies* of the Word Bank – can by all means be used to assert the protection of human rights within the organisation. An assured human rights obligation on the part of international organisations cannot, however, be derived from this (cf. Kälin/Künzli 2008: 100).

Finally, much discussed in the past few years has been the question of the human rights obligation on the part of non-state actors, above all transnational companies which can significantly influence not only the rights to work and to fair working conditions, but the entire range of human rights – both positively and negatively.[9] Also transnational companies are subject in principle to regulation by any state in which it carries out its business and must strictly speaking abide by the national laws and provisions which prohibit or should sanction business practices that are in violation of human

9. Corresponding human rights violations are documented, for example, on the website of the *Business & Human Rights Resource Centre* (www.business-human-rights.org). See e.g. also Human Rights Watch (2008); Saage-Maaß (2009); Burghart/Hamm/Scheper (2010).

rights. However, in many states – in particular those which are weak, corrupt or even just competing for locational advantages – such laws are either non-existent or ineffective, or they are simply ignored and circumvented. In some cases, the companies also profit from human rights violations.

The discussion about the ESC rights has notably reanimated the debate on the human rights responsibilities of non-state actors and given impetus to demands that transnational companies should be made more responsible for human rights, not only in the host country but also in the home state or by way of international regulation. At the same time there have been demands for the self-commitment of companies with regards to human rights.

As a frame of reference for the discussion meanwhile the former UN special representative for human rights and transnational and other companies, John Ruggie's three-pillar guiding principles have established themselves, according to which the states protect the rights (duty to protect), the companies respect the people (corporate responsibility to protect) and both should ensure the access of those concerned to remedies and redress (access to remedy).[10] Up until now the discussion of the guiding principles concerned mainly the second pillar, i.e. the voluntary measures companies should take in order to meet their human rights responsibilities. However, it must be noted that the guiding principles also provide for international law obligations on the part of the states to protect persons on their sovereign territory from human rights violations by companies by granting those concerned access to judicial and non-judicial remedies.

Ruggie's guiding principles do not, however, contain a state obligation to regulate company activities in other countries. In contrast to the "Maastricht Principles on Extraterritorial Obligations of States in the area of ESC Rights" the extraterritorial state obligations to protect are expressly denied by Ruggie. Here it remains to be seen whether not the international law will develop further in the sense of the Maastricht Principles. On the other hand, the direct commitment of companies in international law as was at one time provided for in the draft for the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights from 2003[11] is currently unlikely to be

10. See UN Doc. A/HRC/17/31, 21st March 2011; A/HRC/RES/17/4, 6th July 2011.
11. UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

implemented. The resistance from companies, governments and international organisations, including the United Nations, is just too high.

5. OUTLOOK

Notwithstanding the unmistakable increase in significance of the economic, social and cultural human rights in the past two decades, the reservations and uncertainties when it comes to interpreting these rights has still not been overcome. Above all the implementation of the ESC rights – and indeed also other human rights - remains the big problem.

The prerequisites for this have certainly improved in that those affected and their supporting groups are able to enforce the ESC rights by way of public demands and protests. The tirelessly repeated declarations, the numerous reports and recommendations and the supportive efforts of international human rights committees formulate conduct expectations and standards which the members of the international community of states cannot simply disregard. Now and then also learning processes may be defined showing how the ESC rights can be better implemented. Yet still the ESC rights are being infringed around the world on a large scale and the states and the community of states are doing far too little to respect, protect and guarantee these rights nationally as well as globally.

The implementation of the ESC rights is though not only dependent on constitutional, participatory and democratic structures, but also on minimum welfare state conditions. A corresponding basic understanding of social state functions – something which is, for example in the USA with its strongly libertarian approach to constitutional rights, not very developed – is decisive for whether and how far even established constitutional democracies recognise and implement social rights. Strong market-liberal and anti-state-dominated notions of order demonstrate in this respect obvious weaknesses and gaps, as the market alone is unable to guarantee social human rights, instead itself leading to many cases in social insecurity.

No less important is the organisation of global political and economic activity in conformity with human rights. The international human rights regime is still primarily aimed at encouraging the individual government to implement the ESC

rights in their own country or supporting them in doing so. In contrast, the social human rights barely regulate international and transnational relations and, in this sense, have not really established themselves as "global social rights" (Fischer-Lescano/Möller 2012). A comprehensive human right approach therefore requires that the states and the community of states adopt global policies which help the ESC rights to become important also in the context of economic globalisation processes. The current globalisation processes create so may "social losers" who are not able to cope with economic pressure of globalisation, that the need for human rights action and regulation is tremendous. The recognition and implementation of extraterritorial state obligations and an effective human rights commitment on the part of international organisations and transnational companies would be an initial, important step towards tackling the enormous social problems which in particular go hand in hand with economic globalisation processes and can no longer be overcome by the individual nation states alone.

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TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT AND INTERNATIONAL ENVIRONMENTAL: STILL MORE MYTH THAN REALITY?[1]

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1. CONTEXT: THE "MYTH" OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT?

In an intriguing and influential article entitled "The Myth and Reality of Transboundary Environmental Impact Assessment,"[2] John H. Knox argues that the predominant account of transboundary EIA has the following elements: (1) a customary international law prohibition of transboundary environmental harm; (2) Principle 21 of the 1972 Stockholm Declaration, which provides that states must ensure that activities within their territories or under their control do not harm the environment beyond their territory or control; and (3) the prevention of transboundary harm by, among

1. The authors wish to acknowledge that this chapter is a fully collaborative work, and the alphabetical order of authorship is not indicative of unequal input. Moreover, one of the authors, Miriam Cohen, further wishes to acknowledge that she was previously an Associate Legal Office at the International Court of Justice where she worked on the initial stages of the case discussed in this Chapter. The discussion and analysis contained in this Chapter are solely and exclusively based on publicly available information, and the views expressed herein are her own, and those of her co-author.

2. John H. Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96:2 *American Journal of International Law* 291.

other things, conducting EIAs before undertaking environmentally risky activities.[3] Knox further argued that this dominant narrative of transboundary EIA belongs to what Daniel Bodansky has described as the "myth system" of international environmental law: a collection of ideas often considered part of customary international law not supported by actual state practice. These ideas, rather, "represent the collective ideals of the international community, which at present have the quality of fictions or half-truths."[4] As Oscar Schachter puts it, "[t]o say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day."[5]

Because state practice prioritizing economic development over environmental protection so routinely fails to live up to the promise of Principle 21, its status, as well as that of its corollary procedural EIA obligation, remains unclear, calling into question the characterization of Principle 21 as customary international law[6] and the cornerstone of international environmental law.[7] More broadly still, the discrepancy between Principle 21 and actual state practice in an ever-more integrated, globalized world and planetary ecosystem raises the question of how the human right to a healthy environment – if such a right exists, or should come to exist – would be asserted and enforced.[8] This question is particularly urgent in light of the increasing importance and impacts of the contributions – both constructive and destructive – of non-state actors, especially civil society groups and transnational corporations, respectively.[9]

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3. *Ibid.*

4. Daniel Bodansky, "Customary (and Not So Customary) International Environmental Law" (1995) 3 *Indiana Journal of Global Legal Studies* 106 at 116.

5. Oscar Schachter, "The Emergence of International Environmental Law" (1991) 44 *Journal of International Affairs* 457 at 463.

6. See e.g. Philippe Sands, *Principles of International Environmental Law* (1995) at 190; David Wirth, "The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?" (1995) 29 *Georgia Law Review* 599 at 620.

7. Sands, *ibid*, at 186.

8. See e.g. Rebecca Bratspies, "Do We Need a Human Right to a Healthy Environment?" (2015) 13 *Santa Clara Journal of International Law* 31. More generally regarding the emergence of global administrative law, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law and Contemporary Problems* 15.

9. See e.g. Jason MacLean, "*Chevron Corp. v. Yaiguaje:* Canadian Law and the New Global Economic and Environmental Realities" (2016) 57 *Canadian Business*

2. TRANSBOUNDARY EIA AND THE INTERNATIONAL COURT OF JUSTICE

Unsurprisingly, commentators and practitioners have looked to the ICJ for clarification. But thus far, the ICJ's pronouncements raise as many questions and they answer. For instance, in its 1996 advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ noted that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[10] As Knox rightly observes, however, the ICJ's use of the impossibly vague term "respect" does little to clarify the scope or substance of Principle 21 and its attendant procedural obligations, including the obligation to conduct transboundary EIAs.[11]

Thus, does the ICJ continually giveth and taketh away when it comes to transboundary EIA. In its decision in *Pulp Mills (Argentina v. Uruguay)*, for example, the ICJ reiterated the customary nature of transboundary harm prevention and the EIA obligation, observing that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse in a transboundary context".[12] The ICJ was not prepared in *Pulp Mills*, however, to identify the minimum core components of an adequate EIA, once again raising more questions than answers.[13]

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10. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, at 241-242, para. 29.

11. Knox, *supra* note 8 at 293.

12. *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 ("*Pulp Mills* Judgment"), para. 204.

13. *Ibid*, para. 205, where the Court explained that the specific substance of an EIA "is for each State to determine in its domestic legislation or in the authorization process for the project." However, the Court was unequivocal in holding that "an environmental impact assessment must be conducted prior to the implementation of a project" (*ibid*). But see Carl Bruch *et al.*, "Assessing the assessments: improving methodologies for impact assessments in transboundary watercourses" (2008) 26:4 *Impact Assessment and Project Appraisal* 239 on the need for greater clarity of the regime governing EIA.

3. MUDDYING THE WATERS? THE *COSTA RICA V. NICARAGUA AND NICARAGUA V. COSTA RICA CASES*

A pair of related cases – *Costa Rica v. Nicaragua*, and *Nicaragua v. Costa Rica* – recently presented the ICJ with a fresh opportunity to clarify the nature of Principle 21 and the scope and substance of the international law obligation to undertake EIAs.

Costa Rica and Nicaragua have been entangled for a number of years in intertwined disputes relating to sovereignty over territory and activities carried out in close proximity to a boundary river between Costa Rica and Nicaragua. The dispute first reached the ICJ in 2010 when Costa Rica alleged that Nicaragua had occupied the three-square-kilometer block. Nicaragua maintained that the territory historically belonged to it, and in 2011 Nicaragua instituted proceedings against Cost Rica arguing that Costa Rica was causing transboundary environmental damage by constructing a road running along the San Juan River ("river"). [14]

The ICJ ruled in favour of Nicaragua on the transboundary harm issue, finding that Costa Rica had failed to conduct an EIA prior to undertaking construction on the road, which veers dangerously close to the river. But the Court (forgive us) muddied the waters by refusing to award damages to Nicaragua, stating that the declaratory judgment in its favour was "satisfaction" enough.[15] Below we assess the implications of the Court's reasoning for the nature, substance, and scope of the transboundary EIA obligation in international law, as well as the nature and promise of international environmental law more generally.

As noted above, the Court's judgment examined, in addition to a claim of breach of territorial sovereignty, mutual allegations of breaches of international environmental law obligations. While there are many interesting questions addressed in the Judgment,[16],

14. *Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, 16 December 2015 ("*Costa Rica and Nicaragua Judgment*"), paras. 92, 99.

15. *Ibid*, para. 139.

16. See e.g. Diane Desierto, "Evidence but not Empiricism? Environmental Impact Assessments at the International Court of Justice in Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)", *EJIL: Talk!*, 26 February 2016; Jutta Brunnée, "International Environmental Law and

our contribution focuses on the Court's analysis of the substance and scope of the international obligation to conduct an EIA for activities that pose a risk of significant transboundary environmental harm. This chapter also comments on the Court's analysis of the appropriate remedy in cases of a breach of the procedural obligation to conduct an EIA.

By way of additional background, the Judgment on the merits of the joined cases of Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) dealt with two distinct but connected international environmental law questions, both related with the EIA obligation.[17] In the Costa Rica v. Nicaragua case, Costa Rica alleged that Nicaragua violated international environmental law obligations in the course of conducting activities in the San Juan River. Costa Rica claimed that Nicaragua's activities posed a potential risk to the flow of the Colorado River and adversely affected Costa Rica's wetlands. In the Nicaragua v. Costa Rica case, Nicaragua alleged that Costa Rica breached its international law obligation to conduct an EIA prior to commencing construction of Route 1856, Juan Rafael Mora Porras (the "road"), which is situated in Costa Rican territory running alongside part of its border with Nicaragua.

In relation to the scope and substance of the EIA obligation, the parties in *Costa Rica v. Nicaragua* agreed that there exists an obligation under international environmental law to conduct an EIA whenever an activity carried out in one state's territory poses a risk of causing transboundary environmental harm in another.[18] In reaching its Judgment, the Court was presented with an opportunity to confirm and clarify its 2010 ruling in *Pulp Mills,* particularly with respect to the core elements of the EIA obligation.

The ICJ made an important initial finding: while the *Pulp Mills* case referred to "industrial" activities, the Court affirmed in *Costa Rica v. Nicaragua* that the EIA obligation applies even more generally to "proposed activities which may have a significant adverse

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Community Interests: Procedural Aspects", in Eyal Benvenisti and Georg Nolte (eds), *Community Interests in International Law* (2017).

17. For a background of the two cases, see *Costa Rica and Nicaragua Judgment*, paras. 1-52.

18. *Ibid*, para. 101.

impact in a transboundary context."[19] Useful as this incremental clarification is, however, the Court neglected to further clarify the scope or substance of the EIA obligation. Instead, the Court simply stated that "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment".[20] Importantly, however, the Court failed to elaborate on what amounts to "significant" transboundary harm. Nor did the Court explain how a state is "to ascertain" whether a proposed activity poses such a risk. Rather abruptly, and with little discussion of the supporting evidence, the ICJ dismissed Costa Rica's claim that there was a risk of significant transboundary harm obligating Nicaragua to conduct an EIA prior to commencing dredging the San Juan River.

Instead, the Court relied on, but did not discuss in any detail, a study conducted by Nicaragua in 2006 concluding that the dredging program planned in 2006 did not pose "a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland."[21] Costa Rica countered that the 2006 study did not specifically assess the potential harm to its wetlands. The Court, however, did not address this argument head on, choosing instead to advert to reports and expert evidence submitted by both parties without meaningfully discussing any particular piece of evidence. The Court concluded that there was no risk of transboundary environmental harm triggering an obligation on the part of Nicaragua to conduct an EIA. Such was the extent of the ICJ's discussion of the international environmental law EIA obligation in *Costa Rica v. Nicaragua*: an inconsequential affirmation of its previous jurisprudence, the failure to carefully scrutinize the parties' technical evidence, and most importantly, a missed opportunity to usefully clarify the scope and substance of the international environmental law obligation to conduct an EIA in a potential transboundary harm context.

19. *Costa Rica and Nicaragua Judgment*, para. 104.
20. *Ibid*, para. 104.
21. *Ibid*, para. 105.

Nicaragua v. Costa Rica likewise presented the ICJ with an opportunity to clarify the scope and substance of the EIA obligation of international environmental law. Nicaragua alleged that Costa Rica breached its obligation to conduct an EIA prior to commencing road construction. Costa Rica denied that there was any risk of significant transboundary harm and claimed that, in any event, it was exempted from the obligation to conduct an EIA in light of the state of emergency precipitated by Nicaragua's occupation of Isla Portillos. The Court began by addressing what it means to "ascertain" whether a given activity poses a risk of transboundary harm, a question it left unanswered in the companion case of *Costa Rica v. Nicaragua*. The Court stated that "to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm" triggering the obligation to conduct an EIA.[22] Upon evaluation of the circumstances surrounding the construction of the road, including the substantial scale of the road project, the location of the road along the river, and the geographic conditions of the river basin where the road was to be situated, the Court found that the construction of the road posed a risk of significant transboundary harm.[23]

Having found that the obligation to conduct an EIA was triggered, the Court dealt next with Costa Rica's claim that it was exempt from conducting an EIA because of the state of emergency precipitated by Nicaragua's territorial incursion. Curiously, the Court decided this question by looking solely to the facts of the case, without clarifying whether, as a matter of international law, a state of emergency is capable of exempting a state from its obligation to conduct an EIA where there is a risk of significant transboundary harm.[24] The Court's strange choice marks yet another missed opportunity to clarify the relationship between a declared state of emergency under domestic law and the obligation to conduct an EIA under international environmental law. Instead, the ICJ left the door open to further EIA exemption claims, which, in addition to making the law more uncertain, further calls into question the customary nature of transboundary EIA.

22. *Ibid*, para. 154.
23. *Ibid*, para. 156.
24. *Ibid*, paras. 157-159.

Referring to its previous jurisprudence, the Court confirmed that the obligation to conduct an EIA is one of a continuous nature, lasting for the life of a project, and that an EIA must be undertaken before a project commences. Because Costa Rica conducted studies only after its road construction had begun – they were in fact *post hoc* assessments of the stretches of the road that had already been built – the Court found that Costa Rica had breached its obligation under "general international law" to conduct an EIA. As Judge *ad hoc* Dugard discussed in his Separate Opinion, a review of international law demonstrates that the EIA obligation is one of *customary international law*.[25] This, however, is somewhat old news. More importantly, given state practice to the contrary, it is also highly dubious news.

By failing to conduct an EIA prior to commencing construction of the road, Costa Rica was unable to properly assess the risk of transboundary harm. Although the Court found this to be a breach of procedural international environmental law, not substantive international environmental law, the EIA obligation is nonetheless closely linked with the obligation of due diligence and the core *substantive* principle of prevention. In this regard, the Court's Judgment failed to clarify whether the duty to conduct an EIA is an independent obligation under international environmental law or whether it is a constituent element of the obligation of due diligence; Judges of the Court also diverged on this point,[26] thereby raising (once again) more questions than answers for international environmental law.

Against this background, it is at once surprising and perhaps not surprising at all that the Court found that a declaration that Costa Rica had breached its obligation to conduct an EIA constituted "satisfaction" enough of Nicaragua's claim.[27] This reasoning is classic bootstrapping: because there was no evidence of significant transboundary harm, a mere declaration was in order. But the precise point of conducting an EIA is to assess the risk of significant transboundary harm *prior* to the harm occurring. If a state can plead the absence of transboundary harm *after* a project has started without having conducted an *ex ante* EIA, the transboundary EIA

25. *Ibid,* Separate Opinion of Judge *ad hoc* Dugard.
26. *Ibid.*
27. *Ibid*, para. 224.

obligation begins to look much more like a myth than a robust, important obligation of international environmental law. By dismissing Nicaragua's claim for reparation, the Court minimized the significance of the severity of Costa Rica's breach in the case at bar and, more broadly, the EIA obligation of international environmental law. The Court's mere declaration is surprising in light of its jurisprudence on the customary nature of the EIA obligation, but it is not surprising at all in light of states' practiced disregard of this obligation along with the principle of transboundary harm prevention. Regrettably, the ICJ decided to follow present state practice rather than guide it.

4. CONCLUSION: WITHER CUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW?

At bottom, or for that matter at its highest, is international environmental law just politics? Is the notion of customary international environmental law out of date? Has the time come, as Knox argues, to embrace regional transboundary EIA agreements that effectively embody the principle of non-discrimination, whereby states apply the same protections to potential transboundary harm as they would to potential domestic harm, even if those (political) agreements are as unlikely to actually prevent transboundary environmental harm as they are to prevent domestic environmental harm?[28] As Knox puts it, regional EIA agreements have an indisputable advantage over the "myth" of a customary norm of transboundary harm prevention: "they actually exist."[29] Consequently, Knox argues that treating Principle 21 and its procedural corollaries – including the obligation to conduct transboundary EIAs – as customary discredits international law generally.

We are not so sure. Aspirations matter. Discussing the nature of legal regulation generally, the Canadian legal theorist Rod Macdonald argued – convincingly, we think – that law is not merely a means to other ends; it is also an end in itself, a symbol and a collective achievement. As such, law can be "a surrogate for power, hate, prejudice, poverty or alienation".[30] Or, Macdonald argued, law can be

28. Knox, *supra* note 8 at 319.
29. *Ibid.*
30. Roderick A. Macdonald, "Understanding Regulation by Regulations" in I. Bernier & A. Lajoie, eds, *Regulations, Crown Corporations and Administrative*

"a surrogate for freedom, equality and justice."[31] Crucially, "[h]ow we deploy law to address these ideas betrays how we see ourselves. *How we discuss law does the same*."[32]

Law and politics, therefore, are intimately interconnected and fundamentally discursive. In the context of international human rights law, for example, Teitel argues that the expanded range of legal discursive practices represented by the ongoing expansion of legal machinery, institutions, and processes occurring in the international sphere contributes to a rhetoric that both enables and constrains politics.[33] Thus, even if "in the end it is all politics",[34] no one can predict what form(s) that particular politics is going to take. But as new proposals percolate, and as competing interests and institutions continue to interact, new forms of transnational democratic deliberation and decision-making may yet emerge which are "not above, or autonomous from, deliberation within domestic polities, but deeply intertwined with the domestic and the local."[35]

We conclude, then, that there is immeasurable value in the *aspiration* of a peremptory obligation of transboundary EIA. We urge practitioners to continue to advocate on its behalf, including before the ICJ, in order to help usher in a new discursive and institutional sphere for international environmental law capable of establishing and enforcing an international human right to a healthy environment and an institutional architecture capable of addressing climate change. Indeed, not only is this peremptory obligation critical to vindicating Principle 21 of the 1972 Stockholm Declaration as the cornerstone of international environmental law, but it may well also be pivotal to the ultimate success of the UN Paris Agreement. Given the gross inadequacy of the climate change mitigation strategies proposed thus far by ratifying states,[36] the ultimate success of the Agreement may well depend on the ability of subnational and

Tribunals (Toronto: University of Toronto Press), 81-154 at 146 [emphasis added].

31. *Ibid.*

32. *Ibid.*

33. Ruti G. Teitel, "Humanity's Law: Rule of Law for the New Global Politics" (2002) 35:2 *Cornell International Law Journal* 355.

34. Robert Howse, "From Politics to Technocracy—And Back Again: The Fate of the Multilateral Trading Regime" (2002) 96 *American Journal of International Law* 94 at 117.

35. *Ibid.*

36. Joeri Rogelj *et al.*, "Paris Agreement climate proposals need a boost to keep warming well below 2 °C" (2016) 534 *Nature* 631.

transnational civil society actors to leverage emergent international environmental norms and practices – including transboundary EIAs[37] – to compel states to implement more stringent mitigation policies in line with the urgent public policy warnings of climate scientists.[38] The ultimate fate of this international environmental law obligation – myth versus reality – may well determine the fate of the international environment itself.

37. See e.g. Jason MacLean & Chris Tollefson, "Climate-Proofing Judicial Review of Environmental Assessment" (2017) 31 *Journal of Environmental Law and Practice* (*forthcoming*).

38. See e.g. Johan Rockström *et al.,* "A roadmap for rapid decarbonization: Emissions inevitably approach zero with a 'carbon law'" (2017) 335:6331 *Science* 1269; Joeri Rogelj *et al.,* "Differences between carbon budget estimates unraveled" (2016) 6 *Nature Climate Change* 245; James Hansen *et al.,* "Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2 °C global warming could be dangerous" (2016) 16 *Atmospheric Chemistry & Physics* 3761 at 3801 (arguing that even "2 °C global warming is dangerous" and concluding that "we have a global emergency. Fossil fuel C02 emissions should be reduced as rapidly as possible").

RECLAIMING HUMANITY: ECONOMIC, SOCIAL, AND CULTURAL RIGHTS AS THE CORNERSTONE OF AFRICAN HUMAN RIGHTS

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A point very often missed in human rights praxis is that economic, social, and cultural rights (ESCR) "are the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the world."[1] Despite the international rhetoric on the equal relevance, interdependence, and indivisibility of all human rights,[2] in practice states have paid less attention to the enforcement and implementation of ESCR, and their attendant impact on the quality of life and human dignity of the citizenry,

1. Rolf Kunnemann, *A Coherent Approach to Human Rights,* 17 HUM. RTS. Q. 323, 332 (1995).

2. *See, e.g.,* Aft. Charter Hum. Peoples' Rts., June 27, 1981, pmbl., para. 8, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1982) [hereinafter Aft. Charter]; *Proclamation of Tehran, Final Act of the International Conference on Human Rights,* May 13, 1968, art. 13, U.N. Doc. A/CONF.32/41 (1968), *reprinted in* UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS vol. 1 (2d part), at 51-54, U.N. Doc. ST/HR/1/Rev.5 (1994); *Vienna Declaration and Programme of Action,* June 25, 1993, U.N. World Conference on Human Rights in Vienna, U.N. Doc. A/CONF. 157/24 (1993), *reprinted in* 32 I.L.M. 1661 (1993); *see also* THE LIMBURG PRINCIPLES ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Jan. 8, 1987, princs. 2-3, U.N. ESCOR, Commission on Human Rights, 43d Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), *reprinted in* 9 HUM. RTS. Q. 122, 123 (1987) (underscoring the indispensability of indivisibility and interdependence); *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,* guideline 4, *reprinted in* 20 HUM. RTs. Q. 691 (1998) (reemphasizing equality, interdependence and indivisibility of all human rights). On interdependence generally, see Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights,* 27 OSGOODE HALL L.J. 769 (1989).

than other rights.[3] African states, still living with the nightmares of slavery and colonial exploitation, are perhaps unsurpassed in this dreamy, rhetorical exercise.

African states ought to take the lead in the enforcement of ESCR, given Africa's deplorable socio-economic conditions. They ought not to emulate the industrialized states of the North which can afford the luxury of hollow rhetoric in the implementation of ESCR. Regrettably, African states have so far failed to match their words with appropriate, sufficient action.[4] Where African leaders have asserted the importance of satisfying ESCR as part of protecting other rights, some have done so with the intention of using this rhetoric as a ploy to suppress civil and political rights.[5]

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3. See Noam Chomsky, The United States and the Challenge of Relativity, in HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 24, 32-35 (Tony Evans ed., 1998); see also Scott Leckie, The U.N. Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach, 11 HUM. RTS. Q. 522, 525-26 (1989) (discussing the relative lack of state action in spite of numerous resolutions affirming the legal validity of ESCR and indivisibility of human rights).

4. This may in part be attributed to the prevailing unwillingness of the international community to match its high-minded rhetoric with commensurate actions. In fact, notwithstanding all pretensions to the contrary, there is evidence to support active undermining of the efforts of the developing countries to realize ESCR by the developed countries. *See* El Hadji Guiss, *The Realization of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations,* U.N. Comm. Hum. Rts., 49th Sess., U.N. Doc. E /CN.4/ Sub.2/1997/8 (1997), *available at* http://www.derechos.org/nizkor/impu/guisse.htmi (last visited Feb. 11, 2002).

5. In the past, repressive regimes in Africa (like Eyadema of Togo and Mobutu of Zaire) have claimed that they could not allow basic civil and political rights in their various states so long as there were prevailing economic hardships and the population remained underfed and economically underdeveloped. While it is true that economic development might lead to the improvement of the civil and political rights as a result of improvement in the quality of life, it cannot be shown that the curtailment of the civil and political rights of the people can, in any way, contribute to the improvement of their socio-economic rights and development. Its only contribution is the preservation of the repressive regimes in question. On this and related issues, see Peter R. Baehr, *Concern for Development Aid and Fundamental Human Rights: The Dilemma as Faced by the Netherlands,* 4 HUM. RTS. Q. 39, 43-44 (1982); Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa,* 5 HUM. RTS. Q. 467, 468-78 (1983); Rhoda Howard, *The Dilemma of Human Rights in Sub-Saharan Africa,* 35 INTL J. 724, 725 (1980).

Africa's worsening socio-economic conditions, and resulting exacerbation of civil and political strife coupled with the current lack of interest in the enforcement of ESCR,[6] renders the effective realization of human rights on the continent a remote possibility. Even if largely unintended, the neglect of ESCR, a substantial part of an indivisible whole, has brought about this sad state of affairs. This Article contends that there is an urgent need for a change of attitude and a relocation of emphasis from neglect and discriminatory enforcement of human rights to respect and balanced, holistic enforcement. Given the prevailing socio-economic circumstances in Africa, ESCR remain the cardinal means of self-defense available to the majority of Africans.

Part I of this Article emphasizes the imperative of a holistic and nondiscriminatory enforcement of all human rights in Africa and links the failure of African governments to safeguard the socio-economic rights of their citizens to the widespread incidence of civil and political strife. Part I contends that, in contemporary Africa, a government's legitimacy is largely a function of its ability to guarantee and protect the ESCR of its people.

In contrast to many scholars and commentators who have pointed to the under-development and acute economic crises of African states as the reasons behind the non-enforcement of ESCR,[7] Part II contends that underdevelopment and economic crises are hardly the whole story. It argues that recognition and enforcement of these rights catalyze development and are inextricable from it. Any quest for meaningful development ought to be predicated on the effective protection, enforcement, and realization of ESCR. While mindful of the poor economic conditions of many African states, Part II argues that these conditions do not justify outright nonenforcement of ESCR.

Part III discusses some factors militating against the realization of ESCR in Africa. Part IV highlights the consequences of the continued marginalization of these rights. In strategizing the way forward, Part V articulates alternative enforcement approaches that

6. See J. Oloka-Onyango, Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa, 26 CAL. W. INT'L L.J. 1, 2 (1995).

7. See, e.g., R.M. D'sa, The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action, 10 AUSTL. Y.B. INT'L L. 101, 114 (1987).

will ensure a nondiscriminatory and more effective enforcement of ESCR. In Part VI, I shall offer a few concluding remarks.

The aim of this Article is not to analyze the various rights traditionally classified as ESCR. Rather, it seeks to question the marginalized enforcement of ESCR as codified in the African Charter (work, health, education, and cultural rights), including the "new rights,"[8] such as access to the public services of one's country, public property, and other services.[9] The Charter does not *expressly* provide for housing or social security rights. But, except as otherwise indicated, this Article does not exclude these or other socio-economic rights from its purview. This Article focuses on the *collective* marginalization of ESCR, broadly construed. It focuses on particular ESCR merely to illustrate points.

I. THE IMPERATIVE OF A HOLISTIC APPROACH TO ENFORCEMENT

"Perils to the part imperil the whole."[10]

In the 1993 Vienna Declaration,[11] the consensus opinion recognized the futility inherent in entrenching civil and political rights without the corresponding ESCR. This consensus emerged despite the bipolar (East-West) ideological differences, which then dominated international relations, and led to the implementation of the Universal Declaration of Human Rights (UDHR) by means of two international covenants, and continue to have grave implications for ESCR.[12] Long before the Vienna Declaration, the UDHR set the

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8. Chidi Odinkalu, Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights, 23 HUM. RTs. **Q.** 327, 339 (2001).

9. *See* Afr. Charter, *supra*, note 2, art. 13

10. Ebow Bondzie-Simpson, A Critique of the African Charter on Human and Peoples' Rights, 31 How. L. J. 643, 660 (1988).

11. Vienna Declaration and Programme of Action, supra note 2; see also Shadrack Gutto, Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa, 4 BUFF. HUM. RTs. L. REV. 79, 86-88 (1998) (discussing the Vienna Human Rights Conference and its outcome).

12. The ideological altercation that produced two covenants arguably confined ESCR to, in the words of-one scholar, "human rights regime's shabby second cousin." *See* Krysti Justine Guest, *Exploitation Under Erasure: Economic, Social and Cultural Rights Engage Economic Globalization,* 19 ADEL. L. REV. 73, 82 (1997). For an overview of the history behind the two covenants, see Matthew Craven, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 1-16 (1995), and Peter Cumper, *Human Rights: History, Development and Classification, in* HUMAN RIGHTS: AN

parameters for evaluating the legitimacy of governmental actions by codifying "the hopes of the oppressed, [and] supplying authoritative language to the semantics of their claims."[13] The euphoric "Never Again" declaration by the victorious powers after World War II was intended to encapsulate humanity's resolve to banish human misery in all its ramifications, whether arising from physical abuse or from want.

If the purpose of government is to provide for the welfare and security of all citizens, governments fail to fulfill this purpose when they commit to enforcing only civil and political rights. Such an ostrich-like posture denies the various forms of state abuse against which the citizen must be protected: above all, the state's neglect of its citizens.[14] Even opponents of enforceable ESCR recognize this axiom. The *defacto* commitments of many Western states to a welfare ethos[15], despite their official opposition to ESCR, assures a high degree of compliance in protecting the rights of their citizens.[16]

Modern governments are active participants, not passive spectators, in events that fundamentally impact the ability of the people to lead a meaningful and dignified life.[17] Governance ceases to

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AGENDA FOR THE 21ST CENTURY 1, 6-7 (Angela Hegarty & Siobhan Leonard eds., 1999).

13. *See* Jose A. Lindgren Alves, *The Declaration of Human Rights in Postmodernity,* 22 HUM. RS. Q. 478,481 (2000).

14. An example of the right to protection against state neglect is the case *Laxmi Kant v. Union of India,* (1987) 1 S.C.C. 67, in which the Indian Supreme Court held that the right of children to life and livelihood included the right to be protected by the state against emotional and material neglect.

15. It should, however, be pointed out that the *de facto* commitment to a welfare ethos has become a victim of globalization even in rich societies, where the dismantling of the institution of the welfare state is seen as a necessary step for the efficacy of state management. Thus, social exclusion and human misery are being transformed into a new economic ideology. *See* Alves, *supra* note 13, at 485.

16. See Richard Falk, The Challenge of Genocide and Genocidal Politics in an Era of Globalisation, in HUMAN RIGHTS IN GLOBAL POLITICS 177, 190 (Tim Dunne & Nicholas Wheeler eds., 1999); see also Jack Donnelly, Human Rights, Democracy and Development, 21 HUM. RTS. Q. 608, 629-30 (1999) (noting the use of the welfare system by all existing liberal democracies to compensate some of "those who fare less well in the market" and that this system "remains a powerful force in all existing liberal democratic regimes and a central source of their legitimacy").

17. *See* Abubakar Momoh & Said Adejumobi, THE NIGERIAN MILITARY AND THE CRISIS OF DEMOCRATIC TRANSITION: A STUDY IN THE MONOPOLY OF POWER 211 (1999) (questioning the basis, rationale and

be meaningful when the majority of the people is put in a situation where it cannot appreciate the value of life, let alone enjoy its benefits, and where it lacks the appropriate mechanisms to compel change. Where human survival needs frequently go unmet, as in Africa, protection of human rights ought to focus on "preventing governments from neglecting their citizens.[18]

A point that is often overlooked in contemporary human rights discourse and practice is that the greatest benefit of guaranteeing enforceable rights is the *assurance* it gives to people that effective mechanisms for adjudicating violations or threatened violations of their rights are available. As events in many parts of Africa have shown,[19] the absence of such mechanisms gives the impression that resort to extra-legal means, such as armed rebellion, is the only way to improve one's condition or challenge governmental abuse and neglect.[20] Most current African conflicts consist of people who are fighting not against themselves but against poverty and governmental inaction in the face of destitution. This conflict usually is due to many years of impoverishing neglect and to the absence of other viable ways of compelling meaningful change. Because governments

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justification for the existence of the state and its control over national wealth, and its overall responsibility where it fails to live up to its health, educational, employment and other social obligations to the people).

18. Carol M. Tucker, *Regional Human Rights in Europe and Africa: A Comparison*, 10 SYRACUSE J. INTL L. & COM. 135, 162 (1983).

19. Notable examples are the internecine fratricidal conflicts involving different communities in Nigeria, such as the Niger Delta, Ife-Modekeke, and other religious-political conflicts in the northern parts of the country. Other examples are the fratricidal conflicts in Congo, Sierra Leone, and Liberia, as well as the unending conflicts in Somalia. *See* Segun Odunga, *Achieving Good Governance in Post-Conflict Situations: The Dialectic Between Conflict and Good Governance* 41, 42-49 *in* AFRICAN CONFLICTS, *infra* note 23.

20. This assertion holds true for all rights. Generally, people tend to develop means of expressing their grievances. Where they are denied an organized avenue, such as the courts or other tribunals, they resort to extra-legal means. Essentially the gist of human rights has always revolved around maintaining a balance between the haves and the have-nots. Even the so-called civil and political rights, as a pseudonym for western liberalism, emerged in different forms. As Falk points out, they emerged "as a centrist compromise that offered enough to those currently disadvantaged to discourage recourse to revolution while providing essential stability for existing social and economic hierarchies." Falk, *supra* note 16, at 180. It is arguable that the denial of socio-economic rights in Africa has assumed revolutionary proportions akin to the pre-revolution denial of civil and political rights in Europe, thereby justifying similar empowerment.

are increasingly expected to meet the basic needs of their citizens, there is a growing tendency to demand results in militant terms, particularly in the absence of a proper forum to compel governmental action.[21] As Callisto Madavo, World Bank Vice President for the African region, observes, "Africa's wars are not driven.., by ethnic differences. As elsewhere, they reflect poverty, lack of jobs and education, rich natural resources that tempt and sustain rebels, and [ineffective and insensitive] political systems. ... "[22]

These are, for the most part, socio-economic and political conflicts among ethnically differentiated peoples. Although holistic protection of all rights will not prevent every conflict, it will defuse the majority of conflicts that are triggered or sustained **by** those who exploit abject socio-economic conditions.[23] Scholars have demonstrated a causal link between these conflicts, which can be seen as a people's violent resistance to their deplorable socio-economic conditions,[24] and the absence of perceived modes of effecting a peaceful change. On the psychological level, it has been observed that:

> [T]he gap between what a people expect as being just and fair and what they actually have can heighten a sense of unfair treatment and so develop a sense of deprivation.... Feelings of deprivation provide fertile grounds for mobilizing opposition and the affected group with the real potential for collective violence and social instability. Economic, social and political institutions that are perceived to have failed to address the conditions producing deprivation become victims of vicious campaigns that can lead to [violence].... [T]he fear

21. *See* Richard Falk, *Responding to Severe Violations, in* ENHANCING GLOBAL HUMAN RIGHTS 205, 226 (Jorge I. Dominguez et al. eds., 1979).
22. *See* Callisto Madavo, Editorial, *Stand Back and Take a More Positive Look at Africa,* INT'L HERALD TRIB. (Paris), June 6, 2000.
23. *See* Adebayo Adedeji, *Comprehending African Conflicts, in* COMPREHENDING AND MASTERING AFRICAN CONFLICTS: THE SEARCH FOR SUSTAINABLE PEACE & GOOD GOVERNANCE 10-12 (Adebayo Adedeji ed., 1999) [hereinafter AFRICAN CONFLICTS]; *see generally Report of the Secretary-General on the Causes of Conflict and Promotion of Durable Peace and Sustainable Development in Africa, reprinted in* 10 AFR. J. INT'L & COMP. L. 549, 549-53 (1998) (highlighting causes of conflicts in Africa).
24. See Will H. Moore et al., Land Reform, Political Violence and Economic Inequality-Political Conflict Nexus: A Longitudinal Analysis, 21 INT'L INTERACTIONS 335 (1996); Maro Ellina & Will H. Moore, Discrimination and Political Violence: A Cross-National Study with Two Time Periods, 43 W. POL. Q. 267, 268-71 (1990).

> of unemployment and the strain of reduced economic security in people's private lives can create tremendous anxiety and agitation. Psychologically, reactions to unemployment, especially when it is rising, and its attendant strain of reduced economic security may create fear, frustration and aggression.... Conceivably, the fear of social instability may increase the potential for violence.[25]

This relationship between deprivation and conflict underscores the fundamental link between protection of human rights and stability. The intimate relation between stability and human rights, in turn, reinforces the necessity of guaranteeing the enforcement of all human rights without exception.[26] Since the different fights are interconnected and operate in support of each other, it logically follows that the full realization of one set remains dependent on the realization of the other.[27] In a state of instability resulting from the denial of basic ESCR, it becomes difficult, if not impossible, to realize civil and political fights, and *vice versa*.[28]

Apart from the instability it causes, the non-realization of ESCR creates insurmountable obstacles to the enjoyment of civil and

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25. Al-Hassan Conteh et al., *Liberia, in* AFRICAN CONFLICTS, *supra* note 23, at 118-19.

26. The link between neglect of ESCR and instability is further underscored by the U.N. Secretary-General's eloquent testimony to the effect that unfulfilled basic needs constitute "the deepest causes of conflict." *Report of the Secretary-General on the Work of the Organization, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping,* U.N. GAOR, at 4, U.N. Doc. A/47/277/S/24111 (1992), *available at* http://www.un.org/Docs/SG/agpeace.html (last visited Feb. 2, 2002).

27. *See* Pierre De Vos, *Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution,* 13 S. AFR. **J.** HUM. RTS. 67, 71 (1997). De Vos further elucidates that "[s]tarving people may find it difficult to exercise their freedom of speech while a restriction of freedom of speech may make it difficult for individuals to enforce their right of access to housing." *Id.*

28. See Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development, at para. 5, U.N. Doc.A/CONF.166/9 **(1995),** available at gopher://gopher.undp.org:70/OO/unconfs/wssd/summit/off/a-9.en (last visited Feb. 2, 2002) ("[S]ocial development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms"); see also Wesley T. Milner et al., Security Rights, Subsistence Rights, and Liberties: A Theoretical Survey of the Empirical Landscape, 21 HUM. RTs. Q. 403, 413 (1999) (underscoring the inextricable link between abuses of personal integrity inherent in not being free from wants and violations of political liberties).

political rights. People can only be free from abuse and exploitation when they have what it takes to assert their rights and free themselves from exploitative rule. Because the majority of Africans are illiterate and poor, they lack the requisite knowledge and means to assert their rights, let alone enjoy them. As U. **0.** Umozurike observes:

> A great impediment to the attainment of civil and political rights is constituted by illiteracy, ignorance and poverty. To the many rural dwellers in any African state, and indeed to the urban poor, the lack of awareness or means make it impossible for them to assert their rights. They are very much at the mercy of their rulers.[29]

Thus, even a society interested in protecting only civil and political rights should give equal priority to ESCR as a practical means to achieving the former.[30] An absence of the latter commitment deepens a collective feeling of injustice. The majority, comprised of the more vulnerable members of society, cannot but feel that it has been denied an accepted forum for the recognition and redress of injustices.[31] Moreover, the nonenforcement of ESCR ridicules the so-called autonomy of the individual, a concept that is the linchpin of civil and political rights. Adequate socioeconomic conditions must exist as a precondition to personal autonomy.[32] As Joseph Raz illustrates:

> A person whose every major decision was coerced, extracted from him by threats to his life or that of children, has not led

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29. U.O. UMOZURIKE, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS 41 (1997).

30. David Selby argues that "human rights do not stop at counting political prisoners any more than they stop at counting the unemployed. Human rights are about human needs-needs that extend from proper nutrition, clothing, shelter, health care and education to participating in decisions that frame our lives." R. R. Akankwasa, *Human Rights Education and the Quest for Development: The Case of Ugandan Schools,* 5 E. AFR. J. PEACE & HUM. RTS. 105, 108 (1999) (quoting DAVID SELBY, HUMAN RIGHTS 77 (1987)).

31. The discovery of injustice as such depends upon, and is aggravated by, the feeling that one has rights that are not being respected. *See* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field,* 38 HASTINGS L.J. 805, 833 (1988). The feeling of injustice is heightened when those who are making excuses of lack of resources for non-recognition of the people's rights are unabashedly flaunting the wealth amassed from their concerted fleecing of the people.

32. See Daniel Warner, An Ethics of Human Rights: Two Interrelated Misunderstandings, 24 DENY. J. INT'L L. & POL'Y 395, 411 (1996).

> an autonomous life. Similar considerations apply to a person who has spent the whole of his life fighting starvation and disease, and has no opportunity to accomplish anything other than to stay alive...[33]

According to Raz, autonomy "affects wide-ranging aspects of social practices and institutions .... Almost all major social decisions and many of the considerations both for and against each one of them (whether civil and political rights or ESCR) bear on the possibility of personal autonomy, either instrumentally or inherently."[34]

African states have not failed to recognize the dangers of a selective - as opposed to holistic - recognition of human dignity. The African Charter remains a testament to the collective recognition of the indivisibility of human rights and dignity. As parties to the Charter, African states apparently appreciate the necessity of a holistic approach to enforcement. While this must be pursued at the international and regional levels **-as** the African Charter seeks to do- the *locus* of active enforcement must be the domestic arena where the mechanisms of enforcement will be within easy reach of aggrieved citizens and thus more widely utilized.[35] Moreover, international protection or mechanisms are designed to complement the domestic protection of human rights.[36] As Theo van Boven persuasively argues, international procedures "can never be considered as substitutes for national mechanisms and national measures with the aim to give effect to human rights standards. Human rights have to be implemented first and foremost at national levels."[37]

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33. Joseph Raz, *Rights-Based Moralities, in* THEORIES OF RIGHTS 182, 192 (Jeremy Waldron ed., 1984).
34. Id. at 193.
35. *See* Roman Wieruszewski, *National Implementation of Human Rights, in* HUMAN RIGHTS IN A CHANGING EAST-WEST PERSPECTIVE 264, 279-84, (Allan Rosas & Jan Helgesen eds., 1990) (discussing the importance of judicial remedy for the national implementation of human rights).
36. *See* Allan Rosas & Martin Schenin, *Implementation, Mechanisms and Remedies, in* ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 355, 379 (Asbjorn Eide et al. eds., 1995).
37. Theo van Boven, *The International System of Human Rights: An Overview, in* MANUAL ON HUMAN RIGHTS REPORTING, at 10, U.N. Doc. HR/PUB/91/1, U.N. Sales No. GV.97.0.16 (1997); *see also* Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment,* 14 HUM. RTs. Q. 43, 57-58 (1992) (arguing that enforcement of human rights depends on state action).

Anything short of a holistic enforcement of human rights at the domestic level belies the African Charter's recognition that "the satisfaction of economic, social and cultural rights is *a guarantee* for the enjoyment of civil and political rights."[38]

Bifurcated enforcement is not in keeping with the virtues of Africa's historical tradition and the values of African civilization, which are among the founding philosophies of the Charter.[39] African states subscribed to a Charter that acknowledges the importance traditionally attached to these rights, and, therefore, ought to do more than pay them lip service.

Rather than the existing approach to enforcement, which marginalizes ESCR, action should be taken across the board to ensure a minimum level of enjoyment of all human rights. As argued in the next section, the excuse of impossibility of performance due to underdevelopment, often put forward by African leaders and some scholars,[40] does not represent the whole truth. It is too often a rationalization for a lack of political will and the continued elevation of luxury over necessity.

II. RIGHTS AND THE ARGUMENT OF DEVELOPMENT

The point is often made that development[41] of Africa, and indeed of all Third World states, is a necessary precondition for the

38. *See* Aft. Charter, *supra* note 2, at pmbl., 8 (emphasis added).
39. *See id.* 5.
40. *See, e.g.,* Umozurike, *supra* note 29, at 111.
41. The term "development" (a concept with varying and diverse definitions, long considered synonymous, and used interchangeably, with the terms "growth" and "economic development") is "often equated with economic development, usually measured as economic growth, improved balance of payment, and other macroeconomic variables." Sigrun I. Skogly, *Structural Adjustment and Development: Human Rights - An Agenda for Change,* 15 HUM. RTS. Q. 751, 752-53 (1993); *see also* Theo Van Boven, *Human Rights and Development: The U.N. Experience, in* HUMAN RIGHTS AND DEVELOPMENT: INTERNATIONAL VIEWS 121, 125 (David P. Forsythe ed., 1989). Consequently, a country's gross national product (GNP) per capita is usually, if erroneously, used to determine its level of development, and it is generally believed that economic development guarantees automatic improvement in other sectors and segments of society. Yet, as Milner, Poe & Leblang convincingly argued, the use of GDP or GNP variables to measure economic development does not "take into account economic inequality among citizens" and "can sometimes mask the true underlying extent of development" since "a country could have a high overall per capita GDP but also have a majority of the population living in poverty." Milner et al., *supra* note 28, at 411; *see also*

enforcement and enjoyment of ESCR.[42] It has been contended that African states cannot reasonably be expected to fulfill their ESCR obligations under the African Charter given their socio-economic problems, which arise from underdevelopment and "existing patterns of international trade."[43] Scholars have also asserted that the poverty of African states[44] justifies treating ESCR as principles of state policy[45] (as they are in the constitutions of Nigeria,

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Danilo Turk, *Development and Human Rights, in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 167, 167-73 (Louis Henkin & John L. Hargrove eds., 1994) (expressing a view similar to Milner's). A more appropriate and acceptable definition of development is one that transcends purely economic factors, as in the U.N. Declaration of the Right to Development, which defines development in the second paragraph of its preamble as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom." *United Nations Declaration on the Right to Development, reprinted in* UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS vol. 1 (2d part), at 548, U.N. Doc. ST/HR/1/Rev.5 (1994). On the interface of human rights and development, see Brigitte Hamm, *A Human Rights Approach to Development,* 23 HUM. RTS. Q. 1005, 1010 (2001); N.J. Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium,* 22 HUM. RTS. Q. 753, 755-57 (2000); and Theo Van Boven, *supra,* at 126-27.

42. *See* Baehr, *supra* note 5, at 43. Sometimes this point assumes an ambivalent dimension with repressive regimes arguing that they cannot allow basic civil and political rights in their states as long as the population is underfed and economically underdeveloped. The implication is that the satisfaction of civil and political rights is also dependent on economic development.

43. *See* D'Sa, *supra* note 7, at 114 (internal citations omitted).

44. Minasse Haile, Human Rights in Africa: Observations on the Implication of Economic Priority, 19 VAND. J. TRANSNAT'L L. 299, 300-01 (1986); see also Richard Gittleman, The African Charter on Human and Peoples' Rights: A Legal Analysis, 22 VA. J. INT'L L. 667, 687 (1982) (asserting that the realities of African economic development render ESCR merely "promotional and not protective."); U.O. Umozurike, The Significance of the African Charter on Human and Peoples' Rights, in PERSPECTIVES ON HUMAN RIGHTS 44, 48 (Awa U. Kalu & Yemi Osinbajo eds., 1992) (claiming that African states cannot guarantee a right to work).

45. UMOZURIKE, *supra* note 29, at 110. Indeed there are a number of studies demonstrating that economic development has a strong, positive impact on the fulfillment of basic human needs. Han Park has revealed that economic development is the strongest predictor of improved basic needs achievement. Han S. Park, *Correlates of Human Rights: Global Tendencies,* 9 HUM. RTS. Q. 405, 410-13 (1987); *see also* Bruce E. Moon & William J. Dixon, *Politics, the State, and Basic Human Needs: A Cross National Study,* 29 AMER. J. POL. SCI. 661, 689-90 (1985). While economic development may be the strongest predictor of the ability to fulfill

Cameroon, Lesotho, Liberia, Malawi, Namibia, Sierra Leone, and Tanzania).[46]

African states are, no doubt, among the most impoverished states of the world. This fact makes the argument that they are too poor to realize ESCR very compelling. However, these oft-invoked arguments usually proceed from two interrelated yet erroneous and misleading suppositions. First, they presuppose that ESCR are resource-intensive and require the direct intervention of governments, whereas civil and political rights do not involve government expenditure but merely entail the government's forbearance from interfering with the rights of the people.[47] Second, they presuppose that African states'

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basic needs, it does not follow that basic needs are actually met, as events in the industrialized countries have shown. *See* Noam Chomsky, *supra* note 3, at 33-40.

46. *See* CAMEROON CONST. (1972-1996); LESOTHO CONST. (1993); LIBER. CONST. (1984); MALAWI CONST. (1994); NAMIB. CONST. (1990); NIG. CONST. (Constitution of the Federal Republic of Nigeria 1999); SIERRA LEONE CONST. (1991). The Constitutions of Ethiopia (1996), Ghana (1979), Somalia (1979), and Uganda (1995) also contain declaratory socio-economic rights, while the constitutions of Comoros (1992), Cote D'Ivoire (1990), Djibouti (1992), The Gambia (1987), Mauritania (1991), Togo (1992), Zambia (1991), and Zimbabwe (1980-2000), do not contain social rights provisions at all. I am grateful to Solomon Ukhuegbe for calling my attention to and supplying the foregoing information.

47. *See* Marc Bossuyt, *La distinction entre les droits civils et politiques et les droits economiques, sociaux et cuturels,* 8 HUM. RIS. J. 783 (1975) (arguing that civil and political rights require noninterference on the part of the state (in the sense of being cost-free) while ESCR require active intervention by the state (in the sense of being cost-intensive)); E.W. Vierdag, *The Nature of Rights Granted by the International Covenant on Economic, Social and Cultural Rights,* 9 NETH. Y.B. INT'L L. 69, 103 (1978) (asserting that because ESCR are resource-intensive, their implementation should properly be a political matter and not a matter of law or rights); *see also* D. M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles,* 8 S. AFR. J. HUM. RTS. 475, 478 (1992) (arguing that a social or economic right imposes a duty upon the state to provide certain resources, unlike civil and political rights that require a mere 'non-interference' from the state). These sources suffer from inherent non-recognition of the true cost implications of protecting civil and political rights. In *Re: Certification of the Constitution of the Republic of South Africa, 1996,* 1996 (10) BCLR 1253 (CC) at 1289, I E-F, the South African Constitutional Court, in response to the claim that the enforcement of socio-economic (as opposed to civil and political) rights must be dependent on the capacity of a state to afford the cost, stated:

It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court

underdevelopment is enough to justify non-enforcement of ESCR but not civil and political rights.

The African Charter does not impose separate or more onerous obligations on States Parties with respect to ESCR.[48] The Charter's provisions on these rights are modest. The right to an education, for instance, does not impose a more resource-intensive obligation than the right to a fair trial. Should a state then be justified in not providing necessary medical or educational facilities, but not in failing to provide the necessary machinery for law enforcement, fair trials, or dignified prison conditions?[49]

If the reason for marginalizing the enforcement of ESCR is a lack of development, how does the state intend to develop if the overwhelming majority of its citizens remains illiterate? A report to U.N.E.S.C.O. underscores that "[n]ational development hinges on the ability of working populations to handle complex technologies and to demonstrate inventiveness and adaptability, qualities that depend

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may require the provision of legal aid, or the extension of state benefits to a class of people who were formerly not beneficiaries of such benefits.

Id. For a more detailed rebuttal of the resource intensive argument, see Shedrack C. Agbakwa, Retrieving the Rejected Stone: Rethinking the Marginalization of Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights 45-56 (2000) (unpublished LL.M. Thesis, Dalhousie Law School) (on file with author).

48. *See* Carlson Anyangwe, *Obligations of States Parties to the African Charter on Human and Peoples' Rights,* 10 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ 625, 642 (1998).

49. One scholar argues forcefully that:

If judges decide that no one may be imprisoned without fair trial, and therefore that an order of habeas corpus must issue to secure the release of a person detained without trial, the effect is to burden the state with massive costs of a criminal justice system. The effect is to require the state to pay the salaries of judges, prosecutors and their administrative staff, to build court houses, and much more.... It is true, of course, that judicial protection of personal liberty does not expressly compel the state to commit resources. The state could instead refrain from prosecuting; but that would put it in breach of its duty to maintain peaceful order, and in a prospering society this option is in any event not a real possibility. Judicial protection of personal liberty consequently makes considerable expenditure inevitable.

Etienne Mureinik, *Beyond A Charter of Luxuries: Economic Rights in the Constitution,* 8 S. *AFR. J.* HUM. RTs. 464, 466 (1992); *see also* J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?,* 6 BUFF. HUM. RTS. L. REV. 39, 57 (2000) (arguing that "certain obligations with respect to the realization of the rights such as education, health, and shelter cannot simply be evaded by the state, irrespective of the question of resources or financial ability").

to a great extent on the level of initial education."[50] Accordingly, the realization of the right to education and other ESCR are, as Hercules Booysen observes, "a prerequisite for the creation of wealth"[51] and, as such, a necessary precondition of development.[52]

Even if under-development is such a potent factor, it merely affects the extent to which these rights can be realized and does not justify outright non-enforcement. Under-development does not justify partial enforcement any more than poverty justifies parents consistently feeding one child to the neglect of their other children. In any case, it is well-known that, but for the poor administration and kleptomaniacal tendencies of their rulers, many African states might have attained a level where basic survival needs are met.[53] As it is, most African rulers are richer than their states[54] and continue to squander available resources. Thus, "it is not [necessarily] scarcity (of resources) which is the first problem, but maldistribution"[55] or

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50. *See* REPORT TO U.N.E.S.C.O. OF THE INTERNATIONAL COMMISSION ON EDUCATION FOR THE TWENTY-FIRST CENTURY: THE TREASURE WITHIN (Odile Jacob ed., 1996), *quoted in* Mustapha Mehedi, *The Realization of Economic, Social and Cultural Rights: The Realization of the Right to Education, Including Education in Human Rights,* Working Paper Presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 50th Sess., U.N. Doc. E/C.N.4/Sub.2/1998/10 (1998), *available at* http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrameId7ebdbb5988e7cl8O2566420051e693?Opendocument (last visited Feb. 2, 2002); *see also* Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?,* 4 BUFF. HUM. RTS. L. REV. 25, 37 (1998).

51. Hercules Booysen, The Dilemma of International Economic Human Rights: Their Improvement Through an Integrated System Approach, 23 S. AFR. Y.B. INT'L L. 93, 109 (1998); see also Hans-Otto Sano, Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development, 22 HUM. RTS. Q. 734, 749 (2000) (positing that ESCR are most relevant to the target groups of development); Van Boven, supra note 41, at 127 (noting that "human rights is an ingredient of the development process").

52. This much is implied in art. 1(1) of the U.N. General Assembly *Declaration on the Right to Development, supra* note 41. *See* Skogly, *supra* note 41, at 753-54.

53. Basic survival needs in this context "refer[] to the minimum requirements for sustaining physical life, that is, health, food, housing, clothing, work, literacy." Richard Falk, *supra* note 21, at 225; *see also* Frances Stewart, *Basic Needs Strategies, Human Rights, and the Right to Development,* 11 HUM. RTS. Q. 347, 351 (1989).

54. One scholar writes that the late Mobutu Sese Sekou wa Zabanga of Zaire (now Democratic Republic of Congo) "is believed to have amassed a fortune far in excess of his country's national debt, bankrupting what must be one of the richest nations on the continent." Onyango, *supra* note 6, at 3. Zaire (DRC) has a host of mineral riches, including extensive reserves of gold, diamond, copper, cobalt, and zinc.

55. Tucker, *supra* note 18, at 162, n.226.

inequitable "allocation of resources... [and] provision of government controlled benefits."[56] As Richard Falk argues, "[available] research strongly suggests that most Third World countries possess the resources to eliminate poverty and satisfy basic human needs if their policy makers were so inclined."[57]

Although Richard Falk's point may be overstated (even rich Western countries have not eliminated poverty in spite of their huge resources), its import is instructive. The commonly asserted underdevelopment of African states is not "something akin to an original state of nature."[58] Conditions in many African states today arise not out of a lack of wherewithal to satisfy the socio-economic rights of the people to a minimum of human dignity. Rather, they are partly the direct consequence of an active process of impoverishment[59] and de-development. In some cases, international loans and grants purportedly secured to provide essential facilities have ended up lining private pockets, securing safe nests for the advantaged class or being spent to protect that class from the ire of the dispossessed, all in the name of development and security.[60] It is unconscionable for those who participate in the squandering of developmental opportunities

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56. Minasse Haile, *Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality,* 24 VA. J. INT'L L. 575, 578 (1984). There is a widespread tendency among many governments particularly in developing countries not to make the best available use of resources for improving the general living conditions of their people. *See* Yoko Yokota, *Reflections on the Future of Economic, Social and Cultural Rights, in* THE FUTURE OF INTERNATIONAL HUMAN RIGHTs 201, 215 (Bums H. Weston & Stephen P. Marks eds., 1999) ("Instead, they often misallocate their scarce resources for unnecessarily large military expenditure and personal luxury, and waste them also by corrupt practices.").

57. *See* Falk, *supra* note 21, at 225; *see also* Graciela Chichilnisky, *Development Patterns and the International Order,* 31 J. INT'L AFF. 275 (1977); U.N.D.P., HUMAN DEVELOPMENT REPORT 1990, at 4 (1990) (stating that "[d]eveloping countries are not too poor to pay for human development and take care of economic growth," and listing some factors –including disoriented national priorities, debt repayments, very high military spending, inefficient parastatals, and unnecessary government controls-inhibiting the realization of human development in developing countries).

58. George Kent, *Globalization and Food Security in Africa, at* http://www2.hawaii.edu/-kent/globaFeb99.html (last visited Feb. 2, 2002).

59. *Id.*

60. For these reasons, Skogly, *supra* note 41, at 753, relying on U.N.D.P., *supra* note 57, at 128-60, writes, "It is now widely recognized that assistance towards economic development does not necessarily improve income distribution, education, or health for the majority of people in Africa."

to point to the conditions they create as grounds for marginalizing enforcement of ESCR.

If an enforceable system of ESCR had been in place, it might have provided an opportunity to challenge the government's priorities and to hold it accountable for the expenditure of international loans. The Nigerian government recently awarded a $350 million contract (with another $6 million paid to foreign consultants) for an Olympic-size stadium in Abuja.[61] During the same period, resident doctors and university teachers across the country were on a prolonged strike over irregular or non-payment of salaries and allowances.[62] The government's priorities seem highly questionable for a country with more than five world-class stadiums and an infrastructure (water supplies, electricity, health facilities and schools) in shambles.[63] Under a regime of enforceable ESCR, the money for the stadium project might have been directed to health care, education or the acute housing shortage in the capital city, where it would have made a significant difference.

Under a robust regime of ESCR, accountability for such expenditures would likely improve policies and the quality of governance. As Etienne Mureinik argues:

> a decision maker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible

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61. *See* Samuel Udeala, *NLC Faults FG over N38bn Abuja Stadium Contract,* VANGUARD (Lagos), July 19, 2001, *at* http://www.vanguardngr.com/news/articles/2001/July/19072001/b119O7O1.htm (last visited Feb. 2, 2002).

62. *See* Rotimi Ajayi, *FG Moves To End Doctors' Strike,* VANGUARD (Lagos), June 14, 2001, *at* http://www.vanguardngr.com/news/articles/2001/june/14/nationallO614111651.htm (last visited Feb. 2, 2002).

63. *See* Karl Maier, *Nigeria: Hope After 40 Years,* B.B.C. NEWS ONLINE, Oct. **1,** 2000, *at* http://news.bbc.co.uk/hi/english/world/africa/newsid- 949000/949021.stm (last visited Feb. 2, 2002); *see also* U.N. Comm. on ESCR, *Concluding Observations on the Report of Nigeria,* at para. 28, U.N. Doc. E/C.12/1/Add.23 (1998) (noting with concern "that gross under-funding and inadequate management of health services led during the last decade to rapid deterioration of health infrastructures in hospitals.").

> justification for the programme that it had chosen... then the programme would have to be struck down.[64]

In this sense, the lack of an enforceable regime of ESCR may itself impede development. **A** government that is not required to justify its socio-economic policies and priorities is not likely to develop a consistent policy that encourages wise investments and conserves resources necessary for sustainable development.

One cannot deny the reality of Africa's grim economic situation, which remains a significant constraint on the financial abilities of African states. Although blame is often placed on this economic situation, the lack of political will and the corruption of the ruling elite have also played a large role in preventing an equal emphasis on enforcement of ESCR as of civil and political rights. Where African states have taken steps to enforce ESCR, they have not been negatively affected **by** it. The introduction of a regime of judicially enforceable ESCR in South Africa[65] has not paralyzed the state developmentally.[66] Yet, South Africa is not endowed with vastly greater resources than some African states with non-enforceable ESCR.

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64. Mureinik, *supra* note 49, at 471-72. According to Mureinik, the court might intervene to quash legislation that created fourteen departments of health if it found multiple bureaucracies to be a senseless squandering of precious resources. The court might also intervene "if the annual Budget appropriated funds to build a replica of St. Peter's, [as Houphet Boigny of Cote d'Ivoire did], or perhaps a nuclear submarine before the rights of education promised by the constitution had been delivered." *Id.* at 472.

65. The Bill of Rights of the South African Constitution provides for justiciable ESCR, including rights to housing, health care, food, water, social security, education, a safe environment, and the right to form, join, and maintain cultural, religious and linguistic associations, as well as children's rights to basic nutrition, shelter, health care and social services. S. AFR. CONST. (1996), §§ 24, 26-29, 31.

66. The point here is not that the existence of justiciable ESCR, by itself, necessarily guarantees their automatic enjoyment or that the courts will deliver these rights in every case. As in *Soobramoney v. Minister of Health, KwaZulu-Natal 1998* (1) SALR 765 (CC), the courts may still be reluctant to grant every prayer. In *Soobramoney,* the Court declined to compel the provision of dialysis treatment for a sick patient because of the state's insufficient resources. Nevertheless, the availability of judicial review (or other independent review) can be a significant weapon in the hands of the oppressed and may provide occasions for appropriate judicial intervention. See, for example, the landmark *Grootboom v. Oostenberg Municipality* 2000 (3) BCLR 277 (SA) and its analysis by Craig Scott & Philip Alston in *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on* Soobramoney's *Legacy and* Grootboom's *Promise,* 16 S. AFR. J. HUM. RTS. 206 (2000).

Enforcing ESCR can lead to social and political stability. Two recent South African decisions on ESCR[67] may have averted a breakdown in law and order that could have led to land invasions (occupations) like those in Zimbabwe-a result that would have threatened investment and development.

Under-development has not affected "[s]ervices which are of concern to the richer and more powerful sections of the society--such **as...** prestige development projects,"[68] nor induced cuts in military spending.[69] The fact that governments pour money into such projects makes it clear that underdevelopment is a smokescreen for a lack of political will to enforce ESCR.

Rather than blaming the existing lack of development for non-enforcement of ESCR, responsible leaders should address the other, more dominant obstacles to the realization of ESCR in Africa. Some of these obstacles also prevent future development and underlie the underdevelopment critique. The next section discusses some of these factors.

III. IMPEDIMENTS TO THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The obstacles to the realization and enforcement of ESCR under the African Charter include a combination of internal, textual factors and external, contextual factors. The internal factors stem from the normative flaws of the Charter's provisions on ESCR. The external factors include the host of political, economic and historical forces that prevent States Parties from fulfilling their ESCR obligations under the Charter. This article does not attempt to address comprehensively all the impediments to enforcement of ESCR in Africa. Many important factors-such as the effects of the Cold War,[70]

67. *See* South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC); Minister of Public Works v. Kyalami Ridge Environmental Association, 2001 (7) BCLR 652 (CC).
68. *See* U.N.I.C.E.F., THE STATE OF THE WORLD'S CHILDREN 16 (1989); *see also* Akankwasa, *supra* note 30, at 113 (describing the Ugandan government's eviction of "peasants" from their land to make way for a prestigious national park project).
69. *See* U.N.D.P., *supra* note 57, at 4.
70. For a brief insight into the atrocities of the Cold War, see Adebayo Adedei, *Comprehending African Conflicts, supra* note 23, at 9-10.

slavery and colonialism[71] - are mentioned either briefly or not at all in favor of focusing on more recent, less developed factors.

A. Content and Scope of African Charter Provisions on Economic, Social and Cultural Rights

The normative inadequacies of the African Charter, particularly the provisions on ESCR, are well-known.[72]

One serious obstacle to the enforcement of the Charter's provisions on ESCR is their lack of conceptual clarity. The Charter's failure to define ESCR adequately is not unique among international instruments. Nonetheless, the vagueness of ESCR makes enforcement quite difficult.[73]

The Charter's provision on the right to health[74] is typical. It entitles individuals to enjoy "the best attainable state of physical and mental health" without prescribing the standard of health[75] or defining what is meant by "the best attainable state." Given this

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71. The role of slavery and colonialism in the economic exploitation and cultural domination of Africa has been sufficiently set out elsewhere. *See generally* WALTER RODNEY, How EUROPE UNDERDEVELOPED AFRICA (1981); WALTER RODNEY, WEST AFRICA AND THE ATLANTIC SLAVE TRADE (1967); Adam Hochschild, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998); PHILIP CURTIN, DEATH BY MIGRATION: EUROPE'S ENCOUNTER WITH THE TROPICAL WORLD IN THE 19TH CENTURY (1989).

72. See generally Makau Mutua, The African Human Rights Court: A Two Legged Stool?, 21 HUM. RMS. Q. 342 (1999); Makau wa Mutua, The African Human Rights System in a Comparative Perspective, 3 REV. AFR. COMM. HUM. & PEOPLES' RTs. 5 (1993); Onyango, supra note 6, at 51; D'Sa, supra note 7, at 113-15; George W. Mugwanya, Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System, 10 IND. INT'L & COMP. L. REV. 35 (1999); Wolfgang Benedek, The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective, 11 NETH. Q. HUM. RTS. 25 (1993).

73. *See* BRIGIT C. A. TOEBES, THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW 6 (1999); Yokota, *supra* note 56, at 205-06; Brigit Toebes, *Towards an Improved Understanding of the International Human Right to Health,* 21 HUM. RTS. Q. 661, 661-62 (1999); Mario Gomez, *Social Economic Rights and Human Rights Commission,* 17 HUM. RTS. Q. 155, 161 (1995).

74. "(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health; (2) State Parties to the present Charter shall take necessary measures to protect the health of their people and ensure that they receive medical attention when they are sick." Ar. Charter, *supra* note 2, art. 16.

75. Umozurike, *supra* note 44, at 48.

ambiguity, the Charter's right to health depends on how a state construes it. A reasonable interpretation is that it imposes an unlimited obligation to provide free medical services, which leads to the frustrating conclusion that "[e]ven if governments employ the services of modern doctors as well as traditional healers, it seems quite impossible for them to carry out the obligation."[76] The provision's ambiguity allows states to avoid this interpretation. For both the individual and the state, the provision provides little guidance as to the state's obligation and the individual's appropriate expectations. As with its correlate in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Charter's right to health needs to be better defined.[77]

B. Lack of Effective Enforcement and Promotion

The absence of effective promotion and enforcement at the agency level also impedes the realization of ESCR under the Charter. The vagueness problem discussed in the section above might have been alleviated through an African agency's better enforcement or promotion of ESCR. However, this has not happened until recently. After a long period during which the African Commission did not bother with ESCR[78], it appears to be gradually changing its

76. *Id.*

77. *See* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A(XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). For an attempt to clarify the scope and implications of the right to health under the ICESCR, see Toebes, *supra* note 73. Gomez, *supra* note 73, at 161, argues that "[giving clarity and content to these standards [or rights] is one of the major tasks awaiting the human rights movement." Similar ambiguities surround other ESCR provisions of the Charter. The right to education under article 17(1) is ambiguous. It provides that, "Every individual shall have the right to education." The right to work under article 15 entitles individuals to "work under equitable and satisfactory conditions" and to "receive equal pay for equal work." The ambiguity allows States Parties to deny any obligation to provide jobs, to initiate measures to create jobs, or to recognize any rights of the unemployed.

78. In 1988, shortly after the Commission came into being, former Chairman Umozurike disclosed that the Commission had decided to concentrate on civil and political rights. He claimed that the Commission would be overwhelmed with cases if it attempted to make ESCR an immediate priority. *See* U. Oji Umozurike, *The Protection of Human Rights Under the African Charter on Human and Peoples' Rights*, 1 AFR. J. INT'L L. 62, 81 (1988).

attitude.[79] Yet, as Makau Mutua notes, the Commission's decisions and pronouncements have been merely "formulaic": they "do not reference jurisprudence from national and international tribunals, nor do they fire the imagination."[80] Chidi Odinkalu asserts that the Commission has been successfully addressing the deficiencies of the Charter "through its practice, evolving procedures, and jurisprudence."[81] When it comes to ESCR provisions, it is difficult to accept this assertion without some skepticism. The Commission has yet to address the Charter's ESCR-related normative deficiencies in any significant way. The Commission cannot be wholly dismissed "as a worthless institution."[82] It certainly is not. The Commission has commendably earned itself a place in the international human rights firmament. Yet, as far as ESCR is concerned, the Commission, although not entirely a sham, is still much less than a savior.

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79. The Commission has dealt with ESCR in several recent communications. *See* Pagnoulle (on behalf of Mazou) v. Cameroon, Communication No. 39/90 (1997), *reported in* 6 HUM. RTS. REP. 819 (1999) (holding that the failure of Cameroon to reinstate Mazou, a magistrate, who had been unlawfully detained and removed from his former position, constituted a violation of the right to work under article 15 of the Charter); Media Rights Agenda v. Nigeria, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), *reported in* 7 INVL HUM. RTS. REP. 265 (2000) (consolidating various cases against the Nigerian government and holding that denying a detainee access to doctors while his health deteriorates violates the right to health), *available at* http://wwwl.umn.edu/humanrts/africa/12thannex5.htm (last visited Feb. 2, 2002); International Pen v. Nigeria, Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998), *reported in* 7 INT'L HUM. RTS. REP. 274 (2000) (consolidating several cases brought before the Commission concerning Ken Saro-Wiwa and co-defendants and holding that the Charter requires State Parties to provide detainees access to medical care), *available at* http://wwwl.umn.edu/humanrts/africa/12thannex5.html (last visited Feb. 2, 2002); *see also* World Organisation Against Torture v. Zaire, Communication Nos. 25/89, 47/90, 56/91, 100/93 (1996), *reported in* 4 HUM. RTS. REP. 89 (1997) (consolidating cases that, "taken together, showed evidence of serious or massive violations of human rights in Zaire" and holding the Zairean government's failure to ensure its citizens a minimum standard of health care constituted a violation of article 16 of the Charter), *available at* http://www.up.ac.za/chr/ahrdb/acomn decisions.htm#25/89 (last visited Feb. 2, 2002).

80. Mutua, African Human Rights Court, supra note 72, at 348.

81. Chidi Odinkalu, The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment, 8 TRANSNAT'L L. & CONTEMP. PROB. 359, 398 (1998). For a similar view, see Gino Naldi, Reparations in the Practice of the African Commission on Human and Peoples' Rights, 14 LEIDEN J. INT'L L. 681, 693 (2001).

82. *Id.* at 402.

Both in promotion and enforcement, the Commission has concentrated its efforts mainly on civil and political rights to the detriment of ESCR. In fairness to the Commission, it can only entertain cases brought before it. The Commission does not have a mandate to be a knight errant in shining armor initiating cases on behalf of helpless victims. However, one of its primary mandates, as stipulated in Article 45(1)(a) of the Charter, is to "undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights **...** "[83] The dearth of cases on ESCR is due in part to the Commission's inadequate efforts to encourage such cases and to educate and sensitize people as to their rights. Given its broad mandate, the Commission has a responsibility to ensure respect and observance of provisions of the Charter, without exception. If the Commission excels in its broad promotional mandate, it will face a deluge of ESCR cases. It remains to be seen if the newly created African Court on Human Rights[84] will be more successful in promoting and protecting ESCR. In the absence of effective promotion, individuals are less likely to assert their rights, no matter how clearly they are expressed.

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83. Afr. Charter, *supra* note 2, art. 45(1).

84. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU/LEG/EXP/AFCHPR/PROT (Ill) *not yet in force, reprinted in* 6 INT'L HUM. RTS. REP. 891 (1999). For an analysis of the Protocol and the history of the creation of the Court, see Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never,* 3 YALE HUM. RTS. & DEV. L.J. 45 (2000), *available at* http://www.yale.edu/yhrdlj/; Mutua, *African Human Rights Court, supra* note 72; Ibrahim Ali Baldwi El-Sheik, *Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory Note,* 9 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMART 943 (1997); Gino J. Naldi & Konstantinos Magliveras, *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison,* 8 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPART 944 (1996). Only three states (Burkina Faso, Gambia and Senegal) have ratified the Protocol; eight more are needed to bring the Protocol into force. For the status of ratification, see http://wwwl.umn.edu/humanrts/instree/ratz2afchr.html (last visited Feb. 2, 2002).

C. Inept and Corrupt Leadership

It is a truism that the destiny of a people is tied to the quality of its leadership. Colonialism left Africa and Africans socio-economically battered. However, the ineptitude and corruption of certain past and present African leaders have worsened the socio-economic woes of the continent.[85] As George Kent argues, "[s]ome [African states] have had corrupt governments that exploited their own people as viciously as any outsiders have ever done."[86] Corruption is hardly unique to Africa, but some African states have elevated it to an art form worthy of its own national museum. Resources that should have been utilized to provide basic facilities have been filched and transferred into the private Western bank accounts of high-ranking African leaders and officials.[87] Less directly, corrupt leaders steal by rejecting policies that would better spur development and promote ESCR in favor of policies that bring greater profits their way through businesses, investments, or unscrupulous cohorts. The interests of the people are pursued only to the extent that they coincide with the selfish interests of those in power. Corruption leads to infringement of civil and political rights as well. Those emboldened enough to call for accountability and transparency in the conduct of public affairs are designated "security risks" or enemies of the "people" and become targets for incarceration or worse.[88]

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85. *See* Robert I. Rotberg, *Africa's Mess, Mugabe's Mayhem,* 79 FOREIGN AFF. 47 (2000).

86. Kent, *supra* note 58.

87. For instance, a former Nigerian military head of state, the late General Sani Abacha, is believed to have stashed away billions of dollars in foreign accounts. *See* Pres. Olusegun Obasanjo, How We Fared in the Last One Year, Broadcast Address on the One Year Anniversary of Civil Rule, May 29, 2000, VANGUARD (Lagos); Umozurike, *supra* note 29, at 48 (characterizing Abacha's corruption as "a high-ranking cause of underdevelopment, resulting in malnutrition, lack of healthcare and other deprivations."); *see also Afe* Babalola, *Legal and Judicial System and Corruption, in* AFRICA LEADERSHIP FORUM: CORRUPTION, DEMOCRACY AND HUMAN RIGHTS IN WEST AFRICA 93-94 (1994); Onyango, *supra* note 6, at 3 (noting how Mobutu's "corruption and vice directly impinged upon the people of Zaire's economic and social rights to adequate health care, sufficient food and appropriate shelter.").

88. *See* HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1996, at 7, 34-36 (1995) (documenting accounts of suppression of freedom of expression of government critics in Nigeria); AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1999, at 236-37 (1999) (describing the

African corruption could not thrive on its own. Corrupt rulers receive significant outside support. As the Igbos of Nigeria say, when a person is dancing alone at the center of the road, his drummers must be somewhere nearby in the bush. The Cold War era stands out as a period of extensive outside support for repressive regimes and the propping up of corrupt rulers throughout Africa. The effects of this pernicious ideological wrangling can still be felt in Mozambique, Eritrea, Angola, and the Democratic Republic of Congo (formerly Zaire), among others. Adebayo Adedeji calls Somalia and Ethiopia "two... unfortunate examples of the havoc of the Cold War."[89]

The Cold War also ensured the continued influx of external loans to many African rulers despite their known distinction in mismanagement. As the next section reveals, the servicing of these (sometimes spurious) debts continues to take a significant toll on the funding of public services such as health and education.[90]

D. Debt and Structural Adjustment

Many African states, like other developing countries, are overburdened with heavy debts. Debt burdens are major obstacles to meaningful economic development in those states and contribute to non-enforcement of ESCR.[91] According to the 1992 U.N.D.P. *Human Development Report,* from "1983-89, rich creditors received a staggering [$1242 billion [dollars] in net transfers on long term lending from indebted developing countries."[92] The greatest impact of this transfer, according to George Kent, "is in sub-Saharan Africa

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repression of freedom of expression in Liberia following criticisms of the government's handling of public affairs).

89. Adedeji, *supra* note 23, at 9-10. Adedeji argues that American support for Siad Barre's suppression of Somalians sowed the seed of the country's disintegration. The United States also scuttled several attempts to overthrow Mobutu Sese Sekou, who is believed to have amassed a fortune far in excess of his country's national debt. The Soviets' support allowed Mengistu Haile Mariam to decimate the Ethiopian people. *Id.*

90. *See* B.B.C. News Online, *Overdrawn: The Developing World's Debt Crisis,* April 28, 1999, *at* http://news.bbc.co.uk/hi/english/world/newsid_140000/140581.stm (last visited Feb. 2, 2002).

91. *See* Guissé, *supra* note 4, at para. 54.

92. U.N.D.P., HUMAN DEVELOPMENT REPORT 1992, at 45 (1992). The report also noted yearly debt-related net transfers of $50 billion from developing to industrial countries up to 1992.

where the debt load is approximately equal to the region's cumulative gross national product."[93]

This situation has led to debt crises in these states, necessitating the current call for alleviation or- renegotiation of their debts. Servicing these debts,[94] some of which are "merely a series of fictitious operations bringing no benefit to the populations concerned, which they are nevertheless called on to repay,"[95] greatly incapacitates the states involved. They also undermine the prospects of the affected states to provide even the most basic facilities needed to meet ESCR obligations. Debt servicing has had "especially negative impacts on the poor and their children, obliging them to do without food subsidies and health and other services, and often pressing them into exploitative working conditions."[96] This devastating impact is not mitigated by international development assistance, because, as George Kent notes,

> [t]he amount of money going from the [S]outh to the [N]orth for debt servicing greatly exceeds the current amounts of official development assistance going from the [N]orth to the [S]outh. Moreover, official development aid is likely to benefit the rich and the middle class rather than the poor . . . [since it] does not concentrate on the most needy either within countries or among countries.[97]

Under the dual burden of debt and evaporating aid, many African states were goaded into adopting the structural adjustment policies[98]

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93. Kent, *supra* note 58. In some cases, the loans are "misappropriated by those responsible for managing them, to be redeposited in the banks of the creditor countries or reinvested in companies in those same countries." Guissé, *supra* note 4, at para 57.

94. Nigeria currently spends $3.5 billion (more than 40 percent of its 2000 budget) annually to service its debt burden of about $33 billion. *See* Laolu Akande, *Ahead Visit, Clinton Begins Debt-Pardon Crusade for Nigeria,* THE GUARDIAN (Lagos), July 13, 2000.

95. Guissé, *supra* note 4, at para 57.

96. Kent, *supra* note 58.

97. *Id.; see also* Yemi Osinbajo & Olukonyisola Ajayi, *Human Rights and Economic Development in Developing Countries,* 28 INT'L LAW. 727, 731 (1994). Strikingly, it has been reported that the "I.M.F. took £390m more out of Africa than it put in, in 1997" and that for every £1 given in aid by the West, £3 goes back to it as debt repayment. B.B.C. NEWS ONLINE, *supra* note 90.

98. Structural adjustment has been defined as "reforms of policies and institutions covering micro-economic (such as taxes and tariffs), macro-economic (fiscal policy) and institutional interventions-these are changes designed to improve

of the International Monetary Fund (I.M.F.) and World Bank. These policies appear to have worsened their economic circumstances.[99] These states have had to reduce their imports, devalue their currencies, deregulate capital movements, privatize state public utilities, dismantle social programs by cutting government expenditures on social services, such as health care, education and removal of subsidies on market staples, and provide "national treatment" to foreign investors.[100] "These provisions," according to Michel Chossudovsky, "are often coupled with a 'bankruptcy programme' under the supervision of the World Bank with a view to triggering the liquidation of competing national enterprises,"[101] with the obvious "loss of indigenous control of critical areas of the economy." The adjustments culminate in severely austere measures that unleash sweeping pauperization on the majority of people and "a severe deterioration in the abilities of these countries to uphold the economic and social rights of their peoples."[102]

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resource allocation, increase economic efficiency, expand growth potential and increase resilience to shocks." WORLD BANK, STRUCTURAL ADJUSTMENT AND POVERTY: A CONCEPTUAL, EMPIRICAL AND POLICY FRAMEWORK 22 (1990), *cited in* SKOGLY, *supra* note 41, at 755. According to Skogly, "[t]he premise of structural adjustment conditions is that certain economic factors should be altered in a given country to ensure better economic performance with a view to repay debt and debt servicing, to achieve a better balance of payment situation, and to achieve a healthier economy in general." *Id.* at 756. *See also* Caroline Thomas, *International Financial Institutions and Social and Economic Human Rights: An Exploration, in* HUMAN RIGHTS FIFTY YEARS ON, *supra* note 3, at 167 (noting that "[t]here was an unspoken agreement that adjustment and debt repayment would be rewarded by inflows of new finance and investment.").

99. *See* Osinbajo & Ajayi, *supra* note 97, at 731.

100. See Kent, supra note 58; see also Michel Chossudovsky, World Trade Organisation (WTO): An Illegal Organisation that Violates the Universal Declaration of Human Rights, HUM. RTS. ARTICLES (Derechos Human Rights, N.G.O.), at http://www.derechos.org/nizkor/doc/articulos/chossudovskye.html (last visited Feb. 2, 2002).

101. Chossudovsky, *supra* note 100.

102. Osinbajo & Ajayi, *supra* note 97, at 731. Zimbabwe used to provide free education for all until adherence to an I.M.F. structural adjustment program brought it to an end. *See* Maria Nzomo, *The Political Economy of the African Crisis: Gender Impacts and Responses* 51 INT'L J. 78 (1996); Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda,* 19 HUM. RTs. Q. 630, 641 (1996); *see also,* J. Oloka-Onyango, *Poverty, Human Rights and the Questfor Sustainable Human Development in Structurally-Adjusted Uganda,* 18 NETH. Q. HUM. RTs. 23, 24 (2000). Onyango elsewhere explains:

The obvious impact of structural adjustment programs is to reduce the capacity of the states to meet their human rights obligations.[103] In Africa and elsewhere, structural adjustment programs adversely affect not only ESCR, but also civil and political rights.[104] As Yemi Osinbajo and Olukonyisola Ajayi observe, "[f]aced with standards of living well below poverty levels, the citizenry has usually responded with strikes, rioting, and other forms of dissent, which have almost always been met with suppression by force or draconian legislation...."[105] Although the structural adjustment policies are sold to states as the only way to improve their economies and reduce their debt burdens[106], the adjustment policies have

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In more specific ways, structural adjustment affects working conditions and the right to work through retrenchment as a result of deindigenization, privatisation and the liberalization of trade controls. The extent of available health care and its costs is severely affected by the introduction (as in Zimbabwe) of user fees, which is an additional burden on people who are already impoverished and exist largely in a subsistence economy. The nature of educational services and their accessibility is affected by the increase in fees for tuition .... Finally, the ability to provide food and combat poverty is affected by the overall concentration on export crops and removal of subsidies for market staples.
Onyango, *supra* note 6, at 27.

103. See Lawrence Tshuma, The Impact of I.M.F. World Bank Dictated Economic Structural Adjustment Programmes on Human Rights: Erosion of Empowerment Rights, in THE INSTITUTIONALISATION OF HUMAN RIGHTS IN SOUTHERN AFRICA 219, 227 (Pearson Nherere & Marina d'Engelbronner-Kolff eds., 1993); see also Sigrun I. Skogly, Human Rights and Economic Efficiency: The Relationship Between Social Cost of Adjustment and Human Rights Protection, in HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK 1994, at 43-65 (Peter Baehr et al. eds., 1994).

104. *See* Tshuma, *supra* note 103, at 230; *see also* Margaret Conklin & Daphne Davidson, *The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-1985,* 8 HUM. RTS. Q. 227 (1986) (exploring the violations of all human rights following the adoption of structural adjustment policies in Argentina).

105. Osinbajo & Ajayi, *supra* note 97. In Ghana, Senegal, Nigeria, and Zambia, the ruling regimes resorted to repression to implement adjustment programs. *See* Tshuma, *supra* note 103, at 229. For the I.M.F.'s and World Bank's need for policies on accountability and human rights, see Daniel D. Bradlow, *The World Bank, the I.M.F., and Human Rights,* 6 TRANSNAT'L L. & CONTEMP. PROBLEMS 47 (1996). It has been argued that women suffer most both from the economic crisis and from the adjustment policies. *See* Christine Chinkin & Shelly Wright, *The Hunger Trap: Women, Food, and Self-Determination,* 14 MICH. J. INT'L L. 262, 313 (1993); *see also* Sadasivam, *supra* note 102.

106. *See, e.g.,* Gerald Scott, *Who Has Failed Africa?: I.M.F. Measures or the Aftican Leadership?* 33 J. ASIAN & AFR. STUD. 265, 268-70 (1998) (arguing that I.M.F. programs are the most effective available option for addressing Africa's economic

merely worsened the social and economic ruin in these countries.[107] This led the U.N. Sub-Commission on Human Rights Special Rapporteur to conclude that the adjustment policies "are actually means designed to recover the sums owed to the wealthy countries without any concern for the debtor countries."[108] The debts have increased exponentially instead of decreasing,[109] making the attempt at debt control and recovery an undisguised "failure as blatant as it is significant.[110]

Structural adjustment promotes marginalization and deprivation of ESCR by both worsening conditions and preventing states from recognizing or enforcing ESCR. By its example, the imposition of these policies devalues an ethos of accountability. External actors, who are not accountable to the affected people, induce these measures.[111] Despite these policies' track record of dehumanizing affected populations, many African states are still being goaded into accepting them as a condition for rescheduling

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woes). *But see* S. P. Schatz, *The World Bank's Fundamental Misconception in Africa,* 34 J. MOD. AFR. STUD. 239 (1996) (demonstrating that, contrary to I.M.F. World Bank claims, the implementation of structural adjustment most often causes *poorer* economic performance); S.P. Schatz, *Structural Adjustment in Africa: A Failing Grade So Far,* 32 J. MOD. AFR. STUD. 679 (1994) (same).

107. *See* Paul J. Kaiser, *Structural Adjustment and the Fragile Nation: The Demise of Social Unity in Tanzania,* 34 J. MOD. AFR. STUD. 227, 231-37 (1996) (linking the decay of social cohesion in Tanzania to the introduction of structural adjustment).

108. Guissé, *supra* note 4, at para. 66.

109. *See* Peter Baehr et al., HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK 1996, at 394 (Peter Baehr et al. eds., 1996) (noting the exponential increase in the debt of Uganda since its adoption of structural adjustment policies).

110. Guissé, *supra* note 4, at para. 63. For a more detailed exploration of the impact and failures of structural adjustment policies in Africa, see THE IMPACT OF STRUCTURAL ADJUSTMENTS ON THE POPULATION OF AFRICA (Aderanti Adepoju ed., 1993); CRISIS AND ADJUSTMENT IN THE NIGERIAN ECONOMY (Adebayo Olkoshi ed., 1991); AUTHORITARIANISM, DEMOCRACY AND ADJUSTMENT: THE POLITICS OF ECONOMIC REFORM IN AFRICA (Peter Gibbon et al. eds., 1992); THE POLITICS OF STRUCTURAL ADJUSTMENT IN NIGERIA (Adebayo Olukoshi ed., 1993).

111. *See* Obiora Chinedu Okafor, *Re-Conceiving "Third World" Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism,* 6 BUFF. HUM. Rms. L. REV. 1, 1-37 (2000) (demonstrating how international financial institutions have assumed an everincreasing share of Third World governance); *see also* Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War,* 38 HARV. INT'L L. J. 443, 451-60 (1997).

or cancellation of their debts.[112] One is tempted to agree with the suggestion that "perpetuating the debt of the developing countries is the result of a deliberate and political decision designed solely to frustrate any attempt by the developing countries and their peoples to achieve economic and social progress.[113] The fact that "countries that oppose the measures suggested by the institutions (themselves agents of neo-colonial interests) do not receive any financial assistance"[114] amply lends credence to the suggestion. Just as debts and structural adjustments are vital instruments sustaining the continued deprivation of ESCR of the people, there are growing fears that globalization further exacerbate human suffering and erosion of socio-economic rights."[115] Be that as it may, African states' relative achievement in the enforcement of civil and political rights shows that where the international will does exist greater achievements will be made in the enforcement of ESCR.

E. International Apathy and Hostility

One of the greatest impediments to the enforcement and realization of ESCR in Africa is the indifference - and even hostility - of the international community towards enforceable ESCR. The most notable monument to this attitude is the fact that the UDHR had to be translated into two covenants instead of one.[116] Although lip service was paid to the notion of ESCR during much of the Cold War, indifference and apathy towards enforceable ESCR grew increasingly in the later years of the Cold War and especially since

112. In 2000, U.S. Treasury Secretary Larry Summers announced that the United States would support Nigeria's bid for debt rescheduling only if Nigeria accepts the structural adjustment policies of the I.M.F. and "manages to keep up with the terms of [the] program with the International Monetary Fund." Stephen Fidler, *Nigeria Wins U.S. Debt Backing,* FINANCIAL TIMES, June 12, 2000; *see also* Arthur Obayuwana, *U.S. Links Support for Debt Relief to I.M.F. Conditions,* THE GUARDIAN (Lagos), June 13, 2000.

113. Guissé, *supra* note 4, at para. 59.

114. Skogly, *supra* note 41, at 756.

115. There is ample scholarship addressing the negative impact of globalization on ESCR in both developed and developing states. *See generally* MICHEL CHOSSUDOVSKY, THE GLOBALIZATION OF POVERTY: IMPACTS OF THE IMF AND WORLD BANK REFORMS (1997); GLOBALIZATION: CRITICAL REFLECTIONS (U. Mittleman ed., 1996); Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights,* 21 HUM. RTS. Q. 735 (1999).

116. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS 256-57 (2d ed. 1996).

the end of the Cold War.[117] The end of the Cold War deprived ESCR of the support of a superpower, the Soviet Union, on the international stage. The demise of the Soviet Union was taken as the defeat of an ideology that emphasizes ESCR and a victory for liberal ideology that emphasizes civil and political rights to the exclusion of ESCR.

The supposed victory of liberalism led to the current "development Orthodoxy[118] based on economic and political liberalism, which is being sold as the best method for maximizing global welfare.[119] Yet, as Caroline Thomas points out, "evidence of such a claim is lacking, resting largely on the perceived absence of alternatives. *[Per contra,]* evidence against seems to be mounting."[120] Furthermore, "even the supporters of the neoliberal market economics have had to admit its abysmal failure to assist the world's poor"[121] and improve the realization of ESCR.[122] Despite all the praises for the market system of wealth creation as the most effective that humanity has yet devised, "it remains an imperfect force since two-thirds of the world's population have gained little or no substantive advantage from rapid economic growth. [Even] in the developed world, the lowest quartile has witnessed trickle-up rather than trickle-down."[123] Although international markets may give little reason for hope, one cannot underestimate the potency of external pressures on the overall improvement of the human rights situation in Africa.[124] What these

117. *But see* Mugwanya, *supra* note 72, at 38 (celebrating the end of the Cold War as having "liberated international efforts to promote human rights from ideological conflicts and political sloganeering"). On the contrary, the end of the Cold War merely shifted ideological battlefronts, making the war more covert and dangerous. The "victory" enthroned a mentality of ideological victors and vanquished, making the "victors" more entrenched in their ways to the detriment of ESCR enforcement.

118. Thomas, *supra* note 98, at 164.

119. *Id.*

120. *Id; see also* B. Crossette, *U.N. Survey Finds World Rich-Poor Gap Widening,* N.Y. TIMES, July 15, 1996, at A3 (highlighting the global inequality which continues to characterize the global social order).

121. Thomas, *supra* note 98, at 165.

122. See G. Lean & Y. Cooper, The Theory Was That as the Rich Got Richer We'd All Benefit. But It Hasn't Worked, INDEPENDENT ON SUNDAY, July 21, 1996, at 52-53.

123. Thomas, *supra* note 98, at 165 (notes and citations omitted). *See also* Donnelly, *supra* note 16, at 630 (describing free markets as "an economic analog to a political system of majority rule without minority rights").

124. Such external pressures include linking financial assistance to the human rights records and performance of prospective recipient states. *See* Agbakwa, *supra* note 47, at 22-24; Olusola Ojo & Amadu Sesay, *The O.A.U. and Human Rights:*

influences have helped to achieve with respect to civil and political rights- including entrenching those rights as enforceable under the various constitutions -has not, however, been attempted with regard to ESCR. Even prominent transnational human rights organizations have yet to-rise fully to the occasion in the area of ESCR.[125] Thus, while perceived violations of civil and political rights give rise to a hue and cry, there is usually only silence in the face of egregious violations of ESCR, thereby creating the impression that no injustice has been done and emboldening violators. With insufficient or no pressure on them, several governments continue to deny the enforcement and justiciability of socio-economic rights and to misuse funds.[126]

Arguably, the efforts of some African states with respect to the enforcement of civil and political rights would not have materialized

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Prospects for the 1980s and Beyond, 8 HuM. RTs. Q. 89, 92 (1986); UMOZURIKE, *supra* note *29,* at 27; Amy Young-Anawety, *Human Rights and ACP-EEC Lome II Convention,* 13 N.Y.U. J. INT'L L. & POL. *63,* 71-74 (1980).

125. *See, e.g.,* HUMAN RIGHTS WATCH, ECONOMIC, SOCIAL AND CULTURAL RIGHTS ("Since its formation in 1978, Human Rights Watch has focused mainly on upholding civil and political rights, but in recent years we have increasingly addressed economic, social and cultural rights as well.... We pay special attention to economic, social and cultural rights violations when they result from violations of civil and political rights or must be remedied as part of a plan for ending violations of civil and political rights."), *at* http://www.hrw.org/esc/ (last visited Feb. 2, 2002); AMNESTY INTERNATIONAL, ABOUT A.I. ("Amnesty International is a worldwide campaigning movement that works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards. In particular, Amnesty International campaigns to free all prisoners of conscience; ensure fair and prompt trials for political prisoners; abolish the death penalty, torture and other cruel treatment of prisoners; end political killings and "disappearances"; and oppose human rights abuses by opposition groups."), *at* http://web.amnesty.org/web/aboutai.nsf (last visited Feb. 2, 2002). African and African- based N.G.O.s have been, for the most part, as unconcerned in this regard as international human rights organizations. This is unfortunate, for human rights are not given, they are taken through struggle against the political elite. *See* Harry M. Scoble, *Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter, in* HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 177 (Claude E. Welch & Ronald I. Meltzer eds., 1984).

126. *See* Ojo & Sesay, *supra* note 124, at 103 (noting the negative impact of the absence of "potent pressure on African leaders in the way they treat their citizens"). *See generally* Augustine Ikelegbe, *Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle,* 39 J. MOD. AFR. STUD. 437 (2001) (noting the impact of civil groups' sustained engagement with, and pressures on, both state and non-state actors in elevating or compelling the entrance of a human rights problem onto the national agenda, warranting more urgent resolutions than would have been the case).

without the pressures of the international community -states, NGOs, and civil society. It follows that similar efforts by the international community with respect to ESCR might have achieved similar results in the enforcement of ESCR.[127] However, most states either lack the moral high ground to criticize other states about their respect for ESCR or will not do so for ideological reasons. As a consequence, ESCR remain the province of impunity. Moreover, developed states have successfully marketed at home and abroad a mythology that ESCR are prohibitively expensive, convincing less developed states that the path to economic wealth cannot include enforceable ESCR.[128]

The hostility of some Western states to the notion of enforceable ESCR[129] reveals itself in their various tactics to undermine the efforts of developing states moving in the direction of implementation or enforcement of ESCR. This undermining takes place directly or by proxy, through agents, multinational corporations, the World Trade Organization (W.T.O.) or other international financial institutions.[130] For instance, in the past few years, some Western states, particularly

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127. In spite of all pretensions, human rights and law-especially international law - remain what a community or its powerful members say they are. *See* John O'Manique, *Development, Human Rights and Law,* HUM. RTs. Q. 383, 405-06 (1992); W. Michael Reisman, *International Lawmaking: A Process of Communication,* 75 PROC. AM. SOC'Y INT'L L. 101-20 (1981).

128. *See* Thomas, *supra* note 98, at 171-72.

129. According to Philip Alston, the U.S. presidential administrations of Ronald Reagan and George H. Bush rejected entirely the notion of ESCR. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy,* 84 AM. J. INT'L L. 365 (1990).

130. Other tactics include: the perpetuation of indebtedness and initiation of catastrophic economic policies, *see* Guiss6, *supra* note 4, at para. 60; Rhoda E. Howard, *Civil Conflict in Sub-Saharan Africa: Internally Generated Causes,* 51 INT'L J. 26, 32 (1996); Orford, *supra* note 111, at 464-75; pressuring the various countries to open up their borders to permit the dumping of products that end up stifling local industries, *see* Kent, *supra* note 58; toppling regimes that are opposed to these tactics, *see* Ariande K. Sacharoff, *Multinationals in Host Countries: Can They Be Held Accountable for Human Rights Violations?,* 23 BROOK. J. INT'L L. 928-64 (1998) (describing the toppling of regimes that insisted on improving the lots of the people); and exporting harmful and hazardous wastes that imperil the health of the recipient states while at the same time goading them to cut back on health care, *see* James H. Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States,* 13 UCLA J. ENVTL. L. & POL'Y 167, 171-81 (1995). A World Bank Chief Economist (and former U.S. Treasury Secretary under Clinton) wrote in an internal memo:

I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.... I've always thought that

the United States, have undermined the efforts of certain developing countries to obtain cheaper generic drugs by threatening trade sanctions, notwithstanding that "drug costs account for up to 60 percent of health care budgets in poor countries."[131] In a crass show of insensitivity, the U.S. fought South Africa's policies to procure cheaper generic HIV drugs, in spite of clear evidence of a catastrophic AIDS epidemic in South Africa. According to Bess-Carolina Dolmo, even when U.S. pressure on South Africa was eased due mainly to pressures from civil society groups, the U.S. still directed its "arsenal trade attacks" on "other nations that have enacted [similar] measures permitting compulsory licensing and parallel trade....,[132]

The foregoing example is emblematic of developed states' attitudes towards developing states' socio-economic development. In his final report on the impunity of perpetrators of ESCR violations, U.N. Commission on Human Rights Special Rapporteur, Mr. El Hadji Guissé notes:

> During the discussions on the methods of implementing economic, social and cultural rights, ... the representatives of several developing countries expressed the fear that the inevitably slow progress in realizing those rights might be taken for unwillingness on their part. *They had not reckoned with the developed countries' determination to undermine any possible basis for a truly fair world economic order where economic, social and cultural rights would have a fair chance of being realized.* It was soon observed afterwards that the fears of the former and the hypocrisy of the latter very rapidly became a source of massive grave violations of economic, social and cultural rights....[133]

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under-populated countries in Africa are vastly under-polluted; their air quality is probably vastly inefficiently [high] compared to Los Angeles or Mexico City. *Let Them Eat Pollution,* ECONOMIST (London), Feb. 8, 1992, at 66; *see also Pollution and the Poor,* ECONOMIST (London), Feb. 15, 1992, at 18.

131. Bess-Carolina Dolmo, Examining Global Access to Essential Pharmaceuticals in the Face of Patent Protection Rights: The South African Example, 7 BUFF. HUM. RTS. L. REV. 137, 151 (2001); see also Blood and Gore: Office of the U.S. Trade Representative Goes Too Far in Promoting Interests of U.S. Drug Companies Abroad, THE NATION, July 19, 1999, at 16, available at http://past.thenation.com/1999/990719.shtm (last visited Feb. 2, 2002).

132. Dolmo, *supra* note 131, at 151.

133. Guissé, *supra* note 4, at para. 16 (emphasis added); *see also Why King Gold Has No Clothes,* 402 NEW AFR., Dec. 2001, at 29-37 (describing other instances of undermining the basis for a fair economic order).

The inescapable conclusion is that, not only did the international community fail to provide the active support it might have, but also members of the international community actively hindered the development of ESCR. Without such hostile interference, ESCR might have fared better in many African states than they have.

IV. CONSEQUENCES OF CONTINUED MARGINALIZATION

Certain implications are conspicuously discernible from the continued marginalization of the enforcement of ESCR. As Henry Shue observes, "to enjoy something only at the discretion of someone else, especially someone powerful enough to deprive you of it at will, is precisely *not* to enjoy a *right* to it."[134] The notion of a non-enforceable right is nothing but a negation of the very concept of right.[135] Continued marginalization of the enforcement of ESCR dresses these rights in the garb of mere luxuries. This deception is emblematic and symptomatic of the continued oppression, and relegation to second-class citizens, of those most dependent on such rights for basic survival.[136]

For a region that has staked its integrity on the adoption of a document that gives equal prominence to all aspects of human rights, maintaining a contradictory posture at the domestic level is an exercise in self ridicule. It also casts the Charter in a bad light for proclaiming what cannot be guaranteed. By marginalizing the enforcement of these rights, the African claim that the satisfaction of ESCR is the precondition for the enjoyment of civil and political rights in international fora rings hollow and remains exposed for what it is: a poor excuse for insensate violations.

The continued marginalization of ESCR also deepens the collective feeling of betrayal of the African people. The modern state's displacement of traditional African systems, which, to a great extent, ensured the welfare of every member of the community, failed to bring

134. Henry Shue, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 78 (1980).

135. According to Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 37 (1999), "[a] state that fails to protect fully individuals against human rights violations or that otherwise violates remedial rights commits an independent, further violation of internationally -recognized human rights."

136. *See* Skogly, *supra,* note 41, at 770 (discussing the advantages of effective recognition of all human rights, especially economic, social and cultural rights).

with it an adequate replacement.[137] Unlike traditional structures, the state appears as a remote center of power that has no relevance to the lives of the people. This feeling of betrayal manifests itself in various forms, including lack of faith in the process of supposed democratic governance. Accordingly, one of the most serious consequences of the continued marginalization of ESCR is the prolongation of the existing crisis of state and governmental legitimacy in Africa. People hold minimum expectations of their state and government. These expectations are "the irreducible duties of any ruling apparatus to its subjects, such that a failure to discharge these duties vitiates the legitimacy of the regime's assertion of authority."[138] When such expectations are not met, it fuels the general level of disaffection and dissatisfaction that may lead to the fall of the government, either by constitutional or extra-constitutional means. As Jack Donnelly argues:

> The link between a regime's ability to foster development (prosperity) and the public's perception of the regime's legitimacy is close to a universal, cross-cultural political law. Whatever a ruling regime's sociological and ideological bases, its *sustained or severe inability to deliver prosperity,* however that may be understood locally, *typically leads to a serious political challenge.*[139]

Donnelly's argument is particularly apt for Africa. As has been argued earlier, the continued deprivation of ESCR sometimes leads to popular insurrections and civil war.[140] In such situations, existing

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137. *See* Agbakwa, *supra* note 47, at 100-09.

138. Brad R. Roth, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 21 (1999). For a critique of Roth, see James Thuo Gathii, *Governmental Illegitimacy in International Law,* 98 MICH. L. REV. 1996 (2000) (book review).

139. Donnelly, *supra* note 16, at 609 (emphasis added).

140. *See supra* notes 19, 20, 23-26. In its 1979-80 annual report, the Inter-American Commission on Human Rights noted the existence of an "organic relationship between the violation of rights to physical security on the one hand, and neglect of economic and social rights... on the other." It further noted that "neglect of economic and social rights, especially when political participation has been suppressed, produces the kind of social polarization that leads to acts of terrorism by and against the government." INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 1979-80, at 151 (1980). The Commission reiterated in 1991 that "it is evident that in many cases poverty is a wellspring of political and social conflict." ANNUAL REPORT 1991, at 305 (1991); *see also* Orford, *supra* note 111, at 451-55 (noting the role of economic crisis in the loss of legitimacy of the Yugoslavian federal government, which snowballed into fratricidal civil conflict). *But see* Milner et al., *supra* note 28, at 412 (arguing that "people at the lowest

governments are perceived as having outlived their usefulness as a result of the deterioration of the basic socio-economic rights of the people.[141] As in Somalia, crisis generated by an attempt to oust an incumbent government threatens the foundations of the state and may lead to its disintegration.

In the ensuing crisis of legitimacy, maintaining law and order can be difficult or impossible, and civil and political rights are likely to be neglected. Economic activities are also truncated, thus imperiling developmental efforts. This bad situation is made worse when people are displaced as refugees.

Even in the absence of a full-blown civil conflagration, want and deprivation create an atmosphere that is not conducive to the enjoyment of civil and political rights. As Donnelly states, "those living on the economic edge or with no realistic prospect of a better life for their children are much less likely to be willing to accommodate the interests and rights of others."[142] Thus, in the absence of measures that are likely to ensure the realization of all rights, protecting only civil and political rights without ESCR is tantamount to making ropes out of sand.

Protecting all rights requires both the implementation of existing approaches, like effective judicial review, and the development of alternative approaches, as discussed in the next section.

V. STRATEGIZING THE WAY FORWARD

A. Rejection of the Western Model

Unless there is a committed rejection of the dominant Western paradigm that has historically viewed civil and political rights as the rights that are most worthy of enforcement, substantial

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level of needs fulfilment would have neither the wherewithal nor the energy to pose threats to a regime, no matter how displeased they were with the status quo").

141. The civil wars in Liberia, Sierra Leone, and to an extent Angola, owe their origin and continuation to the deterioration of the basic socio-economic rights of the people. *See* Anthony Barclay, *Consolidating Peace Through Governance and Regional Cooperation: The Liberian Experience, in* AFRICAN CONFLICTS, *supra* note 23, at 303-05; John B. Leggah et al., *Sierra Leone, in* AFRICAN CONFLICTS, *supra* note 23, at 181; Reginald Green, *Angola: Seeking to Remedy the Limitations and Bias in Media and Scholarly Coverage, in* AFRICAN CONFLICTS, *supra* note 23, at 203.

142. Donnelly, *supra* note 16, at 610.

progress towards the enforcement of ESCR in Africa may continue to elude African states. The West may be able to maintain such a model, because its attainment of an appreciable standard of living provides an environment that enables the enjoyment of civil and political rights. African states do not enjoy this luxury. They cannot afford this model without facing widespread civil and social strife. Already, by adopting a charter that departs markedly from the European Convention and Inter-American Convention, African states demonstrated an understanding of the inadequacies of the two systems for their purposes. A rejection of the Western model, therefore, merely requires a practical commitment to the noble intentions expressed in the African Charter.

This practical commitment does not necessarily entail guaranteeing the maximum enjoyment of all the Charter's provisions on ESCR. Rather, it requires judicial (including quasi-judicial and other forms of independent review), legislative, and executive actions to ensure a baseline, minimum protection of all rights equally. **A** truly African approach is one that *practically* parallels the African Charter or one that *critically* reflects the South African model.

Rejection of the Western model, as advocated here, presupposes a complete rejection of ideologies that subordinate ESCR. It does not, however, advocate a puritanical isolationist movement that heedlessly rejects the obvious achievements of the institutional structures of Western human rights regimes. As the next section demonstrates, the institutional mechanisms of these older regimes have something important to offer in spite of their normative and ideological shackles.

B. Alternative Enforcement Approach

The best way to effectuate any human rights provision may be to subject it to direct judicial scrutiny in the way that many systems currently protect certain human rights.[143] For ESCR, such procedures

143. While judicial remedies constitute the principal guarantees of human rights, they do not always present the most desirable means by which to affirm these rights. Sometimes, given their costly, time-consuming, and procedure-laden nature, individuals may prefer to pursue administrative avenues to settle their disputes. Indeed, there is growing evidence that individuals are turning to non-judicial remedies. *See* Wieruszewski, *supra* note 35, at 279 n.13. In light of this fact, the approaches discussed below are equally amenable to judicial, quasijudicial, and administrative measures.

are lacking in many African states. Given the necessity of ensuring effective protection of human dignity-the enjoyment and protection of all rights without discrimination -additional means ought to be utilized to give effect to ESCR provisions.

In recommending the adoption of the following approaches, I am wary of appearing to advocate subjugation of ESCR to other rights. I do not. Rather, these approaches are put forward as interim measures pending the adoption by state authorities of a regime of directly enforceable (justiciable) ESCR. Ironically perhaps, I draw insights from the jurisprudence of Western human rights systems (European and Inter-American) that place ESCR in a subservient position and whose ideological foundations I partially reject. However, if, as I have argued, it is true that ESCR and other rights are inseparable, it should not be surprising that effective systems set up to protect the latter will find their way into the territory of the former. These regimes have recently demonstrated an ability to adjust to the challenges of addressing basic violations of ESCR.[144] In particular, the European Court on Human Rights offers a rich insight into how a progressive judicial, quasi-judicial, or administrative body can transcend normative hurdles in finding solutions to serious human rights problems. Its jurisprudence is, therefore, relevant for immediately effectuating ESCR in African states where these rights are still not domestically justiciable, notwithstanding the provisions of the African Charter.

1. Concerted and Integrated Approach

The fact that ESCR are regarded as mere aspirations and are nonjusticiable in several African constitutions,[145] as well as largely ignored at the regional level, means that there is as yet no hope for their direct judicial enforcement as independent rights. Accordingly, a concerted and integrated approach that takes advantage of currently enforced rights is needed.

The concerted and integrated approach seeks to enforce ESCR through the provisions on civil and political rights that are, or usually

144. For insight into how the ECHR is adapting to the challenges of basic violations of ESCR, see, for example, Aisling Reidy et al., *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey,* 15 NETH. Q. HUM. RTS. 161 (1997).

145. Above, I have listed examples of such constitutions. *See supra* note 46.

are, justiciable.[146] Using this method, ESCR can get their foot in the door, where they can be developed, expanded, and enforced by the domestic courts, the African Court of Human Rights (when it becomes operational), the African Commission, and national human rights commissions (where they exist).[147] It is not certain that these African institutions will rise to the occasion, but there is a strong chance of it. These institutions will merely be holding the states to the standards they recognized by ratifying the Charter and to which the states assumed a definite and binding obligation to give effect in their respective domestic legal order.[148] It is clear that some African judges would make the most of an opportunity to put ESCR and other rights on equal footing. As a retired Justice of the Nigerian Supreme Court recognized:

> The fundamental rights provisions of our Constitution (dealing with civil and political rights) cannot be appreciated let alone enjoyed in a state of utter illiteracy and abject poverty. To attain true liberty and freedom the average [citizen] needs to have equal access to... decent housing and health services. If these opportunities are not equal and, or, equally accessible, then the talk of liberty, of equality or even justice will be a far cry ...[149]

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146. *See* Bard-Anders Andreassen, *Article 22, in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 453, 487 (Gudmundur Alfredsson & Asbjom Eide eds., 1999).

147. Human rights commissions currently exist in a number of African states, including Benin, Cameroon, Chad, Ghana, Kenya, Liberia, Malawi, Nigeria, Rwanda, Senegal, South Africa, Sudan, Togo, Uganda and Zambia. Plans are underway to establish such commissions in Ethiopia and Tanzania. Many of the commissions, however, have remained administrative outposts for the government of the day and have proven to be disappointments. Many have very limited and flawed mandates with limited ability to investigate, monitor, or make public statements. But some-like the Ghanaian, Senegalese, South African, Nigerian and Ugandan commissions-appear very promising in their activities so far. *See* HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1999, at 12-13 (1998). For a detailed assessment of the performance of some of these commissions, see Obiora Chinedu Okafor & Shedrack C. Agbakwa, *On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context,* 24 HUM. RTs. Q. (forthcoming Aug. 2002).

148. *See* U.N. Committee on ESCR, *General Comment No. 9,* U.N. Doc.E/C.12/1998/24, *reprinted in* 6 INTL HUM. RTS. REP. 289 (1999).

149. C. A. Oputa, *Commentary, in* ALL NIGERIAN JUDGES CONFERENCE PAPERS 1982, at 290 (A. G. 0. Agbaje ed., 1983).

The concerted and integrated approach accords with the functional or interpretative approach practiced by the European Court of Human Rights. Under the European system of human rights, State Parties' obligations with respect to socio-economic rights are, in the words of Matti Pellonpaa, "of a somewhat less straightforward nature, and the international supervision far less effective"[150] having been left to the less judicial mechanisms of the European Social Charter.[151] In the absence of judicial enforcement for rights provided under the Social Charter, the European Court has assumed a dynamic mode of interpretation that seeks to effectuate the socioeconomic rights provided in the Social Charter. In *Airey v. Ireland,* the European Court of Human Rights found connection between the classical civil liberties covered by the European Convention and socio-economic rights covered by the Social Charter.[152] The Court noted:

> Whilst the [European Convention on Human Rights] sets forth what are essentially civil and political rights, *many of them have implications of a social or economic nature.* The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; *there is no water-tight division separating that sphere from the field of the Convention.*[153]

In *Airey,* the Court held that a person seeking legal separation from a spouse had a right to legal aid if she could not afford to pay a lawyer. The Court found that denying Ms. Airey such aid amounted to a violation of her right of access to courts and of her right to a fair trial guaranteed by Article 6 of the European Convention. The Court rejected the Government's argument that "the [European] Convention should not be interpreted so as to achieve social and economic developments in a Contracting State."[154] The case shows

150. Matti Pellonpaa, *Economic, Social and Cultural Rights, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 855, 857 (R. St. Macdonald et al. eds., 1993).
151. European Social Charter, *entered into force* Feb. 26, 1965, Europ. T.S. No. 35, 529 U.N.T.S. 89.
152. Airey v. Ireland, 2 Eur. Ct. H.R. 61 (1979), 2 EuR. H.R. REP. 305 (1979).
153. *Id.* at 316-17 (emphasis added).
154. *Id.* at 316.

how political rights can be used to secure economic rights, and indeed, how they are inextricably linked.

In Schuler-Zgraggen v. Switzerland,[155] the Court extended protections against discrimination under Article 6(1) and Article 14 of the European Convention to ESCR. The Court held, "today the general rule is that Article 6(1) does apply in the field of social insurance, including even welfare assistance."[156] In *Akdivar v. Turkey,*[157] the Court recognized claims that forced evictions violated the right to privacy under Article 8 of the European Convention. Similarly, in *Feldbrugge v. The Netherlands*[158] *and Deumeland v. Germany,*[159] the Court extended the non-discrimination right to health insurance allowances.

The U.N. Human Rights Committee has also applied the integrated approach, using non-discrimination guarantees in Article 26 of the International Covenant on Civil and Political Rights to require unemployment benefits.[160] An integrated approach may also be inferred from the Human Rights Committee's elaboration on the "social dimension" of the right to life. In its *General Comments No. 6* on the right to life,[161] the Committee noted the desirability for states to take "all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[162]

Using the integrated approach in *Tavares v. France,*[163] the European Commission recognized that a public-health system falling below a certain minimum level of quality could be in breach

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155. Schuler-Zgraggen v. Switzerland, 263 Eur. Ct. H.R. (ser. A) 7, 16 Eur. H.R. Rep. 405 (1993).

156. *Id.* at 430; *see also* Salesi v. Italy, 257 Eur. Ct. H.R. (ser. A) 54 (1993).

157. Akdivar v. Turkey, 1996-IV Eur. Ct. H.R. 1192 (1996), *reprinted in* 1 BUTERWORTHS HuM. RTS. CASES 137 (1996).

158. Feldbrugge v. The Netherlands, 99 Eur. Ct. H.R. (ser. A) 2 (1986), 8 Eur. H.R. Rep. 425 (1986).

159. Deumeland v. Germany, 100 Eur. Ct. H.R. (ser. A) 7 (1986), 8 Eur. H.R. Rep. 448 (1986).

160. F. H. Zwaan-de Vries v. The Netherlands, U.N. HUM. Rrs. CoMM., Communication No. 182/1984, Supp. No. 40, at 160, U.N. Doc. A/42/40 (1987).

161. *General Comment 6,* U.N. GAOR, 16th Sess., Annex 5, Supp. No. 40, U.N. Doc A/37/40 (1982), *reprinted as* Annex 3, *in* TEXTBOOK, *supra* note 36, at 454-55.

162. *Id.* at 454, 5.

163. Tavares v. France, App. No. 16593/90, Eur. Comm'n H.R. Dec. & Rep. (Sept. 12, 1991) (unreported), *reprinted in* Pellonpaa, *supra* note 151, at 865.

of a state's obligation to protect the right to life under Article 2 of the European Convention. Although the Commission did not find the respondents liable, it clearly demonstrated that regulatory measures aimed at protecting life with regard to the hospital system are inherent in the Convention's protection of the right to life.[164]

Following examples such as these, domestic courts, National Human Rights Institutions, the African Court, and the African Commission can creatively enforce ESCR through civil and political rights. Using this integrated and concerted approach, for instance, the right to health can be enforced through the right to life, for it is absurd to claim to have a right to life if the individual is so poor that she cannot afford the cost of adequate medical treatment to enable her to enjoy the right to life. It may also amount to unlawful and arbitrary deprivation of life[165] if the victim does not have access to adequate and sufficient medical facilities or treatment.[166]

Likewise, the integrated and concerted approach can be used to enforce the right to education through the right to freedom of expression and the right to participate in the governance of one's country.[167] As a legacy of colonialism, African states conduct many affairs in official languages that are different from the original language of the people in these states. Most states have laws imposing a minimum qualification as a precondition for aspiring to elective positions. In order to guarantee the political right to participation in governance, African institutions will need to ensure the right to acquire requisite qualifications and basic education.

For the same reasons, individuals could seek the right of equal access to state public services[168] based on the freedom from discrimination. After all, those who do not meet the imposed minimum qualifications for aspiring to elective offices due to inadequate educational opportunities are victims of state sanctioned discrimination. A state ought not to raise participatory thresholds to disbar some citizens when, at the same

164. See id.
165. *See* Afr. Charter, *supra* note 2, at art. 4; *see also* FED. REP. NIG. CONST. § 33; REP. S. AFR. CONST. § 11.
166. *See* Pellonpaa, *supra* note 150, at 868-69 (arguing that right to life presupposes a certain minimum level of health services and that respect for private and family life under Article 8 of the European Convention may in certain circumstances oblige the state to provide housing to the homeless).
167. *See* Afr. Charter, *supra* note 2, art. 13(1).
168. *See* Afr. Charter, *supra* note 2, art. 13(2).

time, it cannot provide those who are likely to be disqualified with the enabling environment and facilities for meeting the threshold.

Enforcing a person's right to participate in government, to express herself freely, or to be free from discrimination in the foregoing instances would not necessarily obligate *de jure* the state to provide free education as such. Rather, it obligates the state not to deny its people participation, access, or other civil services implicated by the policies. However, it will quickly be apparent that *de facto* these rights require a minimum level of education, health, or other social services.

Using the integrated and concerted approach may avoid the obstacles posed by the ambiguity of the ESCR provisions of the African Charter. Rather than debating which of two or more possible interpretations is correct, this approach concentrates on the practical effectuation of the spirit and substance of the provision. Moreover, the integrated and concerted approach will be in keeping with the holistic, traditional African philosophy and conception of rights, the virtues of which are the "historical tradition and values of African civilization [that] inspire and characterize [the] reflection on the concept of human and peoples' rights" in the African Charter.[169]

Evidently, the reach of this approach is limited in the sense that a victim who cannot fit her complaints within any of the justiciable provisions of civil and political rights is likely to be left without a remedy. Consequently, this approach is no replacement for a system of direct justiciability and enforcement of ESCR. Nor does this approach obviate the need to amend the African Charter to strengthen its normative and institutional framework.[170] To those proposed amendments should be added a change to the *Protocol* of the African Court to provide for direct individual access.[171] It is not part of Africa's traditional heritage that a person against whom a

169. *See* Afr. Charter, *supra* note 2, at pmbl., 5.

170. See Mutua, African Human Rights Court, supra note 72, at 358.

171. Article 34(6) of the Protocol renders the competence of the Court to accept cases directly from individuals dependent upon the consent of the State Party involved. *See* Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 34, § 6, OAU/LEG/EXP/AFCHPR/PROT (Il), adopted June 9, 1998, *reprinted in* 6 INT'L HuM. RTS. REP. 891 (1999). For a critique of this provision, see Mutua, *African Human Rights Court, supra* note 72, at 355.

complaint is to be made must first give her consent. There is no good reason for a state to benefit from such a shield.

2. Minimum Threshold Approach

Commentators have described the Inter-American Commission's attempt to give effect to ESCR as the "minimum threshold approach."[172] The term does not appear in the Convention.[173] The emphasis of this approach is on equal recognition and implementation of all human rights. As explained by Craven, "[r]ather than creating any *a priori* hierarchy of rights or emphasizing categorical differences in implementation, the minimum threshold approach advocates the necessity of action being taken across the board to ensure for all a minimum level of enjoyment of the whole range of human rights."[174]

In 1980, the Commission determined that State Parties should "strive to attain the economic and social aspirations of its people by following an order that assigns priority to... the 'rights of survival' and 'basic needs."[175] In 1993, the Commission explained that the obligation to observe and defend human rights of individuals in the *American Declaration* and the *American Convention* "obligates [states], regardless of the level of economic development, to guarantee a minimum threshold of these rights."[176]

As recognized by the Commission, the minimum threshold approach encapsulates a number of basic principles that are fundamental to the implementation of ESCR. Among other things, this

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172. See Bard-Anders Andreassen et al., Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to Economic and Social Rights, in HUMAN RIGHTS IN DEVELOPING COUNTRIES 1987/88, at 333 (Bard-Anders Andreassen & Asbjom Eide eds., 1988).

173. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, OEA/ser. L/V/I.23, doc. 2 rev. 6, 1, O.A.S.O.R. OEA/ser. K./XVI/I.1, doc. 65 rev. 1 corr. 2 (1970), *reprinted in* 9 I.L.M. 673 (1970). *But see* Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 (1988), OEA/Ser.L.V/II.82 doc.6 rev.1, 67 (1992), *reprinted in* 28 I.L.M. 156 (entered into force Nov. 16, 1999).

174. Matthew Craven, *The Protection of Economic, Social and Cultural Rights Under the Inter-American System of Human Rights, in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 289, 317 (David **J.** Harris & Stephen Livingstone eds., 1998).

175. *See* INTER-AMERICAN COMM'N, ANNUAL REPORT 1979-80, at 152 (1980).

176. INTER-AMERICAN COMM'N, ANNUAL REPORT 1993, at 524 (1993).

approach calls for "the identification of the most deprived groups"[177] and demands "that in the creation and implementation of economic and social policies, states should place emphasis, as a priority, upon assisting the poorest and the most vulnerable in society."[178] In order to realize the minimum threshold, the Commission underscored the importance of "pay[ing] close attention to the equitable and effective use of available resources and the allocation of public expenditures to social programs that address the living conditions of the more vulnerable sectors of society ...."[179]

The Commission's minimum threshold is in line with the jurisprudence of the U.N. Committee on ESCR. In its *General Comment No.* 3,[180] the Committee spoke of "a minimum core obligation" necessary to "ensure the satisfaction, at the very least, minimum essential levels of each of the rights."[181] According to the Committee, the existence of resource constraints does not in any way eliminate State Parties' obligations to protect "the vulnerable members of society."[182]

Although, for the most part, the Inter-American Commission's pronouncements hover in the region of the abstract, and the Commission has not put itself in a position to review claims of ESCR violations[183], the minimum threshold approach holds potential to advance the cause of ESCR. An effective human rights commission, whether national or regional, could utilize the approach to require state accountability for those policies, decisions, and practices that would diminish the provision of ESCR. A court or commission could invoke the approach to ensure that a State Party does not amass instruments of torture in the name of state security or spend excessively on defense while inadequately supporting measures to protect the health of the people. Considering the "equitable and

177. Asbjorn Eide, Realization of Social and Economic Rights and the Minimum Threshold Approach, 10 HuM. RTS. L.J. 35, 47 (1989).
178. Craven, *supra* note 174, at 318.
179. INTER-AMERICAN COMM'N, *supra* note 174, at 533.
180. Gen. Comment No. 3, U.N. COMM. ESCR, 5th Sess., Supp. No. 3, Annex III, U.N. Doc.E/1991/23 (1990). For a brief analysis of the Comment, see Scott Leckie, *An Overview and Appraisal of the Fifth Session of the U.N. Committee on Economic, Social and Cultural Rights,* 13 HUM. RmS. Q. 545, 562-65 (1991).
181. *See* U.N. COMM. ON ESCR, *supra* note 180, at 10.
182. *Id.* at 11-12.
183. *See* Craven, *supra* note 174, at 318.

effective use of available resources"[184], a court or commission could compel a government to justify its priorities, for instance where it chooses to embark on a prestige development project or construct a sports stadium while neglecting dilapidated health facilities.

Using the minimum threshold approach, the African Commission or the African Court could set up country-specific thresholds (or minimum core obligations) measured by indicators[185] to determine what amounts to "the best attainable state of physical and mental health" or "necessary measures to protect the health of their people."[186] In this way, what the government can or cannot afford can be independently verified and juxtaposed with other competing national priorities. This baseline approach could also be used to set up benchmarks to measure the "equity" and "satisfaction" in "equitable and satisfactory working conditions."[187] With the aid of such indicators, it would be easier to ascertain or monitor when a state fails to fulfill its obligations.[188] Admittedly, fixing a minimum

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184. Fairness and appropriateness of governmental actions and proposed or actual expenditures are implicated in the phrase "equitable and effective use of available resources." A creative and effective use of the minimum threshold approach will necessarily involve evaluating the fairness of a state's actions (vis-à-vis the most vulnerable group) and the appropriateness of its use (or allocation) of resources.

185. *See* Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062, 1065 (2001) (defining a human rights "indicator" as "a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation").

186. Afr. Charter, *supra* note 2, art. 16.

187. *See* Afr. Charter, *supra* note 2, art. 15.

188. *See* Andreassen et al., *supra* note 172, at 341 (noting that when the threshold approach is adopted "[t]he *scope of violation ofsocio-economic rights* would then refer to the *percentage of the population not assured of this minimal threshold,* in the first instance, and further involve the question of whether such failure of minimal threshold assurance *is evenly or unevenly distributed by group,* defined by ethnicity, race, occupation etc ..." (emphasis added)). Philip Alston appears to be making a case for the minimum threshold approach when he states:

The fact that there must exist such a [minimum] core [content of each right that cannot be diminished under any pretext]... would seem to be a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a "claim" to the status of a right (with all the connotations that concept is generally assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the rightholders possess no particular entitlement to anything. Each right must therefore give rise to an absolute minimum entitlement in the absence of which a state party is to be considered to be in violation of it[s] obligations.

threshold is more of an administrative duty properly exercised by a nonjudicial body like the Commission. Nonetheless, it is not inconceivable for a court to embark on such an exercise. A court can always encompass such an exercise within its notions of fairness and equity. After all, the category of fairness is never closed and can be expanded to embrace new situations.

One obstacle to a court-directed minimum threshold approach is that the allocation of resources is a policy matter properly left to the executive and legislature. The difference with respect to the courts' involvement in the minimum threshold approach would "be one of degree and not kind."[189] Courts frequently make decisions and orders based on public policy.[190] Lord Denning and Lord Diplock of the English Bench have revealed their consideration of policy issues in determining cases.[191]

Courts' decisions regularly impact the application of resources as well. Where the court finds the state liable for violating a citizen's right to personal liberty and awards damages for unlawful detention, such a decision implicates the state's application of resources. Where the court finds a state liable for failure to protect a citizen from counterdemonstrators while in the lawful exercise of her freedom of expression, it is unlikely that the state will prevail on a defense based on lack of resources to recruit and equip police officers. Although the threat of future damages will likely induce the state to increase funding for public safety, the court is not blamed for making decisions on the allocation of resources.

The minimum threshold approach, therefore, is not an entirely novel practice, but an extension of an already existing practice. Even if it were entirely new, this is no reason, by itself, to reject it. The courts are put in place to do justice. Justice must shift and adjust to cover new situations and the demands of the times. If the courts are not sufficiently equipped, they should be and the earlier the better.

Philip Alston, Out of Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights, 9 HUM. Rms. Q. 332, 352-53 (1987).

189. DAVID KINLEY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COMPLIANCE WITHOUT INCORPORATION 6-10 (1993) (internal citations omitted).

190. *Id.* at 6-10.

191. *See* Magor & St. Mellons Rural Dist. Council v. Newport Corp., 2 All E.R. 1226, 1235-37 (1950) (illustrating Lord Denning's opinion); Spartan Steel & Alloys v. Martin & Co. (Contractors) Ltd., 1 Q.B. 27, 36 (1973) (same); *see also* O'Reilly v. Mackman, 2 A.C. 237, 285 (1983) (illustrating Lord Diplock's opinion).

The minimum threshold approach can reinforce the concerted and integrated approach and make it more effective. A court or commission could hold a State Party to be in violation of the right of an individual to "respect of the dignity inherent in a human being"[192] where the individual has been made to live below the threshold set for the defendant State Party. In this way, it would be more difficult for a state or government to use lack of development as a defense, because its financial abilities would have been independently assessed and factored into its minimum threshold.

If these two approaches were combined effectively, it might be possible to provide greater, effective ESCR protection under the African Charter, even in the absence of direct national judicial enforcement. Regardless, the integrated and minimum threshold approaches should be a first step, and not the end game, in the overall effort to accord due, equal relevance to ESCR under the African Charter at both the national and regional levels.

VI. CONCLUSION

Human rights in Africa should be a quintessence of Africa's attempt to reclaim humanity following its devaluation by the most invidious abuses, especially the slavo-colonial, tentacular reach of some European states. Full reclamation of humanity entails *equal emphasis* on what it takes to be human. This equal emphasis translates into *equal enforcement* of all human rights, whether civil and political or ESCR, without discrimination. It requires a change of attitude towards ESCR in contemporary Africa. Protecting and enforcing only civil and political rights in a situation of exacerbated civil and political strife occasioned by worsening socioeconomic conditions "projects an image of truncated humanity."[193] It *"excludes those segments of society [the overwhelming majority] for whom autonomy means little without the [basic] necessities of life."*[194] As the South African Constitutional Court underlined in *Grootboom:* "A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality

192. *See* Afr. Charter, *supra* note 2, art. 5.
193. Craig Scott & Patrick Macklem, Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution, 141 U. PA. L. Rev. 1, 29 (1992).
194. *Id.* (emphasis added).

and freedom."[195] The solution lies in adopting a truly holistic view of human dignity: one that is "pursued in light of both the overarching purposes and underlying values of human rights protection, rather than under the constraint of false dichotomies."[196]

195. South Africa v. Grootboom, 2000 (11) BCLR 1169, 44 (CC), *available at* http://www.concourt.gov.za/judgments/2000/grootbooml.pdf (last visited Feb. 2, 2002).
196. Craig Scott, Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights", 21 HUM. RTS. Q. 633, 664 (1999).

APPROACHES TO THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE JURISPRUDENCE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PROGRESS AND PERSPECTIVES

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1. INTRODUCTION

In contrast with the prevailing trend at the time of its adoption, the African Charter on Human and Peoples' Rights (African Charter) clearly recognises the indivisibility of human rights,[1] and enshrining economic, social and cultural rights together with civil and political rights and collective rights. In addition to such cross-cutting rights as the rights to equality and non-discrimination and the right to dignity, the African Charter guarantees the right to equitable and satisfactory conditions of work, the right to health, the right to education and the right to culture.[2] It supplements these classic economic, social and cultural rights with such related rights as the right to property, the right to protection of the family, the right to economic, social and cultural development and the right to a satisfactory environment.[3]

The African Charter further subjected the aforementioned rights to monitoring by the African Commission on Human and Peoples' Rights (African Commission) – an 11-member quasi-judicial body with promotional and protective mandates.[4] Under its protective mandate, the African Commission is granted power to examine inter-state communications and "communications other than those of states parties".[5] Based on the latter provision, the Commission

1. Preamble, para 7 African Charter on Human and Peoples' Rights, CAB/LEG/67/3/Rev 5 (1985).
2. Arts 2, 3, 5, 7 & 15-17 African Charter.
3. Arts 14, 18, 22 & 24 African Charter.
4. Arts 30 & 45 African Charter.
5. Arts 46-58 African Charter.

established its individual communications mechanism, under which it considers claims of violation of rights by individuals, groups or their representatives in an adversarial procedure and issues authoritative findings and remedies.

The protection of economic, social and cultural rights as substantive norms and their subjection to adjudicatory enforcement by the African Commission mean that the rights are generally justiciable. The establishment of the African Court on Human and Peoples' Rights (African Court) to complement the protective mandate of the Commission with a judicial mechanism of enforcement leading to binding judgments increases the justiciability of the economic, social and cultural rights protected under the African Charter.[6] Although the Charter does not provide for an exhaustive list and content of economic, social and cultural rights, the authorisation of the African Commission to draw inspiration from international human rights law and practice and the power of the African Court to enforce any relevant human rights instrument ratified by the states concerned may be used to close the normative gaps.[7] While the African Court has not yet handed down any relevant decision, the African Commission has developed a young economic, social and cultural rights jurisprudence from the small, but relatively sizable, number of pertinent cases.[8] The latter has over the years been applying and giving content to the terse economic, social and cultural rights provisions of the African Charter. Especially in its early days, the Commission's reasoning in its decisions lacked in proper analysis and rigour, but it has improved the quality of its arguments and findings.[9]

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6. Arts 2 & 26-28 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/EXP/AFCHPR/PROT (III) (2004). A decision has been taken to merge the African Court with the Court of Justice of the African Union, resulting in the Protocol on the Statute of the African Court of Justice and Human Rights which is not yet in force.
7. Arts 60-61 African Charter; arts 3 & 7 African Court Protocol.
8. Out of only 71 cases which the African Commission finalised on the merits by the end of 2009, it decided 13 cases involving claims of violations of one or more of the classic economic, social and cultural rights. If we add cases in which violations of the right to property and the right to protection of the family were found, the number jumps to 25, which is 35% of the cases decided on the merits by the end of 2009. There were some relevant pending cases at the time of writing.
9. For a review and characterisation of the African Commission's approach with regard to economic, social and cultural rights cases decided until 2003, see C

The article reviews the jurisprudence of the African Commission to see whether it has developed or followed principled approaches in the application of the economic, social and cultural rights provisions of the African Charter to actual cases. It measures the progress of the Commission's practice of adjudication of economic, social and cultural rights in comparison with approaches developed in other systems and provides perspectives for the further development of its jurisprudence. It argues for the application of methods of adjudication leading to well-reasoned decisions that ultimately increase the legitimacy, and hence compliance with the Commission's findings and recommendations.

2. APPROACHES TO THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Objections to the justiciability of economic, social and cultural rights, which question the legal nature of these rights and the competence of judicial and quasi-judicial organs to enforce them, fail to realise that there is "no monolithic model of judicial enforcement for all human rights".[10] Models of review that respect the limits of the power of adjudicatory organs and take the circumstances of each case into account respond to possible challenges to the justiciability of economic, social and cultural rights. Judicial or quasi-judicial organs may measure the compliance of the actions or inactions of states or their organs against standards that may be derived from provisions of human rights instruments. Approaches or models of adjudication or review are methods by which judicial or quasi-judicial organs derive the standards of evaluation from relevant legal provisions and apply them in their findings on specific issues.

Various approaches to the litigation and adjudication of economic, social and cultural rights have been developed and advanced in the practices of judicial and quasi-judicial organs and in

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Mbazira "Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides' (2006) 6 *African Human Rights Law Journal* 333 342-353.

10. AA An-Na'im "To affirm the full human rights standing of economic, social and cultural rights" in Y Ghai & G Cottrell (eds) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) 7.

scholarly writings.[11] They may be broadly categorised as direct and indirect approaches. Direct approaches are based on the argument that economic, social and cultural rights are directly enforceable by adjudicatory organs and they apply in systems where the rights are expressly protected as justiciable substantive norms. Indirect or interdependence approaches, which rely on the indivisibility, interdependence and interrelatedness of all human rights, are typically employed in systems where economic, social and cultural rights are not clearly or sufficiently protected in applicable legal instruments.

In the African human rights system where economic, social and cultural rights are protected as (quasi-) judicially enforceable substantive norms, direct approaches to the justiciability of the rights apply. Based on the integrated protection of the various groups of rights in the African Charter, the interdependence approach may also be used to close normative gaps in the Charter that result from the non-inclusion or incomplete protection of some economic, social and cultural rights. The latter is, in a way, an approach for the stronger protection and enforcement of economic, social and cultural rights in the system.

2.1 Direct approaches

In systems where a judicial or quasi-judicial organ has subject matter jurisdiction over clearly protected economic, social and cultural rights, direct approaches have been advocated and applied in the enforcement of negative (non-interference) as well as positive (action-oriented and resource-dependent) duties of states. Two such approaches are as follows: one that relies on the identification of the minimum essential elements of rights, and another that inquires into the reasonableness or justifiability of a state's action or inaction.

2.1.1 Minimum core model

Adopted first by the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee), the minimum core model is a model for the "assessment" of a state's action in the discharge of its obligations relating to economic, social

11. See T Melish Protecting economic, social and cultural rights in the Inter-American human rights system: A manual on presenting claims (2002) 193-357.

and cultural rights based on whether it meets minimum essential levels of a right.[12] The model has since been a subject of doctrinal debate as a standard for monitoring and enforcement of economic, social and cultural rights. Young summarises the various approaches to the minimum core as those that identify an "essential" minimum or absolute foundation for economic, social and cultural rights, those that seek minimum consensus surrounding these rights, and those that correlate the minimum core with minimum obligations.[13] Best exemplified by a definition of the core as the intrinsic and fundamental elements of rights, a normative understanding that identifies minimum entitlements and duties is the prevailing sense in which the minimum core model has been referred to.[14]

Much as it has the advantage of giving normative content to the seemingly crude obligation of "progressive realisation" and serving as a standard against retrogressive measures, the minimum core model, especially as defined by the ESCR Committee, has limitations in terms of providing clear, simple, consistent and common standards of monitoring or adjudication.[15] The contents of the core have been expanding from "immediately realisable" negative duties to positive obligations, including the provision of essential drugs and access to education and water facilities.[16] The definition of core obligations does not provide a clear mechanism or methodology for the identification of minimum duties. There is also a question as to whether the minimum core model is suitable for individual or

12. United Nations Committee on Economic Social and Cultural Rights (ESCR Committee) General Comment 3 The nature of states parties' obligations (1990) paras 4 & 10.

13. K Young "Conceptualising minimalism in socio-economic rights" (2008) 9 *ESR Review* 6 7-9.

14. See F Coomans "In search of the core content of the right to education" in D Brand & S Russell (eds) *Exploring the core content of economic and social rights: South African and international perspectives* (2002) 166-167. See generally A Chapman & S Russell (eds) *Core obligations: Building a framework for economic, social and cultural rights* (2002).

15. For example, while the Committee makes failure to meet the core minimum exceptionally justifiable under General Comment 3 para 10, it says that the minimum core is non-derogable in General Comment 14, The right to the highest attainable standard of health (2000) para 47 and General Comment 15, The right to water (2003) para 40.

16. See General Comment 13, The right to education (1999) para 57; General Comment 14 para 43; General Comment 15 para 37.

group claims of economic, social and cultural rights.[17] Nonetheless, while the determination of minimum core entitlements and duties should be contextualised, the following may be considered common denominators of the various definitions: the negative obligations of non-interference and non-discrimination; the duty to lay down a legal and policy framework for the realisation of rights, at least part of the duty to protect from the breach of rights by third parties; and the duty to prioritise those in urgent and desperate need. There is also no reason why the definition of such core obligations cannot apply in relation to individual as well as group claims of economic, social and cultural rights.

While adjudicatory organs in various systems have recognised and applied basic and fundamental elements of rights without necessarily using the minimum core concept,[18] the South African Constitutional Court considered the model as a competing approach of adjudication. The Court consistently rejected the idea of directly justiciable minimum core obligations based mainly on a lack of sufficient information, the diversity of needs and opportunities for the enjoyment of the core, the impossibility of giving everyone immediate access to the core and the competence of courts to determine the minimum core standard.[19] Although the difficulty of fully defining the core minimum that applies in all circumstances may be recognised, the Constitutional Court's insistence that it starts from obligations of states in the application of rights and that it does not do rights analysis is difficult to understand.[20] The Court may make a context-based incremental determination of the minimum core by starting with an analysis of rights provisions and the identification of their basic or fundamental elements.

17. See Government of the Republic of South Africa & Others v Grootboom & Others 2000 11 BCLR 1169 (CC) para 33.
18. See M Langford "Judging resource availability" in J Squires et al (eds) The road to a remedy: Current issues in the litigation of economic, social and cultural rights (2005) 99-100.
19. Grootboom (n 17 above) paras 29–33; Minster of Health & Others v Treatment Action Campaign & Others 2002 10 BCLR 1033 (CC) (TAC) paras 26–39. See also Lindiwe Mazibuko & Others v City of Johannesburg & Others 2009 ZACC 28 paras 52-58, 60-62 & 68 (rejecting the argument of the lower courts indicating the possibility of determining the minimum core in relation to the right to water).
20. See D Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* 1.

Nevertheless, the Court does not reject the minimum core model out of hand as it said that it may take it into account in determining whether measures adopted by the state are reasonable, rather than as a self-standing right conferred on everyone.[21]

In some of its early decisions, the African Commission enforced the "basic" and "immediate" elements of economic, social and cultural rights without expressly referring to them as the minimum core. In one such case it held that "the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine" constituted a violation of the right to health under article 16 of the African Charter.[22] Although the African Commission's conclusion is not based on a proper analysis of the normative contents of the right to health, the case exemplifies the use of basic or essential components of rights, which define the minimum core,[23] in the enforcement of the duty to fulfil the right to health. The finding in the same case that the closure of universities and secondary schools constitutes a violation of the right to education under article 17 of the Charter also coincides with the related minimum duties of states and the principle against retrogressive measures.[24]

The African Commission places a heightened responsibility on states and finds it easy to establish the violation of the right to health in conditions of detention. In a couple of cases it found a denial of access to doctors, and a lack of food, blankets and adequate hygiene in prisons in violation of the right to health under article 16 of the African Charter.[25] The Commission considers the pertinent positive duties of states to be immediate. If the minimum core of the right to health is to be defined in the context of prisons, it would

21. *Grootboom* (n 17 above) para 33; *TAC* (n 19 above) para 34.
22. Free Legal Assistance Group & Others v Zaire (2000) AHRLR 74 (ACHPR 1995) para 47.
23. See ESCR Committee General Comment 14 para 43 (enumerating access to safe and potable water and the provision of essential drugs as part of the minimum core of the right to health). Note that the provisions of art 12(1) of the International Covenant on Economic Social and Cultural Rights, which the General Comment elaborates, resemble those of art 16(1) of the African Charter.
24. Free Legal Assistance Group (n 22 above) 48.
25. *Malawi African Association & Others v Mauritania* (2000) AHRLR 146 (ACHPR 2000) paras 121-122; *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 89-91; International PEN & Others (on behalf of Saro-Wiwa) v Nigeria (2000) AHRLR 212 (ACHPR 1998) paras 111-112.

most probably include the elements identified by the Commission. Reading between the lines, one may argue that the Commission's reasoning and findings indicate that the obligations of states to provide health services to prisoners and to maintain healthy prison conditions are among the core minimum of the right to health.

In its celebrated decision in a case that concerned the economic, social and cultural rights of the people of the Ogoni region of Nigeria, the African Commission used the minimum core language more clearly in enforcing the rights to shelter and food, which as shown further below were read into the African Charter through the interdependence approach.[26] First, the Commission observed that the fact that the government gave the green light to private actors to devastatingly affect the well-being of the Ogonis "falls short of the minimum conduct expected of governments".[27] It then said that the right to shelter "at the very minimum" obliges the government to avoid destroying the housing of its citizens and obstructing their efforts to rebuild their homes and to prevent the violation of the right to housing by any other individuals, and found that the government of Nigeria "has failed to fulfill these two minimum obligations".[28] The Commission further noted that "the minimum core of the right to food requires" that the government should not destroy or contaminate food sources, allow private parties to do the same or prevent peoples" efforts to feed themselves, and held that "the government's treatment of the Ogonis has violated all three minimum core duties of the right to food".[29] It finally concluded that the Nigerian government "did not live up to the minimum expectations of the [African] Charter".[30]

The use of the minimum core language demonstrated that the African Commission has been following the jurisprudential debates about the definition of the normative content of economic, social and cultural rights.[31] The Commission considered the duties to respect (duty to refrain from interference with enjoyment of rights) and

26. Social and Economic Rights Action Centre & Another v Nigeria (2001) AHRLR 60 (ACHPR 2001) (Ogoni case) paras 58-68.
27. *Ogoni* case (n 26 above) para 58.
28. *Ogoni* case (n 26 above) paras 61-62.
29. *Ogoni* case (n 26 above) paras 65-66.
30. *Ogoni* case (n 26 above) para 68.
31. F Coomans "The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52 *International and Comparative Law Quarterly* 749 757.

protect (duty to protect right-holders against third parties) the rights to housing and food as the minimum core obligations. It did so without engaging in a proper analysis and definition of the normative content of the rights it applied. Its understanding of minimum duties also does not fit perfectly with that of the ESCR Committee, which, for example, elaborated the minimum core of the right to food in terms of availability, acceptability and accessibility of food.[32] Nonetheless, the Commission applied the concept in connection mainly with duties of states which in any case are considered to be among the minimum contents of economic, social and cultural rights.

In a later decision in a case concerning mental health patients in The Gambia, the African Commission defined the obligations of state parties relating to the right to health as "to take concrete and targeted steps" to realise the right "without discrimination of any kind".[33] Although it has not used clear minimum core language in this case, the Commission imported the standards which the ESCR Committee adopted in defining the nature of states' obligations in the General Comment in which it adopted the minimum core model for the first time.[34] It is probably for this reason that commentators close to the Commission considered its definition of the obligations of states in this case as an indication that it was "leaning towards" or "importing" the minimum core standard of the ESCR Committee.[35] Even though the latter does not specifically incorporate the duties identified by the Commission into its list of core obligations, they may be taken as the minimum of the positive obligations of states.

In applying the right to culture in the more recent case concerning the Endorois community of Kenya, the African Commission seems to have followed what Young called the "essence approach" to minimum core.[36] After observing that imposing restrictive rules on culture "undermines its enduring aspects", it found the threat to the pastoralist way of life of the Endorois community of Kenya by their relocation and the restriction of access to resources for their livestock to be a denial of "the very essence of the Endorois" right

32. General Comment 12, The right to adequate food (1999) paras 8-13. See also Coomans (n 31 above) 756.
33. *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84.
34. General Comment 3 paras 1-2.
35. Mbazira (n 9 above) 353; F Viljoen *International human rights law in Africa* (2007) 240.
36. Young (n 13 above) 7.

to culture".[37] This indicates that the obligation to refrain from imposing restrictions on cultural ways of life is an essential element of the right to culture that may be characterized as its minimum core. It is only that the Commission has not specifically used such language in this case.

While one may say, based mainly on the *Ogoni* case, that the minimum core model has generally formed part of the jurisprudence of the African Commission, it should also be acknowledged that the standards of review are not articulated sufficiently well as to make it a model of review of economic, social and cultural rights chosen and followed by the Commission. Its approach of considering the duties to respect and protect economic, social and cultural rights as minimum core obligations is also not a consistent one. It did not, for example, apply the model in its recent decision in the case relating to atrocities committed in the Darfur region of Sudan, where it found a violation of the right to property, the right to health and the right to development mainly because of the failure of the state to refrain from destructive acts and to protect the people of Darfur from the Janjaweed militia.[38] The Commission should engage in an analysis of applicable rights provisions and the prudent evaluation of models of review that suit the nature and circumstances of various cases. Wisely employed, the minimum core model that involves the scrupulous identification of essential or fundamental elements of rights and duties provides a principled approach to the justiciability of economic, social and cultural rights protected in the African Charter.

2.1.2 Reasonableness model

Judicial and quasi-judicial organs in national as well as international jurisdictions have inquired into the compatibility, justifiability or reasonableness of states' conduct in the light of their obligations relating to socio-economic rights.[39] The reasonableness model developed by the South African Constitutional Court stands

37. Centre for Minority Rights Development & Others v Kenya (2009) AHRLR 75 (ACHPR 2009) (Endorois case) paras 250-251.

38. *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur* case) paras 205, 212, 216 & 223. See text accompanying n 91/93 below.

39. See M Langford "The justiciability of social rights: From practice to theory" in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 3 43.

out as a veritable standard of review of positive duties that may also apply in other legal/human rights systems. The model escapes institutional legitimacy objections as it involves the scrutiny of government programmes for reasonableness without dictation or pre-emption of policy choices and by giving appropriate deference to the executive and legislative branches.[40] The government would be required to take steps where it has taken none, and to revise adopted measures to meet constitutional standards where they are found to be unreasonable.[41]

From the South African Constitutional Court's judgments in the relevant cases, a "reasonable" programme must be comprehensive, coherent, co-ordinated, balanced and flexible; should make appropriate provision for short, medium and long-term needs; should not exclude a significant sector of society, and take account of those who cannot pay for the services; have appropriate human and financial resources; be both reasonably conceived and implemented; be transparent and involve realistic and practical engagement with concerned communities; provide relatively short-term relief for those whose situation is desperate and urgent; and be continually reconsidered to meet the needs of relatively poorer households.[42]

Some of the above criteria have also been applied by the United States Supreme Court in connection with a state's treatment programme for persons with mental disability[43] and by the European Committee of Social Rights in evaluating the compatibility of the conduct of states with positive obligations under the European Social Charter.[44] It is by taking these jurisprudential developments

40. See D Brand "Socio-economic rights and courts in South Africa: Justiciability on a sliding scale" in F Coomans (ed) *Justiciability of economic and social rights: Experiences from domestic systems* (2006) 227; CR Sunstein *Designing democracy: What constitutions do?* (2001) 222-23.

41. *Mazibuko* (n 19 above) para 67.

42. *Grootboom* (n 17 above) paras 39-43; *TAC* (n 19 above) paras 68, 78, 95 & 123; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2009 ZACC 16 paras 115-117; and *Mazibuko* (n 19 above) para 93. For the elaboration of some of the criteria, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 151-157.

43. *Olmstead v LC* 527 US 581 (1999) part III B 18-22 (whether the state had a comprehensive and effectively working plan and a waiting list that moved at a reasonable pace).

44. Eg, see Complaint 39/2006, European Federation of National Organisations Working with the Homeless (FEANTSA) v France (5 December 2007) paras 56-58; and Complaint 41/2001, Mental Disability Advocacy Centre (MDAC) v Bulgaria (3

into account that the recent Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) incorporated reasonableness as a predefined model of review for communications to be submitted to the ESCR Committee.[45]

The reasonableness model best exemplifies the adoption of an appropriate model of review as the ultimate response to objections to the justiciability of economic, social and cultural rights. While their association with policies is seen as an impediment to the justiciability of the rights, the reasonableness model shows that state policies meant to implement the rights can be reviewed by adjudicatory organs. Nevertheless, the reasonableness model, especially as developed by the South African Constitutional Court, has limitations in terms of responding to claims for direct socio-economic benefits for an individual or a class of individuals, throwing the burden of proof of the unreasonableness of the state's programme on the litigants and failing to link the reasonableness standard with more detailed elaboration of the content of specific rights.[46] It is in connection with its failure to do "rights analyses" that the Constitutional Court has been urged to integrate the minimum core model – an argument which it openly rejected.

Despite the development of the reasonableness model in a domestic system quite close to it, the African Commission has an immature jurisprudence with regard to models of review applying to positive obligations. In the famous *Ogoni* case, in which it referred to the minimum core model, the Commission has not gone beyond underlining the obligation of states "to take reasonable measures" in connection with the right to the environment.[47] Even though it only specified the measures that need to be taken without elaborating what constitutes "reasonable" steps to achieve them, the observation of the Commission indicates that the general obligation of states under the African Charter to take "legislative and other measures"

June 2008) para 39 (applying such criteria as reasonable timeframe, measureable progress, meaningful statistics on needs, resources and results, regular reviews of the impact of the strategies adopted and special attention to vulnerable groups).

45. Optional Protocol to ICESCR (2008) art 8(4); B Porter "The reasonableness of article 8(4) – Adjudicating claims from the margins" (2009) 27 *Nordic Journal of Human Rights* 39 46-50.

46. See Liebenberg (n 42 above) 308; S Liebenberg "Enforcing positive socio-economic rights claims: The South African model of reasonableness review" in Squires *et al* (n 18 above) 83; Bilchitz (n 20 above) 9 19.

47. *Ogoni* case (n 26 above) para 52.

should be interpreted as requiring "reasonable measures" to realise economic, social and cultural rights. This can be a solid basis for the application of the reasonableness standard of review in the style of the Constitutional Court in relation to positive state obligations.

The African Commission has nevertheless applied what may be called a variant of the reasonableness model in evaluating states' conduct in cases concerning the infringement of property rights. It used the internal qualifiers of article 14 of the African Charter, which allow encroachment upon property in the interest of the public and in accordance with the law, to require states to justify their actions affecting property rights. In a mass deportation case against Angola, for example, the Commission found a violation of the right to property because the state failed to provide a "public interest" justification for its actions of deportation of foreign citizens that resulted in the confiscation and abandonment of their properties.[48] In the *Endorois* case, in which it interpreted the right to property as including a justiciable right to the use of land by an indigenous community without real title,[49] the Commission laid down more detailed requirements for the justification of encroachment upon property.

The African Commission examined the justifiability of the state's eviction of the Endorois from their ancestral land against the criteria of proportionality, participation, consent, compensation and prior impact assessment which it basically derived from article 14 of the African Charter.[50] It found the state in violation of the right to property as well as the right to development for its "disproportionate" forced removal of the community, its failure to allow effective participation or hold prior consultation with a view to secure the consent of the Endorois, the absence of reasonable benefit enjoyed by the community, the failure to provide collective land of equal value or compensation after dispossession, and the failure to conduct prior environmental and social impact assessment.[51] It further noted that the standards derived from article 14 require the state to evaluate whether a restriction of the Endorois property rights is necessary to preserve the community's survival.[52] The standards of review applied

48. Institute for Human Rights and Development in Africa v Angola (2008) AHRLR 43 (ACHPR 2008) (IHRDA) paras 72-73.
49. *Endorois* case (n 37 above) para 187.
50. *Endorois* case (n 37 above) paras 218 & 224-228.
51. *Endorois* case (n 37 above) paras 238 & 281-298.
52. *Endorois* case (n 37 above) para 267.

in this case show by and large that the Commission examines the justifiability or reasonableness of states' actions that restrict the article 14 right to property or affect the right to economic, social and cultural development under article 22 of the African Charter. The standards helped the Commission in deciding the complex issues relating to the impact of states' development initiatives on the economic, social and cultural rights of a community.

There are also cases where the African Commission found violations of specific economic, social and cultural rights based on the impropriety of states' conduct in light of relevant provisions of the African Charter. It, for example, found the abrupt expulsion of foreign nationals without any possibility of due process to challenge the state's actions in violation of the victims' right to work.[53] The problem is that the Commission's reasoning in such cases is too short and shallow to allow the conclusion that it applied a proper model of review. With further articulation and rationalisation, the style of reasoning in relation to the rights to property and development in the *Endorois* case may lead to the adoption of a model of review of positive duties. Especially the criterion of meaningful engagement with affected people, which is also an important element of the South African Constitutional Court's reasonableness model, may be used to address the democracy deficit that characterises the denial of economic, social and cultural rights in many parts of Africa.

2.1.3 Model of review combining minimum core and reasonableness standards

The previous sections show that both minimum core and reasonableness models are possible approaches to the direct justiciability of economic, social and cultural rights. While the minimum core model seems to be best suited to the justiciability of negative and "basic level" positive obligations, the reasonableness model provides more advanced standards for the review of positive obligations. Whereas the former more or less concentrates on the content of rights to identify minimum entitlements and duties, the latter focuses on the obligations of states or measures to realise rights. They respectively use normative and more of "empirical or sociological" standards of review. Both models also provide well for those in urgent need or vulnerable groups. These characteristics of

53. *IHRDA* (n 48 above) paras 74-76.

the two models make it logical to conceive a model of review that combines elements or features of both.[54] Without an intention to exclude other possibly effective models, an approach that carefully combines the analysis of rights and obligations provisions and the evaluation of measures taken by a state against standards derived from such analysis could work well in practice.

There is no good practical example of a case where the "combined approach" has been applied so far, but the ESCR Committee indicated in a statement issued in mid-2007 that it would apply standards that may broadly fall within such an approach. In elaborating the standards that it will apply in considering communications concerning an alleged failure of a state party to take steps to the maximum of available resources, the ESCR Committee stated that it would examine the adequacy or reasonableness of measures taken by the state based on a list of criteria that effectively encapsulated minimum core and reasonableness standards.[55] The "combined model" appears to provide promising standards of review of positive as well as negative obligations. It should, however, pay attention to the legitimacy and competence objections to the adjudicatory enforcement of economic, social and cultural rights and also to the limitations of the minimum core and reasonableness models indicated earlier. It should, for example, rein in the expanding definition of the minimum core and also allow provision for individual claimants at least in some circumstances.

Some of the ESCR Committee's standards of the "combined model" were identified by the African Commission as measurements of the positive obligations relating to the right to health in the Gambian mental health case.[56] Although it has not expressly identified its reasoning with the minimum core or the reasonableness models in that case, its criteria of "taking concrete and targeted steps and avoiding discrimination" may be applied in the evaluation of states'

54. See Bilchitz (n 20 above) 1-26.

55. Statement "An evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant" (10 May 2007). The criteria include that the measures taken towards the fulfilment of economic, social and cultural rights be deliberate, concrete and targeted, non-discriminatory and non-arbitrary, recognise the precarious situation of disadvantaged and marginalized individuals, and follow transparent and participative decision-making process. Elements of core obligations are also made part of the criteria in the examination of failure to take steps and retrogressive measures.

56. *Purohit* (n 33 above).

obligations relating to other economic, social and cultural rights. It is also interesting to see in this case that the African Commission made "rights analysis" in defining the contents of the right to health in general and the right to mental health in particular.[57] It finally concluded that the impugned Lunatic Detention Act "is lacking in terms of therapeutic objectives as well as provisions of matching resources and programmes of treatment of persons with mental disabilities" and found the state in violation of the right to health.[58] This is the result of an evaluation of the propriety or reasonableness of the legislative measure taken by the state to realize the right to (mental) health based on criteria derived through "rights analysis". Even though it lacks articulation as a proper model of review, the reasoning in the case shows an attempt at normative analysis and evaluation of the state's conduct against specific duties derived from applicable legal provisions.

Together with the jurisprudence in the *Ogoni* case, the *Endorois* case and other relevant cases where variants of either or both of the minimum core and reasonableness models have been applied, the reasoning of the African Commission in the Gambian mental health case may be used as a good starting point for the development of a "combined model".

2.1.4 Some remarks on the direct approaches of the African Commission

The study of cases it decided so far shows that the African Commission has been practically applying the right to work, the right to health, the right to education, the right to culture and other related rights. In the *Ogoni* case, it made the far-reaching observation that it "will apply any of the diverse rights contained in the [African] Charter" and welcomed the "opportunity to make clear that there is no right in the Charter that cannot be made effective".[59] Considered a "radical approach", for it sees all rights as equally enforceable,[60] the pronouncement of the African Commission confirmed the direct

57. *Purohit* (n 33 above) paras 80-82.
58. *Purohit* (n 33 above) para 83.
59. *Ogoni case* (n 26 above) para 68.
60. GJ Naldi "The African Union and the regional human rights system" in M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 20 30.

justiciability of the economic, social and cultural rights enshrined in the African Charter.

Although the Commission has been courageous in directly applying the economic, social and cultural rights provisions of the Charter, including in the most complex of cases involving resource-dependent duties and development policy issues, it has also exhibited serious reasoning deficits in many of the relevant cases it decided. In the early years of its existence, the Commission rushed to conclusions after merely summarising the complaints and citing applicable provisions of the Charter. Some of its more recent decisions show evolution towards more reasoned decision making.[61] Nonetheless, even at the current improved phase of the Commission's decisions, there is much to be desired in terms of a systematic analysis of facts and laws, evaluation of competing perspectives, soberness of findings, consistency in details and justification of remedies. The quality of decisions differs from one case to another. The shallowness and inconsistent quality of the reasoning of the Commission in many of the economic, social and cultural rights cases it decided is reflected in the underdevelopment of its jurisprudence with respect to models of review.

The African Commission's approach to the direct justiciability of rights in many of its decisions may basically be characterised as the mechanical application of provisions of the African Charter to the facts of the various cases. Seeing that the Commission often begins with a recital of the relevant rights and obligations provisions of the Charter, one would expect "rights analysis" to find specific norms that apply to the particular circumstances of the cases. It creates an expectation that it will derive standards based on which it evaluates the action or inaction of the state in question. However, in many cases, the Commission made haste to reach conclusions, sometimes merely following the arguments of the complainants.

The African Commission has been attempting to develop its case law by referring to its own decisions and those of international as well as national human rights bodies based on article 61 of the African Charter.[62] It is unfortunate that it has not referred to the widely-cited jurisprudence of the South African Constitutional

61. See Viljoen (n 35 above) 354.
62. *Ogoni* case (n 26 above); *Purohit* (n 33 above); *Endorois* case (n 37 above); *Darfur* case (n 38 above).

Court in its decisions relating to economic, social and cultural rights. In the direct application of economic, social and cultural rights, the Commission may find it useful to begin with a "rights analysis" to identify the normative contents of relevant provisions which may result in the definition of the minimum essential levels of rights. The specific normative standards may then be used for the evaluation of states' conduct. An approach combining facets of the minimum core and reasonableness models may work well in the African system if accompanied by the rationalisation of the definition of the core and the criteria of reasonableness. The reference to the minimum core model in the *Ogoni* case, the application of a variant of the reasonableness standard in the *Endorois* case, and the brief combination of rights analysis and evaluation of the state's measure against specifically identified duties in the Gambian mental health case may be used as starting points for the development of a more comprehensive model of review of economic, social and cultural rights in the African system. This is not, however, to foreclose the development of other suitable models that do not necessarily rely on the ones discussed above.

2.2 Interdependence approach

The interdependence approach is a method of judicial or quasi-judicial enforcement of economic, social and cultural rights that relies on process and procedural rights that are common to all groups of rights (including the right to equality and non-discrimination), and the overlapping components of substantive rights normally placed in different categories. It is based on the intertwinement of human rights and seeks to undermine their artificial categorisation and create a coherent human rights norm system. The integrated protection of different groups of rights which are clearly stated to be indivisible and interdependent in the African Charter provides a solid basis for the approach.[63] It is probably for this reason that the African Commission declared in one of its economic, social and cultural rights decisions that it is "more than willing to accept legal arguments" that take into account the principle that "all human rights are universal, indivisible, interdependent and interrelated".[64] The requirement that the Commission draw inspiration from other

63. Preamble, para 7 African Charter.
64. *Purohit* (n 33 above) para 48.

international human rights instruments and the African Court's broad subject matter jurisdiction widen the substantive basis for their interdependence approach as they allow the cross-fertilisation of human rights norms or contents across treaties.[65]

The interdependence approach has been put to creative use in systems where there are substantive and procedural gaps in the protection of economic, social and cultural rights. The UN Human Rights Committee and the European Court of Human Rights gave socio-economic rights dimensions to the cross-cutting rights to non-discrimination and a fair trial, respectively, especially in cases concerning social security.[66] The two organs have also shown some interest in making use of the interdependence between substantive rights. The European Court, for example, protected the right to work by reading together provisions on non-discrimination and the right to respect for private life, and also indicated that the right to life covers aspects of the right to health.[67] The Human Rights Committee read socio-economic aspects into the right of members of minorities to enjoy their own culture in community with others.[68] The Inter-American Court of Human Rights has also affirmed the justiciability of indigenous land and resource rights through the right to property and the right to judicial protection.[69] The right to property, which is often enshrined in instruments devoted to civil and political rights, has also been used for the protection of components of such economic, social and cultural rights as the rights to housing and social security.[70]

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65. Arts 60-61 African Charter; arts 3 & 7 African Court Protocol.
66. For the analysis of relevant cases, see M Scheinin "Economic and social rights as legal rights" in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 32-38; C Krause & M Scheinin "The right not to be discriminated against: The case of social security" in T Orlin *et al* (eds) *The jurisprudence of human rights law: A comparative interpretive approach* (2000) 259-264.
67. *Sidabras & Dziautas v Lithuania* (2004) 42 EHRR 104 paras 50 & 62; *Zdzislaw Nitecki v Poland*, application 65653/01, decision, ECHR (2002) para 1.
68. M Scheinin "The right to enjoy a distinct culture: Indigenous and competing uses of land" in Orlin *et al* (n 66 above) 164-168.
69. *Mayanga (Sumo) Awas Tingni Community v Nicaragua* IACHR (2001) Ser C 79 paras 137-139 & 148-155.
70. *Akdivar & Others v Turkey* application 21893/93, ECHR 1998-II 69 (1998) (finding forced evictions and destruction of housing in violation of the right to property); *Gaygusuz v Austria*, application 17371/90, ECHR 1996-IV 14 (1996) para 41 (social benefits as pecuniary rights covered by the right to property); and *Case of the "Five Pensioners" v Peru* IACHR (2003) Ser C 98 paras 102, 103 & 121

The most robust utilisation of the approach based on the interdependence of substantive rights is to be found in the jurisprudence of the Indian Supreme Court where the right to life has been interpreted as including the right to a livelihood, the right to health care, the right to shelter, the right to the basic necessities of life, such as adequate nutrition, clothing and reading facilities, the right to education, and the right to just and human conditions of work.[71] While the understanding of the interdependence among substantive rights is good, care should be taken with regard to the extent to which the right to life or any other right may be expanded.[72] Interpretations should be able to show a genuine substantive interrelationship between the rights in question or their components.

As indicated earlier, the application of the interdependence approach is not limited to systems where there are substantive and/or procedural gaps in the protection of economic, social and cultural rights. In the African system, the approach can be used to bridge gaps and strengthen the protection of economic, social and cultural rights. The African Charter enshrines rights that are not commonly categorized under economic, social and cultural rights but may serve as bases for the enforcement of the latter. These rights include the cross-cutting rights to non-discrimination or equality, equal protection of the law, and a fair trial; the highly permeable substantive rights to life and dignity; the instrumental right to freedom of movement, including the rights of non-nationals; the right to equal access to public property and services; and the multi-faceted right to property and development-related rights, which may also be treated as economic, social and cultural rights.[73] In its practice, the African Commission

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(finding arbitrary changes in the amount of pensions to be in violation of the right to property).

71. *Tellis & Others v Bombay Municipal Corp & Others* (1987) LRC (Const) 351; *Pashim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426; *Shantistar Builders v Narayan Khimalal Totame & Others* (1990) 1 SCC 520; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Others* (1997) *AIR SC 152; Francis Coralie Mullin v The Administrator Union Territory of Delhi (1981) 2 SCR 516 529; Jain v State of Karnataka* (1992) 3 SCC 666; *Krishnan v State of Andhra Pradesh & Others* (1993) 4 LRC 234; *Bandhua Mukti Morcha v Union of India* (1984) 2 SCR 67.

72. See T Melish "Rethinking the "less as more" thesis: Supranational litigation of economic, social and cultural rights in the Americas" (2006) 39 *New York University Journal of International Law and Politics* 326-327.

73. Arts 2, 3, 4, 5, 7, 12, 13(2) & (3), 14, 19 & 20-22 African Charter.

is inclined to see all human rights as interconnected set of values and used some of the aforementioned rights for its interdependence approach. It has also utilised the approach to protect economic, social and cultural rights that are not expressly incorporated in the African Charter.

2.2.1 Interdependence approach in the jurisprudence of the African Commission

The African Commission in many cases underscored the value of the rights to non-discrimination and equal protection of the law under articles 2 and 3 of the African Charter respectively as the foundations for the enjoyment of all other rights.[74] It observed that equality or lack of it "affects the capacity of a person to enjoy many other rights" and presented the goals of article 2 as "the elimination of all forms of discrimination (in all its guises) and to ensure equality among all human beings".[75] It indicated in one case that individuals may successfully establish a claim for a violation of the right to equal protection of the law by showing that the state has not given them the same treatment it accorded to others.[76] In another decision it demonstrated the applicability of the equality provisions of the African Charter to the protection of the economic rights of individuals or peoples in a state party. It found the requirement of the use of the French language for the registration of companies in anglophone Cameroon and the concentration and relocation of business enterprises and economic projects in francophone Cameroon in violation of articles 2 and 19 of the African Charter.[77] In the Gambian mental health case, the African Commission implied that it expected states to provide legal aid and assistance to vulnerable groups and found that the absence of such legal aid failed to meet the standards of anti-discrimination and equal protection of

74. *Purohit* (n 33 above) para 49; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169.
75. *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63; *Malawi African Association* (n 25 above) para 131; Purohit (n 33 above) para 49; IHRDA (n 48 above) para 78; *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire* (2008) AHRLR 75 (ACHPR 2008) para 87.
76. See *IHRDA* (n 48 above) paras 45-48.
77. *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) paras 102-108 & 162.

the law under the African Charter.[78] The foregoing review shows the actual and potential relevance of the cross-cutting rights to equality and non-discrimination to the interdependence approach of the African Commission.

The African Commission has repeatedly applied the right to dignity and the related right against inhumane and degrading treatment that are protected under article 5 of the African Charter in an approach of interdependence of substantive rights.[79] It positions the right to dignity as an inherent right or a primordial and foundational value that underlies all human rights.[80] Violations of many economic, social and cultural rights would meet the African Commission's standards of "unfair treatment, so as to result in [one's] loss of worth and integrity" and "[feeling] devalued, marginalised, and ignored" for the violation of the right to dignity.[81] The Commission also recognises the potential of the permeable right to life to be used in an interdependent approach to cover issues of livelihood and facets of such rights as the rights to health and food.[82]

In detention cases where the main issues concerned such civil and political rights as the right to personal liberty and the right against arbitrary detention, the African Commission found detention in dark, overpopulated or "roofless" facilities under conditions of poor hygiene, insufficient food and/or a lack of access to medicine and medical care, and without access to family members, to be inhuman and degrading forms of treatment constituting a violation of article 5 of the African Charter.[83] The findings demonstrate the fundamental nature of the right against inhuman and degrading treatment and its interdependence with aspects of the rights to

78. *Purohit* (n 33 above) paras 34-38 & 52-54.
79. The right to the respect of the dignity inherent in a human being under this article is taken as a self-standing right that may be applied to a wide range of cases. Eg, see *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) para 58; and *Malawi African Association* (n 25 above) para 135.
80. See *Purohit* (n 33 above) para 57; and *Darfur case* (n 38 above) para 163.
81. *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 49.
82. See *Darfur* case (n 38) para 146.
83. *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999) paras 5, 25 & 27; *Constitution Rights Project & Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999) paras 5 & 28; *Malawi African Association* (n 25 above) paras 116 & 118; Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR 2000) paras 40-41; and IHRDA (n 48 above) paras 49–53. See also *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 54.

health, housing, food and the right to family life. In establishing a link between these rights and the basic right to life in one of the cases, the Commission further observed that denying detainees food and medical attention pointed to a shocking lack of respect for life and constituted a violation of article 4 of the African Charter.[84] Its findings of violations of other specific civil and political rights as well as economic, social and cultural rights, such as the right to health and the right to protection of the family, in some of the detention cases demonstrate the Commission's understanding of the various rights in the Charter as interdependent in practice. The cases also exemplify the utilisation of the interdependence approach based on rights that normally fall in the category of civil and political rights to reinforce the protection of economic, social and cultural rights. It is only unfortunate that the Commission failed to engage in the analysis of the normative contents of the relevant provisions of the Charter in order to show the interdependent components of the various rights.

In a case involving claims of slavery and exploitation in Mauritania, the African Commission further demonstrated the interdependence between the right to dignity under article 5 and the right to work. It emphasised that "unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being".[85] The argument of the Commission shows that the right to dignity can be interpreted to protect substantive aspects of the right to work that are not clearly covered by the provisions of article 15 of the African Charter. However, it is not clear why the Commission failed to refer to this latter article while reciting provisions of the Universal Declaration of Human Rights and ICESCR on the right to just and favourable remuneration through what may be called "cross-treaty interdependence of substantive rights".

In the *Ogoni* case, the African Commission used the interdependence approach in a more advanced way to find normative bases for the protection of the rights to shelter and food that are not clearly incorporated in the African Charter. Based on the interdependent interpretation of the Charter provisions, it read the right to food into the rights to life, to health and to development, and the right to housing into the rights to property, to health and

84. *Malawi African Association* (n 25 above) para 120.
85. *Malawi African Association* (n 25 above) para 135.

to family life.[86] In deriving the right to housing, the Commission argued that the corollary of the combination of the provisions of the Charter protecting the rights to property, to health and to family life "forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected".[87] It observed in a further illustration of the substantive interdependence of rights that "the right to food is inseparably linked to the dignity of human beings and is, therefore, essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation".[88] The African Commission exploited the interdependence between substantive socio-economic and civil and political rights for the purpose of filling gaps in the protection of economic, social and cultural rights.

In the more recent *Darfur* case, despite the request of one of the applicants that it follow the *Ogoni* case approach of reading rights into the African Charter,[89] the African Commission used the facts of the case that relate to the rights to housing, food and water to find a violation of article 5. It argued that the forced eviction of civilian population from their homes and villages, and the destruction of their houses, water wells, food crops, livestock and social infrastructure by the state and its agents amount to cruel, inhuman and degrading treatment that threatened the very essence of human dignity.[90] In a typical approach of interdependence of substantive rights, the Commission interpreted "the right to dignity and against cruel and inhuman treatment" as covering facts which, taken separately, would also constitute violations of the right to property as well as the rights to housing, water and food. While one may wonder if the approach in the *Darfur* case signifies a change in the Commission's

86. *Ogoni* case (n 26 above) paras 59-60 & 64-65. (In the case of the right to food, the African Commission basically accepted the interdependence argument advanced by the communication.)
87. *Ogoni* case (n 26 above) para 60.
88. *Ogoni* case (n 26 above) para 65.
89. *Darfur* case (n 38 above) paras 112-126. (The applicant requested the African Commission to read the rights to housing and food into the African Charter and to develop its jurisprudence further by reading the right to water into some specific provisions.)
90. *Darfur* case (n 38 above) paras 155-164 & 168.

approach of "reading missing rights into the Charter", members of the Commission who were part of the decision disagree.[91]

The African Commission also showed that it may use the right to property under article 14 of the African Charter in the interdependence approach to cover the physical aspects of the right to an adequate standard of living, including shelter, food and water. The *Ogoni* case illustrates the interdependence between the right to property and the right to housing. In the *Darfur* case, the Commission found Sudan in violation of the right to property for it failed to refrain, and protect victims, from eviction or demolition of their houses.[92] In the case against Mauritania, it similarly found the expropriation and destruction of the houses of black Mauritanians before forcing them to go abroad a violation of the right to property.[93] The cases demonstrate the interdependence between the right to property and the right to housing, which directly relates to the core violation. In accordance with the jurisprudence of the Inter-American and European Courts, the African Commission may also systematically apply the right to property for the protection of some aspects of the right to social security (social benefits including pension) which is not clearly incorporated in the African Charter.

Finally, deportation cases present a special example of the interdependence approach that relies on the cross-cutting right to nondiscrimination and the substantive interdependence between aspects of the right to movement (or the right of non-nationals) under article 12 of the African Charter and specific economic, social and cultural rights. Without foreclosing the possibility of deportation of non-nationals, the African Commission observed that the mass expulsion of any category of persons constituted a "flagrant" or "special" violation of human rights.[94] It also stated in a case concerning the nationality of an individual that "deportation

91. Interviews with Commissioners Mumba Malila (on 12 November 2009); Faith Pansy Tlakula (on 14 November 2009), Catherine Dupe Atoki (on 14 November 2009); Yeung Kam John Yeung Sik Yuen (on 16 November 2009); and Musa Ngary Bitaye (17 November 2009) (all arguing for reading rights into the African Charter based on the interdependence of human rights).

92. *Darfur* case (n 38 above) para 205.

93. *Malawi African Association* (n 25 above) para 128.

94. Rencontre Africaine pour la Défense de Droits de l'Homme (RADDHO) v Zambia (2000) AHRLR 321 (ACHPR 1996) paras 20 & 31; Union Inter-Africaine des Droits de l'Homme & Others v Angola (2000) AHRLR 18 (ACHPR 1997) paras 15-16, IHRDA (n 48 above) paras 63 & 67-69; African Institute for Human Rights

or expulsion has serious implications on other fundamental rights of the victim, and in some instances, the relatives".[95] The Commission quite logically depicted mass expulsion or deportation as an action of compound effects that entails the violation of a range of rights, including the rights to property, to work, to education and to the protection of the family.[96] It further found the measures of mass expulsion to be discriminatory and hence in violation of the cross-cutting right to non-discrimination.[97] It is the discriminatory nature of the expulsions (including on the enjoyment of the economic, social and cultural rights of the deportees) that made them rightsviolating acts. Although the African Commission was too brief in its arguments, in the mass expulsion cases it has laid down a basis for an interdependence approach by which articles 2 and 12 of the African Charter may be used as vehicles for the protection of economic, social and cultural rights.

The decisions of the African Commission in the above-reviewed cases show that it has been making use of the interdependence approach in enforcing economic, social and cultural rights. They demonstrate the Commission's understanding of human rights as an interdependent and coherent set of values. In some of the cases, the Commission related the main issues of the complaints to specific economic, social and cultural rights in very general terms or only tangentially. Although the arguments of the Commission were not detailed enough in terms of clearly setting out the interdependent elements of specific rights falling in different commonly used categories, the interdependence approach helped it to bridge normative gaps in the justiciability of economic, social and cultural rights.

CONCLUSION

Both the direct and interdependence approaches to the justiciability of economic, social and cultural rights apply in the African human rights system. The direct justiciability of the rights protected under the African Charter should not make the

and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea (2004) AHRLR 57 (ACHPR 2004) paras 69 & 71.

95. *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000) para 90.

96. *Union Inter-Africaine* (n 94 above) para 17 (but a violation of arts 15 and 17 was not found in the operative part of the decision). See also *Modise* (n 95 above).

97. *RADDHO* (n 94 above) paras 20-25; *Union Inter-Africaine* (n 94 above) para 18; and *IHRDA* (n 48 above) paras 77-80.

interdependence approach irrelevant. The latter should not also overshadow or undermine the justiciability of economic, social and cultural rights in their own right. Nor should the approaches be seen as necessarily separate and self-standing methods of adjudication of economic, social and cultural rights as both of them may sometimes apply in one and the same case.

The African Commission has directly applied many of the economic, social and cultural rights provisions of the African Charter. It made some use of models of review applied in the adjudication of economic, social and cultural rights cases in other systems. It also utilised the interdependence approach for the protection of economic, social and cultural rights (through equality rights and civil and political rights) and also to find substantive bases for economic, social and cultural rights that are not protected in the African Charter. However, in many of its relevant decisions, the Commission made hasty findings and conclusions without defining a method of inquiry. Even though the quality of reasoning of the Commission has been improving, it is still somewhat difficult to talk of a model of review of economic, social and cultural rights that has been chosen and applied or developed in the African system. It should show greater soberness and make a jurisprudential probe in interpreting and applying provisions on economic, social and cultural rights to actual cases. Its interdependence approach should also engage in proper normative analysis to identify the overlapping components of rights. Reasoned decisions with principled and consistent arguments increase the likelihood of compliance with the remedies that the African Commission issues.

ATTACHMENTS

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

PREAMBLE

The States Parties to the present Covenant,
Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Recognizing that these rights derive from the inherent dignity of the human person,
Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,
Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,
Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,
Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of

mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3.
(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by,

and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.
2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United

Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.
3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.
4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.
2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.
2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause

other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.
2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
(a) Twelve members shall constitute a quorum;
(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
(b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized

agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;
(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;
(d) The Committee shall hold closed meetings when examining communications under this article;
(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;
(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;
(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:
(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;
(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.
2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal

of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.
(a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;
(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.
5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.
6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:
(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;
(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;
(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;
(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.
8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.
9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General

Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices

of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

1. Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:
(a) Signatures, ratifications and accessions under article 48;
(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

LIMBURG PRINCIPLES ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

INTRODUCTION

A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), met in Maastricht from 2 to 6 June 1986 to consider the nature and scope of the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights, the consideration of States parties' reports by the newly constituted Committee on Economic, Social and Cultural Rights, and international cooperation under Part IV of the Covenant.

The 29 participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, the Netherlands, Norway, Senegal, Spain, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Yugoslavia, the United Nations Centre for Human Rights, the International Labour Organization (ILO),

the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the Commonwealth Secretariat and the sponsoring

organizations. Four of the participants were members of the Committee on Economic,

Social and Cultural Rights.

The participants agreed unanimously upon a set of principles, which they believe reflect the present state of international law, with the exception of certain recommendations indicated by the use of "should" instead of "shall".

PART I

THE NATURE AND SCOPE OF STATES PARTIES' OBLIGATIONS

A. General Observations

1. Economic, social and cultural rights are an integral part of international human rights law. They are the subject of specific treaty obligations in various international instruments, notably the International Covenant on Economic, Social and Cultural Rights.

2. The International Covenant on Economic, Social and Cultural Rights, together with the International Covenant on Civil and Political Rights and the Optional Protocol, entered into force in 1976. The Covenants serve to elaborate the Universal Declaration of Human Rights: these instruments constitute the International Bill of Human Rights.

3. As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights.

4. The International Covenant on Economic, Social and Cultural Rights (hereafter the Covenant) should, in accordance with the Vienna Convention on the Law of Treaties (Vienna 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice.

5. The experience of the relevant specialized agencies as well as of United Nations bodies and intergovernmental organizations, including the United Nations working groups and special rapporteurs in the field of human rights, should be taken into account in the implementation of the Covenant and in monitoring States parties' achievements.

6. The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

7. States Parties must at all times act in good faith to fulfil the obligations they have accepted under the Covenant.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.

9. Non-governmental organizations can play an important role in promoting the implementation of the Covenant. This role should accordingly be facilitated at the national as well as the international level.

10. States Parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.

11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.

12. The supervision of compliance with the Covenant should be approached in a spirit of co-operation and dialogue. To this end, in considering the reports of States parties, the Committee on Economic, Social and Cultural Rights, hereinafter called "the Committee", should analyze the causes and factors impeding the realization of the rights covered under the Covenant and, where possible, indicate solutions. This approach should not preclude a finding, where the information available warrants such a conclusion, that a State party has failed to comply with its obligations under the Covenant.

13. All organs monitoring the Covenant should pay special attention to the principles of non-discrimination and equality before the law when assessing States parties' compliance with the Covenant.

14. Given the significance for development of the progressive realization of the rights set forth in the Covenant, particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities.

15. Trends in international economic relations should be taken into account in assessing the efforts of the international community to achieve the Covenant's objectives.

B. Interpretative Principles specifically relating to Part II of the Covenant

Article 2(1): "to take steps... by all appropriate means, including particularly the adoption of legislation"

16. All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.

17. At the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.

18. Legislative measures alone are not sufficient to fulfil the obligations of the Covenant. It should he noted, however, that article 2(1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.

19. States parties shall provide for effective remedies including, where appropriate, judicial remedies.

20. The appropriateness of the means to be applied in a particular State shall be determined by that State party, and shall be subject to review by the United Nations Economic and Social Council, with the assistance of the Committee. Such review shall be without prejudice to the competence of the other organs established pursuant to the Charter of the United Nations.

"to achieve progressively the full realization of the rights"

21. The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant.

22. Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2(2) of the Covenant.

23. The obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available.

24. Progressive implementation can be effected not only by increasing resources, but also by the development of societal resources necessary for the realization by everyone of the rights recognized in the Covenant.

"to the maximum of its available resources"

25. States parties are obligated. regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.

26. "Its available resources" refers to both the resources within a State and those available from the international community through international co-operation and assistance.

27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources.

28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.

"individually and through international assistance and co-operation especially economic and technical"

29. International co-operation and assistance pursuant to the Charter of the United Nations (arts. 55 and 56) and the Covenant shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, economic, social and cultural as well as civil and political.

30. International co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the Covenant can be fully realized (*cf*. article 28 Universal Declaration of Human Rights).

31. Irrespective of differences in their political, economic and social systems, States shall co-operate with one another to promote international social, economic and cultural progress, in particular the economic growth of developing countries, free from discrimination based on such differences.

32. States parties shall take steps by international means to assist and co-operate in the realization of the rights recognized by the Covenant.

33. International co-operation and assistance shall be based on the sovereign equality of States and be aimed at the realization of the rights contained in the Covenant.

34. In undertaking international co-operation and assistance pursuant to article 2(1) the role of international organizations and the contribution of non-governmental organizations shall be kept in mind.

Article 2(2): Non-discrimination

35. Article 2(2) calls for immediate application and involves an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures.

36 The grounds of discrimination mentioned in article 2(2) are not exhaustive.

37. Upon becoming a party to the Covenant States shall eliminate *de jure* discrimination by abolishing without delay any discriminatory laws, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights.

38. *De facto* discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.

39. Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights tor different groups and that such measures shall not be continued after their intended objectives have been achieved.

40. Article 2(2) demands from States parties that they prohibit private persons and bodies from practising discrimination in any field of public life.

41. In the application of article 2(2) due regard should be paid to all relevant international instruments including the Declaration and Convention on the Elimination of all Forms of Racial Discrimination as well as to the activities of the supervisory committee (CERD) under the said Convention.

Article 2(3): Non-nationals in developing countries

42. As a general rule the Covenant applies equally to nationals and non-nationals.

43. The purpose of article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times. In the light of this the exception in article 2(3) should be interpreted narrowly.

44. This narrow interpretation of article 2(3) refers in particular to the notion of economic rights and to the notion of developing countries. The latter notion refers to those countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.

Article 3: Equal rights for men and women

45. In the application of article 3 due regard should be paid to the Declaration and Convention on the Elimination of All Forms of Discrimination against Women and other relevant instruments and the activities of the supervisory committee (CEDAW) under the said Convention.

Article 4: Limitations

46. Article 4 was primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State.

47. The article was not meant to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person.

"determined by law"

48. No limitation on the exercise of economic, social and cultural rights shall be made unless provided for by national law of general application which is consistent with **the** Covenant and is in force at the time the limitation is applied.

49. Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory.

50. Legal rules limiting the exercise of economic, social and cultural rights shall be clear and accessible to everyone.

51. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition on application of limitations on economic, social and cultural rights.

The Limburg Principles 48-51 are derived from the Siracusa Principles 15-18, United Nations Doc. E/CN.4/1984/4, 28 September 1984 and 7 Human Rights Quaterly 3 (1985), at p.5.

"promoting the general welfare"

52. This term shall be construed to mean furthering the well-being of the people as a whole.

"in a democratic society"[**]

53. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the application of limitations.

54. The burden is upon a State imposing limitations to demonstrate that the limitations do not impair the democratic functioning of the society.

55. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

"compatible with the nature of these rights"

56. The restriction "compatible with the nature of these rights" requires that a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.

57. Article 5 (1) underlines the fact that there is no general, implied or residual right for a State to impose limitations beyond those which are specifically provided for in the law.

None of the provisions in the law may be interpreted in such a way as to destroy "any of the rights or freedoms recognized". In addition article 5 is intended to ensure that nothing in the Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

Article 5

58. The purpose of article 5 (2) is to ensure that no provision in the Covenant shall be interpreted to prejudice the provisions of domestic law or any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected. Neither shall article 5 (2) be interpreted to restrict the exercise of any human right protected to a greater extent by national or international obligations accepted by the State party .

[**]*Compare Siracusa Principles 19-21,* ibid.*, at p. 5.*

C. Interpretative Principles specifically relating to Part III of the Covenant

Article 8: "prescribed by law"[***]

59. See the interpretative principles under the synonymous term "determined by law" in
article 4.

"necessary in a democratic society"

60. In addition to the interpretative principles listed under article 4 concerning the phrase "in a democratic society", article 8 imposes a greater restraint upon a State party which is exercising limitations on trade union rights. It requires that such a limitation is indeed necessary. The term "necessary" implies that the limitation:

(a) responds to a pressing public or social need;

(b) pursues a legitimate aim; and

(c) is proportional to that aim.

61. Any assessment as to the necessity of a limitation shall be based upon objective considerations.

"national security"

62. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

[**]*The Limburg Principles 59-69 are derived from the Siracusa Principles 10, 15-26, 29-32 and 35-37,* ibid.*, at pp. 4-7".*

63. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

64. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may be invoked only when there exist adequate safeguards and effective remedies against abuse.

65. The systematic violation of economic, social and cultural rights undermines true national security and may jeopardize international peace and security. A State responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

"public order (ordre public)"

66. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order (ordre public).

67. Public order (ordre public) shall be interpreted in the context of the purpose of the particular economic, social and cultural rights which are limited on this ground.

68. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

"rights and freedoms of others"

69. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

D. Violations of Economic, Social and Cultural Rights

70. A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant.

71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.

72. A State party will be in violation of the Covenant, *inter alia*, if:

- it fails to take a step which it is required to take by the Covenant;
- it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;
- it fails to implement without delay a right which it is required by the Covenant to provide immediately;
- it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
- it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;
- it fails to submit reports as required under the Covenant.

73. In accordance with international law each State party to the Covenant has the right to express the view that another State party is not complying with its obligations under the Covenant and to bring this to the attention of that State party. Any dispute that may

thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes.

PART II. CONSIDERATION OF STATES PARTIES' REPORTS AND INTERNATIONAL CO-OPERATION UNDER PART IV OF THE COVENANT

A. Preparation and submission of reports by States parties

74. The effectiveness of the supervisory machinery provided in Part IV of the Covenant depends largely upon the quality and timeliness of reports by States parties. Governments are therefore urged to make their reports as meaningful as possible. For this purpose they should develop adequate internal procedures for consultations with the competent government departments and agencies, compilation of relevant data, training of staff, acquisition of background documentation, and consultation with relevant non-governmental and international institutions.

75. The preparation of reports under article 16 of the Covenant could be facilitated by the implementation of elements of the programme of advisory services and technical assistance as proposed by the chairmen of the main human rights supervisory organs in their 1984 report to the General Assembly (United Nations Doc. A39/484).

76. States parties should view their reporting obligations as an opportunity for broad public discussion on goals and policies designed to realize economic, social and cultural rights. For this purpose wide publicity should be given to the reports, if possible in draft.

The preparation of reports should also be an occasion to review the extent to which relevant national policies adequately reflect the scope and content of each right, and to specify the means by which it is to be realized.

77. States parties are encouraged to examine the possibility of involving non-governmental organizations in the preparation of their reports.

78. In reporting on legal steps taken to give effect to the Covenant, States parties should not merely describe any relevant legislative provisions. They should specify, as appropriate, the judicial remedies, administrative procedures and other measures they have adopted for enforcing those rights and the practice under those remedies and procedures.

79. Quantitative information should be included in the reports of States parties in order to indicate the extent to which the rights are protected in fact. Statistical information and information on budgetary allocations and expenditures should be presented in such a way as to facilitate the assessment of the compliance with Covenant obligations. States parties should, where possible, adopt clearly defined targets and indicators in implementing the Covenant. Such targets and indicators should, as appropriate, be based on criteria established through international co-operation in order to increase the relevance and comparability of data submitted by States parties in their reports.

80. Where necessary, governments should conduct or commission studies to enable them to fill gaps in information regarding progress made and difficulties encountered in achieving the observance of the Covenant rights.

81. Reports by States parties should indicate the areas where more progress could be achieved through international co-operation and suggest economic and technical co-operation programmes that might be helpful toward that end.

82. In order to ensure a meaningful dialogue between the States parties and the organs assessing their compliance with the provisions of the Covenant, States parties should designate representatives who are fully familiar with the issues raised in the report.

B. Role of the Committee on Economic, Social and Cultural Rights

83. The Committee has been entrusted with assisting the Economic and Social Council in the substantive tasks assigned to it by the Covenant. In particular, its role is to consider States parties reports and to make suggestions and recommendations of a general nature, including suggestions and recommendations as to fuller compliance with the Covenant by States parties.

The decision of the Economic and Social Council to replace its sessional Working Group by a Committee of independent experts should lead to a more effective supervision of the implementation by States Parties.

84. In order to enable it to discharge fully its responsibilities the Economic and Social Council should ensure that sufficient sessions are provided to the Committee.

It is imperative that the necessary staff and facilities for the effective performance of the Committee's functions be provided, in accordance with ECOSOC resolution 1985/17.

85. In order to address the complexity of the substantive issues covered by the Covenant, the Committee might consider delegating certain tasks to its members. For example, drafting groups could be established to prepare preliminary formulations or recommendations of a general nature or summaries of the information received. Rapporteurs could be appointed to assist the work of the Committee in particular to prepare reports on specific topics and for that purpose consult States parties, specialized agencies and relevant experts and to draw up proposals regarding

economic and technical assistance projects that could help overcome difficulties States parties have encountered in fulfilling their Covenant obligations.

86. The Committee should, pursuant to articles 22 and 23 of the Covenant, explore with other organs of the United Nations, specialized agencies and other concerned organizations, the possibilities of taking additional international measures likely to contribute to the progressive implementation of the Covenant.

87. The Committee should reconsider the current six-year cycle of reporting in view of the delays which have led to simultaneous consideration of reports submitted under different phases of the cycle. The Committee should also review the guidelines for States parties to assist them in preparing reports and propose any necessary modifications.

88. The Committee should consider inviting States parties to comment on selected topics leading to a direct and sustained dialogue with the Committee.

89. The Committee should devote adequate attention to the methodological issues involved in assessing compliance with the obligations contained in the Covenant. Reference to indicators, in so far as they may help measure progress made in the achievement of certain rights, may be useful in evaluating reports submitted under the Covenant. The Committee should take due account of the indicators selected by or in the framework of the specialized agencies and draw upon or promote additional research, in consultation with the specialized agencies concerned, where gaps have been identified.

90. Whenever the Committee is not satisfied that the information provided by a State party is adequate for a meaningful assessment of progress achieved and difficulties encountered it should request supplementary information, specifying as necessary the precise issues or questions it would like the State Party to address.

91. In preparing its reports under ECOSOC resolution 1985/17, the Committee should consider, in addition to the "summary of its consideration of the reports", highlighting thematic issues raised during its deliberations.

C. Relations between the Committee and Specialized Agencies, and other international organs.

92. The establishment of the Committee should be seen as an opportunity to develop a positive and mutually beneficial relationship between the Committee and the specialized agencies and other international organs.

93. New arrangements under article 180 of the Covenant should be considered where they could enhance the contribution of the specialized agencies to the work of the Committee. Given that the working methods with regard to the implementation of economic, social and cultural rights vary from one specialized agency to another, flexibility is appropriate in making such arrangements under article 18.

94. It is essential for the proper supervision of the implementation of the Covenant under Part IV that a dialogue be developed between the specialized agencies and the Committee with respect to matters of common interest. In particular consultations should address the need for developing indicators for assessing compliance with the Covenant; drafting guidelines for the submission of reports by States parties; making arrangements for submission of reports by the specialized agencies under article 18. Consideration should also be given to any relevant procedures adopted in the agencies. Participation of their representatives in meetings of the Committee would be very valuable.

95. It would be useful if Committee members could visit specialized agencies concerned, learn through personal contact about programmes of the agencies relevant to the realization of the rights contained in the Covenant and discuss the possible areas of collaboration with those agencies.

96. Consultations should be initiated between the Committee and international financial institutions and development agencies to exchange information and share ideas on the distribution of available resources in relation to the realization of the rights recognized in the Covenant. These exchanges should consider the impact of international economic assistance on efforts by States parties to implement the Covenant and possibilities of technical and economic co-operation under article 22 of the Covenant.

97. The Commission on Human Rights, in addition to its responsibilities under article 19 of the Covenant, should take into account the work of the Committee in its consideration of items on its agenda relating to economic, social and cultural rights.

98. The Covenant on Economic, Social and Cultural Rights is related to the Covenant on Civil and Political Rights. Although most rights can clearly be delineated as falling within the framework of one or other Covenant, there are several rights and provisions referred to in both instruments which are not susceptible to clear differentiation. Both Covenants moreover share common provisions and articles. It is important that consultative arrangements be established between the Economic, Social and Cultural Rights Committee and the Human Rights Committee.

99. Given the relevance of other international legal instruments to the Covenant, early consideration should be given by the Economic and Social Council to the need for developing effective consultative arrangements between the various supervisory bodies.

100. International and regional intergovernmental organizations concerned with the realization of economic, social and cultural rights are urged to develop measures, as appropriate, to promote the implementation of the Covenant.

101. As the Committee is a subsidiary organ of the Economic and Social Council, non-governmental organizations enjoying consultative status with the Economic and Social Council are urged to attend and follow the meetings of the Committee and, when appropriate, to submit information in accordance with ECOSOC resolution 1296 (XLIV).

102. The Committee should develop, in co-operation with intergovernmental organizations and non-governmental organizations as well as research institutes an agreed system for recording, storing and making accessible case law and other

interpretative material relating to international instruments on economic, social and cultural rights.

103. As one of the measures recommended in article 23 it is recommended that seminars be held periodically to review the work of the Committee and the progress made in the realization of economic, social and cultural rights by States parties.

ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS "PROTOCOL OF SAN SALVADOR"

PREAMBLE

The States Parties to the American Convention on Human Rights "Pact San José, Costa Rica,"

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain State, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States;

Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified;

Recognizing the benefits that stem from the promotion and development of cooperation among States and international relations;

Recalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights;

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that

those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof, Have agreed upon the following Additional Protocol to the American Convention on Human Rights "Protocol of San Salvador:"

Article 1

Obligation to Adopt Measures

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Article 2

Obligation to Enact Domestic Legislation

If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.

Article 3

Obligation of nondiscrimination

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Article 4

Inadmissibility of Restrictions

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

Article 5

Scope of Restrictions and Limitations

The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

Article 6

Right to Work

1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.
2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

Article 7

Just, Equitable, and Satisfactory Conditions of Work

The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;

b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;

c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;

d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;

e. Safety and hygiene at work;

f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;

g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;

h. Rest, leisure and paid vacations as well as remuneration for national holidays.

Article 8

Trade Union Rights

1. The States Parties shall ensure:
a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;
b. The right to strike.
2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.
3. No one may be compelled to belong to a trade union.

Article 9

Right to Social Security

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.
2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

Article 10

Right to Health

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.
2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:
a. Primary health care, that is, essential health care made available to all individuals and families in the community;
b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
c. Universal immunization against the principal infectious diseases;
d. Prevention and treatment of endemic, occupational and other diseases;
e. Education of the population on the prevention and treatment of health problems, and
f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

Article 11

Right to a Healthy Environment

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

Article 12

Right to Food

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.
2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to

promote greater international cooperation in support of the relevant national policies.

Article 13

Right to Education

1. Everyone has the right to education.
2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.
3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
a. Primary education should be compulsory and accessible to all without cost;
b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.
4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.
5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational

institutions in accordance with the domestic legislation of the States Parties.

Article 14

Right to the Benefits of Culture

1. The States Parties to this Protocol recognize the right of everyone:
a. To take part in the cultural and artistic life of the community;
b. To enjoy the benefits of scientific and technological progress;
c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.
3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

Article 15

Right to the Formation and the Protection of Families

1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.
2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.
3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:
a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;

b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years;
c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;
d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.

Article 16

Rights of Children

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

Article 17

Protection of the Elderly

Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:
a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;
b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;
c. Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

Article 18

Protection of the Handicapped

Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to:

a. Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be;

b. Provide special training to the families of the handicapped in order to help them solve the problems of coexistence and convert them into active agents in the physical, mental and emotional development of the latter;

c. Include the consideration of solutions to specific requirements arising from needs of this group as a priority component of their urban development plans;

d. Encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

Article 19

Means of Protection

1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol.

Article 20

Reservations

The States Parties may, at the time of approval, signature, ratification or accession, make reservations to one or more specific provisions of this Protocol, provided that such reservations are not incompatible with the object and purpose of the Protocol.

Article 21

Signature, Ratification or Accession Entry into Effect

1. This Protocol shall remain open to signature and ratification or accession by any State Party to the American Convention on Human Rights.
2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the General Secretariat of the Organization of American States.
3. The Protocol shall enter into effect when eleven States have deposited their respective instruments of ratification or accession.
4. The Secretary General shall notify all the member states of the Organization of American States of the entry of the Protocol into effect.

Article 22

Inclusion of other Rights and Expansion of those Recognized

1. Any State Party and the Inter-American Commission on Human Rights may submit for the consideration of the States Parties meeting on the occasion of the General Assembly proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognized in this Protocol.
2. Such amendments shall enter into effect for the States that ratify them on the date of deposit of the instrument of ratification corresponding to the number representing two thirds of the States Parties to this Protocol. For all other States Parties they shall enter into effect on the date on which they deposit their respective instrument of ratification.