RESEARCH HANDBOOK ON INTERNATIONAL LAW AND SOCIAL RIGHTS

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Research Handbook on International Law and Social Rights
Edited by Christina Binder, Jane A. Hofbauer, Flávia Piovesan and Amaya Úbeda de Torres

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RESEARCH HANDBOOKS IN INTERNATIONAL LAW

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

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Cover image: Photo by Chris Caines on Unsplash.

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Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2020940503

This book is available electronically in the **Elgar**online
Law subject collection
http://dx.doi.org/10.4337/9781788972130

ISBN 978 1 78897 212 3 (cased)
ISBN 978 1 78897 213 0 (eBook)

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Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACFC	Advisory Committee to the Framework Convention for the Protection of National Minorities
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
AfCHPR	African Charter on Human and Peoples' Rights, African Charter
AJIL	American Journal of International Law
ALR	American Law Review
AP	Additional Protocol
App	Application
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
Art/Arts	Article/Articles
ASEAN	Association of Southeast Asian Nations
ATCA	Alien Torts Claims Act
AU	African Union
AWID	Association for Women's Rights in Development
BIT	bilateral investment treaty
CAT	Convention Against Torture
CDE	UNESCO Convention against Discrimination in Education
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDDIS	Inter-American Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Center for Economic and Social Rights
CIADDIS	Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities
CoE	Council of Europe
COMESA	Common Market for Eastern and Southern Africa

COP	Conference of the Parties
CPI	Corruption Perception Index
CPR	civil and political rights
CRC	Convention on the Rights of the Child
CRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRPD	Convention on the Rights of Persons with Disabilities
CSR	corporate social responsibility
DARIO	Draft Articles on the Responsibility of International Organizations
DPA	Declaration and Program of Action
DRM	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
e.g.	exempli gratia
ECCC	Extraordinary Chambers of in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECommHR	European Commission on Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ed./eds	editor/editors
EJIL	European Journal of International Law
ESC	European Social Charter
ESCER	economic, social, cultural and environmental rights
ESCR	economic, social and cultural rights
ESCR-Net	International Network for Economic, Social and Cultural Rights
ESG	economic and social governance
et al	et alia
EU	European Union
FAO	Food and Agriculture Organization
FCNM	Framework Convention for the Protection of National Minorities
G77	Group of 77
GC	General Comment
GCI-IV	Geneva Conventions I–IV
GDP/GNI	Gross Domestic Product, Gross National Income
GHG	greenhouse gas

GI-ESCR	Global Initiative for ESCR
GR	General Recommendation
GRECO	Group of States against Corruption
GRI	Global Reporting Initiative
HLPF	High-Level Political Forum
HR	human rights
HRC	Human Rights Council
HRComm	Human Rights Commission
HRCttee	Human Rights Committee
HRIA	Human Rights Impact Assessment
HRQ	Human Rights Quarterly
i.e.	id est
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IA-PESC	Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Center for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDA	International Development Association
IDP	Internally Displaced Persons
IFC	International Finance Corporation
IFI	International Financial Institution
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IO	International Organization

LGBTQI/LGBTI	Lesbian, Gay, Bisexual, Transgender, (Queer or Questioning), Intersex
LOI	List of Issues
LOIPR	List of Issues Prior to Reporting
LoN	League of Nations
MDGs	Millennium Development Goals
MIGA	Multilateral Investment Guarantee Agency
NAPs	National Action Plans
NCP	National Contact Point
NGOs	Non-Governmental Organizations
NHRI	National Human Rights Institution
NIEO	New International Economic Order
No/Nos	number/numbers
NPM	National Prevention Mechanisms
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation of Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
OSCE	Organization for Security and Cooperation in Europe
p	page
PAIC	Pan-African Investment Code
PCIJ	Permanent Court of International Justice
PRI	Principles of Responsible Investment
RdC	Recueil Des Cours
REDD(+)	Reducing Emissions from Deforestation and Forest Degradation
RPD	Rights of Persons with Disabilities
SADC	South African Development Community
SDGs	Sustainable Development Goals
SERAP	Socio-Economic Rights and Accountability Project
SR	Special Rapporteur
SRAC	Social Rights Advocacy Center
SRESCER	Special Rapporteurship on Economic, Social, Cultural and Environmental Rights
UBEC	Universal Basic Education Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNCAC	United Nations Convention against Corruption
UNDG	United Nations Development Group
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
UNWG	UN Working Group on the issue of human rights and transnational corporations and other business enterprises
UPR	Universal Periodic Review
USSR	Union of Soviet Socialist Republics
v	versus
VCLT	Vienna Convention on the Law of Treaties
VDPA	Vienna Declaration and Programme of Action
VNR	Voluntary National Reviews
WCAR	World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance
WGPSS	Working Group of the Protocol of San Salvador
WHO	World Health Organization
WTO	World Trade Organization
YILC	Yearbook of the International Law Commission

Introduction to the *Research Handbook on International Law and Social Rights*

Christina Binder, Jane A Hofbauer, Flávia Piovesan and Amaya Úbeda de Torres

The twenty-first century opened with the international community's realization that achieving *global* social justice constitutes a fundamental prerequisite for ensuring an equitable, inclusive and sustainable international legal order.[1] The idea of global social justice thus constitutes a common value of the international community and pursues the objective of overcoming previous inequalities and injustices in distribution. In comparison to earlier concepts of social justice,[2] the shift towards global (social) justice alters our understanding of the reach of (state) responsibilities, particularly in light of a series of new insights on causal impacts of institutional and structural design.[3] Additionally, it acknowledges that, at least in part, the traditional state-centred structure of international law has been overtaken by the emergence of new institutions and actors.

From a rights-based perspective, the implementation of the ethical and philosophical postulate of global social justice is frequently attempted through social rights.[4] While these two fields do not necessarily always overlap and conceptually lack a common methodology or approach towards prioritization and policy-making, they share important objectives. For example, the global social justice movement might argue for living wages, equal access to medication or climate justice; this can in turn partly be achieved through social rights (for example, the right to work, right to health and right to an adequate standard of living).[5]

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[1] UNGA Res 55/2 (18 September 2000) 'United Nations Millennium Declaration', *inter alia* para 2: 'we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level'; paras 4–5; para 6 (emphasizing solidarity ('Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice.') as a fundamental value essential to international relations in the 21st century).

[2] In essence, social justice theories describe how a just society within a state should be conceptualized. As mentioned in the contribution by Manfred Nowak (Chapter 1), some of the delegates drafting the Universal Declaration of Human Rights even wanted to use 'social justice' in place of 'social security' in the UDHR's umbrella article on economic, social and cultural rights.

[3] For a conceptualization and evaluation of the emergence of 'global justice' see the opening remarks by Thomas Pogge to a symposium on global justice included into the introduction of the corresponding volume published thereafter: Andreas Follesdal and Thomas Pogge, 'Introduction' in Andreas Follesdal and Thomas Pogge (eds), *Real World Justice – Grounds, Principles, Human Rights, and Social Institutions* (2005) 2ff.

[4] On why this attempt fails in practice, see Samuel Moyn, *Not Enough – Human Rights in an Unequal World* (2018), noting that the value of distributive equality notably remains absent among the rights listed in the Universal Declaration of Human Rights and that the strive for a 'floor of protection' was merely achieved within some states, ill-suited as it stands to be transplanted to the global level. Similary also Lanse Minkler, noting that economic and social rights aim at assuring an adequate standard of living for human dignity but do not address wealth, income, consumption or social status disparities (Lanse Minkler, 'Introduction: Why Economic and Social Human Rights?' in Lanse Minkler (ed.), *The State of Economic and Social Human Rights – A Global Overview* (2013) 1, 5).

[5] *Cf.* David Petrasek, 'Human Rights and Social Justice – A False Dichotomy' in Doutje Lettinga and Lars van Troost (eds), *Can Human Rights Bring Social Justice – Twelve Essays* (2015) 89ff.

These interlinkages, among others, have resulted in a stark increase in focus on social rights in scholarship over the past two decades.[6] Treated for a long time as a stepchild in comparison to civil and political rights, social rights have even been heralded as leading a 'rights revolution',[7] as 'essential for the maintenance of democracy',[8] as the most appropriate means of protection available against the current global economic system,[9] and as a fitting companion to the changing nature of sovereignty (from rights to obligations).

Despite this increase in attention, the category of 'social rights' is not clearly defined. 'Social rights' certainly have a broad meaning, in the sense that no separate list of rights can be drawn up and oftentimes the use of terminology in this regard varies between social rights, economic and social rights, socio-economic rights and even welfare rights.[10] In essence, 'social rights' and the 'social rights dimension' relate particularly to those rights/elements which are linked to the core of social rights protection, that is, achieving a society which protects and

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[6] It is impossible to list all volumes focusing on social rights protection in international law which have been published since the turn of the millennium. However, some of the most important include: Katherine G Young (ed.), *The Future of Economic and Social Rights* (2019), focusing on the adjudication of economic and social rights; Katie Boyle, *Economic and Social Rights Law – Incorporation, Justiciability and Principles of Adjudication* (2019); Malcolm Langford, César Rodíguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (2017); Christina Binder, Jane A Hofbauer, Flávia Piovesan, Anna-Zoe Steiner and Elisabeth Steiner (eds), *Social Rights in the Case Law of Regional Human Rights Monitoring Institutions* (2016); Markus Kaltenborn, *Social Rights and International Development – Global Legal Standards for the Post-2015 Development Agenda* (2015), discussing the increasing interlinkages between development policy and human rights following the Millennium Development Goals; Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph (eds), *Fulfilling Social and Economic Rights* (2015); Ben Saul, David Kinley and Jaqueline Mowbray (eds), *The International Covenant on Economic, Social and Cultural Rights – Commentary, Cases and Materials* (2014); Gilles Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (2014); Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (2014); Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (2014); Lanse Minkler (ed.), *The State of Economic and Social Human Rights – A Global Overview* (2013); Malcolm Langford *et al* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2009); Katherine G Young, *Constituting Economic and Social Rights* (2012); Jeff King, *Judging Social Rights* (2012); Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights – Between Theory and Practice* (2007); Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (2007).

[7] Katherine G Young, 'Introduction' in Katherine G Young (ed.), *The Future of Economic and Social Rights* (2019) 1.

[8] Nelson Mandela, 'Foreword' in Scott Leckie (ed.), *National Perspective on Housing Rights* (2003) xvii; CoE, 'Exchange of views between Mr Giuseppe Palmisano, President of the European Committee of Social Rights (ESCR) and the Council of Europe Rapporteur Group on Social and Health (GR-SOC)' (GR-SOC, 17 January 2019).

[9] As highlighted also in Fukuda-Parr, Lawson-Remer and Randolph (n 6), 6.

[10] Exemplary on this also Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (2012), noting that this in part is owed to the disciplinary background, in part to the applicable domestic framework; *cf.* Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 3 (fn 1); Eibe Riedel, Gilles Giacca and Christophe Golay, 'The Development of Economic, Social, and Cultural Rights in International Law' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (2014) 3, 8–10.

advances the enjoyment of basic human needs and ensuring the material conditions for a life in dignity, also sometimes described as a minimum standard of welfare.[11] Rights that aim for the protection of such basic human needs relate to important societal questions such as the just distribution of funds, or the provision of health care and other forms of social security, based on equality and non-discrimination. Additionally, they contain an inherent component of social equality, including the commitment to social integration and solidarity. Consequently, the protection of diversity in relation to groups in society is a central concern of the debate on social rights.

Hence, almost every human right has a 'social dimension', depending on the particular perspective one chooses. Thus, while rights traditionally considered 'economic rights', such as the right to work or the right to property, contain elements of freedom/independence, they of course also serve the purpose of ensuring an adequate standard of living. The right to education has a social, an economic and a cultural dimension. And likewise civil and political rights have important social dimensions. For example, as recognized by the Human Rights Committee in its new General Comment on the right to life, the right to life encompasses *inter alia* the obligation of states to 'provide safe, legal and effective access to abortion where the life and health of the pregnant women or girl is at risk'[12] as well as the duty to take 'appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'.[13] Therewith, obvious health dimensions are covered by the right to life.

The term 'social rights' therefore does not respond to a clear-cut distinction among different categories of human rights, a classification which in any case has been long overcome, but simply circumscribes the angle of analysis on the importance of achieving a more equal society.

With this in mind, one may observe that the advancement and protection of social rights has developed at a fast pace over the past years. However, in terms of success and effectiveness, the protection of social rights is still not on par with civil and political rights. The long prevailing opinion that social rights are goals to be achieved rather than legally enforceable rights has still not subsided entirely, despite significant advancements in recognition of the justiciability of social rights in domestic legal orders demonstrating the opposite.[14] The international level has yet to follow suit to the same extent, though, with only 24 states having ratified the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights by May 2020, and others noting that the political decision to ratify said Protocol is a complex task given the 'Covenant's far-reaching implications'.[15] Comments such as this are not only owed to ambiguities remaining as regards the nature of social rights obligations but also to the historical lack of international jurisprudence detailing the extent and scope of such rights

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[11] *Cf.* Kaltenborn (n 6), 2.

[12] HRCttee, 'General Comment No 36 on the Right to Life' (30 October 2018) CCPR/C/GC/36, para 8.

[13] *Ibid.*, para 26, listing as examples *inter alia* the degradation of the environment, deprivation of land, territories and resources of indigenous peoples, the prevalence of life threatening diseases, extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness.

[14] Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008); Varun Gauri and Daniel Brinks (eds), *Courting Social Justice – Judicial Enforcement of Social and Economic Rights in the Developing World* (2008).

[15] CESCR, 'Periodic Report by Germany' (16 March 2017) UN Doc E/C.12/DEU/6, para 14.

in practice.[16] Challenges therefore remain on a number of oftentimes interrelated issues, such as the interpretation and application of universal and regional treaties and the question how social rights protection is achieved through these instruments, both conceptually as well as practically; the role of social rights in achieving social equality beyond the 'individual'; the suitability and flexibility of social rights in response to unstable circumstances or situations of crisis; and the still ongoing process of mainstreaming social rights into other fields of international law.

These issues, among others, are at the core of this *Research Handbook* focusing on *International Law and Social Rights*. The *Research Handbook* is composed of 30 contributions by leading experts and promising young scholars in the fields of public international law and international human rights law. These contributions are divided into five parts.

The *Research Handbook* opens with a series of contributions on general aspects relating to the protection of social rights in international law. As Manfred Nowak notes in Chapter 1, '[s]ocial rights are at the centre of economic, social and cultural rights and suffer most under the current neoliberal economic system'. This sets the tone of the *Research Handbook*, which, *inter alia*, aims at finding pathways overcoming the still very real divide between normative standard-setting and practice, and between the long prevailing ideological divide among categories of human rights. The contributions in Part I therefore focus on, among others, identifying the scope of application related to and the nature of social rights obligations, from a historical, conceptual and practical perspective. It closes with Ralph Wilde's contribution attempting to bridge the gap and make the connection between global justice and the extraterritorial application of human rights treaties.

The contributions in Part II of the *Research Handbook* explore the protection of social rights in international human rights law, both at the universal and regional levels. Together, they evidence the common trend that the traditional distinction that had been made subsequently to the adoption of the Universal Declaration of Human Rights (UDHR) into civil and political rights, on the one hand, and economic, social and cultural rights, on the other, has largely been overcome. Both at the universal and regional levels, an increasing number of cases can be identified which directly or indirectly afford protection to social rights. The contributions not only describe the mechanisms applicable in this regard, but also investigate the methodology applied by the respective quasi-judicial and judicial bodies and assess the extent to which progress has been made in specifying or developing different social rights standards. The contributors include several members of the respective bodies (Dzidek Kędzia as a member of the UN Committee on Economic, Social and Cultural Rights, Karin Lukas as a member of the European Committee of Social Rights, Flávia Piovesan as a member of the Inter-American Commission on Human Rights, Eduardo Ferrer Mac-Gregor as a judge and former President of the Inter-American Court of Human Rights), providing invaluable insights into the bodies' workings. Additionally, Part II focuses on the role of social rights in the struggle to overcome inequalities and to protect and foster diversity. Four different groups are selected for this purpose: African descendants, persons with disabilities, stateless persons and minorities. The corresponding chapters offer excellent overviews of the multi-layered framework applicable in such circumstances, while at the same demonstrating the still persisting gaps in protection.

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[16] *Cf.* Joe Wills, *Contesting World Order? Socioeconomic Rights and Global Justice Movements* (2017) 70.

Overall, Part II solidifies the observation that social rights have become justiciable rights, though in practice there is often an implementation gap.

Part III sheds light on different avenues pursued to overcome said implementation gap concerning social rights between the 'theoretical' level of protection afforded at the universal and/or regional level and the 'actual' impact for the lives of individuals. The contributions range from the discussion of identifying and using indicators as adequate monitoring mechanisms, the role of domestic actors in ensuring the implementation and enforcement of social rights standards in more effective terms, the question how civil society can use strategic litigation or other forms of collaboration to promote the protection of social rights, to procedural rights of the individual to gain a more effective protection of social rights.

In Part IV of the *Research Handbook*, the contributions place emphasis on the role of social rights in situations that are marked by change, instability, turmoil or lack of regulation. This covers situations such as economic crises and the response by states (such as austerity measures, economic reforms or activation reforms), the role of business or governmental ethics in a global economic setting marked by a series of regulatory and normative gaps (both in relation to transnational corporations and corruption) and armed conflicts. The contributions, however, not only point to the endangerment of social rights, but in fact also highlight that ensuring the protection of social rights, for example through human and social rights impact assessments, is often also the path forward in overcoming such situations. Additionally, they demonstrate the need in some sectors to continue the work towards the drafting of new treaties or protocols in order to create binding legal standards.

Finally, the contributions in Part V deal with a variety of regime interactions and the question whether and how to streamline social rights into other fields of international law (investment law, international financial law, international environmental law and international criminal law). This sheds light on the question of the relationship between social rights and other fields of international law, while at the same time raising new points of discussion in relation to the nature of social rights obligations. Thus, the contributions highlight that overall convergence and streamlining seems to occur in practice – whether through judicial instruments such as systemic integration by means of treaty interpretation or through the drafting of new instruments – but that challenges may arise if, for example, economic growth subsides, inequalities persist or accountability remains lacking. Among others, this cycles back to other parts of the *Research Handbook*, in the exploration of how 'progressive realization of social rights' is detailed in theory and practice or how the implementation and enforcement of social rights can be made more effective.

These interlinkages are among the reasons why we hope that this *Research Handbook* has the potential to make a qualified contribution to clarification of the *status quo* of social rights in international law, as well as inform its further development and respond to contemporary challenges. Indeed, while other human rights have been the object of detailed and well-developed research, social rights are still underrepresented in legal literature, a legacy of their historical neglect. Presenting the development of innovative legal solutions, recent achievements and the implementation challenges which have existed since the beginning of the twenty-first century are further goals of this work. After all, if the struggle for global social justice is a core value of the international community, social rights play a key role in an inclusive, equitable and sustainable development.

Finally, we would like to thank the contributors for their excellent contributions, and the care and attention they afforded their pieces. It was a pleasure reviewing the submissions, and

we are also grateful for the smooth revision and editing process. We also express our appreciation to Ms Laura Mann and the team at Edward Elgar for their support during the entire publication process and for their assistance in bringing the project to completion.

PART I

GENERAL ASPECTS OF INTERNATIONAL LAW AND SOCIAL RIGHTS

1. Social rights in international law: categorization versus indivisibility

Manfred Nowak

I. INTRODUCTION

This introductory contribution starts by defining social rights as a subcategory of the broader category of economic, social and cultural rights in accordance with the ordinary meaning of these terms in international human rights law. It continues with a short history of how economic, social and cultural rights developed as an antithesis to the bourgeois concept of civil and political rights during the nineteenth and early twentieth centuries. Although the Universal Declaration of Human Rights (UDHR) of 1948 achieved a remarkable synthesis between both broad dimensions of human rights, the Cold War was characterized by a fierce political battle between the Western and the socialist concepts of human rights, which led to the adoption of two International Covenants, based on the doubtful ideological assumption that there was a fundamental legal difference between civil and political rights on the one hand, and economic, social and cultural rights on the other, with respect to the nature of state obligations and adequate measures of national and international monitoring and implementation. After the end of the Cold War, this legal categorization was gradually replaced by the doctrine of the equality, interdependence and indivisibility of all human rights and the recognition of obligations of states to respect, protect and fulfil, which apply equally to all human rights. These different types of state obligations are explained by means of various examples, above all in the field of social rights laid down in Article 25 UDHR as well as in Articles 9 to 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.

II. QUESTIONS OF DEFINITION

The term 'social rights' is not clearly defined in international law. In the Preamble to the European Social Charter (ESC) 1961, for example, the term 'social rights' is used to distinguish the rights enumerated in the ESC from the 'civil and political rights and freedoms' specified in the European Convention on Human Rights (ECHR) and its first Additional Protocol. Since the ESC contains a full range of rights, including the right to work, the rights to vocational guidance and training, the right to protection of health, the right to social security and the right of migrant workers and their families to protection and assistance, we can draw the conclusion that the Council of Europe (CoE) applies a fairly broad definition of social rights. The Revised ESC of 1996 maintained this broad definition, although the Preamble also refers to 'economic, social and cultural rights'.

The United Nations, the Organization of American States (OAS) and other regional organizations, including the African Union, on the other hand, primarily use the composite term 'economic, social and cultural rights' for the broad category of rights which in Europe seem

to be called 'social rights'. The most important documents in this respect are the ICESCR of 1966 and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') of 1988, which both cover a wide range of human rights.[1]

However, neither of these treaties clearly define, for example by means of different chapters, which of the rights covered therein are social rights, as distinguished from economic rights on the one hand and from cultural rights on the other. Nevertheless, there is a certain logical structure in the ICESCR. The first three rights in Articles 6 to 8 (right to work, rights in work, right to form and join trade unions, right to strike) are clearly economic rights as they refer to economic activities, and are followed by social rights in Articles 9 to 12 (right to social security, protection of the family with special emphasis on the rights of mothers and children, right to an adequate standard of living, including the rights to food, housing and clothing, right to health), and by cultural rights in Articles 13 to 15 (right to education, right to take part in cultural life, right to enjoy the benefits of scientific progress, right to intellectual property for scientific, literary or artistic production).

The structure of the ICESCR has its roots in the UDHR of 1948, which encompasses civil, political, economic, social and cultural rights in a very clear order. The UDHR starts in Article 1 with the famous words that '[a]ll human beings are born free and equal in dignity and rights', which reflect the concept of human dignity, as defined by Immanuel Kant,[2] as the major source of legitimacy for all human rights. The second umbrella clause in Article 2 defines the principle of equality in terms of a broad non-discrimination clause. Articles 3 to 21 enumerate the classical civil and political rights up to the most important political right in Article 21 to take part in the government of one's country, directly or through freely chosen representatives, including the right of equal access to public service and the right to vote and be elected in periodic, genuine, secret and free elections based upon universal and equal suffrage. The 'freedom rights' in Articles 18 to 20, namely freedom of thought, conscience and religion, of opinion, expression and information and of assembly and association, were inserted between civil and political rights as they serve both a liberal and a political purpose for well-functioning democratic governance.[3] That the right to own property is not an economic right, as often wrongly assumed, but a civil right is clear from its position in Article 17. Article 22 is another umbrella provision, which introduces the concept of 'economic, social and cultural rights' and makes a second reference to human dignity by stressing that these rights are indispensable for the dignity and free development of human personality. Thereafter, economic, social and cultural rights are spelled out in more detail. Article 23 covers most economic rights, such as the right to work, the right to free choice of employment, the right to just and favourable conditions of work, the right to protection against unemployment and the right to form and join trade unions. The right to rest and leisure in Article 24 is also an economic right, as it is based on a reasonable limitation of working hours and provides for periodic holidays with pay. All

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[1] See already the Preamble and Chapter III of the American Convention on Human Rights of 1969, which refer to 'economic, social and cultural rights' as distinct from 'civil and political rights'. Similar language can be found in the Preamble to the African Charter on Human and Peoples' Rights of 1981 and in other regional human rights treaties.

[2] On the relationship between human dignity and human rights see Manfred Nowak, *Menschenwürde und Menschenrechte* (2018) 32ff, with reference to Kant's definition.

[3] On the meaning of political rights see Manfred Nowak, *Politische Grundrechte* (1988).

social rights are covered by Article 25, which provides for the right to an adequate standard of living, including the rights to food, clothing, housing, medical care and social security, as well as special care and assistance for motherhood and childhood. Articles 26 and 27 then specify the two main cultural rights to education and participation in cultural life.

In legal literature, the division between economic, social and cultural rights does not always follow this structure. Asbjørn Eide, for example, regards the right to social security and certain rights which are not covered by the ICESCR, such as the right to property, as 'economic rights', and the rights of minorities in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) as 'cultural rights'.[4] I disagree with this categorization, as it disregards the terminology and structure of the UDHR and the two Covenants. However, Eide rightly considers the right to an adequate standard of living as the 'core' of social rights.[5] I also recognize that the distinction between these three categories is not always waterproof and that the economic right to form and join trade unions is also covered by Article 22 ICCPR. Nevertheless, I use the terms 'economic rights', 'social rights' and 'cultural rights' by following the logical structure of the UDHR and ICESCR as outlined above. This means that I use the term 'social rights' in the narrow sense of the rights covered by Article 25 UDHR as well as Articles 9 to 12 ICESCR, whereas I prefer to use the term 'economic, social and cultural rights' when I refer to this entire category of rights as distinct from the category of 'civil and political rights', as enumerated in the ICCPR.[6] I wish to stress, however, that these terms are purely used for definitional purposes and do not entail any legal consequences, as I will show below.

Based upon the 'three generations theory' developed by Karel Vašák already during the late 1970s,[7] many scholars use the term 'first generation' for civil and political rights, 'second generation' for economic, social and cultural rights and 'third generation' for collective rights of peoples or 'solidarity rights'. Although this theory has a certain value in explaining the historical development of these three categories or dimensions of human rights, I nevertheless prefer to avoid these terms, in order to prevent certain misunderstandings or misconceptions which are often associated with the 'three generations theory'.[8]

III. SHORT HISTORY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Long before human rights were codified in international law, they were gradually developed in domestic constitutional law, starting from the French and American Revolutions of the late

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[4] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2001) 9, 17ff.

[5] *Ibid.*, 17.

[6] For the meaning of 'civil rights' and 'political rights' see Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary* (2005) 564ff.

[7] See Karel Vašák, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' (1977) XXX UNESCO Courier 29.

[8] *Cf.* also Asbjørn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2001) 3, 4.

eighteenth century.[9] Based on the rationalistic doctrine of natural law and on theories of the social contract developed by philosophers such as John Locke, Thomas Paine, Jean-Jacques Rousseau and Samuel Pufendorf, the bourgeois concept of civil and political rights was gradually developed in the American Declaration of Independence of 1776; the Bills of Rights of the newly independent American states, most notably the Virginia Bill of Rights of 1776; and the famous French Declaration of the Rights of Man and the Citizen 1789. Liberalism and democracy are the two main philosophical ideas behind the concept of civil (liberal) rights of men,[10] as distinguished from the political (democratic) rights of citizens in the French Declaration. Liberal freedom was defined in Article 4 of the French Declaration as the right of all men to do whatever is not injurious to others, and political freedom in Articles 2 and 6 as the right of citizens to participate in the democratic decision making of the people.[11]

In his essay 'On the Jewish Question', Karl Marx developed in 1843 a fundamental critique of the very concept of civil and political rights, as contained in the French Declaration as rights of men and citizens:

> Above all, we note that the so-called *rights of man*, the *droits de l'homme* as distinct from the *droits du citoyen*, are nothing but the rights of a *member of civil society*, *i.e.* the rights of egoistic man, of man separated from other men and from the community.[12]

In the right to property, Marx recognized the prototype of a civil right, that is, a right of egoistic self-interest, and the source of the economic exploitation of human beings. The socialist concept of human rights gradually developed as an antithesis to the bourgeois concept of civil rights, above all the right to private property. Instead of civil rights, socialist thinkers, including Friedrich Engels, Pierre-Joseph Proudhon and Louis Blanc, advocated the right to equality in the social and economic sphere as well as the early recognition of certain economic, social and cultural rights, such as the right to education, the right to work and the rights of orphans and the elderly to be supported by the state. After the First World War, economic, social and cultural rights were included, for example, in the 1919 Weimar Constitution and certain Latin American constitutions (such as the 1917 Mexican constitution), and promoted by the International Labour Organization (ILO), established on the basis of the Peace Treaty of Versailles in 1919. The best known catalogue of economic, social and cultural rights was contained in the Stalin Constitution of the Soviet Union of 1936, which included the rights to work, rest and leisure, social insurance, free medical services and education, as well as equal rights of women in all spheres of economic, cultural, social and political life.

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[9] On the history of human rights see, e.g., Felix Ermacora, *Menschenrechte in der sich wandelnden Welt* (Vol I, 1974); Micheline R Ishay, *The History of Human Rights – From Ancient Times to the Globalization Era* (2004); Jack Mahoney, *The Challenge of Human Rights – Origin, Development and Significance* (2007); Lynn Hunt, *Inventing Human Rights* (2008); Manfred Nowak, *Menschenrechte – Eine Antwort auf die wachsende ökonomische Ungleichheit* (2015) 49ff; Manfred Nowak, *Human Rights or Global Capitalism – The Limits of Privatization* (2017) 7ff.

[10] The expression 'man' (*homme*) was meant to only refer to men, while women were excluded from the idea of 'human rights' both in theory, law and practice. When in 1790 Olympe de Gouge drafted a first Declaration of the Rights of Woman in reaction to the French Declaration of 1789, she was convicted and executed for her counterrevolutionary activities under the terror regime of Robespierre in 1793. For the text of this Declaration see Micheline R Ishay, *The Human Rights Reader* (1997) 140.

[11] See Nowak, *Human Rights or Global Capitalism* (n 9), 10.

[12] Karl Marx, *On the Jewish Question* (1843), quoted from Ishay (n 10), 195.

The United Nations was created in 1945 in reaction to two World Wars, the Great Depression, the rise of fascism and the horrors of the Holocaust.[13] The three major aims and objectives stipulated in the UN Charter are, therefore, international peace and security, development and human rights. The 'four freedoms speech', delivered by US President Franklin Delano Roosevelt to Congress on 6 January 1941 and referring to the freedom of speech and expression, the freedom to worship God in his own way, freedom from want and freedom from fear,[14] had a major influence on the Charter of the new world organization. Sixty years later, UN Secretary General Kofi Annan built his well-known report, 'In larger freedom' – which aimed at a fundamental reform of the United Nations – on Roosevelt's concepts of 'freedom from fear' and 'freedom from want'. Human security means a world in which everybody can live in freedom from fear and violence, while human development aims at a world order in which everybody can live in freedom from want and poverty. Annan stressed the interdependence of the three major goals of the United Nations as follows: 'Accordingly, we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.'[15] Human rights are, therefore, the cornerstone on which the two other pillars, security and development, need to be built. At the same time, the terms 'freedom from fear' and 'freedom from want' also relate to the two antagonistic concepts of human rights as they had developed since the late eighteenth century, namely the bourgeois (Western) concept of civil and political rights, and the socialist concept of economic, social and cultural rights. The Charter of the United Nations reflects the three aims and objectives as follows:

> We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.

Although the text of the UN Charter contains seven references to human rights, this term has nowhere been defined. This important and difficult task was entrusted to the Commission on Human Rights, which was established in 1946 as a functional commission of the Economic and Social Council (ECOSOC) in accordance with Article 68 of the Charter. The Commission consisted of 18 states from all world regions, represented by well-known personalities, such as Eleanor Roosevelt (USA) in the chair,[16] Peng Chung Chang (China), Hansa Mehta (India),

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[13] The following is based on the detailed historical analysis in Nowak, *Human Rights or Global Capitalism* (n 9), 17ff.

[14] See Ishay (n 10), 403.

[15] Kofi Annan, 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) UN Doc A/59/2005, para 17. This document can be considered as the main legacy to a world in turmoil of Kofi Annan, who passed away in August 2018. Unfortunately, most of his reform proposals were not taken up by world leaders during their summit in September 2005.

[16] See Mary Ann Glendon, *A World Made New – Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

Charles Malik (Lebanon),[17] Alexandre Bogomolov (USSR), René Cassin (France)[18] and Hernan Santa Cruz (Chile). The history of the drafting of the UDHR in the Commission is well known and shall not be repeated here.[19] What is important for our purpose is the fact that the drafters managed within the short period of two years, in which the antifascist consensus was still stronger than the divisions of the ensuing Cold War, to develop a synthesis between different and antagonistic concepts of human rights. The UDHR, which was formally adopted on 10 December 1948 by the UN General Assembly in Paris, contains all major civil and political rights, including the controversial right to own property (Article 17) in Articles 1 to 21, all major economic, social and cultural rights in Articles 22 to 27, the vision of a social and international order in which the rights and freedoms of the Declaration can be fully realized in Article 28, duties to the community in Article 29 and a clause prohibiting abuse in Article 30.

This synthesis shows that the often repeated argument that human rights are simply a Western concept and invention is wrong. However, it is also a widespread misconception that the Soviet Union and its allies fought strongly against the Western states to achieve this synthesis by having economic, social and cultural rights included in this most important human rights document in human history.[20] Although it is true that the British and Australian representatives repeatedly tried to avoid the inclusion of economic, social and cultural rights, the discussions in the Commission and the Third Committee of the General Assembly, which was chaired by Charles Malik, show a much more diverse picture. According to Johannes Morsink, it is primarily 'the Latin American socialists – and John Humphrey as their conduit – to whom we owe the presence of these rights in the Declaration'.[21] John Humphrey, a young Canadian professor who had been appointed in 1946 as the first director of the UN Division of Human Rights, was entrusted by Eleanor Roosevelt with the task of preparing a first draft of the Declaration in early 1947. In his memoirs, he even claimed a certain ownership for the inclusion of economic, social and cultural rights.[22] Others argue, however, that Humphrey clearly overrated his contribution in this regard.[23] In fact, the French Nobel prize laureate René

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[17] See Habib C Malik (ed.), *The Challenge of Human Rights – Charles Malik and the Universal Declaration* (2000).

[18] See Marc Agi, *René Cassin 1887–1976* (1998).

[19] See, e.g., John P Humphrey, *Human Rights and the United Nations: A Great Adventure* (1984); Johannes Morsink, *The Universal Declaration of Human Rights – Origin, Drafting, and Intent* (1999); Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights – A Common Standard of Achievement* (1999); William Schabas (ed.), *The Universal Declaration of Human Rights – The Travaux Préparatoires* (2013); Vinodh Jaichand and Markku Suksi (eds), *60 Years of the Universal Declaration of Human Rights in Europe* (2009); Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (2009); Barend Van Der Heijden and Bahia Tahzib-Lie, *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (1998); M Glen Johnson and Janusz Symonides, *The Universal Declaration of Human Rights: A History of its Creation and Implementation 1948–1998* (1998).

[20] See, e.g., Ashild Samnoy, 'The Origins of the Universal Declaration of Human Rights' in Guðmundur Alfreðsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights – A Common Standard of Achievement* (1999) 3, 11; Asbjørn Eide and Wenche Barth Eide, 'Article 25' in *ibid.*, 523, 528.

[21] Morsink 1999 (n 19), xiv (and 157ff).

[22] Humphrey (n 19), 32: 'It is by no means certain that economic and social rights would have been included in the final text if I had not included them in mine.'

[23] See, e.g., Bard-Anders Andreassen, 'Article 22' in Asbjørn Eide *et al* (eds), *The Universal Declaration of Human Rights: A Commentary* (1992) 319, 331.

Cassin, who was requested in June 1947 to prepare a second draft on the basis of Humphrey's outline, and the Chilean human rights expert Hernán Santa Cruz seemed to have played an at least equally decisive role in pushing for the inclusion of economic, social and cultural rights. However, Cassin, who was later portrayed by the French government as the true 'father' of the UDHR, was also accused of having overstated his own role.[24] One should also not forget the important role of Eleanor Roosevelt, who as Chair often had to find a compromise. After all, since her husband had introduced the New Deal legislation and the 1935 Social Security Act in the United States and had advocated for the equal recognition of the 'freedom from want' in his 'four freedoms speech', it would have been difficult for her to speak against the inclusion of economic, social and cultural rights.[25]

We can, therefore, conclude that there were many reasons for the inclusion of economic, social and cultural rights in the UDHR. On the one hand, the Soviet Union and its allies would have strongly objected if the UDHR had only contained Western civil and political rights. However, these rights were not seen (yet) as an exclusive domain of socialist states. They had been included already, as stated, in the Weimar Constitution of 1919 and in various Latin American constitutions. They were defended by the ILO, by social democrats all around the world and also by Christian philosophers. Under the imprint of the Great Depression, which had contributed to the rise of communist and fascist movements and regimes, social security legislation was introduced in the United States and many other states, inspired by the economic theories of John Maynard Keynes.[26] In other words, at a time when the antifascist consensus in the international community and the desire to build a peaceful and more just social world order out of the ashes of the Second World War was still stronger than the dividing forces of the Cold War, there was also a fairly broad agreement on the need to find a fair balance between civil and political rights and freedoms, on the one hand, and economic, social and cultural rights, on the other.

When Charles Malik, a Christian professor of philosophy from Lebanon acting as Chair of the Third Committee of the General Assembly, delivered a powerful speech on the eve of the adoption of the UDHR requesting that the delegates of the General Assembly in Paris vote for the Declaration, he proudly observed:

> Every member of the United Nations has solemnly pledged itself to achieve respect for and observance of human rights. But, precisely what these rights are, we were never told before, either in the Charter or in any other international instrument. This is the first time the principles of human rights and fundamental freedoms are spelled out authoritatively and in precise detail. I know now what my government pledged itself to promote, achieve and observe when I had the honour to sign the Charter of San Francisco, on its behalf, on 26 June 1945.[27]

One day later, the UDHR was adopted with a vote of 48 states in favour, none against and eight abstentions.[28]

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[24] See, e.g., Morsink 1999 (n 19), 8.

[25] See, e.g., Glendon (n 16), 42f, 115ff, 155ff.

[26] See John Maynard Keynes, *The General Theory of Employment, Interest and Money* (1936, reprinted 1977).

[27] Charles Malik, 'Speech of Thursday 9 December 1948' in Habib C Malik (ed.), *The Challenge of Human Rights – Charles Malik and the Universal Declaration* (2000) 117, 124f.

[28] UNGA Res 217A (10 December 1948). The eight abstaining states were Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukraine, the USSR and Yugoslavia. The socialist

In accordance with its original three-step approach of drafting first a non-binding declaration, and thereafter a binding convention and measures of implementation, the Commission started in 1949 to work on a convention. In 1950 the General Assembly, emphasizing the interdependence of all categories of human rights, explicitly called upon the Commission to adopt a single convention.[29] However, the memories of the horrors of the Second World War started to fade as the Cold War was intensifying, not least due to the Korean crisis. In order to pursue their goal of submitting civil and political rights to a monitoring system of individual complaints before an independent court, as achieved by the CoE with the adoption of the ECHR in 1950, and at the same time side-lining economic, social and cultural rights, the United States suggested in 1951 to split the International Bill of Rights into two Covenants. John Humphrey observed in his memoirs that the American suggestion had provoked a 'large ideological controversy and decision', which had 'split the United Nations down the middle'.[30] A group of likeminded states from different world regions, including Chile, Egypt, Pakistan and Yugoslavia, had moved to reaffirm the decision of 1950, but the Americans strongly lobbied for splitting the Covenant and managed to reverse the 1950 decision by a very narrow vote.[31] This was a decisive turn in the history of the International Bill of Rights. From that point onward the Commission (until 1954) and later the Third Committee of the General Assembly drafted a 'Western' and a 'Socialist' Covenant with two different types of state obligations and two different sets of international monitoring procedures in mind.[32] After highly controversial discussions on the monitoring mechanisms in the Third Committee, the General Assembly finally adopted both Covenants unanimously on 16 December 1966; the first Optional Protocol (OP) to the ICCPR, which provides for an individual complaints system, was adopted by 66 votes to 2 (Niger and Togo), with 38 abstentions, including all socialist states.

Most of the highly ideological debates between Western, socialist and Southern states related to the monitoring system. The different positions can be characterized as follows. The Western states considered only civil and political rights as 'real' rights, because they were perceived as solely imposing negative obligations on states, that is, obligations of not interfering with the individual exercise of these human rights and freedoms. As a consequence, they could be monitored by an independent court, such as the European Court of Human Rights, by means of a judicial complaints procedure. Economic, social and cultural rights, which were considered as solely imposing positive obligations on states, were only treated as so-called programme rights to be achieved progressively according to the economic capacities of the respective states. As such, they were perceived as 'non-justiciable'. The Soviet Union and its allies claimed ownership of economic, social and cultural rights and insisted, therefore, on the

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states abstained because the right of peoples to self-determination and the minority rights were not included, but they did not claim that there was not enough emphasis on economic, social and cultural rights.

[29] UNGA Res 421 (4 December 1950).

[30] Humphrey (n 19), 162.

[31] UNGA Res 543 (5 February 1952).

[32] On the history of the two Covenants see, e.g., the extensive commentary of the UN Secretary General in UN Doc A/2929; Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (1987); Nowak (n 6), xxiiff; Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (1995) 6ff; Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases, and Materials* (2014).

equality and interdependence of all human rights. According to the socialist doctrine of human rights, the state was responsible for the implementation of all human rights through positive action for the benefit of all members of society. Since in the ideal socialist society there was thus no conflict between the interests of individuals and society, individuals had no right to claim their human rights against the state by means of individual complaints before domestic courts, much less before an international court. Every international mechanism for the monitoring of states' compliance with their human rights obligations, including the state reporting system, was seen as an inadmissible interference with state sovereignty and the domestic jurisdiction clause in Article 2(7) UN Charter. During the Cold War, most countries of the Global South were either in the socialist or the Western camp. African states were primarily interested in the fight against colonialism, apartheid and other forms of racism and racial discrimination, and strongly supported the collective rights of peoples to self-determination and development.

IV. THE LEGAL CONSTRUCTION OF THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

It is almost a miracle that, despite these fundamental ideological differences and in the middle of the Cold War, the diplomats in the United Nations could finally agree on the adoption of the two Covenants with some sort of international monitoring system. However, this compromise had two far-reaching consequences. The international community, based upon largely doubtful theoretical assumptions, decided that the two categories of human rights are legally different and would therefore entail different legal obligations of states. Second, these different legal obligations of states would also require different methods of international monitoring.

With respect to state obligations, Article 2(1) ICCPR requires states parties 'to respect and to ensure to all individuals' the civil and political rights contained therein. Article 2(1) ICESCR, on the other hand, requires each state party only 'to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization' of the economic, social and cultural rights contained therein. The difference between these two types of state obligations could not have been more drastic. Civil and political rights have to be immediately respected and ensured, and every failure of a state party to respect and ensure them can be qualified as a violation of the respective obligation, and any person claiming to be a victim of such violation has a right to an effective, if possible judicial, domestic remedy in accordance with Article 2(3) ICCPR. Economic, social and cultural rights, on the contrary, are considered as mere 'programme rights'. For states, it seems to be enough to take a few steps, such as asking for international development assistance, in order to prove that they have complied with their respective obligations. They can always claim that they are too poor to provide their people with adequate food, education or health care in the absence of adequate international assistance. In any case, there are no obligations of result, only obligations of conduct to progressively achieve some results in the future.

With respect to international monitoring, the international community did not even find it necessary to appoint an independent expert body to supervise states' compliance with their weak obligations deriving from the ICESCR. States were only requested in Article 16 ICESCR to submit 'reports on the measures which they have adopted and the progress made in achieving the observance of the rights' to the ECOSOC for consideration. In other words, one of the

major political bodies of the UN, consisting of states represented usually by diplomats with no specific knowledge on the domestic implementation of economic, social and cultural rights, was entrusted to examine these state reports and to submit 'from time to time to the General Assembly reports with recommendations of a general nature' about the progress in achieving economic, social and cultural rights in all states parties in accordance with Article 21 ICESCR.

Article 28 ICCPR, on the contrary, established an independent monitoring body, the Human Rights Committee (HRCttee), consisting of 18 highly qualified independent experts. In addition to examining state reports in accordance with Article 40, the Committee was also entrusted to decide about inter-state and individual complaints as provided for in Articles 41 and 42 ICCPR, as well as in the first OP. Although the two complaints procedures are both optional and are framed in very weak terms ('communications', 'final views' and so on), the HRCttee did its best to develop at least the individual communication procedure into a fairly effective quasi-judicial procedure, similar to the respective judicial procedures before regional human rights courts.

ECOSOC soon realized that it did not have the required time and expertise to examine state reports, and in 1985 established the independent Committee on Economic, Social and Cultural Rights (CESCR),[33] which developed the state reporting procedure into a fairly effective tool and which adopted far-reaching 'General Comments' on the model of similar comments by the HRCttee, which further developed the legal interpretation of the provisions of the Covenant, including the respective obligations of states. In 2008, the General Assembly, after highly controversial discussions and despite strong opposition by Western states, finally adopted an OP to the ICESCR, which entrusts the Committee to also consider individual and inter-state communications as well as to initiate an inquiry procedure in case of grave or systematic violations of economic, social and cultural rights by a state party.

V. EQUALITY, INDIVISIBILITY AND INTERDEPENDENCE OF ALL HUMAN RIGHTS

The interdependence of all human rights was already stressed by the General Assembly when it requested that the Commission draft one single treaty.[34] Although the Assembly revised this decision one year later, it tried to keep both Covenants as one unity, calling them, together with the UDHR, the 'International Bill of Human Rights', adopting them on the same day and including also some rights with similar language in both Covenants, such as the right of peoples to self-determination in Article 1 and the equal rights of men and women in Article 3. Nevertheless, the differences of state obligations and international monitoring procedures prove that the two categories of human rights were certainly not treated equally. However, the establishment of the CESCR in 1985 and the adoption of the OP to the ICESCR in 2008 were important steps towards treating both categories of human rights more equally than before.

The most important document in this respect is the Vienna Declaration and Programme of Action (VDPA), adopted unanimously by 171 states at the conclusion of the Vienna World Conference on Human Rights in June 1993.[35] The World Conference was convened in order to

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[33] ECOSOC Res 1985/17 (28 May 1985).
[34] UNGA Res 421 (4 December 1950).
[35] UNGA, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc A/CONF.157/23.

use the historic window of opportunity, which had opened by the implosion of the communist regimes in Central and Eastern Europe and the end of the Cold War, to contribute to a new world order based on pluralist democracy, the rule of law and human rights. While the World Conference was being prepared, the situation in many parts in the world rapidly deteriorated and the countries of the Global South accused the West of misusing human rights in support of their neo-colonial aims and dominating globalization with neoliberal economic policies. These accusations led to the claim that human rights were not universal values but a Western concept designed to foster Western (primarily US) hegemony. After long and difficult negotiations, in which NGOs played a decisive role, the drafters were able to find an important compromise, which also paved the way for an agreement on establishing the Office of UN High Commissioner for Human Rights.[36]

Article 5 VDPA reads as follows:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Although this formulation looks fairly innocent and self-evident, it constitutes an important compromise. Despite stressing the significance of national and regional particularities, the Global South had finally agreed to the universality of human rights and thus conceded that human rights were not simply a Western concept. This means, in principle, that African or Asian values should no longer be invoked as an argument to put the universal nature of human rights into question. At the same time, Western states agreed to treat all human rights – that is, economic, social and cultural rights as well as civil and political rights – in a fair and equal manner, taking into account their indivisibility, interdependence and interrelatedness. This means, in particular, that the legal differentiation between the two major categories of human rights needs to be revisited and the incorrect assumptions which had dominated the ideological discussions during the Cold War rectified.

The VDPA contains many commitments in this respect, most of which have been implemented in the meantime. They include the adoption of various OPs with the purpose of entrusting all UN treaty monitoring bodies with the power to examine individual communications on an equal basis with the HRCttee. In the meantime, legal human rights scholars have developed a new theory of state obligations deriving equally from all human rights treaties.[37] This theory proves the Cold War assumption wrong, according to which civil and political rights simply entail negative state obligations, whereas economic, social and cultural rights would only entail positive state obligations. Reality looks, however, totally different. There is no civil or politi-

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[36] On the role of NGOs see, *e.g.*, Manfred Nowak (ed.), *World Conference on Human Rights, Vienna, June 1993: The Contribution of NGOs, Reports and Documents* (1994).

[37] *Cf.*, e.g., Eide (n 4), 9; Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2001) 29; Manfred Nowak, *Introduction to the International Human Rights Regime* (2003) 23ff, 48ff. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, in (1987) 9 HRQ 122; and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, in (1998) 20 HRQ 1.

cal right which can be effectively enforced by states by simply doing nothing. The right to life does not only mean that the police should not kill people arbitrarily. At a minimum, the state must enact laws that regulate the powers and responsibilities of the police and the procedure to be followed in case the police kill somebody. In addition, the police need proper training in order to ensure that as few people as possible are killed arbitrarily. However, in most states the risk of being killed by the police is much smaller than the risk of being killed by criminals, by car accidents or by avoidable diseases. This means that the state has a responsibility to ensure that the crime rate in relation to murder and homicide is not getting out of hand, that car traffic is properly regulated and that the public health system is functioning properly. In other words, the state has many different obligations: to respect the right to life (negative obligation not to interfere with the right to life through arbitrary killings by the police or military); to protect the right to life against criminals, terrorists or other private actors; and to fulfil the right to life by a broad variety of positive measures, such as enacting police laws, training police officials, regulating car traffic and maintaining a well-functioning public health system.

The same is true for economic, social and cultural rights. Of course, the right to education requires states to build schools, to recruit and train teachers and to take many other positive measures aimed at providing a well-functioning primary, secondary and higher education system, as well as vocational and other training. In addition to these obligations to fulfil, the right to education also requires states to protect children against abusive school teachers and to respect the liberty of parents to establish their own private schools or to organize the education of their children in accordance with their own moral and religious convictions, without undue interference by governmental authorities. There are many other convincing examples to show that every civil, political, economic, social and cultural right entails both negative obligations to refrain from interference and positive obligations to protect individuals against powerful private parties and to fulfil the respective rights by means of positive legislative, administrative, judicial and political measures.

These few examples show that it is wrong to talk about 'positive and negative rights' or about rights which entail negative duties to refrain from interference, whereas other rights would entail only positive duties to fulfil and to protect. Positive and negative obligations are inherent in every human right. There might be rights where the positive obligations are more important than the negative obligations and vice versa, but in principle, every human right entails negative state obligations to refrain and positive state obligations to protect and to fulfil. Negative obligations are immediately and directly applicable, whereas positive obligations are subject to the principle of due diligence. This means that states are under an obligation to do whatever can reasonably be expected from them in light of their political, economic and other possibilities. Positive obligations can never be completely fulfilled. There will always be people who die from crime, car accidents and preventable diseases. However, the state can only be held accountable for violating its positive obligations to protect and fulfil the right to life if it has not taken any reasonable action to prevent these causes of death. It is the 'art of human rights' to decide in a specific individual case where to draw the line. The same holds true for the right to education. If children are excluded from public primary schools because they are female, black or gay, the state violates its negative to respect the right to education. If there are, however, not enough public primary schools to provide 100 per cent school enrolment due to a lack of funds, it is a question of due diligence to decide whether the state has taken all measures that can reasonably be expected from that state or not.

By definition, positive obligations can never be fully complied with. This means that positive obligations to protect and to fulfil are always subject to the principle of progressive implementation, irrespective of the fact whether these positive obligations derive from a civil or political right or from an economic, social or cultural right. It follows that the distinction between legal obligations according to the type of human rights, as stipulated in Article 2 of both International Covenants, is simply wrong as it is based on false assumptions that were used as ideological arguments during the Cold War. It also follows that all human rights are justiciable. Of course, the assessment of the implementation of negative obligations is usually easier for courts than the assessment of whether or not a state has taken all measures that can reasonably be expected from that state in order to protect and fulfil certain human rights. But this is not a matter for economic, social and cultural rights alone.

VI. SOCIAL RIGHTS

As outlined above, the rights to social security and an adequate standard of living are at the core of social rights in Article 25 UDHR, a provision which has been elaborated in a more detailed manner in Articles 9 to 12 ICESCR. The *travaux préparatoires* of the UDHR and the ICESCR show that the term 'social security' has been used in a broad sense in Article 22 UDHR and in a more narrow sense in Article 25 UDHR and 9 ICESCR.[38] In the original drafts, Article 22 UDHR was meant to secure a right to social security in the narrow sense of protecting individuals against hardship in the event of unemployment, sickness, disability or old age.[39] However, René Cassin and others then developed the idea of combining this right with an umbrella article at the beginning of the section on economic, social and cultural rights.[40] The combination of such an umbrella article with the right to social security created lengthy debates about the meaning of the term 'social security' in the Commission and later in the Third Committee of the General Assembly. Some delegates would have preferred the term 'social justice' in the umbrella article, but both René Cassin and Eleanor Roosevelt did not wish to give up the term 'social security', which had been coined by Franklin D Roosevelt's Social Security Act of 1935. It follows that 'social security' in Article 22 UDHR is also used as an umbrella term in the sense of social justice or freedom from want. As the umbrella term 'personal security', as laid down in Article 3 UDHR, can be understood to guarantee human beings a life in freedom from fear and violence,[41] 'social security' in the broader sense of Article 22 UDHR aims at ensuring a life in freedom from want and poverty. This shall be realized through the implementation of all economic, social and cultural rights, through national effort and international cooperation, as emphasized in Article 22 UDHR.

The concept of social rights is defined in Article 25 UDHR by another umbrella right: the right to an adequate standard of living. It includes a number of more specific social rights, such as the rights to food, clothing, housing, health (medical care) and social security in the more narrow sense, that is, to provide to everyone the necessary social services 'in the event

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[38] See Andreassen (n 23), 461ff; Eide and Eide (n 20), 524ff; Manfred Nowak, *Human Rights or Global Capitalism* (n 9), 81ff.

[39] See, e.g., the draft of Article 22 presented to the Commission in 1948, UN Doc E/CN.4/127.

[40] See Andreassen (n 23), 470.

[41] On the right to personal security, see Nowak, Human Rights or Global Capitalism (n 9), 138ff.

of unemployment, sickness, disability, widowhood, old age or other lack of livelihood, in circumstances beyond his control'. In Article 25(2), special care and assistance to motherhood and childhood were added to the umbrella social right of an adequate standard of living. During the drafting of the ICESCR, it was felt necessary to split the various elements of the umbrella social right to an adequate standard of living into various separate social rights and to define them in more specific terms. The right to medical care was transformed into a separate right to the enjoyment of the highest attainable standard of physical and mental health in Article 12 ICESCR. The right to social security, 'including social insurance', was kept remarkably short as a separate right in Article 9 ICESCR under the understanding that it reflected the nine pillars of the ILO Convention No 102 concerning Minimum Standards of Social Security of 1952. Assistance to motherhood and childhood was further developed into a general right of protection and assistance to the family as the 'natural and fundamental group unit of society' in Article 10 ICESCR, and the remaining part of the right to an adequate standard of living, including the rights to food, clothing and housing, was retained in Article 11 ICESCR.

States have a primary obligation to fulfil these social rights by adopting comprehensive legislation in the fields of social security, including social insurance, in the event of sickness, disability, injury, unemployment, maternity, old age or death of a family member; protection of the family, motherhood and childhood; food security and food assistance in emergency situations; and access to social housing, clean and affordable water, sanitation and affordable medical care. States must build hospitals and primary health care centres; educate, train, recruit and pay doctors, nurses and other health care personnel; provide social housing for the poor; establish social insurance and pension funds; and take care of the elderly, orphans, street children, persons with disabilities, homeless and jobless people, the poor, refugees, internally displaced persons and other vulnerable groups. Not all of these social services must be provided directly by the state and they may be outsourced to private hospitals, private doctors, private orphanages or old people's homes. However, there are clear limits to privatization of these core governmental functions,[42] and states have an obligation to protect individuals, above all the poor, disadvantaged, discriminated and vulnerable sectors of society, against being excluded from these social services or being evicted from their lands, homes and so on. Furthermore, states have an obligation to respect these social rights by ensuring that everybody has equal access to these essential social services and that nobody is excluded and left behind. Finally, it is of utmost importance that all these rights are laid down in domestic law as justiciable rights, and that everybody has the right to an effective remedy to claim these rights before domestic courts with free legal aid, legal counselling and legal assistance.

VII. CONCLUSIONS AND OUTLOOK

One of the great achievements of the 1948 UDHR is that it defined the term 'human rights' in the Charter of the United Nations in a broad sense, incorporating both the 'Western concept' of civil and political rights and the 'socialist concept' of economic, social and cultural rights. This reflects the antifascist consensus, immediately after the end of the Second World War, that the new world order to be established in reaction to two world wars, the Great Depression, the rise

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[42] See Nowak, *Human Rights or Global Capitalism* (n 9), 77ff, 91ff, 109ff.

of fascism and the horrors of the Holocaust required strong liberal and, at the same time, social welfare states in which the enjoyment of freedom from want and poverty was as important as the enjoyment of freedom from fear and violence. However, during the time of the Cold War the Western states, both in their domestic constitutions and in regional organizations such as the CoE and the OAS, clearly gave preference to civil and political rights, whereas economic, social and cultural rights were considered as mere 'programme rights'. In 1950 the member states of the CoE adopted the ECHR, which contained only civil and political rights and established a strong regional monitoring system with the European Court of Human Rights as the first regional human rights court, whereas the ESC was only adopted in 1961, with far weaker legal obligations of states and a much weaker regional monitoring mechanism. From a terminological point of view, the CoE uses the term 'social rights' for the entire category of human rights, which in the United Nations and other organizations is usually called 'economic, social and cultural rights'. In the constitutions of the newly emerging socialist states of that time, above all in Central and Eastern Europe, a clear preference was given to economic, social and cultural rights.

In the United Nations, in 1952 the Western states succeeded in the General Assembly in reversing an earlier decision and abandoning the original idea of drafting, on the basis of the UDHR, a universal convention which would include all human rights on an equal basis. Instead, two different Covenants were drafted and finally adopted in 1966 as part of the 'International Bill of Human Rights': a 'Western' ICCPR and a 'socialist' ICESCR. With this splitting of the 'International Bill of Human Rights' into two pieces, the international community also agreed, on the basis of largely doubtful theoretical assumptions, that the two categories of human rights are legally different and would entail, therefore, different legal obligations of states which would require different methods of international monitoring. In short, this largely ideological construction assumed that civil and political rights were purely 'negative rights' which only entailed the negative obligation of states to refrain from violating these rights. Since these negative obligations were immediately binding, they could also be subjected to international monitoring by international or regional human rights courts on the basis of inter-state and individual complaints. Economic, social and cultural rights, on the other hand, were constructed as purely 'positive rights' which only entailed positive obligations of states to take steps with a view to achieving progressively their full realization. These positive obligations were not understood as immediately legally binding and, therefore, as 'non-justiciable'. States were only required to submit reports about the measures they had taken to implement these rights, which were reviewed by the ECOSOC of the United Nations, similarly to the reporting procedure under the ESC before the Committee of Ministers of the CoE.

After the implosion of the Communist states in Central and Eastern Europe and the end of the Cold War, this ideological construction of two different legal categories of human rights was challenged in both theory and practice. The outcome document of the Vienna World Conference on Human Rights in 1993 – the VDPA, which is the basis for the establishment of the Office of the United Nations High Commissioner for Human Rights and the post-Cold War human rights programme of the world organization – explicitly confirmed the universality, indivisibility, interdependence and equality of all human rights. Politically speaking, this meant that the states of the Global South accepted that human rights were a universal and not only a Western concept, as Asian and African states often used to claim. On the other hand, Western states accepted that the legal distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other, was nothing but an ideological

construction during the time of the Cold War. On the basis of the Vienna consensus, human rights scholars and monitoring bodies developed the theory that all human rights entail negative obligations of states to respect them and positive obligations to fulfil them by appropriate legislative, administrative, judicial, political and other means, as well as to protect them against interference by private parties. The negative obligation to respect any human right is violated when states take measures that interfere with such right in a manner that cannot be justified. The positive obligation to fulfil or protect a right is violated if states fail to take the necessary steps that can reasonably be expected from them (under the principle of due diligence) with a view to progressively achieving the full realization of that right. Both types of obligations are 'justiciable', although it might be a little more difficult for courts to assess at which point states violate their positive obligation to take sufficiently strong measures of implementation. On the other hand, the European, Inter-American and African human rights courts also need to balance, in most cases of negative state obligations, whether the respective interference by the state was justified by legitimate state interests or not.

In practice, much has been achieved to overcome the ideological distinction between the two categories of human rights. Domestic courts, most notably the Constitutional Court of South Africa and the Supreme Court of India, have proven, in a number of landmark judgments, that economic, social and cultural rights are fully 'justiciable'. On the basis of the VDPA, the United Nations adopted various Optional Protocols to existing human rights treaties which recognized the right of victims to lodge individual complaints also in relation to economic, social and cultural rights, above all the Optional Protocol to the ICESCR of 2008.[43] On the basis of these Optional Protocols, the respective UN treaty monitoring bodies have rendered an increasing number of decisions relating to economic, social and cultural rights. In 1995, the CoE had already adopted an Additional Protocol to the ESC which established at least a collective complaints system before the European Committee of Social Rights.[44] However, neither the CoE, nor the United Nations, or any other international or regional organization has done enough to fully implement the indivisibility, interdependence and equality of all human rights. Economic, social and cultural rights are still considered in many countries of the world as far less important than civil and political rights. Moreover, the current neoliberal global economic system, with its emphasis on privatization, deregulation and minimizing the role of the state, has contributed to a massive reduction of the social welfare economy in many countries, both in the Global North and the Global South, and the current international and regional mechanisms for the protection of economic, social and cultural rights are far too weak to effectively prevent or stop such a powerful global trend.[45]

Social rights are at the centre of economic, social and cultural rights and suffer most under the current neoliberal economic system. The core social rights to social security and an adequate standard of living, including the rights to food, water, housing and health, as provided for in Article 25 UDHR, are most under attack if states are no longer able or willing to uphold a social welfare system and to protect the freedom from want and poverty proclaimed almost

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[43] UNGA Res 63/117 (10 December 2008).

[44] For the Additional Protocol to the European Social Charter and the respective case law of the European Committee of Social Rights see the contribution by Karin Lukas in this *Research Handbook* (Chapter 7).

[45] See Nowak, *Human Rights or Global Capitalism* (n 9); Nowak, *Menschenrechte – Eine Antwort* (n 9).

80 years ago by US President Roosevelt. If we wish to fulfil the vision of Article 28 UDHR, namely the right of all human beings to a 'social and international order in which the rights and freedoms set forth in this Declaration can be fully realized', we need to drastically reduce economic inequality and to fundamentally reform the current global economic system. The full implementation of the 'Agenda 2030' with its 17 Sustainable Development Goals (SDGs),[46] which in fact contains most economic, social and cultural rights and demands a reduction of economic inequality (SDG 10), would be a major step in the right direction.

[46] UNGA Res A/70/1 (25 September 2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development'.

2. The nature of social rights as obligations of international law: resource availability, progressive realization and the obligations to respect, protect, fulfil

Veronika Bílková

I. INTRODUCTION

Social rights, together with economic and cultural rights, have been often treated as rights which, unlike their civil and political counterparts, are not amenable to immediate realization but have to be implemented progressively and subject to available resources. This is reflected in the text of the two UN covenants adopted in 1966. While the International Covenant on Civil and Political Rights (ICCPR) obligates state parties 'to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant' (Article 2(1)), the International Covenant on Economic, Social and Cultural Rights (ICESCR) opts for a different formulation. Under its Article 2(1),

> [e]ach State Party […] undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

A similarly differentiated approach manifests itself in other human rights instruments adopted at the UN level or within regional organizations.[1] Instruments dealing with civil and political rights request states to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention' (Article 4 of the Convention on the Rights of the Child (CRC)),[2] to 'secure to everyone within their jurisdiction the rights and freedoms defined in […] this Convention' (Article 1 of the European Convention on Human Rights (ECHR)) or to 'respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms' (Article 1(1) of the American Convention on Human Rights (ACHR)).

Instruments focusing on social, economic and cultural rights, on the contrary, define the general obligation of state parties in a more conditional language. Thus, the CRC indicates

[1] Some human rights instruments, such as the African Charter on Human and Peoples Rights, opt for a different approach, establishing the same obligations with respect to all human rights. Even in such cases, however, social, economic and cultural rights are usually not treated at par with their civil and economic counterparts. See Sibonile Khoza, 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria' (2004) 4 African Human Rights Law Journal 334.

[2] See also Art 4(1) Convention on the Rights of Persons with Disabilities (13 December 2006) 2515 UNTS 3.

that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation' (Article 4).[3] The (revised) European Social Charter (ESC) expects state parties to 'accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised' (Part I). The Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) in its Article 1 stipulates that

> the States Parties […] undertake to adopt the necessary measures, both domestically and through international cooperation […] to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively […], the full observance of the rights recognized in this Protocol.

The difference in treatment between the two categories of human rights is usually explained by the difference in their nature. Civil and political rights are described as negative, cost-free, capable of immediate realization, relatively precise, justiciable and enforceable, consensual and non-ideological; meanwhile, economic, social and cultural rights are seen as positive, expensive, subject to progressive realization, relatively vague, non-justiciable and difficult to enforce, non-consensual and ideological.[4] Writing shortly after the entry into force of the ICESCR, Brownlie characterized the instrument as 'programmatic and promotional'.[5] Trubek by the same token noted that the Covenant 'speaks in the language of rights [but] refers to the realities of programs'.[6] Although the view has, especially since the establishment of the UN Committee on Economic, Social and Cultural Rights (CESCR) in 1986, been contested by a growing number of scholars,[7] it remains influential both in legal doctrine and among states.

This view also has had a major impact on the way in which Article 2(1) ICESCR and similar provisions in other instruments have been drafted. The provisions present the implementation of social, economic and cultural rights as a process which is both progressive and conditional. It is *progressive* because states are expected to take steps that will gradually lead to the final result, i.e. the full realization of the relevant rights. It is *conditional* because states only have to take these steps within the confines set by the available resources. It would thus seem that

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[3] *Ibid.*, Art 4(2).

[4] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 156, 159–60; see also Marc Bossuyt, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels' (1975) VIII Human Rights Journal 783; Egbert W Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) Netherlands Yearbook of International Law 69, 83.

[5] Ian Brownlie, *Principles of Public International Law* (1979) 572–73.

[6] David Trubek, 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs' in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (1984) 205, 231.

[7] See, e.g., Craig Scott, 'The Interdependence and Permeability of Human Rights: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 Osgoode Hall Law Journal 767; Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003); Olivier De Schutter, 'Economic, Social and Cultural Rights as Human Rights: An Introduction' (2013) *CRIDHO Working Paper* 2.

social rights, together with economic and cultural rights, offer weak guarantees to individuals and that these guarantees differ substantially from those available for civil and political rights.

This chapter shows that this is not truly so. First, the concept of resource availability, despite certain uncertainties entailed in it, does not make the realization of social rights wholly promotional, nor leaves it to the full discretion of states. Second, progressive realization of social rights does not entail a lack of immediately applicable obligations. Third, the threefold obligations to respect, to protect and to fulfil to which social rights, as any other human rights, give rise disprove the idea that human rights can easily be divided into two categories depending on their negative or positive nature.

II. RESOURCE AVAILABILITY

Article 2(1) ICESCR requests a state party to undertake to take steps with a view to achieving progressively the full realization of the rights, 'to the maximum of its available resources'. Commenting on this provision, Dowell-Jones described the reference to resource availability as 'perhaps the most difficult phrase of article 2(1) ICESCR, and in many ways its core'.[8] Robertson, in the same context, noted that the use of the phrase 'as a measuring tool for State compliance is problematic; it has little more definition today than when it was first written'.[9] It is indeed true that although the concept of resource availability has been extensively commented upon by human rights bodies,[10] in soft law instruments,[11] and by legal scholars,[12] it remains vague. This is so with respect to the sphere of its application, the definition of 'available resources' and the way in which the maximum use of such resources should be assessed. Despite various uncertainties it entails, however, the concept does not make the realization of social rights wholly promotional nor leaves it to the full discretion of states.

a. Where and When Does the Resource Availability Condition Apply?

The reference to resource availability appears in some international instruments on social rights but is absent from others. In the instruments where it is present, it seems to be of general application, relating to all obligations stemming from the instrument. Human rights bodies and legal scholars have, however, shown that, first, resource availability is an inherent condition for, and limitation upon, the exercise of social rights regardless of the text of the instrument;

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[8] Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (2004) 44.

[9] Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social, and Cultural Rights' (1994) 16 HRQ 693, 694.

[10] CESCR, 'General Comments No 3 on the Nature of State Parties' Obligations' (14 December 1990) UN Doc E/1991/23; CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' (21 September 2007) UN Doc E/C.12/2007/1.

[11] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, reprinted in UN Doc E/CN.4/1987/17 (8 January 1987), paras 23–28; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (January 1997).

[12] Dowell-Jones (n 8), 44–51; Robertson (n 9); Sepúlveda (n 7) 311–35; Sigrun Skogly, 'The Requirement of Using the Maximum of Available Resources for Human Rights Realisation: A Question of Quality as Well as Quantity' (2012) 12 Human Rights Law Review 393.

and, second, certain obligations related to social rights have to be implemented immediately, regardless of resource availability.

i. The resource availability condition in international instruments

Article 2(1) ICESCR speaks about 'the maximum of its available resources'. In a similar way, the Protocol of San Salvador refers to 'the extent allowed by their available resources' (Article 1). No reference to resources appears expressly in the ESC or the African Charter on Human and Peoples' Rights (AfCHPR). Yet, both the European Committee of Social Rights (ECSR) and the African Commission on Human and Peoples' Rights (ACHPR) have read the requirement into the respective treaties.

In *Autism-Europe v France*, the ECSR held that

> when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.[13]

The three criteria (a reasonable timeframe, a measurable progress and a financing consistent with the maximum use of available resources) have since then been used to assess the adequacy of measures taken in the implementation of the ESC.[14]

The ACHPR introduced the concept of resource availability in *Purohit and Moore v Gambia*.[15] Interpreting Article 16 AfCHPR (right to health), it declared itself

> aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty […]. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation […] to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.[16]

Resource availability thus seems to be an inherent condition for, and limitation upon, the exercise of social rights. It applies irrespective of whether an instrument explicitly refers to it or not.

ii. The resource availability condition and various rights and obligations

Article 2(1) ICESCR is formulated in general terms and, as such, it should apply to all rights contained in the Covenant. It has however been suggested that some rights or, rather, some obligations stemming from these rights, are to be implemented independently of resource availability. These rights and obligations encompass:

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[13] *Autism-Europe v France*, ECSR, Complaint No 13/2002, Decision of 4 November 2003, para 53.

[14] See *European Roma Rights Centre v Bulgaria,* ECSR, Complaint No 31/2005, Decision of 18 October 2006, paras 35, 37.

[15] *Purohit and Moore v Gambia*, ACHPR, Communication No 241/2001 (2003).

[16] *Ibid.*, para 84.

(a) the principle of non-discrimination: the CESCR holds the view that 'the principle of non-discrimination […] is immediately applicable and is […] no[t] dependent on available resources'.[17]
(b) the obligation to take steps: although the ICESCR provides for a gradual realization of social rights, states must start taking steps towards the full realization of such rights immediately and irrespective of available resources.[18]
(c) the obligation to guarantee the minimum content of the core obligations: the CESCR recognizes that the realization of this obligation may require (financial) resources but it posits that the steps necessary for this realization must be taken without delay and regardless of the available resources.[19]
(d) the obligation to respect social rights: the CESCR makes a distinction between the cost-free obligation to respect and the cost-demanding obligations to protect and fulfil.[20]

The exclusion of certain obligations from the scope of application of the principle of resource availability reveals, however, two shortcomings. First, it is only sensible if 'available resources' are understood narrowly in financial terms. When this is not so, all the obligations require at least some, albeit limited, resources.[21] Second, as noted by Dowell-Jones, the distinction between costfree and cost-demanding obligations ignores that 'while many aspects of Covenant rights may be implemented at no immediate cost to the State itself, the costs will fall elsewhere and in so doing will generate macroeconomic effects which must be factored into any strategy for realizing the Covenant'.[22]

b. What are Available Resources?

The concept of available resources is often understood in a narrow sense. Reduced to budgetary allocations, it refers solely to financial means that are made available by the public authorities within the country.[23] This understanding has, however, been contested. Already during the drafting of the ICESCR, the Lebanese representative noted that 'it must be made clear that the

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[17] CESCR, 'General Comment No 18 on the Right to Work' (6 February 2006) UN Doc E/C.12/GC/18, para 33.

[18] 'States parties have immediate obligations […], such as […] the obligation to take steps (article 2, paragraph 1) towards the full realization of articles 11, paragraph 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to social security.' CESCR, 'General Comment No 19 on the Right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19, para 40.

[19] CESCR, 'General Comment No 21 on the Right of Everyone to Take Part in Cultural Life' (21 December 2009) UN Doc E/CN.12/GC/21, para 67.

[20] 'The obligation to respect […] does not necessarily require significant State involvement […] The obligation to protect and, to a greater extent, the obligation to fulfil […] often require positive budgetary measures.' CESCR Evaluation (n 10), para 7. See also CESCR, 'General Comment No 4 on the Right to Adequate Housing' (13 December 1991) UN Doc E/1992/23, para 10.

[21] This is implicitly acknowledged in General Comment No 21, in which the CESCR noted that 'the elimination of all forms of discrimination […] can, in many cases, be achieved with *limited resources* by the adoption, amendment or repeal of legislation, or through publicity and information.' [emphasis added] CESCR (GC 21) (n 19), para 23.

[22] Dowell-Jones (n 8), 48.

[23] See Duncan Wilson, *A Human Rights Contribution to Defining Quality Education* (2004) (paper commissioned for the Education for All Global Monitoring Report 2005, The Quality Imperative, 2005/ED/EFA/MRT/PI/51).

reference [to resources] was to the real resources of the country and not to budgetary appropriations'.[24] His statement was echoed by the French representative, who stressed that '[t]he resources of a state should be interpreted broadly to include budgetary appropriations and also technical assistance, international co-operation and other elements'.[25] That available resources include 'resources other than those of the country immediately concerned'[26] was repeatedly stressed during the drafting of the ICESCR as well. Most scholars have also embraced a broader understanding both of the nature of resources (what are available resources?) and of their sources (where are available resources to be found?).

i. Nature of available resources

Resources, in general, represent 'that upon which the satisfaction of the rights is dependent'.[27] International instruments speak about resources without specifying how the term should be understood. The uncertainty has been addressed by several scholars, who have mostly opted for a broad understanding of resources.

In his 1994 article, Robertson noted that 'there can never be a truly definitive list of the types of resources', because 'the ongoing process of economic and social evolution is constantly creating different resource needs'.[28] He then proposed five categories of resources, namely: financial resources (money), natural resources (land water, animals), human resources (experts, volunteers), technological resources (working tools, computers) and informational resources (analysis, studies, knowhow). An alternative typology was presented in 2012 by Skogly.[29] In addition to financial, natural and human resources, she introduced four categories – educational measures (process of education), cultural and scientific resources (traditional knowledge, modern scientific advances), administrative measures (various implementation measures) and legislative measures (incorporation of human rights into domestic legal systems).

Human rights bodies have not so far come up with a definition of resources or a typology thereof. They have, moreover, often embraced a rather narrow approach to resources, limiting them to budgetary allocations. The canonical case, mentioned by several scholars,[30] is the evaluation of the periodic review submitted by Canada in 1993.[31] During the evaluation, the CESCR criticized the level of homelessness in the country, assessing the adequacy of the measures taken by the country solely in light of the percentage of government expenditures allocated to this area.

It more recent years, human rights bodies seem to be gradually expanding their understanding of resources. In its 2005 Handbook on Economic, Social and Cultural Rights, the OHCHR, relying on Robertson's typology, stresses that '[t]he term [resources] covers both public expenditure and all other resources that can be applied towards the full realization of

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[24] HRComm, 8th session: summary record of the 271st meeting (14 May 1952) UN Doc E/CN.4/SR.271, 5.

[25] *Ibid.*, 6.

[26] HRComm, 7th session: summary record of the 236th meeting (2 July 1951) UN Doc E/CN.4/SR.236, 25 (US representative).

[27] Robertson (n 9), 695.

[28] *Ibid.*

[29] Skogly (n 12), 404–13.

[30] Dowell-Jones (n 8), 47; Robertson (n 9), 703.

[31] CESCR, 'Concluding Observations on Canada' (10 June 1993) UN Doc E/C.12/1993/5.

economic, social and cultural rights'.[32] Similarly, the Guidelines on Reporting, in the section on the CRC, speak about 'allocation of budgetary and other resources'.[33] Such an expression however lends itself to various interpretations and there is, surprisingly, no similar provision in the section on ICESCR. Whether the doctrinal attempts to promote a broader understanding of resources have been matched by a change in the approach of human rights bodies, or, rather, the extent to which this change has happened, is thus not fully clear.[34]

ii. Sources of available resources

Obligations stemming from human rights treaties are incumbent upon states. It could therefore be expected that when referring to the 'maximum of available resources', these treaties refer to the state's own resources, that is, public resources available within the country. The use of the possessive pronoun related to the state ('its' available resources) seems to confirm this view. Yet, such a narrow interpretation has never secured consensus.

First, it is largely recognized that the relevant resources are not limited to those available within the country but include those available outside the country as well. During the drafting of the ICESCR, this view was most actively advocated for by the representatives of the US, UK, Denmark and Egypt.[35] From the late 1980s on, it has also been repeatedly confirmed by soft law instruments, the case law of the CESCR and legal doctrine.[36] The Limburg Principles note that '[i]ts available resources refers to both the resources within a state and those available from the international community through international co-operation and assistance'.[37] Similarly, the CESCR, in its General Comment No 3, stated that 'the phrase "to the maximum of its available resources" refers to both the resources existing within a State and those available from the international community through international cooperation and assistance'.[38] In the subsequent general comments, the CESCR gradually moved from stressing that '[t]o the extent that any […] steps are considered to be beyond the maximum resources available to a State party, it is appropriate that a request be made as soon as possible for international cooperation',[39] to declaring that '[i]n compliance with article 2 (1), States that are not able to comply with their obligations […] due to a lack of resources *must seek* international coop-

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[32] OHCHR, *Economic, Social and Cultural Rights – Handbook for National Human Rights Institutions* (2005) 12.

[33] Report of the Secretary-General, 'Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties' (3 June 2009) HRI/GEN/2/Rev.6, 88.

[34] The Limburg Principles show some openness towards a broader understanding of resources as well, stating that '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'. Limburg Principles (n 11), para 25.

[35] HRComm E/CN.4/SR.236 (n 26), 18, 20, 25; HRComm, 8th session: summary record of the 274th meeting (21 May 1952) UN Doc E/CN.4/SR.274, 5.

[36] Robertson (n 9), 698; Skogly (n 12), 403.

[37] Limburg Principles (n 11), para 26.

[38] CESCR (GC 3) (n 10), para 13. The same position, with minor stylistic changes, is expressed in the 2007 CESCR Statement (see CESCR Evaluation (n 10), para 5).

[39] CESCR (GC 4) (n 20), para 10.

eration and assistance' [emphasis added].[40] This view finds increasing support in doctrine.[41] Whether the obligation to seek assistance is matched by a corresponding obligation by other states or international institutions to provide such assistance remains more controversial.[42]

Second, the public nature of 'available resources' has given rise to some discussion. Chapman and Russell, for example, argue that

> [i]t is worth noting that the Covenant and the general comments do not anticipate that necessary resources will come entirely from within the State. In fact, the opposite is true. The resources they refer to are those that are available within the society as a whole, from the private sector as well as the public. It is the State's responsibility to mobilise these resources, not to provide them all directly from its own coffers.[43]

The CESCR seems to go in the same direction when noting in General Comment No 24 that discharging the obligations under the ICESCR

> may require the mobilization of resources by the State, including by enforcing progressive taxation schemes. It may require seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles.[44]

Private resources thus may fall under 'available resources' and the state may have the obligation to seek to mobilize them, though it remains unclear to what extent it can/should do so without encroaching upon other human rights (especially the right to property).

c. How to Assess the Maximum of Available Resources?

Another controversial issue arising in the interpretation of the phrase 'to the maximum of available resources' concerns the way in which the maximum of available resources that the state shall use in the implementation of social rights is to be assessed. Three more specific questions have to be asked: Who is competent to make the assessment? How is the assessment to be made? What impact do scarcity measures have on the assessment?

i. Who is competent to make the assessment?

Neither the ICESCR nor the other treaties on social rights specify which actor is competent to assess whether the state has taken steps 'to the maximum of its available resources'. Some countries have traditionally favoured the view that the assessment is primarily left to each state. For instance, in the 1985 Restatement of the Foreign Relations Law, the US suggested

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[40] CESCR, 'General Comment No 22 on the Right to Sexual and Reproductive Health' (2 May 2016) UN Doc E/CN.12/GC/22, para 50.

[41] Skogly (n 12), 403.

[42] In its General Comment No 11, the CESCR noted that '[w]here a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist' (CESCR, 'General Comment No 11 on Plans of Action for Primary Education' (10 May 1999) UN Doc E/C.12/1999/4, para 9).

[43] Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 11.

[44] CESCR, 'General Comment No 24 on State Obligations under the ICESCR in the Context of Business Activities' (10 August 2017) UN Doc E/CN.12/GC/24, para 23.

that 'since there is no definition or standard in the Covenant, the United States would largely determine for itself […] whether it is using "the maximum of its available resources" for this purpose'.[45] This interpretation has been criticized by human rights bodies and by scholars. As Alston and Quinn rightly point out, it 'raises the fundamental question as to why it is necessary, or even appropriate, to have an international treaty if each state party is only to be held accountable, with respect to the central element in the obligation, to itself'.[46]

The same authors suggest that while a wide measure of discretion should be left to states to assess the quantum of resources they are able to allocate to the promotion of social rights, this measure cannot be unlimited. It remains subject to scrutiny by the other states and by human rights bodies such as the CESCR. Unsurprisingly, the CESCR itself shares this view. In its 2007 Statement, it declared that while 'always respect[ing] the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances',[47] it was its own competence to assess whether a state party has complied with the obligation in Article 2(1) ICESCR. The Committee has, moreover, made it clear that at the national level, decisions concerning the allocation of resources should not be reserved to the political authorities but should involve judiciary as well, suggesting in this way that at least some aspects of these decisions should be considered justiciable.[48]

ii. How is the assessment to be made?

The most intriguing question is how to assess whether a state has taken reasonable steps 'to the maximum of its available resources'. The assessment has to relate both to the sufficiency of resources (do state parties mobilize enough resources to meet their obligations in regard of social rights?) and to the efficiency of their use (do state parties use resources in a way making it possible for them to improve respect for social rights?), reflecting the two obligations of, first, securing/mobilizing resources,[49] and, second, using them in an adequate manner.[50] The obligations are interrelated but not identical: a state may mobilize huge resources but use them in an inefficient way and, *vice versa*, it may secure relatively limited resources but use them in a wise way.

Already in 1994, Robertson noted that with respect to the phrase maximum of available resources, 'little progress ha[d] been made in creating a set of workable standards which are detailed, systematic and authoritative'.[51] Ten years later, the same criticism was voiced by Dowell-Jones, who stressed that 'little headway has been made in developing quantitative and qualitative criteria by which compliance with this obligation will be assessed'.[52] Another 16

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[45] Cited in Alston and Quinn (n 4), 177–78.

[46] *Ibid.*, 178.

[47] CESCR Evaluation (n 10), para 11.

[48] CESCR, 'General Comment No 9 on the Domestic Application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, para 10.

[49] CESCR (GC 22) (n 40), para 37: 'A State party has the duty to establish that it has obtained the maximum available resources […] with a view to complying with its obligations under the Covenant.'

[50] *Ibid.*, para 21: 'It should also identify the resources available to meet the objectives and the most cost effective way of using them'; see also Limburg Principles (n 11), para 25: '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.'

[51] Robertson (n 9), 703.

[52] Dowell-Jones (n 8), 45.

years later, the situation does not seem to have changed in any dramatic way, though some attempts have been made – by human rights bodies,[53] as well as by experts[54] – to propose at least some general guidelines for the assessment.

In principle, three main approaches can be distinguished.

The first one places emphasis on *quantitative*, *calculable* criteria. It assesses the maximum available resources using such indicators as GDP or financial allocations within the overall government spending. The case mentioned above, in which the CESCR assessed the adequacy of measures taken by Canada to combat homelessness in light of the percentage of government expenditures allocated to this area,[55] would belong here.

The second approach places emphasis on *qualitative* criteria. It builds on a set of soft indicators which cannot be easily measured in quantitative terms. This approach has been promoted by scholars, especially Robertson and Skogly.[56] The CESCR also embraces it when assessing national reports and deciding on individual cases. In its 2007 Statement, the Committee provided examples of indicators used in this context which encompass *inter alia* the country's level of development, its current economic situation, the existence of other serious claims on the state party's limited resources, attempts to secure resources from foreign sources, and so on.[57]

The third approach is *procedural* in nature. Instead of evaluating the substance, that is, whether a maximum of available resources has been used in the implementation of social rights, attention is turned to the decision-making process at the domestic level. The legitimacy of this approach is endorsed by Alston and Quinn, who stress the importance of a state 'show[ing] adherence to a regular and principled decision-making process'.[58] In its 2007 Statement, the CESCR also noted that

> [i]n its assessment of whether a State party has taken reasonable steps to the maximum of its available resources […], the Committee places great importance on transparent and participative decision-making processes at the national level.[59]

The three approaches all have advantages and disadvantages. The quantitative criteria are relatively easy to apply but, as Dowell-Jones recalls, 'the cost structure of providing Covenant rights is far more diffuse than the simple calculation of State expenditure'.[60] The qualitative indicators permit a more comprehensive assessment but there may be more subjectivity involved. The procedural approach obliterates the need to undertake a thorough substantive evaluation but it would leave a potentially unlimited discretion to states. An optimal way would thus seem to consist in combining the elements of the three approaches. The exact way in which this should be done, however, still remains to be found.

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53 CESCR Evaluation (n 10), paras 8, 11.
54 Skogly (n 12).
55 CESCR (Canada) (n 31).
56 See Robertson (n 9), 704–05; Skogly (n 12), 406–07.
57 CESCR Evaluation (n 10), para 8.
58 Alston and Quinn (n 4), 181.
59 CESCR Evaluation (n 10), paras 8, 11.
60 Dowell-Jones (n 8), 48.

iii. What impact do scarcity measures have on the assessment?

The last question which has been extensively discussed in case law and scholarly literature pertains to the impact that scarcity measures have on the assessment of resource availability. Scarcity measures might result from economic crisis, political strife, armed conflicts, sanctions, and other similar factors. Such factors make it, usually on a temporary basis, difficult for states to maintain the standard of protection of human rights, including social rights, and might lead them to resort to retrogressive steps. In General Comment No 8, relating to economic sanctions, the CESCR stated that 'sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures', stressing however that

> [t]he imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State party […] those obligations assume greater practical importance in times of particular hardship.[61]

The same applies *mutatis mutandis* in other emergency situations.

The CESCR's general comments indicate several principles that apply in cases when states resort to scarcity measures.

First, the obligations which do not depend on resource availability have to be met regardless of scarcity measures. These obligations encompass the principles of non-discrimination, the obligation to 'take steps' to progressively achieve the full realization of social rights, the obligation to guarantee the minimum content of the core obligations and the obligation to respect social rights.[62]

Second, the CESCR has stressed that in the period of economic distress, 'the State remains under an obligation to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society'.[63] Persons belonging to vulnerable groups, such as children or older persons, are thus in need of special protection and this protection should be ensured, as a minimum, by the adoption of relatively low-cost targeted programmes.

Third, states should seek to maintain the level of protection of social rights that they have already achieved. Retrogressive step should be an exception which deserves justification. In General Comment No 19, the CESCR explained that '[t]here is a strong presumption that retrogressive measures […] are prohibited under the Covenant'.[64] The CESCR also explained that were a state to take such measures, it would have the burden of proving that such measures

> have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.[65]

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[61] CESCR, 'General Comment No 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/CN.12/1997/8, para 10.

[62] Some of these obligations seem nonetheless open to certain limitations. For instance, in General Comment No 3, the CESCR confirmed that '[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'. CESCR (GC 3) (n 10), para 10.

[63] CESCR (GC 8) (n 61), para 10.

[64] CESCR (GC 19) (n 18), para 42.

[65] *Ibid.*

The Committee also indicated six factors to be considered in the assessment of retrogressive steps, namely whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups; (d) the measures were not directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right(s); and (f) there was an independent review of the measures at the national level.[66]

Thus, when faced with an emergency situation that requires scarcity measures, a state may decelerate the pace of the progressive realization of social rights. It must however do its best to overcome the situation, and 'the obligation remains […] to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.[67]

d. Concluding Remarks

Robertson notes that the phrase 'maximum of available resources' is

> a difficult one – two warring adjectives describing an undefined noun. 'Maximum' stands for idealism; 'available' stands for reality. 'Maximum' is the sword of human rights rhetoric; 'available' is the wiggle room for the state.[68]

This section has shown that, indeed, the interpretation of the phrase gives rise to certain difficulties. While it is more or less accepted that available resources can be mobilized both within the country and through international cooperation and assistance, it is less clear whether private resources should be included and how the very term resources is to be defined. The way to assess whether a state has taken steps 'to the maximum of its available resources' remains undefined as well, though various approaches (qualitative, quantitative, procedural) have been proposed. At the same time, it is clear that the assessment is not left to individual states, even if they enjoy a wide discretion. It is also clear that certain obligations stemming from social rights do not depend on available resources and that the adoption of scarcity measures does not free states from their obligations stemming from social rights.

III. PROGRESSIVE REALIZATION

Article 2(1) ICESCR defines the implementation of social rights as a gradual process leading progressively to the full realization of these rights. In its General Comment No 3, the CESCR notes that 'the concept of progressive realisation constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'.[69] Progressive realization has a direct link to resource availability, as its pace is to a large extent dependent on the presence of adequate resources and on their efficient use. Due to this link, many of the conclusions reached with respect to resource availability can be transferred to progressive realization with relative ease. This is the case with respect

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[66] *Ibid.*

[67] CESCR, 'General Comment No 7 on the Right to Adequate Housing' (20 May 1997) UN Doc E/1998/22, para 11.

[68] Robertson (n 9), 694.

[69] CESCR (GC 3) (n 10), para 9.

to the scope of application of the concept (application under various international instruments, obligations not subject to progressive realization), to its content and to its assessment (various models of assessment, the impact of emergency situations).

a. The Application of the Concept of Progressive Realization

The reference to progressive realization is present in the same international instruments that also refer to resource availability (ICESCR, ECHR, ACHR). Where such a reference is missing (ESC, AfCHPR), the condition has been read into the instruments through case law, similarly as with resource availability. In *Centre on Housing Rights and Evictions (COHRE) v Italy*, the ESCR held that 'such realisation of the fundamental social rights recognised by the Revised Charter is guided by the principle of progressiveness'.[70] It deduced this condition from the preambular provisions referring to the aim to facilitate the 'economic and social progress' of state parties and to secure to their populations 'the social rights specified therein in order to improve their standard of living and their social well-being'. By the same token, the ACHPR, in the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* adopted in 2011, indicated that

> [w]hile the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter […] States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.[71]

Progressive realization is therefore seen as an inherent condition for, and limitation upon, the exercise of social rights in the same way as resource availability.

Another shared feature relates to the scope of application of the progressive realization condition and, more specifically, to the rights and obligations which are not subject to this condition and should be implemented immediately. In its General Comment No 4, the CESCR stressed that two of such obligations, which were of immediate effect, were particularly important in understanding the precise nature of state parties' obligations. These are the principle of non-discrimination in the implementation of social rights and the obligation to take steps with a view to achieving progressively the full realization of all social rights. With respect to the former, the CESCR noted that 'the principle of non-discrimination […] is immediately applicable and is [not] subject to progressive implementation'.[72] With respect to the latter, it stated that

> while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[73]

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[70] *Centre on Housing Rights and Evictions (COHRE) v Italy*, ECSR, Complaint No 58/2009, Decision of 25 June 2010, para 27.

[71] ACHPR, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter of Human and Peoples' Rights* (2011), para 14.

[72] CESCR (GC 18) (n 17), para 33.

[73] CESCR (GC 3) (n 10), para 2.

The third obligation of immediate effect is the obligation to guarantee the minimum content of the core obligations. As the CESCR indicated, '[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*'.[74] At the same time, the Committee mentions that the assessment as to whether a state has discharged its minimum core obligations has to take account of resource constraints.[75] It thus seems that the third obligation relates more to the need to (again) take steps toward the full realization of minimal core obligations and, arguably, to prioritize these obligations, rather than realizing all of them immediately. Finally, the obligation to respect, or at least some aspects thereof, is also of immediate effect. In its 2007 Statement, the CESCR identified equal salary for equal work for women and men as an example of such an aspect.[76]

b. Content of the Concept of Progressive Realization

The concept of progressive realization was introduced in acknowledgment of the fact that social rights cannot be implemented immediately and instantly. The primary reason given for this fact is resource dependence. Alston and Quinn, for instance, note that 'most of the rights granted [in the ICESCR] depend in varying degrees on the availability of resources and this fact is recognized and reflected in the concept of "progressive achievement".'[77] Other factors that determine the path of the realization of social rights include 'the development of the necessary societal structure',[78] efficiency of the use of available means and availability of international cooperation. The role of all these different factors was recognized during the drafting of the ICESCR. Thus, for instance, the Lebanese representative noted that the commitment under Article 2(1) was 'conditional and depended upon factors outside their control, such as international co-operation, available resources and progressive action'.[79] Similarly, the US representative stated that the provision 'merely specified […] that some of the rights could not be enacted into law immediately'.[80]

The introduction of the concept of progressive realization into the ICESCR has given rise to concern since the early years. Already when discussing the draft text of the Covenant in 1955, Hungary expressed the view that '[t]he text of article 2, paragraph 1 of the draft covenant on economic, social and cultural rights permits the obligations set forth in this paragraph to be postponed to an indefinite time in the distant future'.[81] It is interesting to note that most states commenting on this issue in the 1950s did not see the concept as hindering the process leading to the full realization of social rights. It was rather considered that the concept would help in this process, giving states adequate time to mobilize resources and implement the Covenant at the domestic level. It was also felt that the condition of 'progressive realization' would make

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[74] *Ibid.*, para 10.

[75] *Ibid.*

[76] CESCR Evaluation (n 10), para 7. See also CESCR (GC 7) (n 67), para 8: 'in view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant'; CESCR (GC 4) (n 20), para 8.

[77] Cited in Alston and Quinn (n 4), 172.

[78] *Ibid.*

[79] UNGA, Third Committee, 657th Meeting (9 November 1955) UN Doc A/CN.4/SR.657, 164.

[80] HRComm E/CN.4/SR.271 (n 24), 12.

[81] UNGA, Draft International Covenants on Human Rights **(**13 October 1955) UN Doc A/2910/Add.5, para 10.

it easier to accommodate differences in the level of development between various states. This feeling was well captured in the statement by the representative of Guatemala, who held that

> [t]he word 'progressively' was not really dangerous. It should enable certain States to ratify the Covenant, even if they were quite unable to implement its provisions forthwith. It did not in any way mean that states whose social development was adequate would not be bound by the obligations laid on them in the Covenant. It was all a matter of good faith. If socially developed States failed to fulfil the obligations they assumed, they would be guilty of contravening the Covenant, and their action would incur censure.[82]

Similar views were expressed by the representatives of other states. This confirms that, as Alston and Quinn put it, 'supporters of the idea of progressive achievement viewed it not as an escape hatch for states whose performance failed to match their abilities or as a lessening of state obligations. It was viewed and defended simply as a necessary accommodation to the vagaries of economic circumstances.'[83]

The *travaux préparatoires* also show that the concept of progressive realization was not necessarily seen as characteristic of, and confined to, social, economic and cultural rights. For instance, in 1952, Israel proposed to replace the dichotomy between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, by the distinction between '[r]ights which are capable of effectively becoming a reality through immediate legislative or administrative action on the part of each State' and

> [r]ights which, although recognized in principle, cannot effectively come into existence in law until after the execution of programmes, including economic and social programmes, which may vary in duration and feasibility.[84]

States were supposed to make their own assessment of the human rights catalogue and to suggest which rights they would place in either of the two categories. The proposal did not secure adequate support but it shows that the two 'generations' of human rights have never been unanimously seen as completely different in nature.

The concept of progressive realization has been further elaborated upon by the CESCR and by legal scholars. The Committee has repeatedly indicated that the concept has to be taken into account in the assessment of the implementation of the ICESCR but, first, that it does not apply to all rights and obligations stemming from the Covenant, and second, that 'realization over time, or in other words progressively, […] should not be misinterpreted as depriving the obligation of all meaningful content'.[85] It has further explained that the concept is 'a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights'.[86] At the same time, the Committee has stressed that

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[82] HRComm, 7th session: summary record of the 227th meeting (3 July 1951) UN Doc E/CN.4/271, 10.

[83] Alston and Quinn (n 4), 175.

[84] UNGA, Third Committee, Sixth Session, Agenda Item 29, Annexes, Memorandum Submitted by Israel (9 January 1952) UN Doc A/CR.3/565.

[85] CESCR (GC 3) (n 10), para 9.

[86] *Ibid.*

> the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[87]

This confirms that the concept of progressive realization, rather than allowing states to postpone the obligations set in the ICESCR 'to an indefinite time in the distant future', sets it as a duty for them to make progress in the realization of social rights. Inertia or even retrogressive measures are thus not an option, or, rather, they would

> require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[88]

It is not completely clear whether the obligation to make progress in the realization of social rights establishes an obligation of conduct or an obligation of result. Social rights, in general, have been often considered as giving rise to obligations of conduct, unlike civil and political rights, which allegedly would be giving rise to obligations of result.[89] This approach, however, has been challenged by scholars, who have designated it as one of the myths in this area.[90] Relating specifically to Article 2 ICESCR, the CESCR stated that the obligations stemming from this provision 'include both what may be termed […] obligations of conduct and obligations of result'.[91] This view is supported by Alston and Quinn, who rightly indicate that

> [t]his hybrid mixture of obligation types is due to the fact that the concept of 'progressive achievement' mandates the existence of an ongoing process of development the adequacy of which is loosely controlled by norms deduced from a state's objective capabilities.[92]

The concept of progressive realization thus refers both to the conduct in which states must engage (progressive realization) and the final result of this conduct (full realization of social rights).

c. Assessment of Progressive Realization

The previous section established that the assessment of resource availability is not left to individual states only but is to be made also by the other states (state parties) and by human rights bodies such as the CESCR. The same holds true for the assessment of progressive realization – although some discretion is left to states to decide how they will proceed in seeking to achieve, progressively, the full realization of social rights, this discretion is not unlimited and is subject to external scrutiny. To facilitate this scrutiny, states have the obligation to monitor effectively the realization of social rights and to 'identify the factors and difficulties

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87 *Ibid.*
88 *Ibid.*
89 Sepúlveda (n 7), 188–93.
90 Sepúlveda (n 7), 188; David Matas, 'Economic, Social and Cultural Rights and the Role of the Lawyers: North American Perspectives' (1995) 55 ICJ Review 123, 124.
91 CESCR (GC 3) (n 10), para 2.
92 Alston and Quinn (n 4), 185.

affecting implementation of their obligations'.[93] They also have various reporting obligations. In its very first General Comment, adopted in 1989, the CESCR identified several objectives pursued by the national reporting.[94] One of them is 'to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant'.[95] The Maastricht Guidelines confirm that 'the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question' (para 8).

The assessment as to whether the state dispatches its obligation to progressively realize social rights is not subject to any uniform methodology. In General Comment No 1, the CESCR encouraged states to 'identify specific benchmarks or goals against which their performance in a given area can be assessed',[96] though it also mentioned the existence of common, global benchmarks. Yet, such benchmarks are so far missing. Moreover, the assessment does not necessarily need to rely on benchmarks and indicators.

In her article devoted to the situation in Africa, Lillian Chenwi notes that 'there are numerous methodologies to assess the compliance with the obligation to progressively realise socio-economic rights'.[97] She then introduces four such methodologies.

The first one is based on indicators and benchmarks. An indicator is 'a fact that indicates the state or level of something, such as literacy rates'.[98] Benchmarks are 'targets relating to a given human right indicator, […] to be achieved over a period of time'.[99] The 2000 Millennium Development Goals or the 2015 Sustainable Development Goals would be examples of such indicators/benchmarks, though they are not linked specifically to concrete social rights. At the moment, despite the calls for introducing national benchmarks, the CESCR does not seem to apply this methodology.

The second methodology consists in the budget and expenditure analysis. This analysis, as Chenwi explains, can be done in various ways. It can be static analysis, evaluating the allocation of resources to various social rights or to various beneficiaries, or dynamic analysis, which compares the allocations over time, seeking to find out how progressive the progressive realization of social rights is. This methodology is closely linked to the concept of resource availability. Considerations of budget allocations are, as demonstrated in the previous section, present in the practice of the CESCR, which has criticized, for instance, high levels of defence expenditure or the adoption of regressive measures.[100]

The third methodology, the so-called violation approach, was proposed in 1996 by Chapman.[101] It is based on the idea that '[i]nstead of attempting to evaluate compliance with

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[93] See, e.g., CESCR, 'General Comment No 15 on the Right to Water' (20 January 2013) UN Doc E/C.12/2002/11, para 52.

[94] CESCR, 'General Comment No 1 on Reporting by States Parties' (27 July 1989) UN Doc E/1989/22.

[95] *Ibid.*, para 6.

[96] *Ibid.*

[97] Lillian Chenwi, 'Unpacking "Progressive Realisation", its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) De Jure 742, 742.

[98] *Ibid.*, 759.

[99] *Ibid.*

[100] For more details, see *ibid.*, 761.

[101] Audrey R Chapman, '"Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 HRQ 23.

some notion of progressive realization, it seems more fruitful and significant to focus on identifying violations of the rights enumerated in the Covenant'.[102] The relevant violations are violations resulting from state action and policies, violations relating to acts or policies reflecting discrimination and violations resulting from a state's failure to fulfil minimum core obligations. This methodology is considered to be appropriate for the consideration of individual complaints submitted under the Optional Protocol to the ICESCR,[103] but it is not clear to what extent it can be used in the assessment of the overall compliance with the progressive realization condition.

The fourth methodology – or, rather, methodologies – brings together a whole range of various approaches proposed by scholars and international institutions, which combine elements of the previous three types of methodologies. Examples include the three-step methodological framework proposed by Felner,[104] which identifies the deficiencies in the realization of social rights, the main determinants of these deficiencies and the adequacy of policy measures to address these determinants; and the Index of Social and Economic Rights (SERF), developed by Randolph, Fukuda-Parr and Lawson-Remer,[105] which first uses indicators to assess the enjoyment of social rights and then measures the extent to which the state is required to fulfil these rights. None of the combined approaches seems to have found its way to the case law of the CESCR.

Chenwi rightly notes that '[a]ssessing compliance with progressive realisation is […] a complex and demanding task'.[106] This task is rendered more difficult by the absence of any generally accepted methodology to assess this compliance and by the fact that different methodologies may produce different outcomes. Similarly as in the case of resource availability, there is thus a need to consider this issue in a more systematic and coherent way.

d. Concluding Remarks

Alston and Quinn labelled the concept of progressive realization as 'in many ways the linchpin of the whole Covenant',[107] adding that '[u]pon its meaning turns the nature of state obligations'.[108] This is indeed true. If leaving too much leeway to individual states, the concept could, as some feared already during the drafting of the ICESCR, leave the realization of social rights wholly at the discretion of these states. Yet, since that early stage, it has been stressed again and again that

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[102] *Ibid.*, 36.

[103] Chenwi (n 97), 762.

[104] Eitan Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights' (2009) 1 Journal of Human Rights Practice 402, 406.

[105] Susan Randolph, Sakiko Fukuda-Parr and Terra Lawson-Remer, 'Making the Principle of Progressive Realization Operational' in LaDawn Haglund and Robin Stryker (eds), *Closing the Rights Gap: From Human Rights to Social Transformation* (2015) 239.

[106] Chenwi (n 97), 769.

[107] Alston and Quinn (n 4), 172.

[108] *Ibid.*

> [t]he progressive realization of [social rights] over a period of time means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization [of these rights][109]

and that '[u]nder no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization'.[110] Certain rights, or obligations, are moreover of immediate effect, and the condition of progressive realization does not apply to them. Various methodologies have been used, or proposed, to assess compliance with the obligation to progressively realize social rights, but without any of them becoming generally accepted. While the concept of progressive realization is primarily linked to social as well as economic and cultural rights, it was suggested as early as the mid-1950s that in fact it is not limited to these rights, but applies to some civil and political rights as well.[111]

IV. OBLIGATIONS TO RESPECT, PROTECT AND FULFIL

The (alleged) dependence of social rights on available resources has traditionally been linked to the fact that these rights, together with economic and cultural rights, are considered to be positive in nature, that is, they require active measures on the side of the state. This should make them different from civil and political rights, which are considered negative in nature, that is, they require that states merely refrain from interfering with their enjoyment. This dichotomous view was quite influential in the first decades after the Second World War and was also at the origin of the adoption of two separate human rights covenants in 1966. Subsequent developments have, however, largely overcome it. At the UN level (ICESCR) the distinction between negative and positive rights has been replaced by the triple categorization of the obligations to respect, protect and fulfil. In the European system (ECHR), a more simplified distinction between negative and positive obligations has been introduced.

a. Obligations to Respect, Protect and Fulfil (UN Level)

In the 1950s, a deliberate decision was made to keep the two categories of human rights separate and to codify them in two autonomous instruments which are meant to be implemented in a somewhat different way. It took more than three decades for the dichotomy to begin to be seriously challenged. In 1980, the US scholar Henry Shue posited that all basic rights had a set of three correlative duties – the duty to avoid depriving, the duty to protect from deprivation and the duty to aid the deprived.[112] One year later, during a UN seminar held in Norway, a similar threefold typology of human rights obligations was proposed by the then Norwegian member of the UN Sub-Commission on Human Rights, Asbjørn Eide. The typology, further

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[109] CESCR, 'General Comment No 17 on the Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She is the Author' (12 January 2006) UN Doc E/C.12/GC/17, para 26.

[110] Limburg Principles (n 11), para 21.

[111] See Maastricht Guidelines (n 11), which note that 'the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights' (para 8).

[112] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1980).

elaborated upon in Eide's scholarly publications,[113] as well as in the reports he presented to the UN,[114] consists of the obligations to respect, to protect and to fulfil.

The obligation to respect means that

> States should […] respect the resources owned by the individual, her or his freedom […] to make optimal use of her/his own knowledge and the freedom to take the necessary actions and use the necessary resources – alone or in association with others – to satisfy his or her own needs.[115]

The obligation is met when states refrain from interfering with or curtailing the enjoyment of social rights.

The obligation to protect means that 'State obligations require active protection against other, more assertive or aggressive subjects'.[116] The obligation is met when states protect individuals and groups against rights abuses by other individual and groups.

The obligation to fulfil means that 'the State has the obligation to facilitate opportunities by which the rights listed can be enjoyed'[117] as well as 'the obligation to fulfil the rights of those who otherwise cannot enjoy their […] rights'.[118] The obligation is met when states take active measures to facilitate the enjoyment of social rights.

Since the 1980s, this threefold typology of obligations has become widely used at the UN level. The CESCR now conventionally invokes it when commenting on provisions of the ICESCR or when assessing national reports.

Thus, for example, in General Comment No 19 on the right to social security, the CESCR first confirmed that this right 'like any human right, imposes three types of obligations on states parties: the obligation to respect, the obligation to protect and the obligation to fulfil';[119] and then gave examples of concrete actions and measures falling under each of the three obligations.[120] The obligation to respect requires that states refrain from interfering with the right to social security by, for instance, denying equal access to adequate social security or arbitrarily interfering with self-help institutions. The obligation to protect requires that states prevent third parties, for instance corporations or private social security providers, from interfering with the enjoyment of the right to social security. The obligation to fulfil requires states to 'adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security'.[121] This obligation is further subdivided into the obligations to facilitate (take positive measures, such as financial assistance, to assist individuals to enjoy the right to social security), to promote (take steps to

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[113] Asbjørn Eide, *Food as a Human Right* (1984); Asbjørn Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 43 ICJ Review 40; see also Asbjørn Eide, Catarina Krause and Allan Rosas, *Economic, Social and Cultural Rights: A Textbook* (2001).

[114] 'The Right to Adequate Food and to be Free from Hunger', updated study on the right to food, submitted by Mr Asbjørn Eide in accordance with Sub-Commission decision 1998/106 (28 June 1999) UN Doc E/CN.4/Sub.2/1999/12.

[115] *Ibid.*, para 52.

[116] *Ibid.*

[117] *Ibid.*

[118] *Ibid.*

[119] CESCR (GC 19) (n 18), para 41.

[120] *Ibid.*, paras 44–51.

[121] *Ibid.*, para 47.

ensure that there is appropriate education and public awareness in this area) and to provide (provide social security to individuals unable to take care of themselves).

The obligations to respect, protect and fulfil may be of different importance for different categories of individuals. The CESCR has repeatedly indicated that the positive obligations (to protect and to fulfil) are of particular relevance with respect to vulnerable groups. For instance, in General Comment No 5 on Persons with Disabilities, the Committee stressed that

> the obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.[122]

The threefold typology of obligations has not remained confined to the area of social, economic and cultural rights. While rarely mentioning this typology expressly, the Human Rights Committee, monitoring the implementation of the ICCPR, has constantly interpreted the phrase 'to respect and to ensure respect' enshrined in Article 2(1) ICCPR in accordance with the scheme introduced by the CESCR. The obligation to respect entails the (negative) obligation to respect human rights. The obligation to ensure respect entails the (positive) obligations to protect and to fulfil.[123] This parallel development demonstrates that the line dividing the two categories of human rights is in reality much thinner than it seemed in the past – or, rather, that there might be no such line at all.

b. Negative versus Positive Obligations (ECHR Level)

Up to the late 1960s, the European system of protection of human rights seemed to be strictly divided into two pillars – the pillar based on the ECHR, which would grant protection to civil and political rights conceived as rights of a negative nature, and the pillar based on the ESC, which would grant protection to economic, social and cultural rights conceived as rights of a positive nature. The pillars operated in separation and subject to different rules, mechanisms and institutions. The turn came with the so-called *Belgian Linguistic* case,[124] in which the applicants argued that the right to education, enshrined in Article 2 of Protocol I to the ECHR, established not only negative but also positive obligations. Although the European Court of Human Rights (ECtHR) declined to decide the case based on this argumentation, it endorsed the view that the ECHR indeed gave rise to both negative and positive obligations.

The concept of positive obligations was elaborated in more detail by the ECtHR in a series of decisions adopted at the turn of the 1970s and the 1980s (*Marckx v Belgium*,[125] *Airey v Ireland*,[126] *X and Y v The Netherlands*[127]). In these cases, the ECtHR confirmed that 'fulfilment

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[122] CESCR, 'General Comment No 5 on Persons with Disabilities' (25 November 1994) UN Doc E/1995/22, para 9.

[123] See, e.g., OHCHR, *Civil and Political Rights: The Human Rights Committee, Fact Sheet N. 15 (rev 1)* (2005) 5.

[124] *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium,* ECtHR, App Nos 1474/62 *et al*, Judgment of 23 July 1968.

[125] *Marckx v Belgium*, ECtHR, App No 6833/74, Judgment of 27 April 1979.

[126] *Airey v Ireland*, ECtHR, App No 6289/73, Judgment of 9 October 1979.

[127] *X and Y v The Netherlands*, ECtHR, App No 8978/80, Judgment of 26 March 1985.

of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive'.[128] Interpreting Article 8, on the right to respect for private and family life, the Court suggested that such obligations included, for example, the obligation to secure an effective right of access to the courts.[129]

Now firmly established in the case law of the ECtHR, the concept of positive obligations has come to be regularly invoked by the Court, which has further helped to clarify its content and parameters. Although the Court has never proposed a general theory of the concept,[130] we know by now that the main characteristics of positive obligations are that, in addition to refraining from arbitrarily interfering with individual human rights, states must also take the necessary and adequate measures to safeguard, protect and promote these rights.[131] In the older case law, the Court, when introducing positive obligations, mostly relied on the relevant substantive provisions of the ECHR. In recent years, it has turned to a slightly different approach, adding Article 1 ECHR as a general basis for all obligations stemming from the Convention.[132]

The concept of positive obligations has played an important role in reading the social dimension into the ECHR.[133] Provided that the authors of the ECHR made a deliberate decision to leave social rights out of the scope of the instrument, the Court has always been cautious not to go too far in this respect, stressing the particular circumstances of each individual case. This can be seen in *Nencheva and Others v Bulgaria* (2013), which related to the death of 15 children at a state institution for children with serious mental disabilities, due to harsh winter conditions (lack of heating, starvation).[134] The Court concluded that Bulgaria, by failing to adopt positive measures to protect the right of life of its citizens (providing food and heating), violated Article 2 ECHR. It stressed the unique features of the case, such as the vulnerable position of children with serious mental disabilities and the special responsibility of states for state-run institutions. The close link between the rights protected by the ECHR and social rights (or social conditions) has been acknowledged in other cases as well.[135]

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[128] *Airey* (n 126), para 25.

[129] *Ibid.*

[130] For more details, see Frédéric Sudre, 'Les obligations positives dans la jurisprudence européenne des droits de l'homme' (1995) Revue trimestrielle des droits de l'homme 363; Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); Laurens Lavrysen, *Human Rights in a Positive State – Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (2016); Jean-François Akandji-Kombé, *Positive Obligations under the European Convention on Human Rights – A Guide to the Implementation of the European Convention on Human Rights* (2006).

[131] See, e.g., *Hokkanen v Finland*, ECtHR, App No 19823/92, Judgment of 23 September 1994, para 55.

[132] See, e.g., *Vgt Verein Gegen Tierfabriken v Switzerland*, ECtHR, App No 24699/94, Judgment of 28 September 2001.

[133] See Frédéric Sudre, 'La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux' in *Pouvoir et Liberté, Mélanges Jacques Mourgeon* (1998) 467; Frédéric Sudre, 'La protection des droits sociaux par la Cour européenne des droits de l'homme: un exercice de jurisprudence fiction' (2003) Revue trimestrielle des droits de l'homme 755; Liam Thornton, 'The European Convention on Human Rights: A Socio-Economic Rights Charter?' in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (2014) 227.

[134] *Nencheva and Others v Bulgaria*, ECtHR, App No 48609/06, Judgment of 18 June 2013.

[135] The Court has, e.g., confirmed that 'a complaint about a wholly insufficient amount of social benefits may, in principle, raise an issue under Article 3', though in the given case it did not find this threshold was met. *Larioshina v Russia*, ECtHR, App No 56679/00, Judgment of 23 April 2002, para 204.

Moreover, the distinction between negative and positive obligations is also present in the case law of the ECSR, the monitoring body of the ESC. For instance, in *European Roma Rights Centre v Italy*, the ECSR, interpreting the right to housing in combination with the principle of non-discrimination, stated that 'equal treatment implies that Italy should take measures appropriate to Roma's particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless'.[136] It then gave examples of positive obligations that Italy was expected to adopt. These included taking adequate steps to ensure that Roma are offered housing of a sufficient quantity and quality to meet their particular needs and taking steps to ensure that local authorities are fulfilling their responsibilities in this area.[137] Although less elaborate than the UN trichotomy, the European dichotomy serves the same purpose of indicating the plurality of obligations stemming from all human rights.

c. Concluding Remarks

In his 1977 article introducing the concept of generations of human rights, Karel Vašák suggested that the first generation of human rights, encompassing civil and political rights, differed substantially from the second generation, encompassing economic, social and cultural rights. Whereas the former 'concerns "negative" rights in the sense that their respect requires that the state do nothing to interfere with individual liberties',[138] the latter 'requires positive action by the state to be implemented'.[139] Linked to that is the idea that 'civil and political rights can be realized without significant costs being incurred, whereas the enjoyment of economic, social, and cultural rights requires a major commitment of resources'.[140] This section has shown that the distinction between negative and positive human rights does not really hold. All human rights, including social rights, give rise to a comprehensive set of both negative and positive obligations. All of them, consequently, also require resources for their full realization, or, put the other way round, no human right can be fully realized if adequate resources are not allocated to make it possible for the state to meet its obligations to respect, protect and fulfil this right.

V. CONCLUDING REMARKS AND OUTLOOK

Social rights make part of the human rights catalogue and are enshrined in various instruments adopted both at the universal and at the regional level. These instruments, however, describe the implementation of social rights as a process which is both progressive and conditional. It is progressive, because states are expected to take steps that will gradually lead to the final result, i.e., the full realization of the relevant rights. It is conditional, because states only have to take these steps within the confines set by the available resources. The progressive realiza-

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[136] *European Roma Rights Centre v Italy*, ESCR, Complaint No 27/2004, Decision of 7 December 2005, para 21.

[137] *Ibid.*, para 37.

[138] Karel Vašák, 'A 30-Year Struggle*:* The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' (1977) XXX UNESCO Courier 29, 29.

[139] *Ibid.*

[140] Alston and Quinn (n 4), 159.

tion dependent on the available resources stems from the idea that social rights, like economic and cultural rights and in contrast to civil and political rights, are positive in nature, that is, they require that states take active measures to secure these rights rather than merely refraining from interfering with their exercise.

This chapter has shown that the situation is more complex. The concept of resource availability, despite certain uncertainties entailed in it, does not make the realization of social rights wholly promotional; nor leaves it to the full discretion of states. First, some obligations stemming from social rights, such as the principle of non-discrimination or the obligation to take steps towards the full realization of human rights, have to be implemented immediately, regardless of resource availability. Second, the adoption of scarcity measures does not free states from their obligations stemming from social rights and any retrogressive steps adopted in such a context have to be justified. Third, while states enjoy a wide discretion in this area, the final assessment of compliance with the obligations under the ICESCR and the other international instruments appertains to human rights monitoring bodies.[141]

Similar conclusions apply to the concept of progressive realization of social rights. This concept does not make the realization of social rights wholly dependent on the goodwill of states. States have the obligation to start taking deliberate and concrete measures aimed at securing full realization of social rights immediately after the ratification of the relevant instrument. Certain obligations, such as the principle of non-discrimination, have moreover to be implemented immediately. Finally, social rights, as any other human rights, give rise to the threefold obligations to respect, to protect and to fulfil (or, in the European understanding, to a set of negative and positive obligations). The introduction of this triple classification, which is now applicable to all human rights, disproves the idea that social as well as economic and cultural rights are inherently different in their nature from civil and political rights, and that any human right could be totally cost-free.

[141] It is also important to add that if a broad definition of resources is embraced, that is, if resources are not limited to budgetary allocations within the state but encompass non-financial resources available both inside the state and outside it, then virtually no obligation stemming from any human right is totally cost-free.

3. Justiciability and social rights

Amaya Úbeda de Torres

I. INTRODUCTION

When discussing social rights, the issue of their justiciability still tends to come up repeatedly. These rights are considered, with economic and cultural rights, as second generation rights under the 'three generations theory' developed by Karel Vašák.[1] However, in spite of their categorization as a separate set of rights, there are no clearcut definitions or essential characteristics which clearly differentiate which rights are civil and political rights, and which are economic, social and cultural rights. As Manfred Nowak has shown in his contribution to this book, as well as Veronika Bílková in hers, the classic opposition between different sets of rights according to which the first category of rights only entail negative obligations, whereas the second imply positive obligations, derived from the Cold War era. This is wrong, as the state has positive obligations deriving from all human rights treaties.[2] Interdependence and indivisibility of rights, the notions introduced by the 1993 Vienna Declaration and Programme of Action in 1993, have also come to correct the historical difference of treatment between civil and political rights, on the one hand, and economic, social and cultural rights, on the other – a difference which is most often ideological and related to certain misconceptions intrinsically linked to the Cold War and to the idea that civil and political rights are solely the creation of Western states.[3] The 1993 Declaration opened the door to a different way of approaching economic, social and cultural rights. Indeed, even though each generation of rights has its own specificity, no radical differences exist between the two sets of rights and the focus of this contribution will be to try and understand how to achieve an effective realization of economic, social and cultural rights, through the most appropriate legal means. Effectiveness, implementation and, in the end, enjoyment of all human rights, especially those particular rights which protect the vulnerable groups in our societies, is the main goal in this context.

This chapter will therefore explore the notion of justiciability, but does not aim to describe in an exhaustive manner the historical approaches to the legal characteristics usually given to social rights in order to mark their difference. Rather, the objective of this chapter is to reflect on the effectiveness of these rights through the notion of justiciability, unravelling the related notion that the conceptual and doctrinal approach to these rights has often depicted them as a myth, which has conveyed the idea that social rights are an (almost) impossible ideal to achieve. The perspective of international law will be used as the angle through which the study on the meaning of justiciability will be conducted, choosing specific examples which

[1] Karel Vašák, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' (1977) XXX UNESCO Courier 29.

[2] See the contribution by Manfred Nowak in this *Research Handbook* (Chapter 1). See also Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2001) 9.

[3] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2005) 564ff.

will show that justiciability, up to its implementation, is not only possible but an essential consequence of today's human rights developments.

This contribution will therefore approach the notion of justiciability when applied to social rights in three main sections. First, the varied meanings given to the issue of justiciability and its implications from the point of view of their realization will be examined, and existing challenges will be explored. Indeed, the term justiciability has to be put in context in relation to other terms, which may better describe the reality of the protection of social and cultural rights, such as effectiveness and implementation. Second, the main reasons behind the resistance towards considering social rights as justiciable will be assessed and likewise put into context. Finally, the justiciability mechanisms which have been created from the perspective of international law – that is, the different tools to implement and uphold social rights and their evolution – will be analyzed, in an attempt to categorize these rights and identify whether effective claims can be brought in the field of social rights.

II. ON THE CONCEPT OF JUSTICIABILITY

As mentioned above, the characterization of social rights as second generation rights quite often goes hand in hand with the perception that only first generation rights are justiciable. But what does justiciable mean? What is meant when stating that social rights are not *per se* justiciable? There are many different approaches to the notion of justiciability. For the sake of this contribution, justiciability will first be analyzed, mainly focusing on two aspects: the narrow and sometimes formalistic approach to justiciability; and the more substantive, rights-related approach to this concept.

A first possible, even obvious, consideration, when referring to justiciability, is that it has a single and unique meaning: the only issue to take into consideration to define a right as justiciable is judicial enforcement. This is a very narrow sense of the term, and also quite a formalistic approach. Moreover, it appears from international and also national practice that judicial enforcement is not the only or even the best mode of implementation of social rights or human rights in general. If this definition, according to which a right is justiciable only and insofar as it is under the jurisdiction of a judicial authority, is taken as a starting point, justiciability becomes part of legal adjudication. Some scholars have considered, in addition, that 'justiciability' is linked to the procedure used, and that the mere existence of a mechanism to resolve alleged violations of the rights in question is enough. Insofar as there is a mechanism, rights are thus justiciable.[4] Justiciability therefore is linked to the authority of the body making the decision, and does not depend on whether the mechanisms or the decisions taken are suitable to enforce the right in question.[5] In this understanding, the justiciability of a particular issue depends not on the quality of the decision or on the effectiveness of the decision itself, but rather on the authority of the body making the decision. The issue of justiciability in the sense of implying judicial enforcement is no longer at stake and would not be even considered as long as there is a body to which victims may file a petition or a complaint.

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[4] Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (1999) 16–18.

[5] Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (1995).

A second possible meaning of justiciability is much larger and substantive and has to do with the achievement of the full realization of social rights. When moving from the idea of justiciability as legal adjudication towards justiciability as the realization and effective implementation of rights, it becomes self-evident that, to ensure that social rights are complied with, they have to be justiciable. States' actions therefore have to be reviewed by a third party or neutral institution or body, which is allocated specific powers allowing it to consider a state's behaviour and to allocate remedies if states do not comply. But that is not enough; it is equally important that such a third party or body must be empowered and capable of issuing a meaningful decision, meaning one which can lead to concrete results.[6] Under this construction, there is a shift in the debate, which now no longer focuses on whether social rights are as such justiciable. The real question now is how their justiciability can be ensured. Thereby, justiciability becomes 'an assessment about the overall impact of the adjudicator's decision',[7] which implies a much broader discussion on whether the decision can be implemented and whether it is suitable to achieve the obligation to fulfil and respect the pending obligations on social rights. This means that effectiveness, impact and implementation are taken into consideration, a common debate when discussing any human right, and one which is therefore not exclusive to this specific set of rights.

However, when going further into this idea of justiciability as effectiveness or implementation, two main conceptual and traditional obstacles appear. The first aspect has to do with the consideration that social rights are codified in a completely different manner than the other rights and that the texts themselves differ and prescribe specific features, making it difficult to assess the compliance of this set of rights. The other aspect has to do with the fact that, because this is a different set of rights, justiciability becomes more complex and social rights need different legal tools in order to be achieved. This also implies the need to establish indicators which may measure the achievement and effectiveness of such rights.

One aspect that would go against the justiciability of social rights is the difference between them and civil and political rights in the moment of codification; much has been written on the language used in international human rights treaties. Indeed, compared to the International Covenant on Civil and Political Rights (ICCPR), the terms used in the International Covenant on Economic, Social and Cultural Rights (ICESCR) are frequently considered as vague or very general. The rights enounced in the ICESCR are often considered as not being precise enough, mainly in terms of the obligations which they imply for states, which are not sufficiently defined. This has led to two main criticisms: one of these discusses the nature of social rights themselves and asks whether they can then really be considered as rights;[8] the other,

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[6] Michael J Dennis and David P Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 AJIL 462, 475.

[7] *Ibid.*

[8] See among others Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) Human Rights Brief 1; Maurice Cranston, 'Are There Any Human Rights?' (1983) 112(4) Daedalus 1; David Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (1998). Many other scholars have replied to this argument. See among others Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655; Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

which is more mainstream, argues that the full realization of social rights is based in the lack of sufficient legal certainty.[9]

In the works preceding the preparation of the Optional Protocol on individual complaints to the ICESCR, some delegations, such as the Polish one, rejected the concept that the two Covenants are alike and claimed that the different formulation used in Article 2(1) ICESCR showed that it was deliberately made to look different, including through the inclusion of imprecise formulations.[10] Article 2(1) ICESCR reads:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

These considerations go hand in hand with the classic criticism that the ICESCR does not articulate real rights, that it is a non-self-executing treaty and that it contains programmatic or utopian goals.[11] This leads to the overarching question: whether the Covenant is therefore soft law or whether economic, social and cultural rights can ever be fully achieved and ultimately enforced through a human rights lens.[12] To support this view, the language used in the ICESCR is compared to Article 2(1) ICCPR, which reads that each state party undertakes to 'respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. In its different provisions, the ICESCR does not use the formula 'everyone has a right to' but refers to expressions such as 'States undertake to take steps' and includes the notions of 'within the available resources' and 'progressive realization'.[13] The above elements definitely raise the question whether the ICESCR enounces rights, and, maybe more importantly, whether it enounces legal rights. According to this view, the generality of the ICESCR deprives the rights of their legal nature and introduces a new, undefined category of rights, which is not that of individual rights.

The second criticism is formulated in a different manner, although it stems from the same argument. According to this view, the ICESCR indeed contains rights. However, the so-called main obstacle to openly embracing that economic, social and cultural rights in the

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[9] See among those who explain and reply to these criticisms Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 156; Carole Nivard, *La justiciabilité des drotis sociaux. Etude de droit conventionnel européen* (2011); Magdalena Sepúlveda*, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003); Olivier de Schutter, *La Charte sociale européenne: une constitution sociale pour l'Europe*, Bruylant (2009).

[10] Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (23 February 2004) UN Doc E/CN.4/2004/44, paras 56–57 (statement by Poland).

[11] Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals* (Fourth Cluster Reader, ERMA 2002/2003) 245.

[12] Dennis and Stewart (n 6), 464.

[13] For example, Vierdag states that what are laid down in the provisions such as Articles 6, 11 and 31 of the ICESCR are consequently not rights of individuals, but broadly formulated programmes for the governmental policies in the economic, social and cultural fields: Egbert W Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) Netherlands Year Book of International Law 69, 78.

Covenant are justiciable is based on the fact that these rights are stated in a vague manner. For this reason, it is difficult to identify state obligations, which therefore does not allow for a proper legal adjudicative protection. Any form of compliance of a state party with its obligations under the Covenant cannot be determined because of the 'promotional nature of the rights and the generality of their terminology'.[14] This supports the view that the ICESCR is not self-executing, as the rights and obligations need further clarification and elucidation is necessary to achieve implementation of the provisions. Some scholars have considered that this is an 'essential first step before any of those rights can be said to be justiciable in any meaningful sense'.[15] Therefore, the rights as they appear in the Covenant are not justiciable, as its provisions establish *continuing* obligations, which are aimed at the eventual realization of the rights, but not at their immediate application.

These views and considerations have many conceptual weaknesses; moreover, they have been contested by the existing practice and interpretation of the rights, as followed by the interpretation given by both international monitoring bodies and by states themselves, as will be shown in the next sections.

III. *DECONSTRUCTING* THE RESISTANCE

The view that social rights are not rights does not seem to be consistent with the intentions of the drafters or with the final adoption process of the ICESCR. Indeed, the ICESCR is part of the United Nations human rights system and is a human rights treaty. Moreover, social rights are clearly human rights, and the debate has its main focus on the enforcement of the provisions within the Covenant, and on choosing the methods which are best suited. The same debate can be extended beyond the UN Covenants, at the regional level, as will be shown.

The fact that the ICESCR clearly enounces human rights is further reinforced by a comparison between the Covenants: both share a joint preamble and have as their common base the notion of human dignity; both have the same Article 1, providing for all peoples the right to self-determination; the rights contained in the two Covenants also have the same legal character,[16] and were already mentioned side by side in the Universal Declaration.

At the regional level, the lack of justiciability of social rights has clearly proved not to be true – partially because the relevant texts, adopted at a later stage, have a different way of proclaiming social rights, but also because of their evolution.

Only two examples will be named for the purposes of this contribution: the European Social Charter and the Protocol of San Salvador within the context of the Inter-American system of human rights. The European Social Charter, adopted in 1961 and revised in 1996,[17] is, in the field of social rights, the complementary treaty to the European Convention on Human Rights (ECHR), which is devoted to civil and political rights. The composite nature of the European Social Charter and its 'à la carte' regime has often been referred to as proof of its different nature, when compared to the ECHR. Regarding the drafting technique and the terms employed, the Charter is divided into three parts. Part I is considered to be a declaration of the

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[14] Craven (n 5), 101.
[15] Dennis and Stewart (n 6), 466.
[16] Eide (n 2), 9–28.
[17] See the contribution by Karin Lukas in this *Research Handbook* (Chapter 7).

aims which states will pursue by all appropriate means, as stated in the introductory paragraph. Part II refers specifically to 'the obligations by which the States are bound', and also includes each of the different rights enshrined (rights related to work, rights related to family protection, right to health, right to social security, union rights, education, and so on). Finally, Part III contains different aspects, including on monitoring mechanisms. If we compare this text with the ICESCR, it is clear that the rights enounced in the Charter are worded differently from the rights in the ECHR, which contains the formula 'everyone has the right to'.

Nevertheless, the Charter does refer to binding legal obligations for states, which are worded in a precise manner. The Charter has been designed in a quite unique manner, with a system by which states decide, under certain conditions, to choose the provisions that they are willing to accept as binding.[18] The Revised Charter of 1996, moreover, embodies all rights in a single instrument, allowing for easier access to the contents of the 1961 Charter and the Protocols, and recognizes new rights, such as the right to housing or the right to protection against poverty and social exclusion. The monitoring mechanisms created and the role developed by the European Committee on Social Rights (ECSR), both through national reporting and through the collective complaints procedure, have proved that the Charter, both the 1961 and the Revised one, contains very precise obligations for states (see in this respect Section IV).

In the Inter-American system,[19] there are two completely different drafting techniques and terms used in codifying social rights. First, the American Convention on Human Rights contains a reference to 'economic, social and cultural rights' in its Article 26, a provision which was considered for many years as not containing any specific obligation for states. Article 26 has constantly being qualified as programmatic, and as a result of this perception, non-justiciable.[20] This view has changed radically through the interpretation of the Inter-American Court of Human Rights, mainly since the adoption of the case of *Lagos del Campo*.[21] Second, the Protocol of San Salvador is a specific instrument on social rights in the Inter-American system, and was adopted on 17 November 1988. As a much more recent instrument, it contains a list of rights which follow the formulation included in any other basic human rights treaty, starting with social rights such as 'everybody has the right to work'. The evolution in terms of codification of different sets of rights, even though the Protocol was adopted before the 1993 Vienna Declaration, already shows the interdependence of rights. The supposedly different wording existing in human rights treaties devoted to social rights is therefore proven to be irrelevant in the practice that followed and by the fact that these rights are enforceable obligations for states with respective monitoring mechanisms.

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[18] Indeed, states have to accept at least six of nine articles of Part II considered to be essential, which are Articles 1, 5, 6, 12, 13, 16 and 19. Moreover, states have to be bound by an additional number of articles or numbered paragraphs of Part II of the Charter, which it may select provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs.

[19] See the contributions by Flávia Piovesan *et al* (Chapter 9) and Eduardo Ferrer Mac-Gregor (Chapter 10) in this *Research Handbook.*

[20] See, e.g., in this respect, the case law produced in the field of economic, social and cultural rights, as well as environmental rights, in Tara J Melish, 'The Inter-American Commission on Human Rights' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in Comparative and International Law* (2008) 339.

[21] *Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 31 August 2017.

Regarding the second obstacle to justiciability, it is not based on a supposed difference in the exact codification process followed when adopting specific social rights treaties, but on the different 'nature' of these rights. While the criticism is again enounced in general terms, the discussion about the particular 'nature' of social rights encompasses three different types of concerns: the first is the definition and identification of sufficiently precise standards and obligations, which can then be imposed on states; the second concerns the fact that the obligations imposed are obligations of means or, depending on the terminology of the treaties, of conduct, and not obligations of result, which implied building the capacity to measure adequate means; and finally, there is the need for a progressivity test, which goes hand in hand with the non-regression in the field of social rights test.

Within the ICESCR, one of the most important issues at stake discussed by the drafters was the complexity of developing workable criteria by which to measure states' compliance with, or violation of, social rights. The same happened when adopting the Optional Protocol, by which the mechanism of individual complaints was created. The specific approach, and the way in which the indicators of effectiveness of economic, social and cultural rights were to be addressed, was (and still remains) an important obstacle to the ratification of the Protocol. In this manner of drafting, states showed their reluctance to accept a mechanism by which their compliance would be measured, without agreeing in advance on the specific set of criteria or standards to be applied.[22] For those states which have ratified the mechanism, the difficulty that remains is conducting follow-up and enforcing the decisions taken, although this will be clarified though the development of the Committee's case law and state reactions, and similar considerations apply to any other international human rights body. There has been also a strong debate on the specific rules to be applied to monitoring mechanisms in the field of social rights, mainly when applied to procedures which can be considered as judicial or quasi-judicial mechanisms at the international level.[23] The level of evidence collected and requested, the need for witnesses and expert testimonies to demonstrate the alleged violations, the nature of the pleadings and the type of questions that are submitted to the parties for rebuttal and sur-rebuttal are all serious issues which may receive different responses depending on the type of mechanisms chosen for litigating on the effectiveness of social rights.

As will be shown in the next section, these questions do not challenge the justiciability of social rights but rather raise questions concerning the best and most adequate system for adjudicating these rights, which also means identifying specific obligations to respect, protect and fulfil.

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[22] See in this respect CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23; Philip Alston, 'The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights' (1979) 18 Columbia Journal of Transnational Law 79.

[23] For a study on case law and justiciability in practice see Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008).

IV. INTERNATIONAL VERSUS NATIONAL JUSTICIABILITY: LITIGATING IN THE SOCIAL RIGHTS FIELD

Adjudicating social rights claims has been long discussed and may entail many different models. As is also the case with other human rights instruments, the international adjudication mechanisms of protection coexist with protection at the national level, but challenges to social rights have been brought forward by a vast array of actors, both governmental and from the private sector, mainly because of complex interactions with the principle of subsidiarity. The need for a supervisory role at the international level and the question whether its existence contributes effectively to the implementation of social rights has been challenged from three main angles: first, with respect to the complexity of the international supervision, taking into account the need to build specific and compliant national standards; second, involving a discussion on the most appropriate international mechanism; third, the use of 'control of *conventionality*', that is, the need to apply international treaties on social rights at the domestic level by national authorities – mainly by domestic judges – and their direct enforceability have both also raised an important debate on the issue.[24]

First, adjudicating social rights at the international level implies a double exercise: it requires, on the one hand, a clear identification of the standards enshrined within the international treaties at the international level, and, on the other, understanding and adapting them to the specific national context. Concerning the clear identification of standards, again, the alleged lack of precision of social rights in the light of civil and political rights does not hold. The 'duty to respect', the 'duty to protect' and the 'duty to fulfil' are notions that have been developed at the UN level to underline specific obligations enshrined in the ICESCR.[25] These obligations are not only defined as regards state obligations, but have also been useful in establishing the horizontal effect of rights and identifying obligations for non-state actors such as private enterprises. Moreover, as with civil and political rights, the monitoring bodies in the field of social rights have built their own case law through the development of autonomous notions and transversal principles. Autonomous notions are particular constructs, developed generally through case law, in which a term or a notion is given a particular specific meaning under that specific part of international law – a meaning that is independent from the domestic perspective, which may vary from country to country. One clear example in the field of social rights is the specific meaning given within the right to housing to the obligation to ensure an 'adequate standard of living'.[26] Transversal principles are those overarching principles which

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[24] Regarding direct enforceability and applicability by domestic judges in Europe, e.g., see regarding Italy Giovanni Guiglia, 'The Contribution of the Jurisprudence and the Legal Studies to the Effectivity of the European Social Charter in the Italian Legal Order: Reconstructive Hints' (2018) 8 Revista Juridica de Derechos Sociales 45. For a comparative study in other countries, see Luis Jimena Quesada, 'El control de convencionalidad y los derechos sociales: nuevos desafíos en España y en el ámbito comparado europeo (Francia, Italia y Portugal)' (2018) Anuario Iberoamerilegcano de Justicia Constitucional 31.

[25] See the contribution by Veronika Bílková in this *Research Handbook* (Chapter 2).

[26] See in this sense the work of CESCR in defining the right to adequate housing under Art 11(1) ICESCR, according to which state parties 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. See in particular CESCR, 'General Comment No 4 on the Right to Adequate Housing' (13 December 1991) UN Doc E/1992/23. See also the work of the Special

inform all social rights within the specific treaty, such as the principle of non-discrimination or human dignity,[27] which can be combined and are to be respected in relation to any right recognized in the specific treaty in question.

As regards the specific national context, the need to balance the protection of social rights and the 'reason of the state' is extremely present in this field, mainly because of the dichotomy between individual and collective effects of decisions on social rights. However, many civil and political rights whose justiciability is well accepted, such as freedom of expression or freedom of association, or even the right to an effective remedy, for example in contexts of overarching impunity, have a collective dimension, a social dimension which sometimes supersedes the purely individual dimension of the right. In these cases, the role that international supervisory monitoring mechanisms have played is, in practical terms, an essential one, by establishing ways to render these rights effective in the domestic arena. When translating the same idea into the field of social rights, international mechanisms have also proven to be key, allowing those who are in marginalized situations, vulnerable groups, social actors and civil society to highlight a problem and foster change in the domestic arena.[28] Without international supervision, those groups would not have been heard and would have remained powerless. Indeed, social rights are often more blatantly disregarded and this particularly impacts those who are not able to participate in majoritarian decisions (such as migrant workers, undocumented minors or minorities).

The second challenge or concern raised regards the debate about the most appropriate method to ensure the effectiveness of social rights at the international level. Some authors have opposed the use of an individual complaints mechanism specifically created for social rights. Dennis and Stewart, for example, have argued that the individual complaints mechanism at the United Nations level, within the context of the ICESCR, may not be the best suited mechanism to ensure the effectiveness of social rights, for several reasons. One concerns the decision on an individual basis within a specific national context, and the possibility that such mechanisms may not foster compliance, but rather emphasize the difference between states in a North v South approach.[29] These authors further argue that the individual complaint procedure legalizes social rights, although they plead that while

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Rapporteur of the UN on adequate housing, particularly the 2017 Report on 'on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context'.

[27] Human dignity is the foundation upon which human rights are based. International law appeals to human dignity as an overarching principle for all human rights, both from civil and political, as well as for socio-economic rights. See McCrudden (n 8); Roberto Andorno, 'Human Dignity and Human Rights' in Henk ten Have and Bert Gordijn (eds), *Handbook of Global Bioethics* (2014) 45.

[28] See, e.g., concerning the complaints introduced by the European Roma Trust, the European Roma and Travellers Forum or the European Roma Rights Centre before the ECSR on behalf of Roma and in relation to their lack of enjoyment of social rights within certain specific national contexts, such as in the field of education (*European Roma Rights Centre (ERRC) v Ireland*, ECSR, Complaint No 100/2013, Decision of 1 December 2015; *ERTF v France*, ECSR, Complaint No 119/2015, Decision of 5 December 2017) or access to health (*ERRC v Bulgaria*, ECSR, Collective Complaint No 46/2007, Decision of 3 December 2008; *ERRC v Bulgaria*, ECSR, Collective Complaint No 151/2017, Decision of 19 April 2019).

[29] See the Secretary General's Report to the UN Commission on Human Rights, UN Doc E/CN.4/2000/49, at 4–5 (2000) (Georgia); UN Doc E/CN.4/2004/WG.23/CRP.6, at 2 (Europe-Third World Centre and American Association of Jurists). This text refers to the written submissions made by various

> there can be no 'rights' in the absence of a formal adjudicative process and legally sanctioned remedies for identified violations, there are other, more promising pathways to realizing the promises and visions embodied in the UDHR and ICESCR. All rights or rights-related entitlements do not need to be subject to identical or equivalent processes of implementation and enforcement.[30]

Their main argument, however, is not against such mechanism, but more on how to use the mechanisms available in the most effective manner, by perhaps supporting respect for these rights already at the national level, and therefore being able to afford states a margin of appreciation and discretion needed to achieve social rights in their own way. Other authors have highlighted the importance of litigation in the field of social rights, even if not necessarily through an individual complaints mechanism.

At the regional level, the complementarity between the promotional and the quasi-jurisdictional mechanisms developed by the Inter-American Commission on Human Rights have certainly proved successful. The newly created Special Rapporteurship on economic, social, cultural and environmental rights is just another example of the different interactions between individual litigation, the development of indicators through a working group created under the Protocol of San Salvador and the preventive and thematic approach developed by the Commission.[31]

At the European level, several mechanisms coexist. The European Court of Human Rights continues to apply social rights in its case law through the 'connectivity' approach, reinforcing the interdependence between civil and political rights and social rights.[32] Within the European Social Charter, the collective complaints mechanism proposes an innovative solution. It combines the collective approach to rights, where complaints concern a specific situation affecting a collective group, with a reinterpretation of the principle of subsidiarity. Indeed, the social actors allowed to lodge a complaint before the ECSR (mainly trade unions, international NGOs and employers' associations[33]) do not have to exhaust domestic remedies. They highlight the possible lack of conformity of a general situation with the state's obligations under the European Charter and open a possible space for dialogue between the state and the social actor in question. The final decision adopted by the ECSR is not taken on the basis of domestic law in force at the moment in which the complaint was lodged, but on the basis of the law in force at the moment in which the decision is issued, which may imply that the legislation or the

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states which go in the sense of a possible opposition between North and South in terms of protection of economic, social and cultural rights and in consolidating a system of protection at different speeds.

[30] See Dennis and Stewart (n 6), 466.

[31] See on the complementarity among different mechanisms the contributions by Flávia Piovesan *et al* (Chapter 9) and Eduardo Ferrer Mac-Gregor (Chapter 10) in this *Research Handbook.*

[32] See Christina Binder and Thomas Schobesberger, 'El Tribunal Europeo de Derechos Humanos y los derechos sociales: ¿nuevas tendencias en la jurisprudencia?' in Mariela Morales Antoniazzi and Laura Clérico (eds), *Interamericanización del derecho a la salud. Perspectivas a la luz del caso Poblete de la Corte IDH* (2019); Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2017); Colin Warbrick, 'Economic and Social Interests and the European Convention on Human Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (2008); see also the contribution by Eugenia López-Jacoiste in this *Research Handbook* (Chapter 8).

[33] Only in the case of one state, Finland, which has issued a specific declaration accepting its ability to lodge complaints, are national NGOs among the actors who can file collective complaints before the ECSR.

administrative practice at stake is no longer applicable and that, therefore, non-compliance is no longer an issue. The collective complaints mechanism therefore differs from the individual complaint approach, as only certain specific social actors may lodge the complaint. These actors are able to point to a structural issue or problem and become a strategic tool of national reform, triggered by lodging the collective complaint. If the state solves the situation before the case is decided, the decision adopted will establish compliance with the Charter.

The last challenge, the one concerning the use of control of conventionality – that is, using international human rights treaties and conventions as parameters for considering the compatibility of legislation with international standards at the domestic level – is a common concern for all human rights treaties, not only those on social rights. Indeed, it is often noted that international adjudication mechanisms for human rights, mainly judicial or quasi-judicial, provoke a shift in the separation of powers principle.[34] In the case of social rights, the arguments would be that they have strong implications for policy-making, and encourage national authorities and *in concreto* judges to take over this task from their government. Apart from the fact that the judicial decisions concerning civil and political rights also involve policy issues and a judicial review of such policies, judicial adjudication of social rights at both the national and the international levels is a strategic means to achieve greater accountability and transparency.[35] Moreover, social rights do not always impose huge positive obligations and budgetary implications on states but may also involve negative obligations, which the state has to simply respect and based on which the court ensures respect for the law – for example, when it recognizes the right of workers to unionize in legislation, or the rights of union representatives not to be dismissed for performing their tasks, or general regulations of the conditions and rights applicable to night workers. As for civil and political rights, judicial adjudication on social rights may imply a decision on a violation, leaving the specific allocation of resources and the means of implementation to the other national authorities.

The control of conventionality therefore has a doubly *transformative* power: it operates by ensuring compliance at the domestic level through a bottom-up approach to adjudicating social rights, thereby empowering national judges to do so through interpretation; it also ensures a top-down approach, giving concentrated supervisory power to an international third arbiter, who helps identify common minimum standards and the core elements of social rights. Many national constitutions enshrine the protection of these rights and make them justiciable, consequently giving domestic judges the role to adjudicate them.[36] National judges are then

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[34] See on the role of judges and human rights, Robert Alexy, *Teoría de la argumentación jurídica* (2012); on the ECtHR and the separation of powers principle at the domestic level see Amaya Úbeda de Torres, 'La Cour Européenne des droits de l'homme face aux cours nationales' in Emmanuelle Bribosia, Laurent Scheeck and Amaya Úbeda de Torres (eds), *L'Europe des cours, loyautés et résistances* (2010).

[35] In this sense Anashri Pillay, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 International Journal of Constitutional Law 732.

[36] On this topic, see the publication of the conference organized within the Council of Europe, *Social Rights in Today's Europe: The Role of Domestic and European Courts* (2016) <www.coe.int/en/web/european-social-charter/conference-cyprus-2017#{%2223854937%22:[3]}> (5 November 2019). Concerning other key examples, such as the case of South Africa, see International Commission of Jurists, *A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa* (2019) <www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf> (5 November 2019); on Colombia, see Rodolfo Arango, 'Justiciabilidad de los derechos sociales fundamentales en Colombia; aporte a la construcción de un *ius constitutionale commune* en Latinoamérica' in Armin von Bogdandy *et al* (eds), *Construcción y Papel*

held to use international social rights treaties and the international monitoring bodies' case law when applying the control of conventionality, that is, when assessing the compliance of domestic laws with the international obligations included in human rights treaties. This can be done either directly by applying the treaty at stake; through the idea of direct enforceability; or at least by means of an interpretation of domestic law in accordance with international standards.[37] The effectiveness of a multi-level adjudication is based on collaboration more than on competing competences, in order to avoid overlap and double procedures. The subsidiarity principle still is and will remain a pillar of the international human rights protection system. However, for implementation purposes, international adjudication may become an essential factor triggering political and judicial reform in the domestic sphere, by promoting the adoption of legislative action; or by changing judicial practice, which is not always aligned with political authorities' behaviour; or even by fostering political and social change.

V. CONCLUDING REMARKS

The purpose of this contribution was to analyze the idea of justiciability and the many challenges around the enforcement of social rights. Often referred to as goals, programmatic objectives or even soft law, the issue of these rights' lack of precision, the scarcity and low availability of resources and their progressive realization have been used as arguments to contest their justiciability. However, the main challenge is not whether these rights can be justiciable, but rather lies in their implementation and effectiveness. Indeed, any attempt to show non-justiciability of social rights either sets out from an incorrect understanding of the notion of justiciability and its implications, or simply considers that human rights in general, and not only social rights, are not enforceable. States, in performing the obligations stemming from social rights under international law, have to take the necessary steps to choose the appropriate means to make them effective. The main complexity is in discussing how they can best be enforced. The choice of the methods to achieve social rights realization remains in the hands of the state. Moreover, appropriate adjudicative means do not always imply judicial remedies, but, where they do exist, they are also appropriate means of redressing social rights violations. The progressivity element in the advancement towards achieving social rights does not mean that states have the right to defer efforts to ensure full realization. These are legal rights, and relevant case law is being developed at the national and the international levels. The interactions between the international and national spheres of protection and the building of a multi-level network through the empowerment of domestic authorities and the exercise of the control of conventionality is one of these means. Indeed, in the case of social rights,

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de los Derechos Sociales Funamentales (2011) 17; Eduardo José Acuña Gamba, 'Justiciabilidad de los derechos sociales en colombia: análisis de la intervención de la corte constitucional en los casos de la salud y las pensiones' (2014) 12 Revista Iter Ad Veritatem 1.

[37] On the compatibility between the control of conventionality and the control of constitutionality conducted by domestic judges, see Eduardo Ferrer (ed.), *El control difuso de convencionalidad. Diálogo entre la Corte Interamericana de Derechos Humanos y los jueces nacionales* (2012); Eduardo Ferrer, 'Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano' in Miguel Carbonell and Pedro Salazar (eds), *La reforma constitucional de derechos humanos: un nuevo paradigma* (2012) 339.

judicial review serves the function of checking the political branches to ensure that they are responsive to the constitutional rights of the least privileged in society, and that the policy makers do not lose sight of their suffering.[38]

[38] Jeanne M Woods, 'Justiciable Social Rights as a Critique of the Liberal Paradigm' (2003) 38 Texas International Law Journal 763, 773.

4. Pursuing global socio-economic, colonial and environmental justice through economic redistribution: the potential significance of human rights treaty obligations

Ralph Wilde[1]

> In the developing countries most of the environmental problems are caused by under-development. Millions continue to live far below the minimum levels required for a decent human existence, deprived of adequate food and clothing, shelter and education, health and sanitation. Therefore, the developing countries must direct their efforts to development, bearing in mind their priorities and the need to safeguard and improve the environment. For the same purpose, the industrialized countries should make efforts to reduce the gap between themselves and the developing countries.
>
> […]
>
> Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.
>
> Stockholm Declaration 1972, preamble, para 2, and Principle 9[2]

> The greatest and most significant achievement during the last decades has been the independence from colonial and alien domination of a large number of peoples and nations which has enabled them to become members of the community of free peoples. Technological progress has also been made in all spheres of economic activities in the last three decades, thus providing a solid potential for improving the well-being of all peoples. However, the remaining vestiges of alien and colonial domination, foreign occupation, racial discrimination, apartheid and neo-colonialism in all its forms continue to be among the greatest obstacles to the full emancipation and progress of the developing countries and all the peoples involved. The benefits of technological progress are not shared equitably by all members of the international community. The developing countries, which constitute 70 per cent of the world's population, account for only 30 per cent of the world's income. It has proved impossible to achieve an even and balanced development of the international community under the existing international economic order. The gap between the developed and the developing countries continues to widen in a system which was established at a time when most of the developing countries did not even exist as independent States and which perpetuates inequality.

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[2] Stockholm Declaration on the Human Environment (16 June 1972) UN Doc A/Conf.48/14.

Declaration on the New International Economic Order, UNGA 1974[3]

States have […] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

[…]

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.
States shall […] cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Rio Declaration 1992, principles 2, 7 and 13[4]

We are meeting at a time of immense challenges to sustainable development. Billions of our citizens continue to live in poverty and are denied a life of dignity. There are rising inequalities within and among countries. There are enormous disparities of opportunity, wealth and power.

Transforming our World: The 2030 Agenda for Sustainable Development, UNGA 2015[5]

I. INTERNATIONAL EFFORTS AT PROMOTING GLOBAL ECONOMIC REDISTRIBUTION TO REALIZE SOCIAL RIGHTS

As far as the realization of social rights is concerned – the right to food and nutrition, housing, healthcare, education, all within a framework of a sustainable natural environment – three central interrelated challenges are commonly made to the state of the global economy, especially by people, including those of first nation/indigenous heritage, in economically underprivileged, so-called developing countries – notably countries that were formed out of colonies – in the Global South/Third World. The first two challenges became prominent in the agenda for a New International Economic Order (NIEO), as reflected in the above quoted 'Declaration on the New International Economic Order' (NIEO Declaration), the associated 'Programme for Action' (NIEO Programme of Action) and the subsequent 'Charter on the Economic Rights and Duties of States' (NIEO Charter), adopted by the UN General Assembly (UNGA) in 1974.[6] In the first place there is the 'economic injustice' challenge: global

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[3] UNGA Res 3201 (S-VI) (1 May 1974) 'Declaration on the Establishment of a New International Economic Order', para 1.

[4] Rio Declaration on Environment and Development (10 August 1992) UN Doc A/CONF.151/26.

[5] UNGA Res A/70/1 (25 September 2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development', para 14.

[6] NIEO Declaration 1974 (n 3); UNGA Res 3202 (S-VI) (1 May 1974) 'Programme of Action on the Establishment of a New International Economic Order'; UNGA Res 3281 (XXIX) (12 December 1974) 'Charter of Economic Rights and Duties of States'. On the NIEO, see, e.g., Mohammed Bedjaoui, *Towards a New International Economic Order* (1979); Francisco V Garcia-Amador, 'The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation' (1980) 12 Lawyers of the Americas 1; Kamal Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980); John Linarelli, Margot E Salomon and Muthucumaraswamy

socio-economic inequality is an injustice that should be resisted, and this should form the basis for reconceiving international economic relations and the global distribution of wealth and resources in order to promote social rights in the Global South.[7] In the second place is the 'colonial justice' challenge: that there has to be a reckoning for the injustice of colonialism – both in and of itself, and also when it comes to the abuses and exploitation of the colonial era, from the extermination and subjugation of indigenous/first nation peoples to slavery and the trade in enslaved people; the destruction, spoliation and plunder of the environment in general and material resources and cultural artefacts in particular; and the abuses, including massacres, perpetrated against colonial peoples in general and indigenous/first nation peoples in particular.[8] In the third place is the 'environmental justice' challenge, reflected in the foregoing quotes from the Stockholm and Rio conferences in 1972 and 1992: that 'industrialized' countries, whose economic privileges are rooted in environmental harm and exploitation generally, and climate-altering carbon use in particular (an issue that emerged as a mainstream international concern in the runup to Rio), owe a debt to the people in the world who have been and are at the sharp end of much of this harm and exploitation generally, and to people who are suffering and will suffer the most from the damaging effects of carbon use-based climate change in particular.[9]

The 'colonial justice' challenge is raised both as a matter in its own right and because of its relationship to the 'economic injustice' and 'environmental justice' challenges, given the way in which current socio-economic and environmental inequalities – the sharp difference in the realization of social rights and associated environmental conditions across the world, and the environmentally harmful basis on which the economically privileged parts of the world attained this privilege – can in part be linked back to the colonial and imperial structures of the past. One link would be in how industrialization in the west – and the consequences this had for the enhancement of social rights of people there, with its ongoing legacy in terms of socio-economic inequality and environmental destruction, including catastrophic climate alteration – was bound up in and enabled by slavery, the trade in enslaved people, the imposition of unequal trade relations, the exploitation of people, the plunder of natural resources

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Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018) chapter 3. On the NIEO and the broader critiques of the global economic order see, e.g., B Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) International Community Law Review 3.

[7] See the sources cited *ibid.*

[8] *Ibid.* On slavery and the trade in enslaved people in particular, see also the more recent coverage of the issue, reflecting post-NIEO developments in it, in Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (2013); Ana L Araujo, *Reparations for Slavery and the Slave Trade: A Transnational and Comparative History* (2017).

[9] Note also the observation from the 1991 Beijing Declaration on Environment and Development issued by the foreign ministers of developing countries, that 'the developed countries bear responsibility for the degradation of the global environment. Ever since the Industrial Revolution, the developed countries have over-exploited the world's natural resources through unsustainable patterns of production and consumption, causing damage to the global environment, to the detriment of the developing countries.' Quoted in Dinah Shelton, 'Equitable Utilization of the Atmosphere: A Rights-Based Approach to Climate Change?' in Stephen Humphreys (ed.), *Human Rights and Climate Change* (2010) 121. On this topic see, e.g., the review and sources cited in Benoit Mayer, 'State Responsibility and Climate Change Governance: A Light through the Storm' (2014) 13 Chinese Journal of International Law 539, section II, and the discussion in Shelton, section E.

and environmental harm in colonial territories.[10] Another link would be the way in which the colonial legacy of externally imposed arbitrary boundaries forming contours for the borders of post-colonial states set many newly independent states up as entities with considerable challenges in forming cohesive and functioning political and socio-economic communities, placing them at a disadvantage in this regard compared to many western states.[11] Relatedly, it has been argued ever since decolonization that independence has to mean not only (and perhaps not even, given what has been said) formal, legal sovereign statehood but also substantive socio-economic liberation and emancipation, bearing in mind the foregoing link between western industrialization and colonial subjugation and economic exploitation and the plundering of resources, as well as the ongoing foreign ownership of land, material and natural resources in former colonial states and the inability of former colonial states to be able to repatriate these resources fully, or even at all.[12]

Thus, it is argued, it is not possible to address the socially, economically and environmentally unequal world as it is now without an appreciation of the historical context which both contributed to this inequality and also suggests a series of unresolved injustices. Moreover, the continuing operation of foreign socio-economic privileges that have their origins in the colonial period are compounded by other forms of economic domination in the 'post-colonial' era, some of which are also linked back to colonial arrangements, such as the disciplining role of the international financial institutions such as the World Bank and the International Monetary Fund; the substantive policies of what is euphemistically termed 'structural adjustment' – invariably, massive cuts to social provision and privatization linked to foreign corporate ownership – that they and other global and inter-state financial arrangements impose; the unequal terms of global trade (with socio-economically privileged states protecting their industries); the frequent use of development 'aid' also to impose the aforementioned 'structural adjustment' and subsidize the industries/companies of 'assisting' states, thereby 'under-developing' their equivalents in less socio-economically privileged countries, undermining the ostensible underlying rationale for assistance in the first place; the global regime of rules protecting foreign ownership of assets and natural resources in socio-economically underprivileged countries ('investment protection'), effectively preventing the nationalization and so repatriation of such assets and resources without full compensation (which would cancel out the benefits); and the national and global rules on intellectual property, which enable the corporate ownership of plants and seeds and pharmaceuticals, leading to foreign monopolistic ownership of and the setting of high prices for basic foodstuffs and drugs in socio-economically underdeveloped countries, in the case of drugs making it difficult for more affordable generics to be produced.[13] As a result of these and other developments, a distinctive 'neo-colonial' basis for the 'economic inequality' challenge is raised: dynamics equivalent to the historical practices

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[10] For the example of the UK see, e.g., Catherine Hall *et al*, *Legacies of British Slave-Ownership: Colonial Slavery and the Formation of Victorian Britain* (2014).

[11] See Makau wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1994) 16 Michigan Journal of International Law 1113.

[12] See, e.g., the discussion in Linarelli, Salomon & Sornarajah (n 6), *passim*, especially chapters 3–6, and Chimni (n 6), *passim*.

[13] See, e.g., Chimni (n 6), *passim*; Linarelli, Salomon & Sornarajah (n 6), *passim*; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (2003) Part II; Jason Hickel, *The Divide: A Brief Guide to Global Inequality and its Solutions* (2018).

that give rise to the 'colonial justice' challenge continued after those historical practices came to an end with 'decolonization'.[14]

One assertion that has been made in relation to the first two challenges, which was central to the NIEO agenda, is that there should be a radical, transformatory global transfer of economic wealth from the globally socio-economically privileged to the globally socio-economically underprivileged.[15] For the 'economic inequality' challenge, this amounts to a socialist, solidaristic mechanism of redistribution as a means of meeting the challenge and enhancing social rights for people in the Global South. For the 'colonial justice' challenge, this is posited as a form of redress/reparation (and would include the restitution of plundered cultural artefacts as an important component). This idea of a global transfer of wealth is implicated in the related 'environmental justice' challenge, as again a form of redress/reparation, in this case for environmental harm in general and the effects of climate change in particular.

The 'global economic redistribution' agenda would conceptualize the area of state practice within which resource and technology transfers from the rich to the poor operate, for example through international assistance/aid programmes and debt forgiveness aimed at enhancing the social rights of the global poor, as a matter of obligation not discretion.

The international system, it is claimed, has a normative dimension, a field of binding rights and obligations – international law – and an institutional structure of global governance – the United Nations, and other international organizations. The NIEO initiative, whose foundational 1974 Declaration is extracted above, was an initiative by newly independent, former colonial states. Many of these states acted collectively through the Non-Aligned Movement and the Group of 77 countries (G77) to utilize the global normative and institutional system to reconceive global economic relations for the post-decolonization era, addressing the aforementioned challenge of global socio-economic inequality on the 'post-colonial' basis outlined above.[16]

Various regimes were adopted to enshrine norms within the international legal system that had potential relevance to this agenda, some of which were furthered within the United Nations, and which were often linked to the purposes and principles and Chapter IX of the UN Charter, which set out the promotion of economic development through international cooperation as an objective of the organization and pledge of its member states.[17] A significant normative development and precursor to the NIEO Declaration was the 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' adopted by the General Assembly in 1970.[18] Commonly referred to by shorthand as the 'Friendly Relations Declaration' because of its provisions concerning non-intervention and the use of force, and reflecting the commonplace prioritization of security over social rights and welfare concerns, the Declaration

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[14] On this 'neocolonial' critique, see the sources cited in Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008) sources list 5.3.3, from p.538.

[15] See the sources cited above, n 5.

[16] See the sources cited above, n 5.

[17] Charter of the United Nations (26 June 1945) 892 UNTS 119, Chapter IX in general, and Arts 55 and 56 therein in particular.

[18] UNGA Res 2625 (XXV) (24 October 1970) 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.

is significant for present purposes because of its 'cooperation' aspects, articulating a duty to cooperate in general and to promote economic growth and social rights globally in particular.

The NIEO initiatives covered a broad set of measures, such as attempts to challenge the terms of global trade and renationalize assets, including those relating to natural resources owned by foreign companies and nationals, as a way of enhancing social rights in the Global South. These were set out in the aforementioned NIEO Declaration, NIEO Programme of Action and NIEO Charter.[19] Significantly for present purposes, a key component of these three instruments was an agenda calling for a significant increase in financial, resource and technology transfer from socio-economically privileged countries to socio-economically underprivileged countries, and a reckoning, including through compensation, for colonial domination itself and the abuses and exploitation conducted through it.

Other notable initiatives include the 1986 General Assembly Resolution enshrining a 'Declaration on the Right to Development'; various decisions fixing certain targets of GDP/GNI for OECD states to allocate to development assistance; the Millennium Declaration and its associated Millennium Development Goals (MDGs) of 2000; and the successor to these, the Sustainable Development Declaration (the 2035 Agenda resolution quoted above), and associated Sustainable Development Goals (SDGs) of 2015, both adopted by the UNGA, articulating regimes of cooperation and expressions of solidarity in realizing socio-economic rights globally, and setting targets for global poverty reduction and health, gender equality, child mortality, environmental protection and educational outcomes.[20]

The NIEO agenda was resisted by the socio-economically privileged west, notably when it concerned economic redistribution and the expropriation of foreign-owned assets. As reflected in the foregoing quote from the General Assembly in 2015, global socio-economic inequality has persisted; significant redistributive capital and resource flows from the global rich the global poor have not happened and, indeed, flows have continued to move in the opposite direction when it comes to the human, material (including land) and resource capital shifts in

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[19] Cited above, n 5.

[20] UNGA Res 41/128 (4 December 1986) 'Declaration on the Right to Development'; UNGA Res 1161 (XII) (26 November 1957) 'Balanced and Integrated Economic and Social Progress'; UNGA Res 2542 (XXIV) (11 December 1969) 'Declaration on Social Progress and Development'. See also the final acts of the two International Conferences on Human Rights: Teheran (1968) and Vienna (1993): Final Act of the International Conference on Human Rights (22 April–13 May 1968) UN Doc A/CONF.32/41, II, Proclamation of Teheran, and Resolutions XVII and XXI; Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23; see also the resolutions of the UN Commission on Human Rights: Resolution 4 (XXXIII) of 21 February 1977; Resolution 4 (XXXV) of 2 March 1979; Resolution 36 (XXXVII) of 11 March 1981. There have been a number of working groups on the right to development within the UN Commission on Human Rights. In addition, in 1998 an 'independent expert' was appointed, who in 1999 expressed the view that 'Every State which recognized the right to development was obliged to take positive action to assist the citizens of other States in realizing those rights' (HRComm, Summary Record of the 9th meeting, 55th Session (30 March 1999) UN Doc E/CN.4/1999/SR.9, para 29); see also, e.g., the Fifth Report of the Independent Expert on the Right to Development, Frameworks for Development Cooperation and the Right to Development (18 September 2002) UN Doc E/CN.4/2002/WG/18/6. On the targets for GNI/GDP, see the discussion in Ralph Wilde, 'Dilemmas in Promoting Global Economic Justice through Human Rights Law' in Nehal Bhuta (ed.), *The Frontiers of Human Rights* (2016) chapter 5, 162–63 and sources cited therein. On the MDGs see UNGA Res 55/2 (8 September 2000) 'United Nations Millennium Declaration', paras 5, 11, 13, 15–16. On the SDGs, see the sources cited above, n 2.

the global economy. The adoption of the SDGs reflected the failure of the targets set in the MDGs – which had in any case been modest – to be met.[21]

As a matter of international law, the NIEO agenda in general, and most of the foregoing initiatives mentioned, were furthered primarily within the UNGA, a body where each formally 'sovereign' state has an equal vote, and where the process of decolonization had created a situation where socio-economically underprivileged and former colonial states were in the majority. However, and reflecting how ideas of formal independence and sovereign equality cohabit with *de facto* relations of domination, dependency and inequality, General Assembly Resolutions that set out general regimes of standards for member states are not in and of themselves binding, even if they use the language of rights and/or obligations in them – so-called 'soft law'.[22] Such resolutions are usually understood as somehow merely aspirational and discretionary.[23] By contrast, the 15-member Security Council – with five permanent and veto-wielding states, none of which are from the Third World – can 'make law', in the sense of introducing new substantive legal rights and/or obligations operative on some or all of the member states of the UN, directly through its resolutions.

Former colonial states, then, having had to accept the idea of statehood and an associated national identity operating along the lines of externally imposed colonial boundaries as the price of independence from formal colonial rule, were also faced with an international system of global governance – the United Nations – which, as a matter of formal differences in law-making capacities, institutionalized and perpetuated their subordination, preventing legal change on their terms as a matter of the formalities of that organization. This block on majority-based change necessarily also meant preservation of the status quo in international law, which therefore bolstered the absence of a norm concerning global economic redistribution.

The MDGs and the SDGs, supported by socio-economically privileged countries, are also in this 'soft law' category of General Assembly resolutions, and the targets for aid made by those within the privileged OECD club are similarly through instruments that are not formally binding. These undertakings could have been enshrined in binding treaties, as has been the case with some instruments that start off as UNGA resolutions or other non-binding declarations. This did not happen.

By contrast, 'hard law' continued, and its substantive content developed in order to undergird all the aforementioned 'neo-colonial' arrangements. The trade rules that enable the protection of western economies; inter-state and IFI financial arrangements with 'structural adjustment' policies requiring a reduction in social provision and privatization enabling foreign corporate ownership; development 'aid' provision with similar policies, and also used to protect the industries/companies of 'assisting' states; intellectual property and investment protection norms that enable foreign ownership and the setting of higher prices for foodstuffs

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[21] Sustainable Development Declaration 2015 (n 5), paras 2 and 16.

[22] On 'soft law' see, e.g., Dinah Shelton, 'Soft Law' in David Armstrong *et al* (eds), *Routledge Handbook of International Law* (2008); Daniel Thürer, 'Soft Law' in MPEPIL <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1469?prd=EPIL> (29 November 2019).

[23] Although the principles they contain may relate to norms in customary international law, because they codify such norms already existing as a matter of custom, or the affirmation of them by states in the resolutions has significance in the formulation of customary norms. For a classic treatment of this topic see, e.g., Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963).

and pharmaceuticals in socio-economically underprivileged countries: all of these arrangements are enshrined in binding international legal treaties (and also customary international law when it comes to investment protection, via the pre-decolonialization-era legal rules of 'diplomatic protection' covering the property of aliens which newly independent former colonial states were unable to alter).[24]

On the topic of environmental justice in particular, there has long been an acceptance of certain liabilities for particular forms of transboundary harm, as reflected in the aforementioned assertion in principle 2 of the Rio Declaration.[25] However, as currently understood, this falls short of a full-spectrum, universally applicable regime to address all elements of the environmental justice agenda, notably as far as historical harms, and climate change, are concerned. Indeed, the issue of transboundary liability and associated compensation for the effects of climate change in particular has been a hugely contested issue in international climate change negotiations, despite the aforementioned aspirational pledge made in principle 13 of the Rio Declaration in 1992.[26] Whereas the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts was adopted in 2013, there is not even clear and general international agreement on whether loss and damage caused by climate change is something that should involve transboundary liability and compensation, as opposed to being addressed only within regimes concerned with adaptation.[27] Commentators have therefore tended to address the issue of transboundary liability and compensation on this topic only as an arena of potential future normativity.[28]

However, separate from the NIEO-associated soft law initiatives and the ongoing climate change regime negotiations, a separate area of international law, which originated in a (soft law) UNGA resolution, emerged within an overlapping timeframe of the Stockholm conference and the NIEO initiatives, and ended up being enshrined in binding 'hard law' treaties: international human rights law. The foundational instrument here, the 1948 Universal Declaration on Human Rights (UDHR), built on the aforementioned provisions of Chapter IX of the UN Charter to articulate socio-economic rights and the requirement of international cooperation in the realization of these rights, as well as a more general objective of an international order within which all rights can be fully realized.[29] This instrument, as a UNGA Resolution, has 'soft law' status like the foregoing regimes.[30] But unlike those regimes, it

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[24] See the sources cited above, n 12.

[25] See, e.g., Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law* (2007) chapter V, section A; Günther Handl, 'Transboundary Impacts' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (2008) and sources cited therein.

[26] See the discussion in Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (2017) 137 and 239, and sources cited therein.

[27] *Ibid.*

[28] See, *e.g.*, Daniel Farber, 'Basic Compensation for Victims of Climate Change' (2007) 155(6) University of Pennsylvania Law Review 1605; Mayer (n 9), *passim*; Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 1; Roda Veryheyen and Peter Roderick, 'Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage' (2008) WWF UK, and sources cited therein.

[29] UNGA Res 217/A (III) (10 December 1948) 'Universal Declaration of Human Rights', Arts 22 and 28.

[30] For a discussion of the idea that the norms in the UDHR are part of customary international law see, e.g., Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995–96) 25 Georgia Journal of International and Comparative Law 287.

was followed by binding international human rights treaties.[31] Moreover, as will be indicated, some of these treaties address the subject of economic, social and cultural rights. Furthermore, more generally, human rights treaties have come to be understood as encompassing norms concerned with the environment.[32]

The relevant instruments addressing economic, social and cultural rights are the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (I-A PESC), the African Charter of Human and Peoples' Rights (AfCHPR) and its Protocol (a separate treaty) on the Rights of Women in Africa (AfCHPR Women's Rights Protocol), the Arab Charter on Human Rights, the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC) and its first two Protocols – on prostitution and pornography – and armed conflict (hereinafter CRC Protocols 1 and 2), the Convention on the Rights of People with Disabilities (CRPD), the European Social Charter, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CIADDIS) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[33]

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[31] And also further non-treaty soft law instruments such as UNGA Res 61/295 (13 September 2007) 'United Nations Declaration on the Rights of Indigenous Peoples'.

[32] On human rights law and the environment see, e.g., Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law 103; Stephen Humphreys (ed.), *Human Rights and Climate Change* (2010) and sources cited therein. Notable international decisions include the Precautionary Measures Order by the Inter-American Commission on Human Rights, PM 382/10 – *Indigenous Communities of the Xingu River Basin, Pará, Brazil* (adopted 1 April 2011, revised 29 July 2011); *The Environment and Human Rights*, IACtHR, Advisory Opinion OC-23/17 of 15 November 2017; HRCttee, 'General Comment No 36' (30 October 2018) CCPR/C/GC/36, paras 26, 62; *Portillo Cáceres v Paraguay*, HRCttee, Communication No 2751/2016, CCPR/C/126/D/2751/2016 (2019); *Ioane Teitota v New Zealand*, HRCttee, Communication No 2728/2016, CCPR/C/127/D/2728/2016 (2020), paras. 9.4–9.14 and para 10.

[33] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') (17 November 1998) (I-A PESC), entry into force 1999; African Charter on Human and Peoples' Rights (27 June 1981), entry into force 21 October 1986, 1520 UNTS 217 (AfCHPR), Arts 15–18, 21–22; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol') (11 July 2003), entry into force 25 November 2005 (AfCHPR Women's Protocol), *passim,* in particular Arts 2, 5–7, 10, 12–19; Arab Charter on Human Rights (22 May 2004), entry into force 15 March 2008, reprinted in 12 IHRR 893 (2005) (this is the second iteration of the Arab Charter, which was first adopted in 1994 without any state ratifications), Arts 34–42; Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979), entry into force 3 September 1981, 1249 UNTS 13 (CEDAW), Arts 10–14; International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), entry into force 4 January 1969, 660 UNTS 195 (CERD), Arts 2(2), 3, 5(e); Convention on the Rights of the Child (20 November 1989), entry into force 2 September 1990, 1577 UNTS 3 (CRC), Arts 3, 4, 6, 19, 23–32, 39; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (25 May 2000), entry into force 18 January 2002, 2171 UNTS 227 (CRC Protocol 1); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000), entry into force 12 February 2002, 2173 UNTS 222 (CRC Protocol 2); Convention on the Rights of Persons with Disabilities (13 December 2006), entry into force 3 May 2008, 2515 UNTS 3 (CRPD), Arts. 4(2), 9, 19, 20, 23–28, 30; European Social Charter (revised) (3 May 1996), entry into force 1 July 1999, CETS No 163 (ESC); Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (7 June 1999), entry into force 14 September 2001, AG/RES 1608 (XXIX-O/99) (CIADDIS), Arts II–IV; International Covenant

The European Social Charter, uniquely among these instruments, contains express provisions limiting applicability to the metropolitan territory of state parties unless states make declarations extending the obligations to their colonies, which none have done.[34] By contrast, all the other treaties contain provisions relative to applicability which are on their face ambiguous when it comes to the general approach taken within each treaty to the question of whether or not they apply only territorially, or also extraterritorially.[35]

The ICESCR entered into force in 1976 and discussions of its content and meaning in general only started to develop in the following decade, an associated Committee tasked with addressing this and monitoring implementation being established in 1985.[36] Reflecting a common approach across human rights treaties generally, the predominant and sometimes exclusive focus of discussion of its meaning was in the territorial context, not also considering whether it had an extraterritorial dimension and, if so, whether it might somehow speak to the issue of global economic redistribution as a means of enhancing the realization of social rights internationally.[37] Thus attention on that issue initially continued to focus exclusively on the foregoing 'soft law' normative regimes.

The AfCHPR entered into force in 1986 and its Women's Rights Protocol in 2005; the associated Commission became operational in the following year, and the associated Court became operational in 2006.[38] The I-A PESC entered into force in 1999, linked to the preexisting enforcement modalities of the Inter-American human rights system.[39] The Inter-American CIADDIS entered into force in 2001; its enforcement modality, the Inter-American Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS), first met in 2007.[40] The regional specificity of these two sets of arrangements, and the absence of the US from being a party to the Inter-American instruments in particular, has limited their significance to the question of economic redistribution from economically privileged countries to enable the greater realization of social rights of people in economically underprivileged countries, given the absence of most countries in the relatively privileged bracket from the state parties and therefore from being obligation bearers under them.[41]

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on Economic, Social and Cultural Rights (16 December 1966), entry into force 3 January 1976, 993 UNTS 3 (ICESCR), *passim*.

[34] ESC (n 33), Article L. For the declarations made under the Charter see <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/declarations?p_auth=kSgXEOxH> (29 November 2019).

[35] Setting aside some of the specific provisions in some of these regimes which are relatively less ambiguous, e.g., references to Trust Territories. See below, n 76.

[36] On the entry into force, see above, n 33. On the Committee, including its establishment, see <www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (29 November 2019).

[37] See, e.g., Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights* (1998).

[38] On the entry into force of both instruments see above, n 33. On the Commission's date of commencing operation, see <www.achpr.org/history> (29 November 2019). On the Court's date of commencing operation, see <https://en.wikipedia.org/wiki/African_Court_on_Human_and_Peoples%27_Rights> (29 November 2019) (this information is not provided on the official Court website).

[39] On the entry into force, see above, n 34. On the link to existing systems of enforcement, see IA-PESC (n 33), Art 19.

[40] On the entry into force, see above, n 33. On the CEDDIS, see <www.oas.org/es/sedi/ddse/paginas/index-4_comite.asp> (29 November 2019).

[41] For the parties to the two instruments, see I-A PESC, <www.oas.org/juridico/english/sigs/a-52.html> (29 November 2019); CIADDIS, <www.oas.org/juridico/spanish/firmas/a-65.html> (29 November 2019).

The Arab Charter has greater potential here, given that some of the parties to it are in the economically privileged bracket – such as Bahrain, Kuwait, Saudi Arabia, Qatar and the UAE – although again the specificity of the regime to Arab countries limits its scope in terms of potential beneficiaries, and more generally the instrument has not been in force relatively long and does not yet have an enforcement mechanism operating to interpret and enforce the meaning of its provisions.[42]

CERD entered into force in 1969, with its enforcement modality, the CERD Committee, beginning its work in 1986.[43] CEDAW entered into force in 1981, with its enforcement modality, the CEDAW Committee, becoming operational in 1982.[44] The CRC entered into force in 1990 and Protocols 1 and 2 in 2002, and its enforcement modality, the CRC Committee, became operational in 1991, but the (third) Protocol enabling individual complaints to the Committee did not enter into force until 2014.[45] The CRPD entered into force in 2008 and its enforcement modality, the CRPD Committee, became operational in 2009.[46]

Overall, the foregoing indicates that in general, and notwithstanding when the ICESCR was adopted, the significance of binding treaty obligations and the operation of associated enforcement mechanisms in the field of economic, social and cultural rights is more recent compared to such obligations and mechanisms in the field of civil and political rights. Notable features of the latter arrangements are the adoption/activation dates of the original instruments and mechanisms associated with the Organization of American States and the Council of Europe, as well as the International Covenant on Civil and Political Rights (ICCPR) and activities of the associated Human Rights Committee, and also the relatively greater enforcement of civil and political rights, including when the operative legal norms are linked to/based on international legal obligations, before domestic courts. These relative differences overall have meant that opportunities to explore the extraterritorial potential of civil and political rights has been considerably greater than in the case of economic, social and cultural rights as a matter of international law.

The key instruments exclusively concerned with civil and political rights similarly contain provisions relative to the question of applicability – chiefly, the term 'jurisdiction' – which are ambiguous on the question of whether or not they apply extraterritorially, but unlike in case of the relevant treaties covering economic, social and cultural rights, the potential for these

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[42] It has not been possible to find authoritative information about the parties to the Charter. The details mentioned have been taken from Wikipedia, <https://en.wikipedia.org/wiki/Arab_Charter_on_Human_Rights#cite_note-4> (29 November 2019). As for enforcement, again according to Wikipedia, a Statute for a Court was adopted in 2014, and enters into force after seven ratifications; Saudi Arabia ratified it in 2016. <https://en.wikipedia.org/wiki/Arab_Charter_on_Human_Rights#cite_note-4> (29 November 2019).

[43] On the beginning of the work of the Committee, see Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (2016) 44, text accompanying note 105, and source cited therein.

[44] On the entry into force of CEDAW see above, n 33. On the Committee's establishment, see <www.un.org/womenwatch/daw/cedaw/committee.htm> (29 November 2019).

[45] On the CRC Committee's operation from 1991, see <www.ohchr.org/Documents/Publications/FactSheet10rev.1en.pdf> (29 November 2019). For the third Optional Protocol, see Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (14 July 2011), entry into force 14 April 2014, UN Doc A/RES/66/138 (CRC Protocol 3).

[46] On the date of the Committee becoming operational, see <https://en.wikipedia.org/wiki/Committee_on_the_Rights_of_Persons_with_Disabilities> (29 November 2019).

ambiguous provisions to have an extraterritorial meaning has been subject to extensive judicial and academic exploration and, as it turns out, affirmation.[47] Moreover, five broader factors and developments have mediated the way the relative significance of the two sets of rights have been perceived, all in the direction of prioritizing civil and political rights over economic, social and cultural rights. In the first place is the tendency to adopt an exclusively territorial approach when economic, social and cultural rights have been interpreted. In the second place is the popular idea of equating the term 'human rights' more or even exclusively with civil and political rights and private property rights, and therefore seeing it as somehow 'other' than an agenda concerned with socio-economic solidarity to promote social/welfare rights, whether nationally or globally (as is the case in some countries in the west when that term is used). In the third place is the aforementioned failure of the NIEO initiative of economic redistribution as a means of promoting social rights in the Global South. In the fourth place, relatedly, are the 'soft law' normative limitations of the foregoing non-treaty regimes aimed at promoting social rights and the contrasting binding nature of legal regimes concerning trade, finance, development 'aid', investment and intellectual property protection which have been criticized for having had such a negative effect on these rights. Finally, in fifth place, is the actuality of continued extreme poverty, global socio-economic inequality and economic flows from the poor to the rich parts of the world. These factors have led many to criticize or turn away from the global human rights agenda as a legitimate and useful forum within which to articulate claims challenging global socio-economic inequality and promote the social rights of the global poor through ideas of duties owed by the globally economically privileged.[48]

However, relatively recently, there has been a shift in focus to affirm the extraterritorial application of human rights obligations in the area of economic, social and cultural rights. This has come through important affirmations by the Committee on Economic, Social and Cultural Rights (CESCR), to be addressed below. It is also reflected in the 2001 adoption by a group of experts of the 'Maastricht Principles' on the subject, together with an associated commentary and broader supportive academic literature.[49] Moreover, when the International Court of Justice (ICJ), as part of its general shift into the enforcement of international human rights law, affirmed the extraterritorial application of this law, it did so in a manner that covered both economic, social and cultural rights as well as civil and political rights, reflecting how, as a body with potentially plenary reach when it comes to applicable law, it was able to move beyond the limitations of human rights enforcement bodies tied to particular treaty instruments, and

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[47] See the discussion and sources cited in Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (2013) chapter 35.

[48] E.g., most recently, Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (2018); contrast this with the position of Chimni (n 6), discussed below in Section V.

[49] The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (ETO Consortium 2011) <www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm> (29 November 2019); Olivier De Schutter *et al*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084. For a critical analysis of the general topic and the Maastricht initiative, plus further references relating to it see, e.g., Wilde (n 20), and sources cited therein.

the bias in favour of civil and political rights reinforced by the relatively greater activity by institutional arrangements focusing on that field.[50]

Moreover, there has also been a relatively recent acceptance that human rights obligations concerning the environment have an extraterritorial dimension, notably with the landmark 2018 Advisory Opinion of the Inter-American Court of Human Rights on the American Convention on Human Rights, covering civil and political rights, which, following the established position that the term 'jurisdiction' in that treaty has an extraterritorial dimension, affirmed the applicability of transboundary environmental harm in a manner that builds on the regime in international environmental law reflected in the aforementioned principle 2 of the Rio Declaration.[51] As indicated by this Opinion, and by other human rights jurisprudence on the environment generally, human rights law is also significant to the 'environmental justice' topic because of the greater opportunities for enforcement/adjudication that its associated bodies provide compared to the picture when international environmental law is addressed in isolation.[52]

That said, the extraterritorial application of all human rights law – relating to civil and political rights as well as economic, social and cultural rights – remains a hugely contested matter. In the field of economic, social and cultural rights in particular, the question of whether or not such applicability – and, within it, binding obligations that might speak to questions of economic redistribution within the terminology of 'cooperation' and 'assistance' used in some of the aforementioned treaties (to be explored below) – is settled law or merely at the stage of *de lege ferenda* remains disputed, as reflected, for example, by the manner in which the Maastricht Principles advocates hedge their position on the latter issue, seemingly out of deference to resistance by socio-economically privileged states.[53] The Maastricht initiative notwithstanding, commentary on extraterritorial applicability remains skewed towards coverage of civil and political rights, and, the determinations by the CESCR and the jurisprudence of the ICJ notwithstanding, international enforcement remains similarly skewed.

Human rights treaty law may have potential for the question of global economic redistribution to promote social rights via extraterritorial obligations, then, but whether this amounts to much remains unclear. Moreover, when it comes to the 'environmental justice' topic in particular, whereas the concept of extraterritorial human rights obligations triggered in circumstances of transboundary environmental harm, as addressed in the Inter-American Advisory Opinion, is obviously of direct significance and thus central importance, attention is also needed on the potential that the separate, more general notion of social rights obligations operating across borders might also have for the topic.[54]

Thus far, there has not been a detailed and comprehensive academic treatment of all the relevant treaty provisions on the question of extraterritoriality and social rights, expert commentary tending to either ignore or downplay socio-economic rights or, when addressing them, to be selective, focusing only on the ICESCR or only on the global instruments, or not

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[50] See Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties' (2013) 12 Chinese Journal of International Law 639, and sources cited therein.

[51] IACtHR, Advisory Opinion OC-23/17 (n 32), paras 72–82, 95–103.

[52] On this jurisprudence, see the sources cited above, note 31.

[53] See the discussion and sources cited in Wilde (n 20), 161–64, 167–68, 171–75.

[54] For discussion of the broader potential relevance of human rights generally, see e.g. Shelton (n 9), section E.

addressing detailed treaty provisions.[55] This is unfortunate in many respects, not least because, when it comes to enforcement and other means of authoritative interpretations, modalities such as those reviewed above are often linked to particular instruments, and expert analysis is of little/no use if it is either too generic (especially if what counts for generic analysis is actually based on a highly selective review of relevant instruments) or, when it is specific, omits particular instruments, thereby failing to be of any assistance when such instruments come to be interpreted.

As a means of redressing this, the present chapter provides a detailed and comprehensive analysis of the extraterritoriality question, focusing on economic transfers, when it comes to the provisions of all the aforementioned treaties – with the exception of the European Social Charter, given the seemingly settled position indicated above on its exclusively metropolitan territory application, absent express extensions being made to colonial territories.[56] This analysis explores whether or not the provisions are capable of providing a basis for binding obligations that operate extraterritorially. The focus is concerned primarily with the potential these provisions might suggest. The few instances where this potential has been clearly realized through authoritative determinations (such as by the ICJ) are referenced, but given the scant jurisprudence here, the analysis is as much about what interpretive options exist. This is done by focusing on what the treaties say, if anything, about where the obligations they contain apply, and how this question of applicability has been interpreted, and then the potential implications of the foregoing for the question of extraterritorial applicability.

The relevant human rights treaties contain express stipulations of their core obligations that vary significantly, in a highly complex manner, when it comes to the implications for spatial applicability. The following sections review these treaty provisions, mapping out an interpretative taxonomy of extraterritorial applicability. This begins, in section II, by reviewing how most of the relevant treaties link their obligations to secure economic, social and cultural rights to international assistance/cooperation/collaboration/relations. This is significant for the general approaches the treaties then take to the areas in which the obligations they contain apply. Two such approaches can be identified. In the first place, as reviewed in section III, is a 'free standing' regime of applicability, *viz.* lacking an express general stipulation as to where the obligations they contain apply. In the second place, as reviewed in section IV, is a regime based on such an express general stipulation: the term 'jurisdiction'. The extraterritorial potential of these two regimes of applicability is explored in each section, taking into account the significance to this, where relevant, of the links made to international cooperation, etc. These two approaches to applicability do not neatly correspond to particular treaty regimes in a mutually exclusive fashion: some treaty regimes encapsulate both as a general matter; others encapsulate one as a general matter and the other in relation to specific rights.

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[55] See, e.g., Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (2006); Michał Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009).

[56] This is not to accept that the seemingly settled position is, in the final analysis, correct. Space limitations prevent that question from being explored in the present piece.

II. GENERAL FACTOR: REFERENCES TO INTERNATIONAL ASSISTANCE AND/OR COOPERATION AND/OR COLLABORATION AND/OR RELATIONS

In considering the extraterritorial potential of the different regimes of applicability in the relevant treaties, it is necessary to begin by identifying a general context referred to in many of these regimes: international assistance and/or cooperation/collaboration/relations. This context is invoked as a framework within which economic, social and cultural rights should be realized.

Under the ICESCR, the general obligation (reviewed further below) to 'take steps' to realize the rights in the treaty is to be performed 'individually and through international assistance and co-operation'.[57] This requirement is then repeated with respect to various specific provisions in the Covenant.[58] The Covenant also stipulates that parties agree on the need for 'international action for the achievement of the rights' which it contains, with a non-exhaustive list of examples which include providing technical assistance.[59]

Similarly, the I-A PESC references the 'benefits that stem from the promotion and development of cooperation among States and international relations' in its preamble, and in its general obligation to 'adopt the necessary measures' to bring about the full observance of the rights it contains it stipulates that these should be 'both domestically and through international cooperation'.[60] International cooperation is also referenced in relation to the particular rights to food and the benefits of culture, the provision on the latter also invoking the significance of international relations.[61]

Also similarly, the CRC references the importance of international cooperation in its preamble (applicable to all the rights it contains, which are civil and political as well as economic, social and cultural in nature), in its main provision on implementing economic, social and cultural rights, and in specific provisions dealing with access to material from mass media, the right to health, the exchange of information on care for children with disabilities and matters relating to education.[62] It also references the importance of 'co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations' relating to refugee protection.[63] CRC Protocol 1, concerned with suppressing child prostitution and pornography, includes provisions on international cooperation regarding the 'root causes, such as poverty and underdevelopment', contributing to the vulnerability of children, and requiring states 'in a position to do' so to engage in international cooperation and assistance with regard to suppression activities generally, including cooperation on addressing root causes.[64] CRC Protocol 2, concerned with protecting children from involvement in armed conflict, similarly obliges states to engage in international cooperation and assistance generally on the implementation of the Protocol, and

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57 ICESCR (n 33), Art 29.
58 *Ibid.*, Arts 1, 11(1), 11(2), 15(4).
59 *Ibid.*, Art 23.
60 IA-PESC (n 33), preamble; Art 1.
61 *Ibid.*, Arts 12 and 14.
62 CRC (n 33), preamble, Arts 4 (main provision), 16 (on mass media), 18 (on the right to health), 23(4) (on care for disabled children), 28(3) (on education).
63 *Ibid.*, Art 22.
64 CRC Protocol 1 (n 33), Art 10 (quotation from para 3).

in particular requires that states 'in a position to do so' engage in the provision of financial assistance in this regard.[65]

The CRPD emphasizes in its preamble the importance of cooperation in relation to improving the living conditions of persons with disabilities, and invokes cooperation in its dedicated article on economic, social and cultural rights. Also, it has a separate, dedicated article on 'the importance of international cooperation and its promotion', providing stipulations on how this should be conducted, and, further, makes the consideration of international cooperation, and transmitting to international bodies requests for advice and assistance by state parties, part of the mandate of the Committee set up to scrutinize the implementation of the Convention.[66]

Like the CRPD, CIADDIS has an article specifically addressing cooperation, in this case articulated in terms of action between state parties in the prevention and elimination of discrimination against persons with disabilities, and also in undertaking to collaborate in both relevant research and developing means and resources to promote the 'independence, self-sufficiency, and total integration into society' of persons with disabilities.[67]

The provisions on economic, social and cultural rights in the AfCHPR, its Protocol on Women's Rights, CEDAW, CERD and the Arab Charter do not generally reference international cooperation in the realization of these specific rights.[68] However, the AfCHPR, CEDAW and the Arab Charter do contain some references to international cooperation. In the case of the ACfHPR, its preamble references the pledge in the preamble to the OAU Charter, and in the UN Charter and the UDHR, to cooperate in the socio-economic field; the article on self-determination references the right of peoples to assistance in liberation struggles; and the article on the right to freely dispose of wealth and resources also references the obligation of economic cooperation.[69] In the case of CEDAW, the Preamble references the importance of international cooperation in promoting social progress and development.[70] In the case of the Arab Charter, it contains an important provision affirming the right to development, which also references international cooperation:

> all States […] have a duty to give effect to the values of solidarity and cooperation among them and at the international level with a view to eradicating poverty and achieving economic, social, cultural and political development. By virtue of this right, every citizen has the right to participate in the realization of development and to enjoy the benefits and fruits thereof.[71]

Its provision on culture and science also references cooperation.[72]

All the foregoing provisions on assistance and cooperation provide a general context for the substantive obligations that the treaties contain when it comes to the realization of the rights they contain. The significance of the provisions will be revisited, then, when these obligations

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[65] CRC Protocol 2 (n 33), Art 7 (quotation from para 2).

[66] CRPD (n 33), preamble, Arts 4(2) (on economic, social and cultural rights), 32 (dedicated article on cooperation), 36(5) and 37(2) (mandate of the Committee).

[67] CIADDIS (n 33), Art IV.

[68] For these provisions, see the references above, n 33.

[69] AfCHPR (n 33), preamble, Arts 20(3) and 21(3). The relevant provisions of the OAU Charter (Charter of the Organization of African Unity (25 May 1963) 479 UNTS 39), are the preamble and Arts 1 and 2.

[70] CEDAW (n 33), preamble.

[71] Arab Charter (n 33), Art 37.

[72] *Ibid.*, Art 42(3).

are reviewed. This is done in the following two Sections, III and IV. Attention now turns, in Section III, to the first of the two general regimes of applicability, the 'free standing' approach to obligations.

III. FREE STANDING APPROACH TO APPLICABILITY, INCLUDING 'TAKE STEPS' – AFCHPR AND ITS PROTOCOL ON THE RIGHTS OF WOMEN, CEDAW, CERD, CIADDIS, CRPD, I-A PESC, ICESCR

a. As Evident in the Treaties

The AfCHPR and its Protocol on the Rights of Women, CEDAW, CERD, CIADDIS, the CRPD, the I-A PESC and the ICESCR adopt a 'free standing' model of applicability in general: they lack an express general stipulation about where the obligations to secure the individual/group rights (and obligations, in the case of the AfCHPR) contained within them apply (although in some cases, as will be explained, such a stipulation is given in relation to particular rights). They either contain a general clause (the ICESCR and AfCHPR) or a series of general clauses (the CRPD, the I-A PESC) setting out the nature of the obligations to secure such rights (and obligations in the AfCHPR) which lack an indication in this regard (such as by referring to 'jurisdiction'), or they lack such a general clause, obligations being stipulated in particular provisions which themselves (with some exceptions, as will be explained) lack an indication in this regard (the AfCHPR Protocol on Women's Rights, CEDAW, CERD and CIADDIS).[73]

The general clause of the ICESCR is articulated as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[74]

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[73] The AfCHPR (n 33) states in Article 1 that '[t]he […] parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'. But see below (n 75) for a reference to 'territory' in relation to one particular right. Under the CRPD (n 33), state parties 'undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability' (Art 4(1)). It then stipulates a series of general undertakings, all of which similarly make no reference to where they apply, for example '[t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention' (Art 4(1)(a)). See also the general clause relating to economic, social and cultural rights extracted in the text accompanying the following footnote. For the I-A PESC (n 33), the general obligations are contained in Arts 1–5; the main clause, in Art 1, is extracted below, n 74. For the AfCHPR Protocol on Women's Rights, CEDAW, CERD and CIADDIS (all n 33), there is no specific article stipulating a general regime of obligations in the treaty; the 'free standing' approach is evident in each of the specific obligations across the instruments (other than in particular instances, addressed herein).

[74] ICESCR (n 33), Art 2(1).

This language is echoed in the I-A PESC, and the particular general clause of the CRPD which deals with economic, social and cultural rights (that treaty, unlike the ICESCR and the I-A PESC, is not specific to such rights). The key differences for present purposes are that instead of taking 'steps' these treaties refer to taking 'measures', and that they only refer to taking action 'through' or 'within the framework of' 'international cooperation', not also assistance.[75]

Some of these instruments contain provisions on particular rights/aspects of rights that are specific to spatially defined contexts (such as 'jurisdiction' or 'territory').[76] A treatment of these provisions is beyond the scope of the present piece – apart from one specific provision, in Article 14 ICESCR, which is relevant, as will be explained below, to the question of the extraterritorial applicability of that treaty in general.

b. Extraterritorial Meaning, Including through the Links to International Cooperation, etc.

i. The ambiguous significance of the provisions

These 'free standing' obligations, including obligations to take 'steps'/'measures', which are articulated without any indication of where/in relation to whom the steps/measures are taken, could be limited to the situation within each state's sovereign territory, or could also encompass extraterritorial situations.

As for provisions that reference cooperation and, in the case of the ICESCR, assistance, there are two sets of provisions to be considered here: first, those in the AfCHPR, and second, those in the ICESCR, the I-A PESC and the CRPD. As for the provisions in the AfCHPR, as mentioned, these are the specific provisions on self-determination, which reference the right of peoples to assistance in liberation struggles, and the right to freely dispose of wealth and resources, which references the obligation of economic cooperation. As for the provisions in the ICESCR, the I-A PESC and the CRPD, these are the requirement to take steps/measures to realize economic, social and cultural rights in particular, doing this through/within the framework of 'cooperation' and, in the case of the ICESCR, 'assistance'.

These provisions could refer only to being the beneficiary of cooperative activities and assistance, where it is offered, when addressing the territorial situation. They could also refer to being engaged in the provision of assistance and activities of international cooperation (when in a position to do so) in relation to extraterritorial situations. Whereas clearly engaging

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[75] I-A PESC (n 33), Art 1 reads:

> 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.

The somewhat equivalent clause in Art 4(2) CRPD (n 33) reads:

> to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

[76] See AfCHPR (n 33), Arts 12(4) and 23(2)(b); AfCHPR Women's Rights Protocol (n 33), Art 10(2); CIADDIS (n 33), Art III(1)(b); ICESCR (n 33), Arts 1, 14; CEDAW (n 33), Arts 3, 6, 14(1), 14(2), 15; IA-PESC (n 33), Art 10(2)(b).

in the former activities (being a beneficiary) on the part of any given state would presuppose that one or more other states and/or international organizations are engaged in the latter activities (being a provider), rendering the former activity obligatory does not necessarily require the latter also to be obligatory; it could simply require action for the beneficiary state insofar as (as a matter of discretion) action is taken by a provider state/international organization. But equally the provision could be interpreted so that there are obligations both ways. If the latter interpretation were followed, an obligation borne by the provider state would have implications for economic transfers across borders from the socio-economically privileged to the socio-economically less privileged, aimed at the greater realization of social rights for people in the latter category.

Such an interpretation has indeed been followed by the CESCR as far as the ICESCR is concerned, suggesting an extraterritorial orientation, both in a general, non-specific fashion that would be broad enough to encompass an obligation to engage in economic transfers, and even specifically to stipulate an obligation to provide assistance extraterritorially. This approach is potentially transferable to the AfCHPR, I-A PESC and the CRPD.

Similarly, more generally the CERD has been interpreted to have an extraterritorial meaning, an approach that is potentially transferable to the other treaties that also lack general clauses stipulating the nature of the obligations they contain, *viz.* the AfCHPR Protocol on Women's Rights, CEDAW and CIADDIS.

ii. ICESCR, with transferability to the AfCHPR, CRPD and I-A PESC

The CESCR has made various pronouncements affirming the extraterritorial application of the free standing obligation in the Covenant. Adopting the tripartite conception of obligations, pronouncements that are specific to 'respecting' and 'protecting' human rights in the extraterritorial context are significant because they are potentially reflective of a general understanding of extraterritorial applicability. Pronouncements on 'fulfilling' rights extraterritorially are significant in this general sense and also more specifically for the present focus on socio-economic redistribution, given that the provision of material assistance is a key element of fulfilling rights.

On the obligation to 'respect', the CESCR has stated that states are obliged under the Covenant 'to take steps to respect the enjoyment of the right to food in other countries' and 'to respect the enjoyment of the right to health in other countries'.[77] This obligation understood extraterritorially has been most fully explored in the context of economic sanctions, and there is now general consensus that in certain circumstances sanctions which have the effect of diminishing the enjoyment of economic, social and cultural rights in the 'target' state violate the sanctioning state's human rights obligations.[78] On the right to food in particular, the CESCR stipulated that

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[77] CESCR, 'General Comment No 12 on the Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5, para 36; CESCR, 'General Comment No 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4, para 39.

[78] See, e.g., CESCR, 'General Comment No 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/C.12/1997/8; see also Matthew Craven, 'Human Rights in the Realm of Order: Sanctions and Extraterritoriality' in Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 233.

> States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.[79]

On the right to health in particular, the CESCR stipulated that

> States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure.[80]

On the obligation to 'protect', when it comes to the right to health in particular, the CESCR has stated that state parties to the ICESCR must

> prevent third parties from violating the right in other countries, if they [states parties] are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.[81]

When it comes to the 'right to food in other countries' in particular, the Committee has stated that states have an obligation under the Covenant to 'take steps to protect that right'.[82]

Whereas the foregoing specific determinations can be seen as reflective of a more general position on extraterritorial applicability which might also encompass a specific obligation concerning economic redistribution, it is the obligation to 'fulfil' rights which has the potential to implicate such a specific obligation directly. This potential would seem to be realized through determinations affirming that the obligation of cooperation includes a requirement to provide assistance to other states. In its General Comment No 3, the CESCR stated that, as a matter of the ICESCR and other norms,

> 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.[83]

Moreover,

> 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.[84]

On the right to food 'in other countries' in particular, the Committee stated in General Comment No 12 that states 'should take steps to facilitate access to food and to provide

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[79] CESCR (GC 12) (n 77), para 37.
[80] CESCR (GC 14) (n 77), para 41.
[81] *Ibid.*, para 39.
[82] CESCR (GC 12) (n 77), para 36.
[83] CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23, para 14.
[84] *Ibid.*, para 13.

the necessary aid when required'.[85] On the right to health, the Committee stated in General Comment No 14 that

> [d]epending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.[86]

This assertion is then linked, via a footnote, to the following assertion made later in the same General Comment:

> For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide 'international assistance and cooperation, especially economic and technical' [a quote from the Covenant, Art. 2.1] which enable[s] developing countries to fulfil their core and other obligations [regarding the right to health].[87]

This builds on the earlier statement on the negative consequences of there being an absence of assistance programmes on the part of states with the relevant material capacities, creating a positive assertion of a requirement to provide assistance on the part of such states, a position reinforced by the assertion made in relation to the right to food in General Comment No 12. A further assertion has been made in the specific context of emergencies, thus:

> States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities.[88]

There is also a specific 'collective responsibility to address' the problem of diseases that are easily transmissible across borders, and 'economically developed States […] have a special responsibility and interest to assist the poorer developing States in this regard'.[89]

Taking these statements together, there is clear authority that the Covenant applies extraterritorially in general, and in particular the obligation to 'take steps […] through international assistance and co-operation' includes the *provision of assistance* extraterritorially on the part of states in a material position to do so.

The Committee has also made various stipulations concerning what should be done in terms of how assistance programmes operate and the impact of this on the human rights in the Covenant generally; how assistance programmes in the context of emergencies should operate; and the impact of international agreements, and the actions of international organizations, notably the international financial institutions, on the right to health in particular.[90] These

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[85] CESCR (GC 12) (n 77), para 36.

[86] CESCR (GC 14) (n 77), para 39 (footnote omitted).

[87] *Ibid.*, para 45.

[88] *Ibid.*, para 40.

[89] *Ibid.*, para 40. This stipulation is prefaced by the observation that 'given that some diseases are easily transmissible beyond the frontiers of a State'. Such a rationale does not rule out the co-application of other normative underpinnings, including that which is the subject of the present focus.

[90] See, e.g., CESCR, 'General Comment No 2 on International Technical Assistance Measures' (2 February 1990) UN Doc E/1990/23 on assistance programmes on the rights in the Covenant generally; CESCR (GC 14) (n 77), on assistance in the context of emergencies; *ibid.*, para 40, on the right to health.

stipulations imply the extraterritorial application of the Covenant in general, building on what has already been reviewed in this regard.[91]

The approach to extraterritorial applicability generally taken for the ICESCR is transferable to the other treaties that contain equivalent provisions: to the AfCHPR, which similarly contains a general free standing clause setting out the nature of its obligations (and rights) generally, and to the CRPD and the I-A PESC, which contain a series of general clauses setting out the nature of the obligations to secure rights therein.

When it comes to the specific obligation to take 'measures' 'through international co-operation' with respect to economic, social and cultural rights in the CRPD and I-A PESC, and the obligation to engage in economic cooperation when it comes to the right to freely dispose of wealth and resources in the AfCHPR, the absence of the word 'assistance' sets the provisions apart from the ICESCR obligation to take 'steps […] through international assistance and co-operation'. This potentially rules out the transferability of the aforementioned approach taken by the CESCR – that this provision amounts to an obligation on the part of states in a position to do so to provide economic assistance across borders. However, 'assistance' can be seen as encompassed within 'cooperation' so as to enable this. In any case, the approach taken to 'assistance' under the ICESCR is potentially transferable to the express reference to this term in the AfCHPR when it comes to the rights of peoples to assistance in liberation struggles.

iii. CERD, with transferability to the AfCHPR Protocol on Women's Rights, CEDAW and CIADDIS

As for CERD, in the 2008 Provisional Measures Order in the *Georgia v Russia* case, the ICJ observed

> that there is no restriction of a general nature in CERD relating to its territorial application; whereas it further notes that, in particular, neither Article 2 nor Article 5 of CERD, alleged violations of which [by Russia in Georgia] are invoked by Georgia, contain a specific territorial limitation […] the Court consequently finds that these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of a State party when it acts beyond its territory.[92]

It then went on to call upon '[b]oth Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia' to take certain acts to comply with the Convention, a determination that assumed the extraterritorial application of CERD to Russian forces in Georgia.[93]

In the *Roma Rights* decision of the UK's highest court, then called the Judicial Committee of the House of Lords, it was held that CERD applied extraterritorially to the actions of UK immigration officials in Prague airport. This was done without explanation, assuming applicability when holding that the actions at issue breached the treaty.[94]

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[91] In being specific to how assistance programmes are conducted and the impact of the actions of international financial institutions are not by themselves authority for the proposition that there is a particular extraterritorial obligation to provide assistance.

[92] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* 2008 ICJ 353, para 109 (Provisional Measures of 15 October).

[93] *Ibid.*, para 149.

[94] *R v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, 9 December 2004, [2004] UKHL 55. Lady Hale holds that the

In its 2019 decision on preliminary objections in the *Ukraine v Russia* case, the ICJ took the same approach as the Judicial Committee of the House of Lords, assuming extraterritorial applicability without explanation. It held that the complaints Ukraine was making, concerning violations by Russia of the CERD, fell within the provisions of the treaty.[95] These complaints covered, *inter alia*, the situation in Crimea, which Ukraine and many other states and independent international legal experts regard to be Russian-occupied Ukrainian territory, and Russia regards to be its own territory. The Court did not take an express position on the legal status of the territory, nor did it expressly address the issue of territorial/extraterritorial applicability of the Convention. That said, on the legal status issue, it is somewhat unlikely that on such an important matter the Court would opt for implying a position in favour of one view over the other, in lieu of making an express statement on the matter and providing justification for the position taken. Given this, it is preferable to view the Court's position on the complaints falling within the scope of the Convention as intended to be without prejudice to the question of the status of the territory being determined. As such, this position has to assume that the Convention is capable of applying not only territorially but also extraterritorially (if extraterritorial applicability was not being assumed, then the Court's finding would have to be based on an assumption that Crimea was Russian territory).

This approach to CERD is potentially transferable to the other treaties which similarly lack general causes on the nature of the obligations they contain, obligations instead being stipulated in particular provisions which themselves lack an indication in this regard: the AfCHPR Protocol on Women's Rights, CEDAW and CIADDIS.

c. Potential for Socio-economic, Colonial and Environmental Justice Across Borders

The relevance of the foregoing analysis to the idea of economic transfers from the economically privileged to secure social rights across borders is that this can be understood as a multi-level regime cascading through progressive specificity. At the most general level there is simply an extraterritorial orientation to realize socio-economic obligations, within which is the potential, among many other things, for states with the means to engage in resource transfers across borders to secure social rights. This operates with respect to all the instruments: the AfCHPR and its Protocol on the Rights of Women, CEDAW, CERD, CIADDIS,

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practice 'was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party' (para 98). She then goes on to review CERD as one such treaty in paras 100–101. Lords Bingham, Carswell and Hope agree with Lady Hale's general finding on discrimination, thereby including the position on applicability she assumes within this (paras 31 [implicitly], 106 and 114 [with a qualification that is not material to the applicability question], and 48 respectively). Lord Steyn quotes the relevant provisions from CERD and asserts that '[t]he operation at Prague Airport placed the United Kingdom in breach of this international obligation' (para 44). He also offers his agreement to the 'reasons given by Baroness Hale on the discrimination issue' (para 47). This amounts to a unanimous position in the decision in favour of a seemingly automatic applicability of CERD to UK officials acting extraterritorially, given in the context of the immigration decisions being made by such officials, but not explained as being specific to that in terms of its rationale (since no rationale is considered – applicability is assumed).

[95] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Preliminary Objections) 2019 ICJ paras 95–97 (Judgment of 8 November 2019).

CRPD, I-A PESC and the ICESCR. Then there is a relatively narrower obligation to engage in international cooperation in the realization of socio-economic rights extraterritorially, again within which is the potential for a requirement for states with the means to engage in resource transfers across borders. This operates with respect to socio-economic rights in a general sense as a matter of the ICESCR, the CRPD and I-A PESC, and the right to freely dispose of wealth and resources under the AfCHPR. Then, even more narrowly, there is a specific obligation to engage in assistance in the realization of socio-economic rights extraterritorially, which has been affirmed to include the provision of economic assistance across borders by states with the means to do this as far as the ICESCR is concerned – an approach that is potentially transferable to the obligation to assist peoples in liberation struggles under the AfCHPR.

An obligation borne by states to realize social rights extraterritorially has the potential to provide one way through which the agenda of global socio-economic, colonial and environmental justice can be realized, via economic transfers across borders, for the following reasons. In the first place, the extraterritorial orientation is general, thereby taking in all people in the world. In the second place, the way in which obligations to realize social rights are conceived in terms of the position of the rights-holders – that those in greatest need should be given the greatest support – incorporates the objective of challenging inequality in the way that it operates. Similarly, the way such obligations are conceived in terms of the position of the obligation-bearers – that the level of support should be set depending on available resources – incorporates the objective that the globally economically privileged should bear a greater substantive requirement when it comes to the level of resources provided.

Getting to the stage of such a normative regime would require many further steps. Before reviewing what would be needed here, attention will turn to the alternative basis for extraterritorial human rights obligations in human rights treaties, the 'jurisdiction' concept.

IV. 'JURISDICTION' – ARAB CHARTER, CRC, CRC PROTOCOLS 1 AND 2, READ INTO THE ICESCR AND AFCHPR, AND IN CONSEQUENCE POTENTIALLY RELEVANT TO OTHER TREATIES WITH 'FREE STANDING' CONCEPTIONS OF OBLIGATIONS

a. Arab Charter, CRC and CRC Protocols 1 and 2 Express Provisions

The Arab Charter contains a general stipulation whereby states are obliged 'to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein'.[96] Specific provisions, which do not have direct implications for economic redistribution, also reference (again) 'jurisdiction' or 'territory' as the locus for their operation.[97] Under the CRC, state parties are obliged to 'respect and ensure' the rights in the treaty to 'each

[96] Arab Charter (n 33), Art 3(1).

[97] On 'jurisdiction', see *ibid.*, Arts 8 (on the probation on torture, in human and degrading treatment), 12 (on the right to a legal remedy). On 'territory', see *ibid.*, Arts 26 (freedom of movement and the expulsion of individuals from a state's territory) and 34(5) (the rights of migrant workers in a state's territory).

child within their jurisdiction' – a general clause, like in the Arab Charter.[98] Under the CRC Protocols 1 and 2, each state party is obliged to 'take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction'.[99]

b. Extraterritorial Meaning

As with the 'free standing' approach to applicability, the term 'jurisdiction' is ambiguous when it comes to its spatial limits. It could be synonymous with the exercise of state authority in its sovereign territory exclusively, or also have an extraterritorial dimension.

However, the relatively greater instances of authoritative decisions in the field of civil and political rights when compared to economic, social and cultural rights, problematic as a general matter, are less concerning on this particular issue because of the potential transfer of underlying common ideas between the two normative regimes. This is possible because the key treaties on civil and political rights – the American Convention on Human Rights, the European Convention on Human Rights, and the ICCPR – all contain the 'jurisdiction' regime of applicability, and have all been consistently interpreted in such decisions by national and international bodies to have an extraterritorial dimension.[100]

This dimension can be characterized in terms of the existence of a particular type of power relationship between a state and people outside its borders. It has usually been defined somewhat narrowly, to require a degree of kinetic 'effective control' exercised in a direct sense over territory and/or individuals, for example during a military occupation.[101] Only in such circumstances do the obligations apply, and, indeed, it is because of the exercise of this type of determinative power relationship between a state and people/territory outside its sovereign territory that the obligations are seen as necessary. According to this view, absent this particular power relationship, the obligations are inapplicable.

As might be expected, this approach to the extraterritorial meaning of the term 'jurisdiction' in treaties covering civil and political rights exclusively has also been followed for the CRC and CRC Protocol 2, which cover these rights and also economic, social and cultural rights (in the latter case as far as the provision of international assistance in efforts to protect children from involvement in armed conflict is concerned). The extraterritorial applicability of the CRC has been affirmed by both the CRC Committee and the ICJ, the latter also making such an affirmation in the case of CRC Protocol 2. The affirmation by the Committee is contained, for example, in the way it has assumed the applicability of the CRC to Israel in the occupied Palestinian territories (which are extraterritorial as far as Israel is concerned), as a general matter and also in various stipulations concerning specific issues in the territories.[102] The

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[98] CRC (n 33), Art 2(1). Also, CRC Protocol 3 (n 45) references in its preamble that '[n]oting that the States parties to the Convention on the Rights of the Child […] recognize the rights set forth in it to each child within their jurisdiction'.

[99] Art 6(1) of both Protocols (n 33). See also Art 6(3).

[100] See the discussion in Wilde (n 47), and sources cited therein.

[101] *Ibid.*

[102] For example, in its Observations concerning Israel and the CRC in 2002, the Committee prefaced its treatment of the issue by stating that '[g]iven the responsibility of the State party for the implementation of the Convention in the occupied Palestinian territories'. CRC Committee, 'Concluding Observations on Israel' (4 October 2002) CRC/C/15/Add.195, para 2. This position is then implicit in

affirmation by the ICJ also comes from a treatment of the Israel–Palestine situation in the *Wall* Advisory Opinion, where the Court, having reviewed the question of the extraterritorial application of the ICCPR – which contains, as mentioned, the 'jurisdiction' trigger for applicability – and concluded that this treaty 'is applicable in respect of acts of a State done in the exercise of its jurisdiction outside its territory' then turns to the CRC, quotes the 'jurisdiction' provision from the treaty, and simply asserts: '[t]hat Convention is therefore applicable' (within the occupied Palestinian territories, to Israel).[103] Then in its decision in the *DRC v Uganda* case the Court expanded the *Wall* dictum articulated in relation to the ICCPR, stating that 'international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories', citing the *Wall* decision paragraphs which cover the ICCPR, the CRC and, as will be addressed further below, the ICESCR.[104] This reformulation brings out what was implicit in the *Wall* pronouncements, that the logic of its assertion made in relation to the ICCPR applied to the ICESCR and the CRC, thereby casting the assertion as a general doctrine and, moreover, one operative with respect to 'international human rights instruments' generally, not just these three particular treaties. It follows this with a list of human rights treaties, including the CRC and CRC Protocol 2, asserting that it considers them to be 'applicable, as relevant' (which in the context of the case meant applicable extraterritorially).[105] This logic is clearly transferable to CRC Protocol 1 (which, regrettably, was not addressed in the case, despite prostitution being a common practice in wartime, and both states being parties to it at the relevant time).[106] More broadly, these approaches are clearly transferable to the Arab Charter, which has not yet been subject to adjudication on the question of its extraterritorial applicability.

c. Read into ICESCR and AfCHPR, and Defined Extraterritorially, Leading to a Hybrid Model of Applicability

i. Reading 'jurisdiction' into treaties that do not contain it as an express general provision

The foregoing treatment of the subject of extraterritorial applicability by the ICJ in the *Wall* Advisory Opinion and the *DRC v Uganda* decision also takes in, as indicated, the ICESCR and, in the case of the *DRC v Uganda* decision, the AfCHPR, both of which, unlike the CRC and CRC Protocol 2, adopt a 'free standing' rather than a 'jurisdiction' approach to general applicability.

When it comes to the ICESCR in the *Wall* Advisory Opinion, the ICJ observes that since Article 14 ICESCR, concerning one particular right (education), references 'metropolitan territory or other territories under its jurisdiction', extraterritorial applicability of the treaty

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various assertions about particular situations in the territories (paras 4, 5, 14, 15, 20, 26, 36–37, 44–45, 50, 52–53, 57–58, 62).

[103] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136, paras 108–11 (on the ICCPR), 113 (on the CRC) (Advisory Opinion of 9 July).

[104] *Armed Activities on the Territory of the Congo (DRC v Uganda)* 2005 ICJ 168, para 216 (Judgment of 19 December), citing the *Wall* Advisory Opinion (n 103), paras 107–13.

[105] *DRC v Uganda* (n 104), para 217.

[106] Information on the DRC and Uganda being parties to the Protocol taken from here: <https://indicators.ohchr.org/> (29 November 2019).

generally 'is not to be excluded'.[107] The Court then invokes the treatment of the extraterritorial applicability of the treaty as far as Israel is concerned (the state at issue in the *Wall* Opinion) by the ICESCR Committee, which utilizes the 'jurisdiction' test for the extraterritorial applicability of the ICESCR, and defines this extraterritorially as the exercise of 'effective control'.[108] The Court cites the Committee's use of 'effective control' in particular, and then rejects what it describes as Israel's refusenik position on applicability, stating that the Palestinian territories are subject to Israel's 'territorial jurisdiction' (which in this context means *extraterritorial* jurisdiction – the Court was not somehow treating the territories as part of Israel's sovereign territory, quite the reverse), and that 'in the exercise of the powers available to it on this basis' Israel is bound by the ICESCR.[109] Then in *DRC v Uganda*, as mentioned earlier, the Court pronounces a general doctrine for the extraterritorial application of a set of human rights treaties – which includes the ICESCR and the AfCHPR – based on an expansion of the dictum from the *Wall* Advisory Opinion about the ICCPR, that 'international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories'.[110]

Unlike with the CRC and CRC Protocol 2, what is significant about these approaches to the ICESCR and the AfCHPR by the ICJ and (in the case of the latter instrument) the CESCR is that they appear to 'read in' the 'jurisdiction' regime for applicability, including extraterritorial applicability, both directly (this word is used when determining the question of extraterritorial applicability) and indirectly (the 'effective control' basis for extraterritorial applicability – which, as mentioned, is the way the term 'jurisdiction' has been defined in this context – is utilized by the ICESCR Committee, and this is quoted by the ICJ), to treaties that do not use this word expressly as a general term to denote the scope of applicability (although the ICESCR does utilize it in Article 14 with respect to one right in particular).

ii. The effect: hybrid 'free standing' and 'jurisdiction' regimes of applicability

As indicated earlier, the CESCR has considered the extraterritorial application of the ICESCR extensively as a 'free standing' concept, without reference to the jurisdiction concept which it and the ICJ separately deployed when considering Israel in the Palestinian territories and, in the case of the ICJ, Uganda in the DRC – both being situations of occupation involving effective control exercised extraterritorially. Thus, it would seem, the approach to applicability based on the jurisdiction concept, arising when 'effective control' is exercised extraterritorially, is complementary to, not a substitute for, the 'free standing' approach. In consequence, there are two regimes of applicability: first, a 'free standing' approach generally (for example, in the

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[107] *Wall* (n 103), para 112.

[108] See CESCR, 'Concluding Observations to the Initial Report' (4 December 1998) UN Doc E/C.12/1/Add.27, paras 6, 8 (the latter quoted by the ICJ in the *Wall* Advisory Opinion, para 112); 'Second Periodic Report', Add.32, paras 6–8 (para 5 quoted by the ICJ in the *Wall* Advisory Opinion, para 112); 'Concluding Observations to Second Periodic Report' (26 June 2003) UN Doc E/C.12/1/Add.90, paras 15, 31 (cited in the *Wall* Advisory Opinion, para 112). See also the later decisions of CESCR 'Concluding Observations on Third Periodic Report of Israel' (16 December 2011) UN Doc E/C.12/ISR/CO/3, para 8; 'Concluding Observations on Fourth Periodic Report of Israel' (12 November 2019) UN Doc E/C.12/ISR/CO/4, paras 8 and 9.

[109] *Wall* (n 103), para 112.

[110] *DRC v Uganda* (n 104), paras 216–17: the quote is from para 216, and it is quoting the *Wall* Advisory Opinion, para 111 (which is only about the ICCPR).

ICESCR, to 'take steps'), which has an extraterritorial element to it, and, second, an approach focused on the specific exercise of effective control extraterritorially, whereby applicability operates on the basis of the concept of 'jurisdiction' being read into the treaty.

Bearing in mind what was said earlier about the potential transferability of the approach to the extraterritorial operation of the 'free standing' model of extraterritorial applicability in the ICESCR to the AfCHPR, and the reading in of the 'jurisdiction' trigger for extraterritorial applicability adopted by the ICJ in relation to the latter instrument, that instrument would seem similarly to operate in this hybrid manner.

More broadly, bearing in mind what was said earlier about the potential transferability of the approach to the extraterritorial operation of the 'free standing' model of extraterritorial applicability adopted in relation to the ICESCR to not only the AfCHPR but also the CRPD and the I-A PESC, and the equivalent approach adopted in relation to CERD to the AfCHPR Protocol on the Rights of Women, CEDAW and CIADDIS, it could also be said that all these treaties, like the ICESCR and the AfCHPR, can operate in a hybrid fashion, their extraterritorial applicability also being potentially operable on the basis of the 'jurisdiction' approach being read into them.

d. The CRC and its Protocols 1 and 2

A different 'hybrid' approach is evident in the CRC and its Protocols 1 and 2. In these treaties, as mentioned, the 'jurisdiction' regime for extraterritorial applicability, based on effective control, is operative for all the provisions therein, including those with economic implications, based on express references to this term rather than it being read into the treaties. However, additional stipulations are then made for economic, social and cultural rights in particular.

In the case of the CRC, the provision states that:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.[111]

This provision uses some of the language contained in Article 2(1) ICESCR, but unlike that provision, with its obligation to 'take steps […] to achieve progressively the full realization of the rights' in the treaty, this is not the source of the primary obligation to secure the rights in the treaty; that is contained in the separate 'jurisdiction' clause. The 'implementation of the rights' in the treaty being referred to here is therefore what is set out in that clause – the obligation to secure in the 'jurisdiction' – which then, in the case of economic, social and cultural rights, is to be done 'where needed, within the framework of international co-operation'. This is of a different character, then, from the free standing obligation to 'take steps' in the ICESCR. Whether or not it would have an extraterritorial dimension would depend on whether or not the general 'jurisdiction' regime has this, which in turn would arise, according to the standard approach, if there is the exercise of effective control extraterritorially. Absent that unusual situation, there would be no other extraterritorial obligation to secure such rights, unlike in the ICESCR. Thus the requirement of operating 'within the framework of international

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[111] CRC (n 33), Art 4.

co-operation' would be only a matter of being the beneficiary of this for domestic realization of rights, not also, if the means existed, in being involved in the securing of such rights in other countries. The reference to engaging in international cooperation 'where needed', a term that is not used in the ICESCR, would therefore seem to mean 'need' in the sense of the situation in the state in question only, not also the situation in other states if the state was in a position to assist – in other words, to refer only to states in a socio-economically disadvantaged position, not also those in a socio-economically privileged position. If this is correct, then cooperation, in terms of material assistance, from those other states would not be a matter of this treaty (apart from in unusual situations when they exercise effective control in that state's territory), but would have to come from their general obligations in this regard, which would take things back to the other relevant instruments reviewed above.

Things are different, however, in Protocols 1 and 2 to the CRC, which concern the suppression of child prostitution and pornography and protecting children from involvement in armed conflict, respectively. As mentioned earlier, as well as having general regimes of applicability using the 'jurisdiction' concept, those treaties also contain specific stipulations that cover not only cooperation in general but also assistance specifically, with, crucially, the latter requiring the provision of assistance internationally by 'states in a position to do so' in particular.[112] This echoes the language used by the CESCR, reviewed above, which is clearly a reference to socio-economically privileged countries, and is therefore concerned with such states having an extraterritorial obligation with respect to the realization, in other countries, of the rights contained in the treaties. The implications of this for economic assistance are especially significant in CRC Protocol 1, given that, as mentioned, its provisions on international cooperation include a focus on the 'root causes, such as poverty and underdevelopment' contributing to the vulnerability of children when it comes to involvement in prostitution and pornography, and in CRC Protocol 2, given that cooperation is to include the issue of the 'rehabilitation and social reintegration of persons who are victims' as a result of involvement in armed conflict.[113]

e. Potential for Socio-Economic, Colonial and Environmental Justice Across Borders

Bringing together what has been covered in the present section on the 'jurisdiction' regime for applicability: the treaties that use this term expressly – the Arab Charter, the CRC and CRC Protocols 1 and 2, and the treaties that it has been 'read into', the AfCHPR and the ICCPR, and by association, the other treaties it could be 'read into', the AfCHPR Protocol on the Rights of Women, CEDAW, CERD, CIADDIS, CRPD and the I-A PESC – can be interpreted to apply extraterritorially in the specific context where effective control is exercised over territory, such as in an occupation situation. In such circumstances, a state would have a general obligation to realize socio-economic rights.

The general significance, to the present question of global economic, colonial and environmental justice, of the effective territorial control basis for applying obligations is limited, since this basis is concerned with responsibility only when a narrowly defined kinetic power relationship exists. The alternative generalized approach, therefore, is of much broader significance.

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[112] See above, text accompanying notes 64 and 65.

[113] CRC Protocol 1 (n 33), Art 10 (quotation from para 3); CRC Protocol 2 (n 33), Art 7.

That said, within the narrow class of situations involving effective territorial control, having obligations then triggered in a generalized sense is potentially important. Power relations of this kind are usually practised by economically privileged states over territories that are relatively less economically privileged – whether in the case of military occupations, or remaining formal colonial arrangements (to adopt the way international law frames these arrangements and categories, which has its problems, obviously). Indeed, the sharp difference in economic standing is usually a key factor in how it is possible to establish the control relationship in the first place, why this is done by the controlling state and also what effect the relationship has, when it involves, as is usually the case, economic exploitation. Where, then, such relationships exist, a regime of obligations concerning the protection of social rights is highly relevant. Indeed, such obligations would have the potential to challenge the economically exploitative nature of such arrangements. As such, this regime would speak to aspects of the colonial justice agenda even if it would not, by itself, address the fundamental question of ending the arrangement (something which would be a matter for the law of self-determination, which does form part of human rights law).

The provisions made in the two CRC Protocols open the focus out from situations of direct territorial control to a generalized approach evident in the alternative 'free standing' regime of extraterritorial applicability. Under the Protocols, states 'in a position to do so', that is, those which are economically privileged, are under an obligation to provide 'assistance' in the context of international cooperation, concerning the implementation of the Protocols, with specific stipulations in relation to child pornography and prostitution that this address 'root causes, such as poverty and underdevelopment' contributing to the vulnerability of children, and the 'rehabilitation and social reintegration of persons who are victims' through being involved, as children, in armed conflict.

V. CONCLUSIONS

In his manifesto for 'post-colonial' approaches to the global system of law and governance that would address many aspects of the three challenges referred to at the start of this piece, Chimni observes:

> Few would deny that the globalization of human rights does offer an important basis for advancing the cause of the poor and the marginal in third world countries. Even the focus on civil and political rights is helpful in the struggle against the harmful policies of the State and international institutions […]. But it is equally true that the focus allows the pursuit of the neo-liberal agenda by privileging private rights over social and economic rights.[114]

Chimni ultimately chooses not to discard entirely the 'human rights' agenda, as some others have done (as mentioned above). For him, when it comes to international law in general, 'we need to guard against the trap of legal nihilism through indulging in a general and complete condemnation of contemporary international law'.[115] He observes that

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[114] Chimni (n 6), 18.
[115] *Ibid.*, 26.

> [t]he contradictions which mark contemporary international law [are …] manifested in the field of international human rights law which even as it legitimizes the internationalization of property rights and hegemonic interventions, codifies a range of civil, political, social, cultural and economic rights which can be invoked on behalf of the poor and the marginal groups. It holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds.[116]

He therefore argues that 'there is the need to make effective use of the language of human rights to defend the interests of the poor and marginal groups'.[117]

The present chapter has attempted to offer one contribution to such an effort, by making the case for the possibility that the provisions of all the human rights treaties that contain socio-economic rights can be interpreted to have an extraterritorial dimension. This creates the potential for the treaties to be able to address issue of economic, colonial and environmental justice across borders in general and as concerns the realization of social rights in particular. This interpretative potential has been realized, in the sense that it has been positively affirmed by authoritative interpretative bodies (such as the ICJ and the CESCR), across a representative subset of the relevant treaties, and the logic of these affirmations is transferable to the other treaties.

Extraterritorial applicability is possible in two distinct circumstances, with different potential when it comes to the significance for economic, colonial and environmental justice across borders. First is the 'free standing' model of applicability that operates with respect to the AfCHPR and its Protocol on the Rights of Women, CEDAW, CERD, CIADDIS, CRPD, the I-A PESC and the ICESCR, as well as certain specific obligations in CRC Protocols 1 and 2. This has the potential to encompass a duty on the part of states in a position to do so to engage in economic transfers across borders to realize social rights. States with the greatest economic privileges would bear the greater substantive duties in terms of the levels of resources provided.

Second is the 'jurisdiction' basis of applicability that is contained in express provisions in the Arab Charter, CRC, CRC Protocols 1 and 2, has been read in to the ICESCR and AfCHPR, and can be, following this logic, also read into the AfCHPR Protocol on the Rights of Women, CEDAW, CERD, CIADDIS, CRPD and the I-A PESC. It applies extraterritorially when states exercise direct kinetic control over territory, such as in occupation situations. States are then required to secure social rights in a generalized sense, something which has clear potential implications for economic transfers to enable this when they are in an economically privileged position to do so, and where the condition of social rights in the territory in question requires it. Such a position, and such requirements, are of course typically evident in situations where states exercise effective control over foreign territory, such as in military occupations and colonial arrangements.

Establishing how the treaty provisions can be interpreted in the two foregoing approaches is only the starting point in terms of the potential for these provisions to be the basis for an obligation to engage in economic transfers across borders to secure social rights. The next step, which is beyond the scope of the present chapter, is to establish the crucial question of what quantum of social provision is and should be required. This depends on two hugely

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[116] *Ibid.*, 26–27.
[117] *Ibid.*, 24.

contested matters.[118] In the first place is the general question for social rights of how the 'progressive' test, whereby states are required to secure such rights through social provision at levels that are contingent on available resources, can and should be interpreted given that what is 'available' is not a fixed matter but is of course determined by the particular economic/fiscal model adopted by any given state. In the second place is then a specific question raised by the extraterritorial orientation at issue: how is and should a balance be struck between securing social rights within a state's own territory, and doing so extraterritorially? And what difference in this regard should operate as far as the generalized 'free standing' extraterritorial obligations, as distinct from obligations triggered when states exercise direct kinetic control extraterritorially? In addressing these and other questions, it will also be necessary to situate the treaty regimes within the broader normative framework and to revisit the aforementioned 'soft law' regimes, notably concerning the right to development, and the commitments OECD states have made to certain levels of so-called development assistance and, more generally, international environmental law. States' obligations in international law have to be considered in the round, not on the basis of a partial view taking in only a subset of the relevant normative frameworks.[119] It may be, for example, that the interplay between the 'hard' and 'soft' regimes has normative significance, and that the latter, while insufficient to be formally binding by itself, can be read into the former, in turn providing greater specificity and substantive content than is evident in and possible from an exclusive focus on the treaty regimes.

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[118] See further the discussion in Wilde (n 20), 151–55, 162–63, 164–67 and sources cited therein.

[119] For a holistic approach, see the writing of Dinah Shelton, for example Shelton (n 9), section E. The HRCttee made the following observation in the context of the right to life under Article 6 of the ICCPR, and the environment: 'Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. Obligations of States parties under international environmental law should thus inform the contents of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law' (HRCttee (GC 36) (n 32), para 62).

PART II

THE PROTECTION OF SOCIAL RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

A. Universal Protection

5. Social rights protection under the ICESCR and its Optional Protocol – the role of the Committee on Economic, Social and Cultural Rights

Zdzisław (Dzidek) Kędzia[1]

I. INTRODUCTION

The purpose of this contribution is to outline the road to the international recognition of social rights as subjective and justiciable rights,[2] with a particular emphasis on the role of the Committee on Economic, Social and Cultural Rights (CESCR) in this respect. Section II is dedicated to the standard-setting and the substantive scope of the International Covenant on Economic Social and Cultural Rights (ICESCR). Section III focuses on the evolution of the implementation mechanism of the Covenant and its impact on the interpretation of the Covenant. Section IV analyzes some key aspects of the case law under the Covenant. Section V contains the main conclusions.

II. INTERNATIONAL RECOGNITION OF SOCIAL RIGHTS

Social rights are often called second generation rights. This does not seem to be a fortunate qualification, because of its hierarchical connotations. Indeed, regarding timing, more extensive social legislation did not appear until the second half of the nineteenth century. But the first social proclamations were already contained in the 1793 Declaration of Human and Citizen's Rights (Jacobin Constitution), which spoke about the duty of society to ensure a minimum of social security for those in need and the universal access to education (*mettre l'instruction à la portée de tous les citoyens*).[3] This happened only four years after the memorable French Declaration of Human and Citizens' Rights of 1789 and not much longer after the Virginia Declaration of Rights (1776) and the Bill of Rights of the Massachusetts Constitution (1780), which focused on civil and political rights. Nor does the nature of the values protected by social rights justify the hierarchization between generations of rights. Social rights are as

[1] The author is presently a member of the Committee on Economic, Social and Cultural Rights (and a former Chairperson) but opinions presented in this article do not necessarily reflect the position of the Committee.

[2] The term 'social rights' is used in this contribution as a name for the entire category of 'economic, social and cultural rights', as jointly protected by the ICESCR. On the subject of the recognition of social rights, also compare the contribution by Manfred Nowak in this *Research Handbook* (Chapter 1).

[3] Compare Arts 21–22 of the Declaration; also Art 16 of the Declaration establishing a right to property: 'The right of property is that which belongs to every citizen to enjoy, and to dispose at his pleasure of his goods, income, and of the fruits of his labor and his skill.'

important as civil and political ones for the preservation of human dignity and the development of human personality.[4]

The intention of these words is not to uphold the related dispute. Yet, the generation theory, although quite useful in human rights education, should not be applied without comment, in order to avoid misinterpretations leading to sanction of an overriding position of civil and political rights at the expense of social rights. The history of the United Nations confirms that care in this regard is not obsolete.

Three dates have marked the acceptance of social rights as an equal component of the International Bill of Rights at the international level. The first is the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948 by the UN General Assembly. The second is the proclamation of equality of all categories of human rights by the Second World Conference on Human Rights in Vienna in 1993. The third is the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008, completing the process of the recognition of social rights as subjective rights.

a. From the Universal Declaration of Human Rights to the International Covenants

Although the adoption of the UDHR only took two years, negotiations in the Commission on Human Rights had to deal with a number of serious controversies.[5] One of them concerned the recognition of social rights as human rights, which was questioned in particular by the political West for allegedly weak normative content and the associated lack of justiciability. Others, in particular Latin American countries and the Soviet bloc,[6] stressed the importance of social rights as a tool to protect disadvantaged members of society and as a guarantee of social justice. The latter also saw these rights as a political weapon in ideological rivalry in the context of the emerging Cold War. The path to compromise was opened, as was often the case with regard to the contents of the Declaration, by the Chairperson of the Commission, Eleanor

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[4] UNGA, 'Annotations on the text of the draft International Covenants on Human Rights (prepared by the Secretary-General)' (1 July 1955) UN Doc A/2929, chapter I, para 21.

[5] With regard to social rights compare Johannes Morsink, *The Universal Declaration of Human Rights – Origin, Drafting, and Intent* (1999) chapters 5 and 6. Maritain rightly asked: 'How can we imagine an agreement of minds between men who are gathered to precisely accomplish a common intellectual task, men who come from the four corners of the world and who do not only belong to different cultures and civilizations, but are of antagonistic spiritual associations and schools of thought'. Jacques Maritain, 'Introduction' in UNESCO, 'Human Rights – Comments and Interpretations. A Symposium Edited by UNESCO' (25 July 1948) Doc No UNESCO/PHS/(rev.), II.

[6] The Member of the Drafting Committee from Chile, Hernán Santa Cruz, whom Morsink recognizes as a leading advocate of social rights in the Declaration, saw these rights as a guarantee against any reoccurrence of fascism (Morsink (n 5), 89–90). When the General Assembly was about to adopt the Declaration, Santa Cruz emphasized that '[t]he true character of the declaration was revealed in three articles: articles 4, 23, 29 [in the final text respectively Articles 3, 22 and 28]. Article 4 proclaimed the right of the individual to life, freedom, and personal security; article 23 stated that everyone was entitled to economic, social, and cultural rights indispensable for his dignity, and to social security; article 29 proclaimed the need for a just social order and a peaceful international order – the two elements essential for the exercise of basic human rights.' See William A Schabas (ed.), *The Universal Declaration of Human Rights. The Travaux Préparatoires* (2013) 863–64; compare also Daniel Ricardo Quiroga-Villamarín, '"An Atmosphere of Genuine, Solidarity and Brotherhood": Hernán Santa Cruz and a Forgotten Latin American Contribution to Social Rights' (2019) 21 Journal of the History of International Law 71.

Roosevelt. It is said that she took care of her husband's legacy.[7] Indeed, in the Declaration one can see the spirit of the socially oriented messages of President Franklin D Roosevelt enshrined in his addresses to Congress in 1941 and 1944,[8] which not only influenced thinking in the United Nations at its start, but also is said to have helped Chairperson Roosevelt persuade the State Department to withdraw its opposition to the inclusion of social rights in the draft Declaration. There is no doubt that this compromise was also facilitated by the lack of binding legal character of the UDHR at the time of its adoption.

However, shortly afterwards, when it came to the negotiations on the human rights treaty establishing the legal obligations of states, the major differences as to the nature of social rights returned in full force.[9] Nevertheless, the General Assembly, still in 1950, declared that civil and political freedoms and economic, social and cultural rights are interconnected and interdependent, as well as equally important for the human person, and requested that the Commission include 'a clear expression of economic, social and cultural rights' into the draft covenant.[10] Yet, this did not help to overcome the divisions. This time, Chairperson Roosevelt's intermediary power was only enough to facilitate an agreement on the parallel preparation of two treaties with separate implementation mechanisms, a proposal that was eventually endorsed by the General Assembly, which reversed its previous stance in this matter during its sixth session (1951/52).[11]

If the view that economic, social and cultural rights cannot be regulated in a legally binding instrument due to their progressive nature should be put aside because it was not mainstreamed in the debate, the arguments in favour of one or two Covenants can be summarized as follows:[12]

Supporters of one Covenant: the interdependence of the two categories of rights and their complementary impact on the life of a human being as an individual and a member of society speak against any separation of, and even more, any hierarchy between them: 'Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured.'[13] Therefore, all rights should be promoted and protected together in a single Covenant.

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[7] It is amazing that the Report of the Working Group on the Declaration on Human Rights' first meetings speaks about Mrs Franklin Delano Roosevelt instead of Eleanor Roosevelt as the Chairperson of the Working Group. See UN Doc E/CN.4/57 (16 December 1947).

[8] In the first, the 'Four Freedom Speech' outlining the post-war order, President Roosevelt proclaimed along with the freedom of speech, freedom of religion and freedom from fear also the freedom from want, which is often interpreted as a synthesis of social rights. In 1944 he called for the adoption of a second Bill of Rights, entailing social entitlements. Both addresses are available at the Franklin D Roosevelt Presidential Library and Museum: <www.fdrlibrary.marist.edu/fourfreedomshttp://www.fdrlibrary.marist.edu/archives/address_text.html> (27 June 2019).

[9] Compare also Maya Hertig Randall, 'The History of the Covenants: Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (2018) 14.

[10] UNGA Res 421 (4 December 1950), para 7(b).

[11] In UNGA Res 543 (5 February 1952), para 1, the General Assembly requested the Commission on Human Rights through ECOSOC '[t]o draft two covenants on human rights […], one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two covenants simultaneously and open them at the same time for signature'.

[12] UNGA, 'Annotations' (n 4), chapter II, para 12.

[13] *Ibid.*, para 8.

Supporters of two Covenants: in this case, the arguments already used against the incorporation of economic, social and cultural rights into the UDHR were again put on the table. It was stressed that these rights, contrary to the civil and political ones, were not or might not be enforceable or justiciable. They could only be progressively implemented, while the others were immediately applicable. Finally, while positive state action was necessary for economic, social and cultural rights to be realized, the main function of civil and political rights was to protect the individual against unlawful and unjust action of the state.

It would be difficult to say that it was just the weight of the argumentation that allowed the supporters of the 'two Covenants' approach to eventually win the battle. It is more realistic to conclude that their position offered the only politically acceptable solution for giving human rights the status of treaty law.[14]

Consequently, the UN General Assembly's approval of the ICESCR and the ICCPR in 1966 divided human rights at the international level into two broad categories, with separate implementation mechanisms. However, the texts followed the GA recommendation to contain as many similar provisions as possible in order to emphasize the unity of the aim of the Covenants.[15] In particular, the preambles and the first articles concerning the right of peoples to self-determination and to freely dispose over their natural wealth and resources, as well as the applicability of both Covenants to non-self-governing and trust territories, are effectively the same. The preambles of the two Covenants treat all human rights jointly and specifically underline that

> in accordance with the Universal Declaration of 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.[16]

Nevertheless, as a result of the described division, social rights found themselves the 'poor cousins' in the human rights family.[17] This perception was reflected not only in scientific commentaries and political statements, but primarily in two solutions that introduced a real distinction in the system of protection of both categories of rights. First, monitoring the implementation of the ICESCR was vested with ECOSOC, that is, with a political intergovernmental body and not with an independent expert body, which was the case in relation to other human rights core treaties. Second, no communication (complaints) procedure was established for the ICESCR, whereas the ICCPR established the institution of state complaints and its Optional Protocol, adopted together with the Covenant, put in place an individual complaints procedure. Finally, the name of the monitoring body under the ICCPR – the Human Rights Committee – has a symbolic meaning, suggesting that the notion 'human rights' embraces only civil and political ones.[18]

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[14] *Ibid.*, para 9.

[15] UNGA Res 543 (5 February 1952), para 1.

[16] Third sentence of the ICESCR preamble. In the case of the ICCPR, the reverse order is applied: first, the rights regulated by this Covenant are mentioned, and then economic, social and cultural rights.

[17] Ben Saul, David Kinley and Jaqueline Mowbray (eds), *The International Covenant on Economic, Social and Cultural Rights – Commentary, Cases and Materials* (2014) 1.

[18] Dennis and Stewart seem to have a different view: 'Their different treatment in no way disqualified economic, social, and cultural rights as rights or relegated them to a lower hierarchical rung. It did reflect an assessment of the practical difficulties that states would face in implementing generalized

Hence, in 1966, this ambivalent picture left supporters of social rights with 'glass half full' syndrome. It was no wonder that in this situation changes were demanded from various corners. In 1985, ECOSOC set up the CESCR as the Covenant's implementation mechanism, along the lines of other bodies established by core human rights treaties.[19] In 1993, the Second World Conference on Human Rights in Vienna left no doubt that '[a]ll human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.'[20] Moreover, it recommended that the Commission on Human Rights, in cooperation with the Committee, continue the examination of optional protocols to the ICESCR.[21] It was expected that a complaints system for this category of rights would be put in place in this framework. The Vienna recommendations enjoyed the unanimous support of all states existing at that time.[22]

The ensuing discussions in the Commission and its Open-Ended Working Group established to discuss and eventually draft an optional protocol to the ICESCR quickly showed that the controversy over social rights,[23] in particular their subjective nature and justiciability, had not disappeared.[24] It took until 2008 – six years – to draft and eventually adopt this instrument, which establishes complaint and inquiry procedures. The Optional Protocol to the ICESCR finally entered into force on 5 May 2013 after having received the minimum number of ten ratifications.

In this way, the process of levelling the status of all rights in policy, institutional and procedural terms was completed in the international arena. Although opposing positions are still seen,[25] especially during Committee dialogues with state parties under the reporting procedure, this happens less and less frequently.

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norms requiring substantial time and resources.' Michael J Dennis and David P Stewart, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98 AJIL 462, 465.

[19] About the changes in the Covenant implementation mechanism during the 1980s see section III of this contribution.

[20] UNGA Res 49/208 (23 December 1994) 'Vienna Declaration and Programme of Action', Part I, para 5.

[21] *Ibid.*, Part II, para 75.

[22] The UNGA Res endorsing the VDPA was also adopted unanimously.

[23] The Working Group set up by the HRComm Res 2002/24 in 2002 with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, para 9(f).

[24] See Report of the Working Group on its first session (2004) UN Doc E/CN.4/2004/44, in particular chapters V-VI; see also the Report on the third session (2006) UN Doc E/CN.4/2006/47, paras 16, 18–19, 33. *Cf.* Report by Mr Hatem Kotrane, independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights (2003) UN Doc E/CN.4/2003/53, paras 25–49; Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008); Centre on Housing Rights and Evictions (COHRE), Leading Cases on Economic, Social and Cultural Rights: Summaries, Working Paper No 6, ESC Rights Litigation Programme (2008).

[25] *Cf.* the CESCR's concluding observations on Poland, Canada, the United Kingdom and Sweden (UN Doc E/C.12/POL/CO/6; E/C.12/CAN/CO/6; E/C.12/GBR/CO/5; E/C.12/SWE/CO/6).

As of 1 April 2020, 170 countries were parties to the ICESCR; 24 thereof ratified the Optional Protocol to the Covenant (11 from Europe, 8 from Latin America and the Caribbean, 4 from Africa and 1 from Asia).[26]

Despite significant changes in the social, economic and political conditions under which the Covenant has been implemented during the more than 50 years since its adoption, its text has not been amended. It is widely held in international fora that the adjustment of international human rights standards to the changing environment should be achieved, if possible, through their interpretation and not through changes in the texts of treaty law. Attempts to revise human rights treaties are expected to have little chance of being supported in the currently fragmented world. Moreover, they may ultimately be unpredictable in terms of direction, and thus politically risky. In this context, it was not surprising that the state parties, the General Assembly and the Commission on Human Rights did not react to the Secretary General's proposal to align the provisions of the Covenant to the changes of its implementation mechanism introduced by ECOSOC.[27] And, in fact, the Committee's interpretations of the Covenant contained in its general comments, concluding observations and case law help to reduce tensions between the letter of the treaty and the role it is intended to play in changing circumstances.

b. The Content of the ICESCR in a Nutshell

The preamble sets out basic principles in the context of which the Covenant should be interpreted.[28] First, the foundation of freedom, justice and peace consists in the recognition of the inherent dignity of the human being in which the equal and inalienable human rights are rooted. Second, the creation of conditions for the enjoyment of economic, social and cultural rights, as well as civil and political rights, is essential to realize the ideal of a human being free from fear and want. Third, states are obliged under the UN Charter to promote universal respect for, and observance of, human rights and freedoms. Fourth, every individual is responsible for striving for the promotion and observance of the Covenant rights.

The operative body of the ICESCR is composed of five parts.

Part I (Article 1) lays down the right of peoples to self-determination and to dispose of their natural resources. It states that 'under no circumstances may a nation be deprived of its means of subsistence'. The recognition of these rights was undoubtedly influenced by the decolonialization process that was taking place during the preparatory work for the Covenants. However, they differ in nature from the rights set out in the further parts of the ICESCR. As in the case of the ICCPR, they were put before the brackets of other provisions that are specifically related to economic, social and cultural rights.

Part II (Articles 2–5) consists of articles establishing general principles of the catalogue of economic, social and cultural rights, including the principle of equality of rights and the prohibition of discrimination, and equality of rights between women and men. These articles also set out the fundamental obligations of state parties in the implementation of the Covenant, a special clause allowing developing states to restrict the exercise of economic rights by

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[26] Only four states made the declaration under Article 11 of the Protocol and thus recognized the inquiry procedure.

[27] ECOSOC, 'Report of the Secretary-General, Follow-up and monitoring of the International Covenant on Economic, Social and Cultural Rights' (30 September 1996) UN Doc E/1996/101.

[28] Art 31 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

non-nationals, the principles governing the admissibility of restrictions on the rights protected by the Covenant and the principle prohibiting interpretation of the provisions of the Covenant which would lead to the undermining, restriction or suspension of rights laid down in this treaty, as well as human rights established or recognized in national law.

Part III (Articles 6–15) contains specific economic, social and cultural rights. In the reporting process, the Committee divides them into clusters: (a) rights concerning employment and trade unions, and the right to social security (Articles 6–9); (b) rights related to family protection; the right to an adequate standard of living, including the right to food, housing and water; and the right to the highest attainable standard of health (Articles 10–12); and c) rights in the field of education and culture (Articles 13–15). However, it should be stressed that this clustering of rights is purely conventional and has no interpretative effect. Its sole purpose is to facilitate the effective organization of dialogue with the countries reporting to the Committee.

Part IV (Articles 16–25) regulates various aspects of the international implementation of the ICESCR, including the reporting procedure, and equips ECOSOC with the competence to monitor the implementation of the Covenant obligations by state parties.

Part V (Articles 26–31) covers the final provisions, including the entry into force of the Covenant, the conditions and modalities for obtaining state party status, the applicability of the Covenant to federal states and its amendments.

III. THE IMPLEMENTATION MECHANISM OF THE ICESCR

a. The Evolution – The Establishment of the Committee

From 1979, ECOSOC was assisted by its Sessional Working Group, composed of representatives of member states, in monitoring the implementation of the Covenant.[29] As early as 1982, due to the need for a professional analysis of state reports, ECOSOC decided to change this mechanism and set up a working group of government experts.[30] In both cases, however, the members remained the representatives of states and were therefore politically bound. Moreover, the latter solution had proven to be inefficient. Under these circumstances, demands for a deeper reform, called for in particular by civil society, continued. Ultimately, as already mentioned, ECOSOC decided in 1985 to replace the existing arrangements with the CESCR, composed of independent experts, as was the case with the monitoring committees set up under other human rights treaties. The mandate, powers and modalities of action of the Committee are also like those of its sister bodies.[31] However, there are two important differences. First, the formal basis for the Committee's existence is provided by an ECOSOC resolution and not the Covenant itself. Second, the elections of Committee members are carried out by ECOSOC and not the state parties.

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[29] ECOSOC Res 1988(LX) (11 May 1976).

[30] *Cf.* Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights' (1987) 9 HRQ 332, 340.

[31] ECOSOC Res 1985/17 (28 May 1985) 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights'.

Still, in 1996, the Secretary General pointed out that under the existing rules ECOSOC had the power to abolish the Committee.[32] Despite the fact that such an initiative has never been considered by the relevant UN bodies, the formally correct observation by the Secretary General has been weakened by some steps taken in the meantime. Numerous unanimously adopted UN documents leave no doubt that the Committee is regarded by state parties, and more broadly by the UN member states, as the Covenant's implementation mechanism. Among others, the General Assembly explicitly recommended that ECOSOC preserve 'the current structure, organization and administrative arrangement of the Committee as set forth in Council resolution 1985/17' when considering the reform of the Committee election.[33] In addition, the Optional Protocol entrusted the Committee specifically with the competence to receive and consider communications, conduct inquiries and take action concerning international assistance and cooperation.[34] The latter solution means that the Committee's mandate is already partly based on treaty law.

b. The Election of Committee Members

The election of the Committee members by ECOSOC is based, as in the case of intergovernmental UN bodies, on the geographic allocation of quotas of seats to be filled by UN regions. This solution often leads to the practice of 'a clean slate', whereby in the case of an equal number of vacant seats and candidates from a given region, no formal voting takes place and mandates are acquired by the candidates proposed by governments. This gives rise to justified doubts about the electoral nature of the process. One of the consequences is that the same members continue their mandates for a number of subsequent tenures, in some cases exceeding more than 20 years. For a long time, there have been calls for empowering state parties to elect the Committee members. A last attempt going in this direction was made by the General Assembly in 2014 in the framework of the 'Strengthening treaty bodies process' which recommended that ECOSOC adequately change the election procedure. However, no steps have been taken in this respect so far.[35]

c. The Committee's Competences

i. Periodic review

The periodic review of the implementation of the ICESCR by each state party takes place in the framework of the reporting procedure.[36] As the Committee explains, this procedure has in principle been established to assist states in fulfilling their obligations under the Covenant and to monitor the related state action.[37] The five-year reporting cycle begins with the submission of a report by a state party to the UN Secretary General (Office of the High Commissioner

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[32] Report of the Secretary-General (n 27).

[33] UNGA Res 68/268 (9 April 2014) 'Strengthening and enhancing the effective functioning of the human rights treaty body system'.

[34] Articles 1, 11 and 14 of the Optional Protocol.

[35] UNGA Res 68/268 (9 April 2014), para 11.

[36] Arts 16-22 ICESCR, in conjunction with ECOSOC Res 1985/17 (28 May 1985), as well as Rules 58–64 of the Committee's Provisional Rules of Procedure and Guidelines for States Parties' reports.

[37] CESCR, 'General Comment No 1 on Reporting by States Parties' (27 July 1981) UN Doc E/1989/22, para 1.

for Human Rights, OHCHR).[38] Based on the report, the Committee's Pre-sessional Working Group prepares a List of Issues (LOI) to which the state party should respond within six months. Under the gradually introduced optional simplified reporting procedure, also known as the LOIPR (List of Issues Prior to Reporting) procedure, the process begins with the referral by the Committee to a state party of a list of issues to be tackled in the report. This reverse order should allow for a more targeted dialogue between the Committee and the state party and more focused recommendations arising therefrom. It should also help the state party to rationalize the preparation of the report and save it from having to submit two documents (Report and responses to the LOI).

The report; the replies to the LOI, if appropriate; and the Common Core Document provide the state party's input to the documentation of the review process.[39] However, the Committee also benefits from other sources of information, in particular the UN system, national human rights institutions, non-governmental organizations, and similar. This expanded basis for the Committee's analyses and assessments also helps to counter possible attempts at so-called window dressing in governmental reports.

On the basis of all information and data received, the Committee holds a public dialogue with the state party (lasting six hours[40]) and subsequently adopts concluding observations that entail a list of concerns and recommendations. The Committee requests state parties to inform on the implementation of three priority recommendations before the next scheduled periodic report (usually in 24 months). A Rapporteur in charge for followup to concluding observations is elected for a one year term.[41]

At this juncture, it must be stressed that strict application of the principle of equal treatment of the UN members irrespective of their size and population, as required from the Committee, leads to a significant imbalance in the capacity for analysis during the dialogue with government delegations. For example, at the same 52nd session, the Committee devoted the regular six hours to both the Monaco report and the jointly considered reports of China, Hong Kong and Macao (treated as one state).

ii. Individual and inter-state complaints

Consideration of individual and inter-state complaints is set out in the Optional Protocol to the ICESCR.[42] Individuals or groups who claim to have been victims of violations of the Covenant rights by a state party to the Protocol may submit complaints to the Committee. Such complaints can also be lodged by persons or organizations acting on behalf of and with the consent of victims. After considering a complaint, which includes the opportunity for the parties

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[38] State parties that have just acceded to the Covenant should submit their initial report during two years. *Ibid.*, para 2.

[39] The Common Core Document contains synthetic information about the state, its society, political system, legal system, economy and culture. Such a document is prepared by the government and is made available to all treaty bodies.

[40] In the case of initial reports, the Committee allocates nine hours.

[41] See CESCR note on the procedure for follow-up to concluding observations <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/FollowUp.aspx?Treaty=CESCR&Lang=en> (27 June 2019). Initially, the Committee adopted a procedure for follow-up action in 1999, see the Committee's Report on the Twentieth and Twenty-First Sessions (1999) UN Doc E/2000/22, E/C.12/1999/11, para 38 'c, d and f'.

[42] Arts 1–9 and 10 Optional Protocol.

to mutually react to their submissions, the Committee adopts its 'Views' (decision), which includes recommendations for state action (legislative or other measures and compensation or other remedy) or considers the complaint ill-founded. If the complaint does not meet the requirements under the Optional Protocol, the Committee decides on its inadmissibility. It can also offer its good offices to the parties in order to achieve a friendly settlement. The inter-state complaint can be considered only if both the complaining state and the state addressed are parties to the Optional Protocol and have made special declaration recognizing this procedure. It should be noted that no inter-state complaint has been lodged so far.

The entry into force of the Optional Protocol in 2013 and the start of complaint proceedings have opened a new chapter in the implementation of the ICESCR. To have 24 ratifications within ten years since the adoption of the Protocol is probably not particularly satisfactory. To some extent, the arguments raised in the previous disputes surrounding the legal nature of social rights, including their justiciability, continue to guide some governments. As it results from discussions with the representatives of the states, one of the reasons for the slowness of ratification also is uncertainty as to how the Committee will handle complaints and interpret some provisions of the Protocol, which may have a significant impact on the situation of state parties. The remarks below should provide some clarifications in this respect.

Contrary to the rather sluggish increase of ratification of the Optional Protocol, the increase in the number of cases before the Committee has recently strongly accelerated. From the entry into force of the Optional Protocol up to its 66th session (2019), the Committee registered a total of 162 individual complaints, but in 2018 alone 67 new cases were registered. If the Committee continues to adopt two Views per session on average while holding two sessions per year, it would take more than 22 years to consider the already registered cases. Even if around 20 per cent of them were to be discontinued (estimation based on the practice of treaty bodies), it would still take up to 18 years. This problem can only be addressed by increasing the Committee's resources in terms of guaranteeing it expanded working time limits and strengthened analytical services provided by OHCHR.

As of April 2020, the Committee has adopted substantive decisions in five cases and 14 complaints were declared inadmissible. Among the cases completed with a decision on the merits, three were related to housing rights and two to social security, labour rights and the principles of equality and non-discrimination.[43] The complaints declared inadmissible dealt mainly with social security and labour rights. One case invoked the right to health and another the right to education and cultural rights, as well as child protection.

In the context of the protective function of the complaint procedure, it should also be mentioned that the Committee frequently makes use of its power to apply interim measures following the reception of a complaint. The Optional Protocol states that before a determination on the admissibility or the merits of the complaint is reached, the Committee can turn to the state party with a request to urgently consider the necessary interim measures to prevent possible irreparable damage to the victim of the alleged violation of the Covenant right. This does not prejudge the future decisions concerning the admissibility or merits of the complaint. The Committee does it if the author is in a situation of social and economic vulnerability, the complaint is *prima facie* admissible and the risk of irreparable damage to the complainant is

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[43] For details on the CESCR's jurisprudence, see CESCR Report on Sixty-fifth and Sixty-sixth sessions, UN Doc. E/2020/22, E/C. 12/20/19/3 §§ 76–80; see also https://juris.ohchr.org/en/search/results?Bodies=9&sortOrder=Date (1 April 2020).

imminent. The large majority of cases which have involved interim measures were related to situations where the eviction procedure did not guarantee an alternative accommodation.

iii. Inquiry procedure established by the Optional Protocol to the ICESCR (Arts 11–12 OP)

If the Committee obtains reliable information on serious and systematic violations of the Covenant rights by a state party to the Optional Protocol that has explicitly accepted this procedure,[44] an inquiry may take place. With the consent of the state party concerned, the Committee can designate one or more of its members to carry out this task, including a country mission. Once the inquiry has been completed, the Committee may decide to add a summary of results to its annual report. The Committee has not yet acted under this procedure.

iv. Adoption of General Comments

During the preparatory works for the Covenants, two approaches to the drafting of articles on individual rights competed. They differed in terms of the proposed level of generality or detail of the provisions.[45] It was not always possible to reach a compromise striking an appropriate balance. As a consequence, the ICESCR uses a very general language in some provisions (such as the right to social security – Article 9), and a rather specific one in others (such as the right to education – Article 13). In any case, however, due to the nature of the international instruments, a rather high level of generality of the standards was unavoidable. This makes the role of the Committee as interpreter of the Covenant all the more important. It is supported in this endeavour by unique contributions coming from civil society, in particular non-governmental organizations and the academic world. It is enough to hint here, by way of example, at the crucially important Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997; the Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights, 1987;[46] and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 2013.[47]

The comprehensive interpretation is mainly the subject of the Committee's General Comments. However, the provisions of the Covenant have also been construed in its statements and letters to state parties, which constitute a shorter form of expression of the Committee's stance.[48] Often such explanations also result from the concluding observations. With the entry into force of the Optional Protocol, together with the complaint procedure, the case law of the Committee is, of course, also becoming more and more relevant in this respect.[49]

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[44] By way of example, the HRCttee does not have this competence under the ICCPR; under the Optional Protocol to CEDAW, the inquiry procedure is not subject to an optional approval but is applicable to all state parties to this instrument.

[45] UNGA, 'Annotations' (n 4), paras 13–23.

[46] Both these documents are replicated in CESCR (2 October 2000) UN Doc E/C.12/2000/13.

[47] Published by FIAN International (2013).

[48] The complete list of the Committee statements and letters can be found on the OHCHR's website: <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=68> (27 June 2019).

[49] Daniel Moeckli, 'Interpretation of the ICESCR – Between Morality and State Consent' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (2018) 48.

As of 1 April 2020, the Committee had issued 25 General Comments. While mainly covering the interpretation of Covenant rights and/or the situation of specific groups of rights holders (20), they also address other substantive or procedural issues. For example, the four recent General Comments concern science and economic, social and cultural rights (No 25, 2020), state party obligations in the context of business activities (No 24, 2017), the right to sexual and reproductive health and the right to just and favourable conditions of work (respectively Nos 22 and 23, 2016). Among the recent interpretative statements, one deals with the duties of states towards refugees and migrants under the ICESCR (2017), another one with public debt and austerity measures (2016), and still another one with the social protection floors as an essential element of the right to social security (2015).

The Provisional Rules of Procedure specifically empower the Committee to 'prepare general comments based on the various articles and provisions of the Covenant with a view to assisting States parties in fulfilling their reporting obligations'.[50] This position of the Committee was also endorsed by the Commission on Human Rights which in 2002 decided to encourage the Committee to draft 'further general comments to assist and promote the further implementation by States parties of the Covenant, and making the experience gained through the examination of States parties' reports available for the benefit of all States parties'.[51]

Although none of the official documents specifies the legal meaning of General Comments, their rank and persuasive power result from the high quality of content and the authority of the Committee itself. They are treated by the UN system, including by sister treaty bodies, as a reliable interpretation of the ICESCR. General Comments are also used by governments, NGOs and academia. Finally, state parties and rights holders are aware that the Committee will be guided by its own interpretations when dealing with reports, complaints or inquiries.[52]

Nevertheless, not long ago, during a meeting between the Committee and the parties to the Covenant, one of the diplomats argued that states ratify the Covenant within the meaning of its provisions, as defined at that time. Therefore, a later interpretation widening the meaning of rights may actually lead to the extension of the obligations of states without their consent. In response, the Committee members pointed out that without the interpretation of the Covenant it would be difficult in many situations to consistently apply its provisions. Moreover, changes of the conditions under which the Covenant should be implemented can make the regulation of rights inadequate in the course of time. Hence, the interpretation by the Committee serves as both clarifying the provisions of the Covenant and maintaining its topicality.

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[50] The elaboration of these documents is based on a systemic interpretation of the Covenant, in particular Article 21, in conjunction with ECOSOC Res 1985/17 (28 May 1985), as well as on Principle 65 of the Committee's Provisional Rules of Procedure.

[51] Compare the aforementioned HRComm Res 2002/24, para 9(a)(ii).

[52] For further information in the interpretations of the Covenant see the next point. On the impact of the interpretation of the Covenants on domestic law compare also Samantha Besson, 'The Influence of the Two Covenants on States Parties Across Regions – Lessons for the Role of Comparative Law and of Regions in International Human Rights Law' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (2018) 262.

IV. EXAMPLES OF THE INTERPRETATION OF THE COVENANT IN THE COMMITTEE'S GENERAL COMMENTS AND CASE LAW

The Committee construed from the Covenant four key principles that are essential for the understanding of social rights as subjective and consequently justiciable entitlements, as well as for the understanding of the obligations of state parties.

a. The Principle of Progressive Realization of Covenant Rights

Article 2 ICESCR sets forth that state parties should take steps 'to the maximum of its available resources, with a view to achieving progressively the full realization of the Covenant rights.' As this clause makes the implementation of rights conditional on the availability of resources, many commentators have considered that it undermines the normative nature of the Covenant. Already at its fifth session, the Committee explained that

> the fact that realization [of ESCR] over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question.[53]

By the same token, however, the Committee accepted the introduction of retrogressive measures in exceptional circumstances. It stated that they

> would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[54]

In the aftermath of the post-Lehman Brothers economic and financial crisis, the Committee further developed its 'emergency doctrine'. Its letter to state parties sent on 16 May 2012 admitted that '[e]conomic and financial crisis, and a lack of growth, impede the progressive realization of economic, social and cultural rights and can lead to retrogression in the enjoyment of those rights'.[55] Nevertheless, to remain compatible with the Covenant, austerity measures should (i) be temporary – adopted only for the period of crisis; (ii) be necessary and

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[53] CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23, para 9 (*cf.* also paras 6, 12). Compare also Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 156, 172, who called the concept of progressive implementation 'the linchpin of the whole Covenant'.

[54] CESCR (GC 3) (n 53), para 9.

[55] Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights, <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fSUS%2f6395&Lang=en> (27 June 2019).

proportionate, which means that 'the adoption of any other policy, or failure to act, would be more detrimental to economic, social and cultural rights'; (iii) be non-discriminatory and comprise 'measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionally affected', and (iv) determine the minimum core content of rights or a social protection floor (the concept developed by the International Labour Organization) and ensure the protection of this core content under all circumstances. These principles were later reaffirmed in the Statement on Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights.[56]

b. The Principle of the Essential Content of Each of the Covenant Rights[57]

In the Committee's view every right contains a nucleus which must be protected under all circumstances, even in emergency situations.[58] As it seems, the Committee sees 'essential content' primarily as a methodological construct which may be helpful in determining the meaning of the right, drawing the scope of its admissible limitations and assessing infringements of rights in specific situations. On the other hand, it looks rather impossible to define the details of this content *in abstracto* once and for all. To be applied, it needs clarification under real life circumstances.[59]

c. The Principle of the Essential Features of Each of the Covenant Rights

While commenting on the right to adequate housing, the Committee stated that 'it is […] possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context'.[60] Later on, on several occasions, the Committee applied *mutatis mutandis* the same approach, including with a view to determining the essential content of a right. For example, commenting on the right to education, the Committee stated that education as the subject of the right 'shall exhibit the following interrelated and essential features':

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[56] CESCR (22 July 2016) UN Doc E/C.12/2016/1, para 4. The ECSR acting under the ESC has developed its own doctrine concerning austerity measures, albeit going into a similar direction. See *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, ECSR, Collective Complaint No 76/2012, Decision of 7 December 2012, paras 68–75, including the criteria for the assessment of such measures (General Introduction to Conclusions XIV-1, 11) quoted in para 72. Compare also Joe Wills and Ben TC Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socio-economic Rights Discourse' (2016) 23 Indiana Journal of Global Legal Studies 629; ESCR-Net, Red-DESC, Réseau-DESC, 'Bringing Human Rights to Bear in Times of Crisis: A Human Rights Analysis of Government Responses to the Economic Crisis' (2010) <www.cesr.org/sites/default/files/HRResponsestoEconCrisis_Final.pdf> (5 November 2019).

[57] This concept is included *expressis verbis* in some constitutions, e.g., Art 19(2) of the Basic Law for the Federal Republic of Germany, Art 31(3) of the Constitution of Poland.

[58] Letter (n 55).

[59] See, e.g., *Marcia Cecilia Trujillo Calero v Ecuador*, CESCR, Communication No 10/2015, UN Doc E/C.12/63/D/10/2015 (26 March 2018), para 11.2; *Ana Esther Alarcón Flores and 116 others v Ecuador*, CESCR, Communication No 14/2016, UN Doc E/C.12/62/D/14/2016 (19 December 2017), para 3.3.

[60] CESCR, 'General Comment No 4 on the Right to Adequate Housing' (13 December 1991) UN Doc E/1992/23, para 8.

- Availability – sufficient quantity of functional educational institutions and programs;
- Accessibility – everyone, without discrimination, should have access to educational institutions and programs. This concerns the safe physical reach (geographical location or via modern technology), as well as the economic affordability. While it is the obligation of the state to ensure access to free primary education for all, free secondary and higher education should be introduced progressively;
- Acceptability – form and substance of education, including curricula and teaching methods, should be acceptable to students because of their relevance, cultural appropriateness and good quality;
- Adaptability – programs of education should be adaptable to the evolving needs of societies and students, taking into account diverse social and cultural settings.[61]

d. The Principle of Minimum Core Obligations of the State under the Covenant

As early as 1990, the Committee stated that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party'. Otherwise, the *raison d'être* of the Covenant would be put in question.[62] The Committee points out that this principle would be violated by the state if, for example, a significant number of individuals were deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing or of the most basic forms of education. Guided by these considerations, the Committee specifies in its general comments the minimum obligations of states with regard to individual rights. Particular attention is paid in this context to the situation of disadvantaged and marginalized persons and groups.[63] References to this principle are also made in the reporting procedure and in the Committee's case law.[64]

The complaint procedure has enabled the Committee not only to provide protection for victims, but also to demonstrate how the Committee interprets certain provisions of the Protocol which, given their general nature, may have raised some concerns. It is to be hoped that the Committee's case law will have a reassuring effect and help to dispel certain interpretative doubts. The first case concluded with views on substance, *I.D.G. v Spain*,[65] is already a helpful illustration. The applicant submitted that her right to housing had been infringed by the fact that the state party had failed to ensure conditions for exercising her right to judicial protection against foreclosure. To buy a house, she took a mortgage from a bank. Due to the country's economic and financial crisis, her income fell significantly, which prevented her from continuing to pay the loan instalments. As a result of proceedings initiated by the bank, the court decided to sell her house at an auction. The applicant claimed that she became

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[61] CESCR, 'General Comment No 13 on the Right to Education' (8 December 1999) UN Doc E/C.12/1999/10, para 6. The Committee refers here to the analogous analytical scheme of governmental obligations proposed by the Special Rapporteur on the right to education, the so-called A-4 scheme (Preliminary report of the Special Rapporteur on the right to education, submitted in accordance with Commission on Human Rights resolution 1998/33, paras 42–74); compare also Katarina Tomasevski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* (2001) 3ff.

[62] CESCR (GC 3) (n 53), para 10.

[63] This was underlined by *Government of the RSA v Grootboom*, Constitutional Court of South Africa (17 December 1999) (11) BCLR1 169(CC), para 31.

[64] *Trujillo v Ecuador* (n 59), paras 14(2), (3).

[65] *I.D.G. v Spain*, CESCR, Communication No 2/2014, UN Doc E/C.12/55/D/2/2014 (17 June 2015).

aware of that decision only after it had been taken. The state party pointed out that, due to the applicant's failure to collect the summons of the court to appear at the trial, the information about the proceedings was included in a public announcement; eventually the court continued to consider the case in her absence and, indeed, ordered the auction of the house. In the Views concerning the case, referring to its earlier interpretations of Article 11 ICESCR, the Committee stressed that the right to adequate housing is 'a fundamental right central to the enjoyment of all economic, social and cultural rights and is inextricably linked to other human rights, including those set forth in the International Covenant on Civil and Political Rights'.[66] Taking into account the circumstances of the case, the Committee recommended that the state party ensure that 'the auction of the author's property does not proceed unless she has due procedural protection and due process'.[67]

The Committee also used this occasion to take some precedential decisions that may indicate the directions of its future case law. First, the Committee recommended that the state party 'reimburse the author for the legal costs incurred in the processing of this communication'.[68] Subsequent cases show that the Committee's intention is to make it a standard recommendation in case of a successful complaint. Second, the Committee decided to include in its Views, alongside recommendations concerning the specific situation of the complainant, further recommendations of a general nature. For example, the call for measures guaranteeing non-repetition of similar violations in the future will probably become another standard recommendation.[69] The Committee also emphasized that the domestic legislation must ensure the accessibility of legal remedies for persons facing mortgage enforcement procedures for failure to repay loans. This requires that public posting of the notification be strictly limited to situations in which all means of serving notice in person have been exhausted. The effectiveness of this form of notification also requires sufficient exposure and long enough notice to enable the affected person to take full cognizance of the start of the proceedings. The Committee also recommended

> legislative measures ensuring that the mortgage enforcement procedure and the procedural rules contain appropriate requirements […] and procedures to be followed before going ahead with auction of a dwelling, or with eviction.[70]

Third, the Committee reiterated its position that

> it is in the first place for the courts of States parties to evaluate the facts and the evidence in each particular case, and the application of domestic law, and that these aspects are only relevant if it can be shown that such evaluation or application was clearly arbitrary or amounted to a denial of justice that entailed the violation of a right recognized in the Covenant.[71]

The proceedings in the discussed case also gave the Committee the opportunity to reaffirm its standing concerning third party submissions under Article 8 of the Optional Protocol and

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66 *Ibid.*, para 11(1).
67 *Ibid.*, para 16.
68 *Ibid.*
69 *Ibid.*, para 17.
70 *Ibid.*
71 *Ibid.*, para 13(1).

rule 14 of the Committee's Provisional rules of procedure under the Optional Protocol.[72] The Working Group on Communications acting on behalf of the Committee admitted the submission by the International Network for Economic, Social and Cultural Rights (ESCR-Net) to the case. According to the aforementioned provisions, the submission was forwarded to the complainant and the state party for comments. The summary of the submission and the related comments by the parties have been included into the Committee's Views.[73]

Turning to the provisions of the Optional Protocol which need to be interpreted, two of them have already been extensively discussed: the *ratione temporis* criterion on admissibility of complaints, and standard of reasonableness.

i. *Ratione Temporis* – interpretation of the criterion

The Optional Protocol, like other similar instruments, provides that complaints should be declared inadmissible when '[t]he facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date'.[74] The phrase 'unless those facts continued after that date' may be perceived as leaving room for diverging readings. Referring to the position taken by the International Law Commission on the extension in time of the breach of an international obligation,[75] the Committee stated in *Merino v Spain* that 'a fact that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time'.[76] The Committee further elaborated on this matter in *Alarcón v Ecuador*, stating that

> the mere fact that their [facts] consequences or effects extend in time, after the entry into force [of the OP for the state party], is not sufficient ground for declaring a complaint admissible *ratione temporis*. If the distinction between the acts that gave rise to the alleged violation and its ongoing consequences or effects was not made, the *ratione temporis* admissibility criteria established in the Optional Protocol, relating to the Committee's competence to consider individual communications, would be virtually irrelevant.[77]

However, the fact that such a decision was taken before the entry into force of the Protocol for the state party concerned shall not deprive the Committee of its right to consider a complaint if the decision continues to be applied after the Protocol became binding on the state party and thus causes a new infringement (*López v Spain*).[78] Furthermore, according to the Committee, if the review of the earlier judicial or administrative decisions of the national authorities takes

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[72] CESCR, Guidance on third-party interventions: www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx (27 June 2019).

[73] *I.D.G. v Spain* (n 65), paras 6–8.

[74] Art 3(2)(b) OP to ICESCR. This rule corresponds to Art 28 VCLT according to which the provisions of treaties do not bind a state 'in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'. Compare also Art 7(7) OP to the CRC and Art 2(f) OP to the CRPD.

[75] ILC, Draft articles on responsibility of states for internationally wrongful acts, 2001 YILC (Vol II, Part 2), UN Doc A/56/10, 60, para 6 of the commentary on Article 14.

[76] *Merino Sierra and Juan Luis Merino Sierra v Spain*, CESCR, Communication No 4/2014, UN Doc E/C.12/59/D/4/2014 (29 September 2016), para 6(7).

[77] *Alarcón v Ecuador* (n 59), para 9(7).

[78] *Miguel Ángel López Rodríguez v Spain*, CESCR, Communication No 1/2013, UN Doc E/C.12/57/D/1/2013 (20 April 2016), para 8(4).

place after the entry into force of the Optional Protocol for the state party concerned, the complaint can be declared admissible (*I.D.G. v Spain*).[79] In other words, the Committee considers that the 'cycle' of violation is extended until the issue of the violation is finally resolved at the domestic level.[80]

ii. Standard of reasonableness

Considering that no country has unlimited wealth, a tool is needed to assess whether the policies of state parties based on choices between different objectives are commensurate with the Covenant rights and related obligations. In particular, such a tool is necessary to evaluate whether the allocation of funds meets the requirement to take steps to the maximum of available resources by the state party with a view to achieving progressively the full realization of the Covenant rights.[81] When the text of the Optional Protocol was negotiated, it was decided to include the standard of reasonableness as such a device. The initial proposal was made by the High Commissioner for Human Rights, Louis Arbour, as an attempt to reach a compromise in the ongoing quarrel over the justiciability of ESCR. The Committee also presented its own understanding of the reasonableness standard.[82] Eventually, Article 8(4) of the Optional Protocol was formulated to read that

> [w]hen examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Understandably, the way in which the Committee will interpret and apply this provision is of great importance for the state parties to the Covenant. This is probably the second element, after *ratione temporis* interpretation, thoroughly analyzed by states before deciding on the ratification of the Protocol. Porter is right when he describes this provision as 'the heart and pulse of the Optional Protocol to the ICESCR'.[83] It should guide the work of the Committee in dealing with individual complaints but also empower it to assess the social and economic policies of a country from the point of view of their compliance with the Covenant rights, including in the framework of the reporting procedure:

> It affirms that access to justice, in cases where ESCR violations are linked to failures by States to adopt positive measures, requires a robust standard of review of the steps taken by the State Party to realize Covenant rights, based on reliable evidence from a wide range of sources and a clear demarcation of the adjudicative role of the Committee from the policy design and implementation role of the State.[84]

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[79] See, e.g., *I.D.G. v Spain* (n 65), para 9.3; *Arellano Medina v Ecuador*, CESCR, Communication No 7/2015, UN Doc E/C.12/63/D/7/2015 (26 March 2018), para 8(5).

[80] *Alarcón v Ecuador* (n 59), para 9(8).

[81] Art 2(1) ICESCR.

[82] CESCR Statement, 'An Evaluation of the Obligation to take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' (21 September 2007) UN Doc E/C.12/2007/1, para 8.

[83] Bruce Porter, 'Reasonableness and Article 8(4)' in Malcom Langford *et al* (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – A Commentary* (2016) 173.

[84] *Ibid.*

The context for the interpretation of Article 8(4) of the OP is provided *inter alia* by the case law of countries whose legal order knew the standard of reasonableness at the time of drafting of the OP. In particular, the experiences of South Africa were familiar to the members of the Working Group. Many articles of the constitutional Bill of Rights of this country point to the obligation of the state to 'take reasonable legislative and other measures, within its available resources' in order to implement the respective rights. Also in the case law of the South African Constitutional Court, one can find not only references to the standard but also its analysis in specific contexts.[85] Liebenberg takes these findings into account in her convincing list of elements of reasonableness: (i) a reasonable policy must be capable of facilitating the realization of the right; (ii) it must be comprehensive, coherent and coordinated; (iii) appropriate financial and human resources must be made available for the programme; (iv) it must be balanced and flexible and make appropriate provision for short, medium and long-term needs; (e) it must be reasonably conceived and implemented; (e) it must be transparent, and its contents must be made known effectively to the public; (f) it must make short-term provision for those whose needs are urgent and who are living in intolerable conditions.[86]

In the aforementioned statement concerning, *inter alia*, the reasonableness standard, the Committee also explained that, while assessing whether the steps taken by a state are 'adequate' or 'reasonable', it would take into account, *inter alia*, the following considerations:

(a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
(b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
(c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;
(d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;
(e) The time frame in which the steps were taken;
(f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.[87]

The Committee also committed itself to respect 'the margin of appreciation of the State party to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others'.[88] This position of the Committee was not incidental. It was built on earlier interpretations entailed in General Comments.[89]

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[85] *Minister of Health v Treatment Action Campaign (No 2)*, Constitutional Court of South Africa (5 July 2002) (10) BCLR 1033(CC), para 38; *Grootboom* (n 63), paras 39–43.

[86] Sandra Liebenberg, *Socio-Economic Rights – Adjudication under a Transformative Constitution* (2010) 152–53.

[87] See CESCR Statement (n 82).

[88] *Ibid.*, para 12. In view of controversies around the notion 'margin of appreciation', the Optional Protocol uses the phrase 'the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant'. Art 8(4) of the Optional Protocol. For more on these negotiations see Porter (n 83), 184ff.

[89] E.g. CESCR (GC 3) (n 53), para 2. See also CESCR, 'General Comment No 19 on the Right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19, para 63: 'In assessing whether States parties have complied with obligations to take action, the Committee looks at whether implementation

Taking into account the relevance and complexity of the reasonableness standard, it is not surprising that the Committee undertook to interpret it in its early case law. The Views adopted by the Committee in the case of *Djazia and Bellili v Spain* concerning eviction are particularly interesting in this respect:

Reasonableness and human dignity: The Committee concluded that measures taken by the state were compatible with the protection of human dignity under the Covenant only when they are reasonable and proportional.[90]

Reasonableness and social security/services: The Committee declared that it was guided by the principle that the state may choose specific policy measures to implement the rights set out in the Covenant.[91] This included measures to rationalize the use of available resources for social services, such as setting criteria or conditions which applicants must satisfy in order to receive such services. However,

> [t]hese conditions […] must be reasonable and very carefully designed so as to prevent not only any stigmatization but also that the mere behavior of a person in need of alternative housing be used to justify denying his or her application [see also below]. In addition, the conditions must be communicated in a transparent, timely and complete manner to the applicant.[92]

Reasonableness and the burden of proof: In the view of the Committee, where the right holder claims that a state party has failed to grant him the enjoyment of the right, the burden of proof shall lie with the state which

> must demonstrate that it has considered the specific circumstances of the case and that, despite having taken all reasonable measures, to the maximum of its available resources, it has been unable to uphold the right to housing of the person concerned. The information provided by the State party should enable the Committee to consider the reasonableness of the measures taken in accordance with article 8 (4) of the Optional Protocol.[93]

Reasonableness and the conduct of the claimant: The Committee pointed out that it is the responsibility of the claimant to provide information on facts showing that the alleged violation of the right(s) in question actually occurred. In the discussed case, it was up to the claimant to demonstrate facts questioning the legitimacy and necessity of the landlord's action. In the absence of such information and in the light of other circumstances of the case, the Committee considered the eviction of the plaintiff to be justified.[94] On the other hand, the Committee also emphasized that 'the mere behavior of a person in need of alternative housing [cannot] be used to justify denying his or her application'.[95]

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is reasonable or proportionate with respect to the attainment of the relevant rights, complies with human rights and democratic principles and whether it is subject to an adequate framework of monitoring and accountability.'

90 *Mohamed Ben Djazia and Naouel Bellili v Spain*, CESCR, Communication No 5/2015, UN Doc E/C.12/61/D/5/2015 (20 June 2017), para 13(4).

91 Art 8(4) Optional Protocol.

92 *Mohamed Ben Djazia and Naouel Bellili v Spain* (n 90), para 17(2).

93 *Ibid.*, para 15(5).

94 *Ibid.*, para 16(2).

95 *Ibid.*, para 17(2).

V. FINAL REMARKS

The road to the international recognition of economic, social and cultural rights as fully fledged members of the human rights family has been neither simple nor easy. Many actors, both on the part of governments and the civil society, including specialized NGOs and academic experts, have been heavily involved in this process. The role of the regional human rights bodies cannot be overestimated, either. Yet, for more than 30 years, it has been the CESCR that has played a central role at the universal level in this respect by monitoring the implementation of the ICESCR and assisting state parties, collecting and disseminating unique knowledge and expertise in the framework of the reporting procedure, by interpreting the ICESCR and promoting its application in various areas of life, as well as by providing assistance to victims of the violations of social rights by adjudicating on their complaints.

The Committee has recently taken a number of effective measures to improve the quality and efficiency of its work. The introduction of country teams to analyze in depth the implementation of the Covenant by the reporting states and to prepare the dialogue with government delegations allows for a more comprehensive assessment and a more targeted formulation of conclusions and recommendations. The first positive experiences with the so-called simplified reporting procedure (LOIPR) make it possible to expect more and more state parties to opt for this formula. It should be reiterated that it allows for focusing the reports and the Committee's dialogue with the state party on priority issues for holders of economic, social and cultural rights. The Committee's interpretative function has also been considerably strengthened by taking a systematic approach to the selection of topics to become subject of general comments and statements, as well as by consistently upholding the participatory nature of the preparatory processes. In addition, it is clear that the Committee's case law will become increasingly important both as a tool to protect rights holders and as an opportunity to further update the interpretation of international standards.

However, exploitation of the potential of the ICESCR and its Optional Protocol, including the complaint and inquiry procedures of the latter, by the Committee will largely depend on factors beyond its control. Above all, it is up to the UN intergovernmental bodies and the Secretariat to ensure that the working conditions of the Committee are adequate, including through the allocation of necessary resources from the UN budget. In view of the increase in the tasks of the Committee, it is vital to extend the length of its meetings so that it can continue to carry out its functions professionally. The tight time balance takes its toll in all areas of the Committee's activities: in the reporting and the complaint procedures and in the work on general comments. Resources are needed to make the process of followup to Committee recommendations addressed to states fully operational and to allow for closer cooperation with state parties, including between the sessions of the Committee. Finally, additional resources should be used to significantly strengthen the OHCHR's capacity to provide analytical assistance to the Committee.

Progress in ratifying both the ICESCR and the Optional Protocol is another prerequisite for enhancing the protection of social rights. Unfortunately, the rate of ratification of the latter seems to have slowed down recently. Between 2010 and 2015, 21 countries have ratified the Protocol. In the last four years (2016–19) only three new state parties arrived. It is to be hoped that this is only a temporary phenomenon. What is at stake is the ability of the individual to assert his or her rights before an independent expert body, that is, the Committee.

6. Social rights protection through core international human rights treaties beyond the ICESCR

Thomas Kleinlein[1]

I. INTRODUCTION

This chapter analyzes the protection of social rights through core international human rights treaties beyond the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2] The international guarantee of social rights is not limited to the ICESCR. Other core international human rights instruments, namely the Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1965[3], the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979,[4] the Convention on the Rights of the Child (CRC) of 1989,[5] the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) of 1990,[6] the Convention on the Rights of Persons with Disabilities (CRPD) of 2006,[7] and even the International Covenant on Civil and Political Rights (ICCPR)[8] guarantee economic, social and cultural rights as well.

Protection can be achieved either directly, that is, through social rights provisions in other core human rights instruments, or indirectly, that is, through different types of rights provisions which do not guarantee social rights themselves.[9] Indirect protection can be achieved through non-discrimination provisions as applied to the protection of social rights. In this

[1] I would like to thank Lina-Sophie Horn, Alexandra Konecny, Annemarie Wagner and Silke Weller for their valuable research assistance, and Silke Weller for her thoughtful comments on an earlier draft.

[2] International Covenant on Economic, Social and Cultural Rights (CESCR) (16 December 1966) 993 UNTS 3.

[3] International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (21 December 1965) 660 UNTS 195.

[4] Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) (18 December 1979) 1249 UNTS 13.

[5] Convention on the Rights of the Child (CRC) (20 November 1989) 1577 UNTS 3.

[6] Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) (18 December 1990) 2220 UNTS 3.

[7] Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006) 2515 UNTS 3.

[8] International Covenant on Civil and Political Rights (ICCPR) (16 December 1966) 999 UNTS 171.

[9] *Cf.* for the distinction of direct and indirect protection, Lilian Chenwi and Danwood M Chirwa, 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Danwood M Chirwa and Lilian M Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 33; Martin Scheinin, 'Indirect Protection of Economic, Social and Cultural Rights in International Law' in *ibid.*, 72–87.

respect, a suitable distinction can be made between non-discrimination provisions that specifically address discrimination with regard to social rights, on the one hand, and general non-discrimination provisions such as Article 26 ICCPR, on the other. Moreover, considering the inseparability and interdependence of human rights, other substantive guarantees, albeit essentially civil or political rights, are, if understood accordingly, also relevant for the indirect protection of social rights.

Building on these distinctions, the following sections will explain the legal framework for direct and indirect protection of human rights through other core international human rights treaties (section II), and highlight the challenge of coherence (section III).

II. LEGAL FRAMEWORK

Direct and indirect protection of social rights through other core international human rights treaties beyond the ICESCR are of significant practical relevance (section II.a). Their legal framework is based on different approaches to the protection of especially vulnerable populations by different treaties (section II.b) and provides for different forms of social rights protection (section II.c).

a. Practical Relevance of Direct and Indirect Protection of Social Rights through Core Human Rights Instruments beyond the ICESCR

Both direct and indirect protection are significant approaches in the practice of several human rights treaty bodies, and this practice is relevant for the protection of social rights in particular for two reasons. First, some of these instruments have a more inclusive number of state parties than the ICESCR.[10] As of March 2019, the ICESCR was ratified by 169 states. By contrast, the CRC, with its 196 state parties, is the most inclusive of all human rights treaties. Numerically second is CEDAW (189 state parties), which has also been ratified more broadly than the ICESCR. The Convention on the Elimination of All Forms of Racial Discrimination (CERD) has 179 members, CRPD 177 and ICCPR 172. The only instrument with a significantly smaller number of ratifications than the ICESCR is the CRMW, with its 54 members.[11]

Second, the added value of other core human rights instruments is the individual complaints procedures. The CERD, ICCPR, CEDAW, CRC and CRPD Committees may, under specific circumstances, consider individual complaints or communications from individuals. In comparison, the Optional Protocol to the ICESCR,[12] which establishes the competence of the Committee on Economic, Social and Cultural Rights (CESCR) to receive and consider communications in Article 1, entered into force only in 2013.[13] Still today, the CESCR can receive

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[10] For charts of signatures and ratifications, see <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A> (3 June 2019).

[11] To gauge the actual practical significance of these figures, however, the treaty reservations made by the state parties certainly must be taken into account.

[12] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) (10 December 2008) UN Doc A/RES/63/117.

[13] See the contribution by Dzidek Kędzia in this *Research Handbook* (Chapter 5).

communications from individuals only from the relatively small number of 24 state parties. So far, it has adopted only 16 views.[14]

Other treaties provide for an enhanced level of institutional protection in international law because their individual complaints mechanisms took up their work a long time ago and include a higher number of state parties. To date, 116 state parties recognize the competence of the Human Rights Committee (HRCttee) to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that state party of any of the rights set forth in the ICCPR (*cf.* Article 1 of the Optional Protocol).[15] Since the Optional Protocol entered into force in 1976, the HRCttee has already adopted 2209 views.[16] CRC and CEDAW did not include a petition mechanism at the time of their adoption. Although the Committee on the Rights of the Child (CRC Committee) has striven generally successfully to use its mandate to the fullest, the protection of children's economic, social and cultural rights was weakened for a long time by the inability of the Committee to receive individual and group complaints.[17] The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (CRC-OP3)[18] entered into force in 2014.[19] To date, it has been ratified by 41 states and the CRC Committee has considered 11 individual communications submitted under Article 5 CRC-OP3.[20] The Optional Protocol to the Convention on the Elimination of Discrimination against Women, by contrast, came into force in 2000,[21] and has since been ratified by 109 state parties. Individual communications can be brought under Article 2 CEDAW-OP. The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has already adopted 83 views under this procedure.[22] The Optional Protocol to the Convention on the Rights of Persons with Disabilities,[23] which entered into force on 3 May 2008, has 93 state parties; 27 communications have been considered under the

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[14] Out of these, the CESCR has only decided on the merits of three cases: see OHCHR, 'Statistical Survey of Individual Complaints Dealt With by the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (January 2018) <www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (3 June 2019).

[15] Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

[16] Out of these, the HRCttee has decided on the merits of 1155 cases until March 2016; see OHCHR, 'Statistical Survey of Individual Complaints Dealt With by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' (March 2016) <www.ohchr.org/Documents/HRBodies/CCPR/StatisticalSurvey.xls> (3 June 2019).

[17] Geraldine van Bueren, 'Committee on the Rights of the Child: Overcoming Inertia in This Age of No Alternatives' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 569, 572.

[18] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (CRC-OP3) (19 December 2011) UN Doc A/RES/66/138.

[19] *Ibid.*

[20] See <http://juris.ohchr.org/search/documents> (3 June 2019).

[21] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP) (6 October 1999) 2131 UNTS 83.

[22] The CEDAW Committee has decided on the merits of 33 cases thereof: see OHCHR, 'Status of Communications Registered by CEDAW under the Optional Protocol, Information as of 9 August 2018' <www.ohchr.org/Documents/HRBodies/CEDAW/StatisticalSurvey.xls> (3 June 2019).

[23] Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD) (13 December 2006) 2518 UNTS 283.

procedure established by its Article 1, and 16 decisions were issued on the merits.[24] In the case of the CERD, the option to recognize the competence of the Committee on the Elimination of Racial Discrimination (CERD Committee) to receive and consider communications is recognized in the treaty itself. To date, 58 state parties have signed up to Article 14 CERD and the Committee has adopted 49 opinions.[25] The CRMW also contains provisions for allowing individual communications to be considered by the Committee; they will become operative when ten state parties have made the necessary declaration under Article 77.[26]

Accordingly, indirect and direct protection of social rights in individual communications procedures is most relevant in the case of the ICCPR and the CEDAW because they have already considered a significant number of individual communications. Apart from this, the research conducted for this chapter mainly examines general comments, general recommendations and a number of concluding observations in the reporting procedures.

b. Approaches to the Protection of Especially Vulnerable Populations' Social Rights

The notion of the indivisibility and interdependence of human rights provides a starting point for the protection of social rights through instruments beyond the ICESCR. The human rights treaty bodies generally consider all rights to be interdependent and interrelated and, whether they have expressly stated it or not, to have justiciable content.[27] However, there are differences of approach between the Committees, as a consequence of diverging structures in their respective treaties. CERD and CEDAW are essentially non-discrimination Conventions (section II.b.i), while the CRC guarantees human rights from a child-specific perspective (section II.b.ii). CRMW and CRPD combine both approaches and, in this regard, are hybrid instruments (section II.b.iii).

i. CERD and CEDAW: non-discrimination Conventions

CERD and CEDAW are aimed specifically at eliminating discrimination on specific grounds. Accordingly, for the CERD and CEDAW Committees, all issues must be addressed through the prism of non-discrimination (Article 1 CERD; Articles 2 and 3 CEDAW). Their approach is not about defining social rights standards as such but about assessing discriminatory impact.

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[24] See <http://juris.ohchr.org/search/documents> (3 June 2019).

[25] Out of these, the Committee had decided on the merits of 30 cases up to May 2014: OHCHR, 'Statistical Survey of Individual Complaints Dealt With by the Committee on the Elimination of Racial Discrimination under Article 14 of the Convention for the Elimination of all forms of Racial Discrimination' (May 2014) <www.ohchr.org/Documents/HRBodies/CERD/StatisticalSurvey.xls> (3 June 2019).

[26] According to Art 77(1) CRMW, a state party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the CRMW have been violated by that state party.

[27] Urfan Khaliq and Robin Churchill, 'The Protection of Economic and Social Rights: A Particular Challenge?' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 199, 258; OHCHR, 'Monitoring the Convention on the Rights of Persons With Disabilities: Guidance for Human Rights Monitors' (2010) <www.ohchr.org/documents/Publications/disabilities_training_17en.pdf> (3 June 2019).

While CERD is generally considered to be a civil and political rights treaty,[28] Article 5 CERD defines the obligation of state parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination.

CEDAW seeks to eliminate discrimination against women by promoting equality for them across a broad ambit of areas, such as public life (Article 7), equality before the law (Article 15), access to education (Article 10) and health care (Article 12), citizenship and immigration (Article 9) and family life (Article 16).[29] CEDAW is thus potentially a very powerful tool in the promotion and effective protection of women's economic and social rights.[30] It does not refer to categories of rights or any differing legal obligations, such as the progressive realization of certain rights (but see Article 2(1) ICESCR). This only reinforces the claim that CEDAW was not perceived as setting new standards but was primarily about eliminating discrimination on the basis of gender in those rights which were already protected in the two UN human rights covenants of 1966.

ii. CRC: human rights guarantees from a child-specific perspective

The CRC pursues a different approach. It guarantees both civil and political and economic and social rights from the specific perspective of the child. In its General Comment No 5 on general measures of implementation, the CRC Committee notes:

> There is no simple or authoritative division of human rights in general or of Convention rights into the two categories [civil and political rights on the one hand and economic, social and cultural rights on the other]. […] Enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights.[31]

However, Article 4(2) CRC presupposes a distinction between social, economic and cultural rights and other rights. With regard to economic, social and cultural rights, state parties shall undertake measures (only) to the maximum extent of their available resources and, where needed, within the framework of international cooperation. According to the CRC Committee, the standard to which these rights must be protected only has to be 'progressive' in the sense that the standard must rise as the state develops not only economically but also socially and culturally. That does not mean that there is no immediate obligation.[32] The Committee's approach is similar to that of the CESCR.[33] At first sight this is surprising, since Article 4 CRC differs significantly from Article 2(1) ICESCR in that it omits any explicit reference to the notion of progressive realization. However, the CRC Committee, in its General Comment No 5, does refer to the General Comments of the CESCR, which 'should be seen as complementary'.[34] The CRC Committee also notes that Article 4 CRC is 'similar' to Article 2(1) ICESCR.[35] Beyond this reasoning of the Committee, it is also arguable that, since the notion of progres-

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[28] Khaliq and Churchill (n 27), 203.

[29] Meeting of Experts, 'Montreal Principles on Women's Economic, Social and Cultural Rights' (reprinted in (2004) 26(3) HRQ 760–80).

[30] Khaliq and Churchill (n 27), 227.

[31] CRC Committee, 'General Comment No 5 on General Measures of Implementation of the Convention on the Rights of the Child' (27 November 2003) CRC/GC/2003/5, para 6.

[32] *Ibid.*, paras 5–7.

[33] Khaliq and Churchill (n 27), 221.

[34] CRC Committee (GC 5) (n 31), para 5.

[35] *Ibid.*, para 7.

sive realization appears in the ICESCR which applies to 'everyone', including children, and since all state parties to the ICESCR are also party to the CRC, the concept of progressiveness is applicable to social rights under the CRC.[36]

iii. CRPD and CRMW: hybrid instruments

Based on a comparison with CEDAW and CRC, the CRPD can be described as a hybrid instrument.[37] On the one hand, it emphasizes non-discrimination; on the other, it is not limited to banning discrimination and guarantees the rights of persons with disabilities comprehensively. Non-discrimination and equal opportunities are enshrined as general principles in Article 3 lit. b and e CRPD. Article 5 CRPD, placed at the beginning of the individual guarantees, establishes the principles of equality and non-discrimination, and the equality aspect runs through the individual guarantees of the convention: equal 'enjoyment' of rights (Article 10, right to life), the enjoyment on an equal basis with others (see only Article 12(2), equal recognition before the law; Article 1(1), access to justice; Article 14(1) lit. a, freedom and security of the person; Article 15(2), freedom from torture as well as cruel, inhuman or degrading treatment). However, the CRPD goes beyond a mere non-discrimination convention and, as a hybrid instrument, aims to guarantee all human rights from the specific perspective of persons with disabilities.

Perhaps even more than CEDAW and CRC, the CRPD intertwines civil and political rights and economic and social rights: the right to participate in political and public life (Article 29 CRPD), essentially a classic civil and political right, is placed immediately after the right to an adequate standard of living and social protection (Article 28) as a typical social right. Surely, the distinction between civil and social rights also lives on in the CRPD. Its Article 4(2), in accordance with Article 2(1) ICESCR, recognizes that economic, social and cultural rights can only be realized gradually under certain circumstances. The distinction between different types of rights is therefore not obsolete in the CRPD.[38] The Committee on the Rights of Persons with Disabilities (CRPD Committee) has already dealt with the reservation of progressive implementation, but has so far rejected its application. General Comment No 1 on the same recognition before the law explicitly addresses this issue.[39] The Committee has developed an approach to the identification of social rights which has been criticized in the literature: Article 12(3) CRPD obliges states to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. It establishes a positive obligation designed to ensure the effective exercise of the right to equal exercise of legal capacity. As a right to benefits, one could assign Article 12(3) CRPD to economic and social rights within the meaning of Article 4(2) CRPD. The Committee takes a different view, starting from the proposition that Article 12 does not set out additional rights for people with disabilities. According to the Committee, it rather describes the specific elements that states parties are required to take into account to ensure the right to equality before the law for people

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[36] van Bueren (n 17), 571–72.

[37] Theresia Degener, 'Die UN-Behindertenrechtskonvention' (2010) Vereinte Nationen 57, 58.

[38] Robert Uerpmann-Wittzack, 'Die UN-Behindertenrechtskonvention in der Praxis des Ausschusses für die Rechte von Menschen mit Behinderungen' (2016) 54 Archiv des Völkerrechts 181, 186–87.

[39] CRPD Committee, 'General Comment No 1 on Equal Recognition Before the Law' (19 May 2014) CRPD/C/GC/1.

with disabilities, on an equal basis with others.[40] Stressing that the right to equality before the law is a classic civil and political right, the Committee therefore considered Article 4(2) CRPD inapplicable.[41] Similarly, the Committee apparently refuses to qualify Article 9 (right to accessibility) as a social right.[42]

The CRMW can also be qualified as a hybrid instrument. It sets out with a general non-discrimination provision (Article 7) and addresses the specific vulnerability of migrant workers by guaranteeing both civil and political as well as social and economic rights (such as Article 26(1)(b), right to join trade unions; Article 27, social security on the basis of non-discrimination; Article 28, medical care; Article 30, access to education on the basis of equality).

Accordingly, while their approaches to the protection of especially vulnerable populations differ, CEDAW, CRC, CRMW and CRPD are actually 'crosscutting' treaties,[43] as they protect both civil and political rights and economic and social rights. Despite the inseparability and interdependence of human rights, the distinction between civil and political rights on the one hand and social rights on the other is far from completely irrelevant.

c. Forms of Social Rights Protection Beyond the ICESCR

Given these different approaches of the core international human rights treaties, there are differences in the relative significance of direct protection (section II.c.i) and indirect protection based on specific non-discrimination clauses (section II.c.ii), general non-discrimination clauses (section II.c.iii) and the integrative interpretation of other substantive guarantees (section II.c.iv).

i. Direct protection

Judging from the treaty provisions themselves, the CRC is the most significant instrument of direct social rights protection. Social rights provisions in the CRC include the right to life and to survival and development (Article 6),[44] the right of disabled children to special care (Article 23), the right to the enjoyment of the highest attainable standard of health (Article 24), the right to benefit from social security (Article 26),[45] the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Article 27) and the right to education (Articles 28,[46] 29).[47] A more comprehensive list of social rights guarantees

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[40] *Ibid.*, para 1.

[41] *Ibid.*, para 30; for a critique, see Uerpmann-Wittzack (n 38), 197.

[42] CRPD Committee, 'General Comment No 2 on Accessibility' (22 May 2014) CRPD/C/GC/2, para 25; for a critique, see Uerpmann-Wittzack (n 38), 200.

[43] For CRC and CEDAW, see Khaliq and Churchill (n 27), 202–03.

[44] Manfred Nowak, 'Article 6: The Right to Life, Survival and Development' in André Alen *et al* (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2005).

[45] Wouter Vandenhole, 'Article 26: The Right to Benefit from Social Security' in André Alen *et al* (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2007).

[46] Mieke Verheyde, 'Article 28: The Right to Education' in André Alen *et al* (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2006); Susanna Suelmann, *Bildung in der Frauenrechtskonvention, der Kinderrechtskonvention und der Behindertenrechtskonvention der Vereinten Nationen* (2013).

[47] Aiofe Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' in Michael Freeman (ed.), *The Future of Children's Rights* (2014) 121, 125.

adds the right to birth registration (Articles 6 and 7), the right not to be separated from parents because of poverty (Article 9), the right of access to information and material from a diversity of national and international sources, especially those aimed at the promotion of the social, spiritual and moral wellbeing of the child and physical and mental health (Article 17), the right to be protected from all forms of abuse and neglect (Article 19), the right of those temporarily separated to special protection assistance and the right to alternative care (Article 20), the rights of children with disabilities (Article 23), the right to rest and leisure (Article 31),[48] the right to be protected from economic and sexual exploitation and abuse, and from illicit use of narcotic drugs (Articles 32,[49] 33, 34 and 36), the right to be protected from abduction, sale and trafficking as well as torture or other cruel, inhuman or degrading treatment or punishment (Articles 35 and 37) and, depending upon the consequences of the abuse arising or resulting from poverty, the right to physical and psychological recovery and social reintegration (Article 39).[50]

In the practice of the CRC Committee, the right to health has gained particular significance as a social right.[51] Article 24 CRC guarantees the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Thus, states must ensure that no child is deprived of his or her right of access to healthcare services. Furthermore, they have an obligation to ensure the provision of necessary medical assistance and healthcare to all children, combat disease and malnutrition, and develop preventive healthcare.[52] Under Article 24(2)(a), state parties have a duty to diminish infant and child mortality and Article 6 CRC provides that every child has the inherent right to life and that states 'shall ensure to the maximum extent possible the survival and development of the child'.

CRPD and CRMW also protect certain social rights, such as the rights to education, health, work and an adequate standard of living (Articles 24,[53] 25, 27[54] and 28 CRPD; Articles 20, 28, 43 and 45 CRMW). Recognizing the special situation of migrant workers, Article 22 CRMW prohibits collective expulsion and thereby protects a whole range of economic, social and cultural rights of migrant workers and their families. Article 26 CRMW guarantees the right

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[48] Paulo David, 'Article 31: The Right to Leisure, Play and Culture' in André Alen *et al* (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2006).

[49] Lee Swepston, 'Article 32: Protection from Economic Exploitation' in André Alen *et al* (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2012).

[50] van Bueren (n 17), 578.

[51] CRC Committee, 'General Comment No 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) CRC/GC/2003/4; CRC Committee, 'General Comment No 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health' (April 2013) CRC/C/GC/15; *cf.* Asbjørn Eide and Wenche Barth Eide, 'Article 24: The Right to Health' in André Alen *et al* (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (2005).

[52] Asbjørn Eide, 'Adequate Standard of Living' in Daniel Moeckli *et al* (eds), *International Human Rights Law* (2018) 186, 198–99.

[53] Suelmann (n 46).

[54] *A.F. v Italy*, CRPD Committee, Communication No 9/2012, CRPD/C/13/D/9/2012 (19 May 2015); *Gröninger v Germany*, CRPD Committee, Communication No 2/2010, CRPD/C/D/2/2010 (7 July 2014); *H.M. v Sweden*, CRPD Committee, Communication No 3/2011, CRPD/C/7/D/3/2011 (21 My 2012); *Jungelin v Sweden*, CRPD Committee, Communication No 5/2011, CRPD/C/12/D/5/2011 (14 November 2014).

to join trade unions,[55] Article 28 the right to receive any medical care, and Article 31 demands respect for the cultural identity of migrant workers and members of their families.[56] However, in the case of the CRPD Committee, established in 2006, practice is still relatively scarce; and in the case of the Committee on the Protection of the Rights of all Migrant Workers (CRMW Committee), the circumstances in which the economic and social rights of migrant workers are engaged under the CRMW are relatively narrow.[57]

CERD and ICCPR, although generally considered to be civil and political rights treaties, also provide the basis for the direct protection of social rights. Both the HRCttee and the CERD Committee have dealt with economic and social rights in their practice.[58] A relevant provision in the CERD is Article 2(2), which contains a positive state obligation with regard to socio-economic fields. However, the CERD Committee has set out the substantive content of social rights through the prism of non-discrimination.[59] The HRCttee has been particularly expansive in its approach to economic and social rights issues when they have come before it.[60] Articles 18(4) (religious education), 22 (right to form trade unions) and 27 (minority rights) of the ICCPR protect rights which are usually considered to be economic, social or cultural ones.[61] Like the – identical – Article 1 ICESCR, Article 1 ICCPR expressly refers to economic and social rights in the context of self-determination.[62] Article 22 ICCPR potentially overlaps with the rights to form a trade union and to strike under Article 8 ICESCR.[63] Article 22 ICCPR does not expressly extend to the right to strike, but Article 8 ICESCR does.[64] The HRCttee held that the individual right in Article 22 ICCPR did not necessarily exclude the right to strike in all circumstances and saw no reason for interpreting this common matter differently in the two Covenants.[65]

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[55] CRMW Committee, 'General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families' (28 August 2013) CMW/C/GC/2, paras 65f.

[56] Chenwi and Chirwa (n 9), 47. On health care and education, see, e.g., CRMW Committee, 'Concluding Observations on Mexico' (27 September 2017) CMW/C/MEX/CO/3, paras 49–54; CRMW Committee, 'Concluding Observations on Ecuador' (5 October 2017) CMW/C/ECU/CO/3, paras 32–35.

[57] Khaliq and Churchill (n 27), 202.

[58] See William F Felice, 'The UN Committee on the Elimination of All Forms of Racial Discrimination: Race, and Economic and Social Human Rights' (2002) 24(1) HRQ 205; Nathalie Prouvez, 'Committee on the Elimination of Racial Discrimination: Confronting Racial Discrimination and Inequality in the Enjoyment of Economic, Social and Cultural Rights' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 517; Patrick Thornberry, 'Article 5: Economic, Social, and Cultural Rights' in Patrick Thornberry (ed.), *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (2016) 364.

[59] See below section II.c.ii and Khaliq and Churchill (n 27), 238–43.

[60] *Ibid.*, 203.

[61] *Ibid.*, 244.

[62] The HRCttee has, in a number of individual petitions, held that the author of the communication, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in Art 1 of the Covenant, although this is related to the definition of a 'victim' under the admissibility criteria as opposed to a substantive issue. See for example *Kitok v Sweden*, HRCttee, Communication No 197/1985, CCPR/C/33/D/197/1985 (1988) para 6.3; *cf.* Khaliq and Churchill (n 27), 243.

[63] Khaliq and Churchill (n 27), 244.

[64] *Ibid.*, 250.

[65] *J.B. et al v Canada*, HRCttee, Communication No 118/1982, UN Doc A/41/40 (1986), Supp No 40, 151, paras 9–10 (appended Individual Opinion).

ii. Specific non-discrimination provisions

The primary example for social rights protection through specific non-discrimination provisions is provided by CEDAW and the practice of the CEDAW Committee. CEDAW comprises a number of specific non-discrimination provisions that address the equality of women. Article 3 includes a general commitment to take any means for securing the development and promotion of women, not only in the 'political' sphere, but also with reference to the 'social, economic and cultural' spheres. Article 10 addresses the rights of women to access and equality in the field of education.[66] Article 11 states that women should have the equal right to 'work as an inalienable right of all human beings' and adds several supplemental rights:[67] a prohibition on discrimination in employment opportunities and in promotion, a right to equal wages, a right to social security; a right to health and safety at work, including during pregnancy, a prohibition on discrimination on the grounds of pregnancy, delivery and marriage, and a duty to introduce paid maternity leave. It also refers to the encouragement of integrating parents in the job market, including the establishment and development of networks of childcare facilities.[68] Article 12 sets out the right of women to access and equality in the area of health care services and refers especially to suitable services related to pregnancy, confinement and the post-natal period. According to Article 13, women are also entitled to equal rights in the field of family benefits, mortgages and other forms of financial credit. Article 14 addresses the particular problems faced by rural women and emphasizes the need to ensure their right to have access to health care facilities, social security programmes, training and education, employment, financial credit and adequate living conditions. Article 15 states that women shall enjoy legal capacity identical to that of men, including with regard to contracts and property. Article 16 specifically refers to equality in property rights with regard to married women.

The CEDAW Committee has published a number of general recommendations pertaining to social rights, addressing the unpaid contribution made by women in family enterprises,[69] the recognition of women's labour in the non-monetized sector,[70] HIV,[71] and female circumcision.[72] The latter two general recommendations are reinforced in the general recommendation on health, which no longer focuses solely on biological difference but considers the gendered

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[66] Suelmann (n 46); Susann Kroworsch, *Das Recht von Frauen und Mädchen auf Bildung: Indikatoren für die Umsetzung* (2016).

[67] *Dung Thi Thuy Nguyen v The Netherlands*, CEDAW Committee, Communication No 003/2004, CEDAW/C/36/D/3/2004 (14 August 2006); *R.K.B. v Turkey*, CEDAW Committee, Communication No 028/2010, CEDAW/C/51/D/28/2010 (24 February 2012); *Elisabeth de Blok et al v The Netherlands*, CEDAW Committee, Communication No 036/2012, CEDAW/C/57/D/36/2012 (17 February 2014).

[68] Dafnah Baraḳ-Erez, 'Social Rights as Women's Rights' in Dafnah Baraḳ-Erez (ed.), *Exploring Social Rights: Between Theory and Practice* (2007) 397, 403.

[69] CEDAW Committee, 'General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (2010) CEDAW/C/GC/28.

[70] CEDAW Committee, 'General Recommendation No 17 on Measurement and Quantification of the Unremunerated Domestic Activities of Women and Their Recognition in the GNP' (1991) CEDAW/C/GC/17.

[71] CEDAW Committee, 'General Recommendation No 15 on Avoidance of Discrimination against Women in National Strategies for the Prevention and Control of Acquired Immunodeficiency Syndrome (AIDS)' (1990) UN Doc A/45/38.

[72] CEDAW Committee, 'General Recommendation No 14 on Female Circumcision' (1990) CEDAW/C/GC/14.

implications of health.[73] The difficulties experienced by women in accessing health care are reinforced. Echoing CESCR General Comment No 14 on health,[74] the CEDAW Committee requires states to ensure that health care provision for women is adequate, accessible, available and appropriate. Moreover, states are to ensure that the privatization of health resources does not negatively impact on women. The Committee's approach in this regard demonstrates that, while CEDAW is critical in defining states' obligations with regard to substantive equality and non-discrimination, the ICESCR is necessary to elaborate the content of economic, social and cultural rights.[75] Although Article 12 CEDAW creates the state obligation not to discriminate in the provision of health care services and General Recommendation No 24 further elaborates on a state's obligation under this article,[76] only Article 12 ICESCR and the General Comment No 14 published by the CESCR lay out the normative content of the right to health.[77]

Recognizing that many of the human rights violations experienced by women are in the domestic sphere, CEDAW comprises a comprehensive provision covering marriage and family relations (Article 16) together with a general recommendation thereon.[78] Significantly, both the Convention and the Committee's general recommendations identify the impediments to women's enjoyment of their rights as being rooted in social structural inequalities which are exacerbated by a restrictive interpretation of culture and religion (Articles 2(f), 5(a) CEDAW).[79]

Article 5(e) CERD is also a specific non-discrimination provision that provided the basis for a significant practice by the CERD Committee.[80] According to the CERD Committee's General Recommendation No 20, it requires state parties to guarantee the right to housing and the right to public health, medical care, social security and social services.[81] Communications of the Committee address individual employment rights under Article 5(e)(i) CERD.[82]

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[73] CEDAW Committee, 'General Recommendation No 24 on Article 12 of the Convention (Women and Health)' (1999) UN Doc A/54/38/Rev.1, chapter 1.

[74] CESCR, 'General Comment No 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4.

[75] International Network for Economic, Social and Cultural Rights (ESCR-Net) and International Women's Rights Action Watch Asia Pacific (IWRAW), 'Claiming Women's Economic, Social and Cultural Rights' (2013) 23.

[76] CEDAW Committee (GR 24) (n 73).

[77] CESCR (GC 14) (n 74), paras 12 a–d.

[78] CEDAW Committee, 'General Recommendation No 21 on Equality in Marriage and Family Relations' (1994) UN Doc A/49/38.

[79] CEDAW Committee, 'Concluding Observations Ethiopia' (1 January 1996) UN Doc A/51/38(SUPP), para 139; Fareda Banda, 'Understanding Women's Economic and Social Human Rights' (2006) 12(2) East African Journal of Peace & Human Rights 232, 246–47.

[80] Khaliq and Churchill (n 27), 237–43.

[81] CERD Committee, 'General Recommendation No 20 on Non-Discriminatory Implementation of Rights and Freedoms' (1996) UN Doc A/51/18 annex VIII. See also CERD Committee, 'General Recommendation No 23 on the Rights of Indigenous Peoples' (1997) UN Doc A/52/18 annex V; CERD Committee, 'General Recommendation No 27 on Discrimination against Roma' (2000) UN Doc A/55/18, annex V.

[82] *B.M.S. v Australia*, CERD Committee, Communication No 008/1996, CERD/C/54/D/8/1996 (12 March 1999), paras 7.11–7.12; *Yilmaz-Dogan v The Netherlands*, CERD Committee, Communication No 1/1984, CERD/C/36/D/1/1984 (10 August 1988), paras 9.2-9.4; *A.M.M. v Switzerland*, CERD Committee, Communication No 050/2012, CERD/C/84/D/50/2012 (18 February 2014), para 5.9.

Specific non-discrimination provisions can also be found in the CRMW. Article 25 CRMW requires equal treatment in respect of remuneration and other conditions of work,[83] and Article 30 CRMW guarantees the right of access to education on the basis of equality of treatment with nationals.

iii. General non-discrimination provisions

In the absence of specific non-discrimination provisions, Committee work refers to general provisions. Due to the characteristics of Article 26 ICCPR (the right not to be discriminated against) as an independent, freestanding provision on a human right to non-discrimination, this provision has been the most important vehicle for providing indirect protection to economic, social and cultural rights through the complaint procedure and other monitoring mechanisms of the ICCPR.[84] In communications invoking Article 26, the HRCttee has extended the scope of that provision to encompass any right which is recognized in the domestic legal system of a state party.[85] The position was first made clear in *Broeks v Netherlands*, where the HRCttee held in 1987 that Article 26 should prohibit discrimination in all rights protected in a domestic legal system and was not limited to the material scope of the ICCPR. According to the HRCttee, the ICCPR would still apply even if there were an overlap with other international instruments, such as the CERD, the CEDAW or the ICESCR.[86] This proposition was subsequently reiterated, *inter alia*, in General Comment No 18.[87] The HRCttee also recognized limits of interpretation.

The non-discrimination duty enshrined in Article 2 CRC does not only ban discrimination in relation to the subject of the treaty, that is, children. Rather, Article 2(1) places a duty on state parties to respect and ensure the rights in the CRC

> irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Hence the principle of equality in implementing the social rights of children extends to all children regardless of the status of the child's parents or legal guardians and in this way, family members indirectly benefit from the economic and social entitlements of the child.[88]

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[83] CRMW Committee (n 55).

[84] *Gueye et al v France*, HRCttee, Communication No 196/1985, CCPR/C/35/D/196/1985 (1989); *Zwaan-de Vries v The Netherlands*, HRCttee, Communication No 182/1984, CCPR/C/OP/2 (1987); *Edward Young v Australia*, HRCttee, Communication No 941/2000, CCPR/C/78/D/941/2000 (6 August 2003); *Cecilia Derksen and Kaya Marcelle Bakker v The Netherlands*, HRCttee, Communication No 976/2001, CCPR/C/80/D/976/2001 (1 April 2004); *cf.* Scheinin (n 9), 74f.

[85] For a discussion, see Nisuke Ando, 'The Evolution and Problems of the Jurisprudence of the Human Rights Committee's Views Concerning Article 26' in Nisuke Ando (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (2004) 205; Christian Tomuschat, 'The Human Rights Committee's Jurisprudence on Article 26 – A Pyrrhic Victory?' in Nisuke Ando (ed.), *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (2004) 225.

[86] *Broeks v The Netherlands* [1987] CCPR/C/OP/2, paras 12.1–12.2, 12.5.

[87] HRCttee, 'General Comment No 18 on Non-Discrimination' (10 November 1989) UN Doc HRI/GEN/1/Rev.9 (Vol 1), para 12; *cf.* Khaliq and Churchill (n 27), 253f.

[88] van Bueren (n 17), 571.

iv. Integrative interpretation of other substantive guarantees

Social instruments can also be protected through an integrative or holistic interpretation of other substantive guarantees. The HRCttee has developed such a holistic approach to the right to life (Article 6 ICCPR) both in the state reporting procedure and in later General Comments.[89] This approach was established in 1982 in General Comment No 6,[90] and has been maintained ever since. As other phenomena that can also involve economic and social rights have increasingly come to light, the HRCttee has sought to address those as well.[91] The right of women to health is a recurring theme in the HRCttee's practice, including through concerns related to female genital mutilation and other harmful practices, as well as those related to the availability of reproductive health services. The HRCttee invokes a whole range of ICCPR provisions, including Articles 2, 3, 6, 7 and 17.[92] Moreover, the HRCttee often addresses the economic, social and cultural rights of prisoners, in particular their right to health, in the reporting procedure. This is done with reference to Article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment) and Article 10 (humane treatment)[93] but also to Article 6 (right to life).[94] In addition, the HRCttee fairly articulately calls for cultural, economic and resource rights of indigenous peoples and similarly situated groups, based on Article 27 ICCPR.[95] Compared to Article 6 of the European Convention on Human Rights,[96] the right to a fair trial (Article 14 ICCPR), including the right of access to a court and the right to equality before a court, has not obtained a prominent status in the indirect protection of economic, social and cultural rights.[97] Due to the independent nature of the non-discrimination clause in Article 26 ICCPR, claims related to economic, social and cultural rights have usually been presented under that provision.[98]

For the Committee of the Rights of the Child, some of the CRC's provisions are drafted so as to permit a holistic approach to, for example, the right to life that recognizes the mutually supporting interrelationship between all rights.[99] This approach is also potentially far-reaching. Its impact can be seen in a number of the substantive General Comments adopted by the

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89 Khaliq and Churchill (n 27), 247.

90 HRCttee, 'General Comment No 6 on the Right to Life' (1982).

91 Khaliq and Churchill (n 27), 250.

92 Scheinin (n 9), 83.

93 HRCttee, 'Concluding Observations on Botswana' (April 2008) CCPR/C/BWA/CO/124; HRCttee, 'Concluding Observations on Chad' (11 August 2009) CCPR/C/TCD/CO/1; HRCttee, 'Concluding Observations on Rwanda' (31 March 2009) CCPR/C/RWA/CO/3; HRCttee, 'Concluding Observations on Cameroon' (4 August 2010) CCPR/C/CMR/CO/4; *cf.* Scheinin (n 9), 85.

94 *Mukong v Cameroon*, HRCttee, Communication No 458/1991, CCPR/C/51/D/458/1991 (1994); *Lantsov v Russia*, HRCttee, Communication No 763/1997, CCPR/C/74/D/763/1997 (2002); *cf*. Scheinin (n 9), 76f.

95 HRCttee, 'General Comment No 23 on the Rights of Minorities' (8 April 1994) CCPR/C/21/Rev.1/Add.5; HRCttee, 'Concluding Observations on Tanzania' (6 August 2009) CCPR/C/TZA/CO/4; *Diergaardt et al v Namibia*, HRCttee, Communication No 760/1997, CCPR/C/69/D/760/1996 (2000); HRCttee, 'Concluding Observations Kenya' (31 August 2012) CCPR/C/KEN/C0/3; *cf.* Scheinin (n 9), 86.

96 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (4 November 1950) ETS No 5.

97 Scheinin (n 9), 80.

98 *Ibid.*, 81.

99 Khaliq and Churchill (n 27), 258f.

Committee. For example, in General Comment No 3 on children with HIV, the Committee noted that

> HIV/AIDS impacts so heavily on the lives of all children that it affects all their rights – civil, political, economic, social and cultural. The rights embodied in the general principles of the Convention – the right to non-discrimination (Article 2), the right of the child to have his/her interest as a primary consideration (Article 3), the right to life, survival and development (Article 6) and the right to have his/her views respected (Article 12) – should therefore be the guiding themes in the consideration of HIV/AIDS at all levels of prevention, treatment, care and support.[100]

However, the holistic approach taken in the Committee's General Comments is not entirely consistent. In General Comment No 1 on Article 29, the Committee notes that the right to education is essential for the exercise of other rights, such as freedom of expression (Article 13), freedom of thought (Article 14), the right to information (Article 17), the rights of children with disabilities and the linguistic and cultural rights of children belonging to minority groups (Article 30).[101] Despite this reference, the Committee has not developed a clear link between rights from different categories which can be considered to be complementary to one another. In General Comment No 12 on the right of the child to be heard,[102] the Committee had a clear opportunity to adopt a more holistic approach but actually seems to have taken almost the opposite one. It discusses the right in Article 12, but does not refer to the rights in Articles 28 and 29.[103]

III. THE CHALLENGE OF COHERENCE

'Specialized' human rights treaty bodies like the CERD, CEDAW and CRC Committees are fully competent to address social rights in the modes analyzed so far. While the context of their work differs, there is an invariable overlap in their practice. For example, if a woman experiences a violation of her right to health care because the state's policy only extends maternity leave benefits to those women in formal employment, she would be able to bring a claim to the CESCR under Articles 7, 10 and 12 ICESCR or to the CEDAW Committee on Articles 11 and 12 CEDAW. The HRCttee, with its significantly broader mandate, has also displayed a willingness to venture into areas that are within the ambit of more specialized treaty bodies.[104]

The key issue is ensuring that no conflicting obligations are imposed upon state parties, but to date there has been no evidence that this has happened as far as social rights are concerned.[105] Still, it remains important that the understanding of the scope of the rights and obligations of the various mechanisms are consistent. Ensuring coherence is challenging for treaty bodies. Although the articulation of the right might not be exactly the same under each

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[100] CRC Committee, 'General Comment No 3 on HIV/AIDS and the Rights of the Children' (17 March 2003) CRC/GC/2003/3, para 5; *cf.* Khaliq and Churchill (n 27), 222f.

[101] CRC Committee, 'General Comment No 1 on the Aims of Education' (17 April 2001) CRC/GC/2001/1, para 6.

[102] CRC Committee, 'General Comment No 12 on the Right of the Child to be Heard' (20 July 2009) CRC/C/GC/12.

[103] *Ibid.*, para 21; *cf.* Khaliq and Churchill (n 27), 225.

[104] ESCR-Net and IWRAW (n 75), 24.

[105] Khaliq and Churchill (n 27), 258f.

instrument, each Committee should be aware of interpretations of that right under other mechanisms.[106] In some cases treaty bodies have reacted to this concern and published joint general recommendations.[107]

Given this need for consistency, it is understandable that not even the CRC Committee has issued many thematic General Comments. Rather, when addressing social rights under the CRC, the Committee has relied heavily on the work of the CESCR.[108] Prior to February 2013, the CRC Committee had not issued a rights-thematic General Comment on any of the social rights or spelt out the obligations imposed by a particular social right in detail. The Committee's General Comment No 15 on the right of the child to the enjoyment of the highest attainable standard of health (Article 24)[109] and its General Comment No 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Article 31)[110] now take a different approach.[111]

IV. CONCLUSIONS AND OUTLOOK

Based on an analysis of treaty texts and the practice of treaty bodies, this chapter has demonstrated the significance of core international human rights treaties beyond the ICESCR for the protection of social rights. They open up a variety of procedural avenues for the enforcement of social rights. Moreover, the joint efforts of various treaty bodies can contribute to an international protection of social rights that takes into account the diverse contexts in which social rights need protection and that addresses specific vulnerabilities and risks. While treaty regimes differ in the forms of direct and indirect social rights protection, indirect protection and non-discrimination in particular can be a powerful tool for the protection of social rights. Whether indirect protection or non-discrimination gives more leverage will depend on the specific situation and on the general standard of social rights protection in a particular state. While coherence poses an overarching challenge for the work of treaty bodies, the diversity of instruments and mechanisms offers an opportunity for the interactive realization and development of social rights. It should be considered seriously by all treaty bodies.

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[106] ESCR-Net and IWRAW (n 75), 24.

[107] CRC Committee, 'Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination against Women/General Comment No 18 of the Committee on the Rights of the Child on Harmful Practices' (14 November 2014) CEDAW/C/GC/31-CRC/C/GC/18; CRC Committee and CRMW Committee, 'Joint General Comment No 3 of the CMW and No 22 of the CRC in the Context of International Migration: General Principles' (16 November 2017) CRC/C/GC/22; CRC Committee and CRMW Committee, 'Joint General Comment No 4 of the CMW and No 23 of the CRC in the Context of International Migration: States Parties' Obligations in Particular With Respect to Countries of Transit and Destination' (16 November 2017) CRC/C/GC/23.

[108] Nolan (n 47), 127.

[109] CRC Committee (GC 15) (n 51).

[110] CRC Committee, 'General Comment No 17 on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts' (17 April 2013) CRC/C/GC/17.

[111] Nolan (n 47), 126.

B. Regional Protection

7. The European Social Charter

Karin Lukas

I. INTRODUCTION

Social rights in the European system are a contested subject. We see a strong social welfare system in many European countries, and social rights are firmly embedded in many European constitutions. However, social rights continue to struggle with issues of justiciability. Due to the unfortunate political division during the Cold War, the European human rights protection system assigns a court to the enforcement of civil and political rights, and a quasi-judicial body to the enforcement of social rights.[1] Despite these different enforcement tracks, social rights in Europe have a long and rich history and extensive jurisprudence, and are seen as a key pillar of democracy and the rule of law. This chapter explores the European Social Charter, the main human rights treaty for social rights in Europe, and its monitoring system.[2]

Section II delineates key events in the history of the Charter, its development and its implementation system. Section III looks at the specific characteristics of the Charter system, in particular the scope of protection *ratione personae*, the *à la carte* ratification of provisions which determine the scope of protection *ratione materiae*, and the content-related overlaps between certain provisions. The monitoring and implementation system is the main focus of section IV. Besides the state reporting procedure, the system of collective complaints is a major engine in developing Charter jurisprudence. Section V analyzes key findings of the state reporting and collective complaints procedure which give a certain indication of the social rights issues at stake in Europe. The last part of this section is dedicated to concrete legislative and administrative changes in order to comply with Charter standards. Section VI ends with conclusions and trends regarding social rights in the European context.

II. SHORT HISTORY AND DEVELOPMENT OF THE 1961 CHARTER AND THE 1996 CHARTER

The history of the European Social Charter notes three major milestones. The initial European Social Charter was adopted in 1961.[3] This document is the result of nearly ten years of preparatory work in the Council of Europe and with the member states.[4] In this process, one

[1] See the contribution by Manfred Nowak in this *Research Handbook* (Chapter 1).

[2] For a more comprehensive analysis of this instrument see Olivier De Schutter, *The European Social Charter: A Social Constitution for Europe* (2010); Matti Mikkola, *Social Human Rights in Europe* (2010); David J Harris and John Darcy, *The European Social Charter* (2001).

[3] Council of Europe, European Social Charter – Collected texts (2015) 9–24 <https://rm.coe.int/168048b059> (5 June 2019).

[4] For the *travaux préparatoires* see the European Social Charter website of the CoE, <www.coe.int/it/web/turin-european-social-charter/preparatory-work> (5 June 2019).

central document – Opinion No 5 of 1953, formulated that the European Social Charter should guide the member states in the field of social policy – and is to be seen as the counterpart of the European Convention on Human Rights in this area.[5] In the late 1980s and (early) 1990s a political and legal process to modernize the Charter and to increase its impact began. In 1988, an Additional Protocol added new rights,[6] and an Amending Protocol improved the supervisory mechanism in 1991.[7] Another Additional Protocol,[8] providing for a system of collective complaints, was adopted in 1995, which significantly strengthened the monitoring system of the Charter. This reform process culminated in 1996 with the adoption of the Revised Charter,[9] which added a set of new rights while at the same time incorporating the basic content of the 1961 Charter and its protocols.[10] Today, 43 out of the Council of Europe's 47 member states have ratified either the 1961 Charter (eight states) or the Revised Charter.[11] As this process continues, nearly all states will be bound by the Revised Charter at some point in the future.

If not explicitly mentioned otherwise, the following sections refer to both versions of the European Social Charter, hereinafter 'the Charter'.

III. CHARACTERISTICS OF THE CHARTER SYSTEM

a. Personal Scope of the Charter[12]

The Appendix to the European Social Charter outlines the personal scope of this treaty. It generally limits the application *ratione personae* to 'nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'. Foreign nationals must therefore satisfy three conditions for entitlement to the rights in the Charter on the same basis as nationals. They have to be:

– nationals of one of the state parties to the Charter;
– lawfully resident, in other words authorized to enter and reside in the state party's territory;
– and/or be working regularly, which means be authorized to enter and work in the state party's territory.

Consequently, the Charter does not grant foreign nationals in general a right of entry or freedom of movement in the territory of other state parties. However, according to the wording of the Charter and the Committee's case law, state parties are required to implement a flexible

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5 Parliamentary Assembly, Opinion No 5 (23 September 1953).
6 CoE (ESC) (n 3), 25–30.
7 *Ibid.*, 31–34.
8 *Ibid.*, 35–37.
9 *Ibid.*, 38–64.
10 The 1961 Charter and the Revised Charter will continue to coexist until all state parties have adopted the Revised Charter.
11 A detailed chart of signatures and ratifications can be found at the European Social Charter website, <https://rm.coe.int/16806f399d> (5 June 2019). The states yet to ratify either the 1961 Charter or the Revised Charter are Liechtenstein, Monaco, San Marino and Switzerland.
12 For a more detailed discussion of the personal scope of the Charter see for example Claudio Panzera, 'The Personal Scope of the European Social Charter: Questioning Equality' (2014) 24 Revista Europea de Derechos Fundamentales 51.

immigration policy towards nationals of other state parties by liberalizing the regulations governing the employment of foreign workers (see Article 18§§1–3 of the Charter) and facilitating family reunion (see Article 19§6 of the Charter). The Appendix explicitly mentions refugees,[13] as well as stateless persons,[14] who, if they lawfully reside in the territory of a state party, shall be granted

> treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable.

The Committee held in a number of collective complaints decisions that, in view of the nature of the Charter as a living human rights instrument as well as in view of its object and purpose, the personal scope limitation of the Appendix cannot be interpreted to deny the protection of the most basic rights offered by the Charter to state parties nationals who fall within the category of irregular migrants.[15] This would be particularly true in any situation where the exclusion of such migrants from the scope of the Charter, due to a rigid interpretation of the Appendix, would amount to a denial of protection for their fundamental rights, such as the right to life, or to physical integrity. Still, this extension would only apply in exceptional situations, and the personal scope remains limited, which is unusual for a human rights instrument that should be operational for every individual on the territory of a state party.

b. *À la Carte* Ratification of the Charter

Unlike other human rights treaties, the Charter foresees a so-called *à la carte* ratification. According to Article A of the 1961 Charter, each state party must accept so-called core articles, which are Articles 1, 5, 6, 12, 13, 16 and 19. In the corresponding provision of the Revised Charter the core articles are 1, 5, 6, 7, 12, 13, 16, 19 and 20. In addition, the state must accept enough additional provisions to be bound by not less than 10 articles or 45 numbered paragraphs of the 1961 Charter, and not less than 16 articles or 63 numbered paragraphs in total of the Revised Charter. This leads to a certain hierarchization of rights and, consequently, to a prioritization in implementation. The system of *à la carte* ratification leads to a 'protection patchwork' with certain rights left out depending on the selection by the state in question. For example, France and Portugal have accepted all provisions of the Revised Charter, while Albania and Armenia have committed themselves to 64 paragraphs. Moldova accepted the minimum of 63 paragraphs.[16]

The Charter foresees the procedure of meetings on non-accepted provisions where regular meetings and written exchange between states and the Committee aim at the ratification of

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[13] As defined in the Convention relating to the Status of Refugees (28 July 1951) 189 UNTS 137 and in the Protocol (31 January 1967) 606 UNTS 267.

[14] As defined in the Convention on the Status of Stateless Persons (28 September 1954) 360 UNTS 117.

[15] See for example *DCI v Belgium*, ECSR, Collective Complaint No 69/2011, Decision of 23 October 2012, and *EUROCEF v France*, ECSR, Complaint No 114/2016, Decision of 24 January 2018. On the collective complaints procedure see section IV.c.

[16] Council of Europe, Country Factsheets European Social Charter, <www.coe.int/it/web/turin-european-social-charter/implementing-the-european-social-charter#Factsheets> (5 June 2019).

further Charter provisions. This has led to the ratification of additional provisions in almost all states, most recently in Austria, Latvia, Moldova, the Republic of North Macedonia, and Ukraine. Overall, the vast majority of states has ratified a majority of provisions. However, the problem of uneven implementation throughout Europe because of the *à la carte* system remains, even though it is gradually decreasing.

c. Overlapping Provisions

This 'protection patchwork' is somewhat offset by a number of provisions which overlap with each other. For example, Article 2§4 on the elimination of risks in dangerous occupations significantly overlaps with Article 3 on the right to safe and healthy working conditions; Article 16 on the right of the family to social, legal and economic protection provides in the Committee's interpretation a right to shelter and housing for families which is also included in the right to housing (Article 31); Article 4§3 on fair remuneration for women and men and Article 20 on gender equality in employment protect equal pay; similarly, Article 23 overlaps with other provisions of the Charter which protect elderly persons as members of the general population, such as Article 11 (right to protection of health), Article 12 (right to social security), Article 13 (right to social and medical assistance) and Article 30 (right to protection against poverty and social exclusion). Thus, some degree of protection is provided by articles that capture elements of other rights even though the state has not ratified these provisions of the Charter.

IV. SUPERVISORY MECHANISMS OF THE EUROPEAN SOCIAL CHARTER

a. The European Committee of Social Rights

The European Committee of Social Rights (hereinafter 'the Committee', ECSR) is the supervisory body of the Charter.[17] It consists of 15 independent experts from various fields of law such as labour and social security law, constitutional law, international law and human rights law. They are elected for six years and may stand for reelection once.[18] Candidates are nominated by their state and then stand for election by the Committee of Ministers which is the highest political organ of the Council of Europe (CoE). The majority of members are from European Union states, and three current members are from CoE countries (Moldova, Russia and Turkey). In accordance with the Charter, members have to perform their duties 'with the requirements of independence, impartiality and availability'.[19] This entails that no member can be a civil servant or perform other functions in connection with the state. The Committee has the mandate to legally assess the conformity of state legislation and practice with the standards of the Charter. This assessment is done through the state reporting procedure and the collective complaints procedure. The Committee is vitally supported by the Secretariat of the European Social Charter in issuing conclusions on state reports and decisions on collective complaints.

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[17] See Art C of Part IV of the Charter.
[18] For the current composition of the Committee see (5 June 2019).
[19] CoE (ESC) (n 3), 177.

Table 7.1 ECSR review categories

Thematic Groups	Provisions of the Charter
Group 1 Employment, training and equal opportunities	Article 1; Article 9; Article 10; Article 15; Article 18; Article 20; Article 24; Article 25
Group 2 Health, social security and social protection	Article 3; Article 11; Article 12; Article 13; Article 14; Article 23; Article 30
Group 3 Labour rights	Article 2; Article 4; Article 5; Article 6; Article 21; Article 22; Article 26; Article 28; Article 29
Group 4 Children, families, migrants	Article 7; Article 8; Article 16; Article 17; Article 19; Article 27; Article 31

b. The Reporting Procedure

Under the reporting system, states submit written reports on certain thematic groups of rights (see infra) every year regarding how they implement the Charter in law and in practice. All rights are reviewed every four years.[20] They are obliged to communicate the reports not only to the Committee but also to representative national trade unions and employers' organizations.[21] Thus, these organizations have the possibility to submit comments on the report of their government. The reports are examined by the Committee which decides whether the situation is in conformity for each provision accepted by each state. In reaching these decisions, the Committee may also take into account information from other sources than the national report, for example information provided by non-governmental organizations and other human rights treaty bodies.[22]

The Committee reviews progress of the state parties along four categories of rights in a cyclical manner which is shown in Table 7.1.[23]

Since 2014, state parties which have accepted the collective complaints procedure are subject to a reporting procedure 'light' and have to submit a national report only every two years.[24] Every other year, state parties draw up a simplified report which includes the followup action taken in response to the decisions of the Committee on collective complaints. The new system entered into force for all state parties which have already accepted the procedure since October 2014 and, for other state parties, it will enter into force one year after acceptance of the collective complaints procedure.

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[20] With the notable exception of Art 4§3 on equal pay for equal work which is also assessed under Art 20.

[21] See Arts 21 and 23 of Part IV of the 1961 Charter, as well as Art 1 of the Amending Protocol of 1991 which amends Art 23; Art C of Part IV of the Revised Charter refers to the same supervision procedure as under the 1961 Charter.

[22] Karin Lukas, 'The European Committee of Social Rights – The European Monitor in the Social Sphere' (2011) 16 Austrian Review of International and European Law 83.

[23] For a more detailed analysis of the employment related rights of the Charter see Niklas Bruun, Klaus Lörcher, Isabelle Schömann and Stefan Clauwaert (eds), *The European Social Charter and Employment Relation* (2017).

[24] Governmental Committee of the European Social Charter and the European Code of Social Security, Ways of Streamlining and Improving the Reporting and the Monitoring System of the European Social Charter, Decision 4.7, 2–3 April 2014 (CM(2014)26)).

Table 7.2 ECSR review sequence

Date and Thematic Group	General Report	Simplified Report
October 2019 Provisions from Group 1 Employment, training and equal opportunities	States from group B	States from group A
October 2020 Provisions from Group 2 Health, social security and social protection	States from group B	States from group A
October 2021 Provisions from Group 3 Labour rights	States from group A	States from group B
October 2022 Provisions from Group 4 Children, families, migrants	States from group B	States from group A

The 15 states which have accepted the collective complaints procedure are divided into two groups which have been established by distributing the states according to the number of complaints registered against them (from the highest to the lowest). Group A is made up of eight states: Belgium, Bulgaria, Finland, France, Greece, Ireland, Italy and Portugal. Group B consists of seven states: Croatia, Cyprus, the Czech Republic the Netherlands, Norway, Slovenia and Sweden. Table 7.2 illustrates this sequence.

The reporting procedure gives a broad overview of the status quo of social rights regarding these thematic groups in the state concerned. It provides information on legislative changes, state practice and relevant data to assess rights compliance. However, what it cannot deliver is a more indepth look into the social rights of specific groups. This is a matter for the collective complaints procedure.

c. The collective complaints procedure

This procedure is a unique form of collective redress in the human rights system, reflecting a systemic approach in addressing social problems which affect specific groups of persons and thus excludes the possibility of individual complaints.[25] The collective complaints mechanism is a process which does not solely focus on past violations but aims at preventing their reoccurrence in the future.[26] Certain organizations may file complaints of a collective nature alleging that a state is in breach of the Charter. Four categories of organizations are eligible to submit such complaints:[27]

- international organizations of trade unions and employers' organizations;

[25] Karin Lukas, 'The Collective Complaints Procedure of the European Social Charter: Some Lessons for the EU?' (2014) 31(3) Legal Issues of Economic Integration 275.

[26] Mikkola (n 2), 663.

[27] See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No 158 (5 June 2019). Other civil society organizations, although not eligible to file complaints, may intervene in the process by separate submissions which the Committee may decide to include in its findings. This has for example been the case in *International Planned Parenthood*

- the trade unions and employers' organizations in the country concerned;
- international non-governmental organizations which have consultative status and have been put on a list drawn up by the Governmental Committee; and[28]
- national non-governmental organizations.

This last category is only entitled to submit complaints if the state explicitly agrees to it.[29]

A review of the complaints received so far shows that quite a number of national trade unions, and to some extent European trade union organizations such as the European Trade Union Confederation (ETUC), have utilized the collective complaints system. On the part of employers, efforts have been much less extensive. To a considerable extent, international NGOs also avail themselves of the system, notably the European Roma Rights Centre, Defence for Children International, the World Organisation against Torture, the Centre on Housing Rights and Evictions, the International Commission of Jurists and the International Federation of Human Rights Leagues.[30]

To date, the Committee has received more than 170 complaints.[31]

The collective complaints procedure incorporates various features of a judicial process. The arguments of both parties are considered, the applicable norms are applied to the facts of the case and the reasoning of the decision follows a judicious fashion.[32] Thus, it can be regarded as a quasi-judicial process, the first such complaint mechanism in international law specifically for social rights. In terms of enforcement, there are however some limitations. The Committee's decisions are not directly enforceable but are endorsed by a resolution or (if a state takes no steps to implement the Committee's decision) a recommendation of the Committee of Ministers. The state concerned has then to report regularly on the process of implementation of the decision. In terms of monetary sanctions, the Committee has stayed within the limits of its powers under the Protocol, and has in several cases rejected claims for more extensive compensation, such as in the case of *Confédération Francaise de l'Encadrement v France*.[33] The strengths of the complaint mechanism lie in its substantial development

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Federation – European Network (IPPF EN) v Italy, ECSR, Collective Complaint No 87/2012, Decision of 10 September 2013, on the right of women in Italy to access abortion services.

[28] In order to be eligible for this list, the organization has to demonstrate 'access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions etc. in order to draw up complaint files that meet the basic requirements of reliability'. Committee of Ministers, Decision of 22 June 1995, as summarized by the Explanatory Report, para 20. See also Robin R Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 EJIL 417, 424.

[29] The only country that has accepted collective complaints by national NGOs is Finland.

[30] Lukas (n 25), 277.

[31] All collective complaints and decisions on admissibility and the merits regarding those complaints can be found in the HUDOC database of the Council of Europe, <http://hudoc.esc.coe.int/eng#{%22ESCDcType%22:[%22DEC%22]}> (5 June 2019).

[32] Philip Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' CHRGJ Working Paper No 6 (2015) 16, <www.chrgj.org/publications/docs/wp/Alston%20Assessing%20the%20Strengths%20and%20Weaknesses%20of%20the%20European%20Social%20Charter%27s%20Supervisory%20System.pdf> (5 June 2019).

[33] *Confédération Francaise de l'Encadrement v France*, ECSR, Complaint No 9/2000, Decision of 16 November 2007. The fact that the Committee does not award larger sums of compensation has been criticized in the literature. See Harris and Darcy (n 2), 365–67.

of the standards of the Charter and the monitoring of the implementation of the Charter for specific groups in practice.[34]

Regarding the actual procedure, the complaint must be submitted in writing, relate to a provision accepted by the state party and indicate why the state party has not ensured the 'satisfactory application' of the provision.[35] Standing practice of the Committee further requires that the complaint must be signed by a person authorized to represent the complainant organization.[36] The threshold of admissibility is fairly low: nearly all complaints have been declared admissible.[37] Requirements that apply to individual complaints such as the exhaustion of domestic remedies, and the requirement to be an individual alleging that his/her rights have been infringed upon, are not applicable to this (collective) procedure. Moreover, the possibility for social partners or NGOs to allege a breach of the Charter by national legislation or practice gives those actors a possibility to interact with the government and the Committee the opportunity to legally assess the situation at the time when the decision is taken, thus taking into account possible legislative or other changes to bring the situation into compliance with the Charter.

Complaints are examined by the Committee first in view of their admissibility, and, if the complaint satisfies the abovementioned formal requirements, it is declared admissible. The Committee will then decide on the merits of the case. The decision is taken on the basis of an exchange of arguments in writing between the parties. If necessary, the Committee may also decide to hold a public hearing. This has been the case regarding a few complaints, most lately in collective complaint no 111 where the Committee invited the Greek government, the Greek trade union GSEE and three observers – the European Commission, Business Europe and the European Trade Union Confederation – to submit their findings in view of the complexity of the situation and the large number of rights concerned.[38]

Finally, in accordance with Article 9 of the 1995 Additional Protocol, the Committee transmits its decision to the Committee of Ministers – the highest decision-making body of the Council of Europe – which adopts a resolution and invites the state concerned to take the necessary measures to bring the situation into conformity with the Charter.

After the Committee of Ministers' resolution – as is generally the case – or, if no resolution is passed, after four months, the decision is officially published and transmitted to the Parliamentary Assembly of the Council of Europe. In practice, the Committee usually awaits

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[34] Lukas (n 25), 279.

[35] Art 4 of the 1995 Additional Protocol.

[36] ECSR, Rules adopted during the 201st session (29 March 2004), revised during the 207th session (12 May 2005), Rule 23.

[37] *European Council of Police Trade Unions (CESP) v Portugal*, ECSR, Collective Complaint No 36/2006, Decision of 3 December 2007, was declared inadmissible because it had not been properly signed. Other rejections concerned a provision not accepted by the state party (*EUROFEDOP v Greece*, ECSR, Complaint No 3/1999, Decision of 13 October 1999), an insufficient factual basis of the claim (*Syndicat national des Dermato-Vénérologues v France*, ECSR, Collective Complaint No 28/2004, Decision of 13 June 2005), a situation which did not concern the application of the Charter (*SAIGI v France*, ECSR, Collective Complaint No 29/2005, Decision of 14 June 2005) or because the complaint related to an event before the ratification of the complaints procedure by the state party in question (*FFFS v Norway*, ECSR, Complaint No 120/2016, Decision of 18 October 2016).

[38] For details of this case see section VI.

the Committee of Ministers' action; only in very few cases has this led to delay in the delivery of the decision.[39]

Should the state party not comply with the decision, the Committee of Ministers has the obligation to adopt, by a two thirds majority vote, a recommendation to the state. This recommendation means that the state must inform the Committee of Ministers on the measures it has taken to comply with the Committee's findings. Such a recommendation has only occurred once.[40] However, as part of the reform of 2014 which simplified the reporting procedure for state parties having accepted the collective complaints system, the Committee uses a followup procedure to assess progress made on collective complaints by countries in every monitoring cycle.

V. IMPACT OF THE SUPERVISORY PROCEDURES ON THE IMPLEMENTATION OF SOCIAL RIGHTS IN EUROPE

a. Selected State Conclusions

In order to give a short overview of the substance of this procedure, I will present the Committee's summary of conclusions for each cycle, starting with the most recent one of 2017.

In January 2018, the Committee released its Conclusions 2017 on the articles of the European Social Charter relating to the thematic group 'Health, social security and social protection', showing 175 situations of non-conformity (36 per cent) and 228 situations of conformity (47 per cent) with the provisions of the Charter. In 83 cases (17 per cent), the Committee was unable to assess the situation due to lack of information (so-called deferrals) and postponed its conclusion. The Committee found that in many countries in Europe, poverty levels are far too high and the measures taken to remedy this fundamental problem are insufficient. In particular, in many states the social security benefits (notably in respect of unemployment and old age) are well below the poverty level, even when taking into account social assistance. The Committee also noted that many states had failed to take adequate steps to address the persistently high levels of infant and maternal mortality and to reduce the high number of fatal accidents at the workplace. On a positive note, the Committee appreciated the adoption of measures in respect of health and safety at work and the extension of social security benefits, in particular in relation to healthcare and disability, in some of the countries examined.[41]

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[39] See, e.g., ESCR, Collective Complaint Nos 33/2006 and 39/2006, where the publication of the decisions took more than four months.

[40] In *Syndicat national des professions du tourisme v France*, ESCR, Collective Complaint No 6/1999, Decision of 10 February 2000, the Committee of Ministers noted the findings of non-conformity by the Committee regarding access to work and vocational training for guide interpreters and national lecturers, and requested that the French government end this discriminatory practice and inform the respective institutions accordingly. See Recommendation RecChs (2001), <https://wcd.coe.int/ViewDoc.jsp?id=182943&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> (5 June 2019).

[41] For more detailed information on the rights assessed in 2017 see ECSR, Conclusions 2017, Press Briefing Elements <https://rm.coe.int/press-briefing-elements-conclusions-2017n/168077fedf> (5 June

In 2016, the Committee examined state reports on the application of provisions belonging to the thematic group 'Employment, training and equal opportunities'. It adopted 513 conclusions on employment, training and equal opportunities in respect of the 34 states, including some 166 findings of violations of the Charter (32 per cent). There were 262 conclusions of conformity (51 per cent), whereas the number of 'deferrals' amounted to 85 cases (17 per cent). In this cycle, the Committee found major problems with situations of discrimination in employment. Under Article 1§2, legislation should prohibit such discrimination. Of the national situations examined, 56 per cent did not comply with this requirement on grounds such as missing definitions of discrimination and insufficient protection against discrimination in employment, for example due to sexual orientation. Discrimination in access to employment due to disability is prohibited under Article 15§2. Of these national situations, 41 per cent were in violation of the Charter. These violations related primarily to insufficient integration of persons with disabilities into the 'ordinary' labour market. They also concerned the failure to provide for reasonable accommodation or the lack of legislation expressly prohibiting discrimination in employment on the ground of disability. As for the right to equal opportunities between men and women (Article 20), the Committee found that gender discrimination took place in 40 per cent of the national situations examined. Most violations resulted from the maintenance of restrictions on the employment of women or were related to wage discrimination. Progress in state implementation related to legislation to promote the right of persons with disabilities. Such legislation was, *inter alia*, passed in Moldova, the Russian Federation and Ukraine. Similar legislative progress was found regarding gender equality in employment. For example, Armenia adopted a law which prescribes equal rights and opportunities for women and men. Austria passed legislation to prevent discrimination by ensuring effective and proportionate compensation. Belgium approved a federal law combating the gender pay gap.[42]

In 2015, the Committee examined the reports submitted by 31 state parties on the provisions relating to children, families and migrants. There were findings of violations of the Charter of 31 per cent, conclusions of conformity of 57 per cent and 12 per cent deferrals. The Committee in particular expressed its concern on the rights of refugees, on the notion of light work for children, on the rights of posted workers, on language tests and housing requirements in the context of family reunion, on expulsions in case of threat to national security or offence against public interest and on inadequate remuneration during parental leave.[43]

The annual conclusions for 2014 in the field of labour rights showed 35 per cent violations of the European Social Charter, 46 per cent conformity conclusions and 19 per cent deferrals. The findings displayed large disparities in national social and labour law legislation. While the Committee found breaches in all countries, the number of violations was exceptionally high in countries such as Georgia, Azerbaijan and Armenia. Most countries share a non-compliance

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2019). All conclusions of 2017 can be found at <https://rm.coe.int/compilation-of-conclusions-2017-by-country/1680786061> (5 June 2019).

[42] For more detailed information on the rights assessed in 2016 see ECSR, Conclusions 2016, Press Briefing Elements <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ec5a3> (5 June 2019). All conclusions of 2016 can be found at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ebb83> (5 June 2019).

[43] See also Council of Europe, Information on Conclusions 2015 of the European Committee of Social Rights, <https://reliefweb.int/report/world/european-committee-social-rights-finds-277-violations-related-children-families-and> (5 June 2019).

with the Charter standards on minimum wage. Regarding another critical right, the right to strike, a number of countries, such as Bulgaria, Denmark, Ireland, Sweden and Ukraine, were found to be in non-conformity.[44] One of the most problematic provisions where state compliance was insufficient across Europe was the right to adequate remuneration.

Thus, the reporting procedure unravels large disparities in social rights protection among and within state parties. Discrimination against marginalized groups remains rampant in all states, while a minority of countries lags behind in the implementation of a larger number of provisions of the Charter. While there is progress in terms of legislation, *de facto* inequalities regarding specific groups continue to prevail.

b. Selected Case Law from the Collective Complaints System

The Committee has developed a substantive body of jurisprudence on social rights. Regarding the specific issues in question, the complaints show quite a variety. The Committee has decided cases on child labour; on the right to organize in the military and police; on forced labour; on health and safety in employment; on discrimination in various contexts, including against Roma; on union security clauses; on educational provision for autistic children; on housing; and on fair wages and social security benefits.

The collective complaints system enabled the Committee to further develop its interpretative approach to the Charter in quite a dynamic way. One of the key principles of interpretation is the view of the Charter as a 'living instrument'. The Charter standards should be applied in presentday situations and be interpreted in view of actual or emerging human rights issues.[45] Another connected principle is that of the application of the Charter 'in law and practice'. This can be seen, for example, regarding the right to housing. In the case *FEANTSA v France* the Committee noted:

> the implementation of the Charter requires State Parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein. When one of the rights is exceptionally complex and particularly expensive to implement, State Parties must take steps to achieve the objectives of the Charter with the reasonable time, measurable progress and making maximum use of available resources.[46]

The Committee linked this issue of positive obligations with social inclusion and non-discrimination. In *European Roma Rights Centre v Italy*,[47] the Committee stated that 'equal treatment implies that Italy should take measures appropriate to Roma's particular circumstances to safeguard their right to housing and prevent them, as a subject group, from becoming homeless'.[48] Among the positive obligations identified by the Committee in this decision are: the

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[44] For further details see ECSR, Conclusions in a Nutshell 2012–2015, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064b639> (5 June 2019).

[45] See, e.g., *Autism-Europe v France*, ESCR, Collective Complaint No 13/2002, Decision of 4 November 2003; *Transgender Europe and ILGA-Europe v The Czech Republic*, ESCR, Complaint No 117/2015, Decision of 15 May 2018.

[46] *FEANTSA v France*, ESCR, Collective Complaint No 39/2006, Decision of 5 December 2007.

[47] *European Roma Rights Centre v Italy*, ESCR, Collective Complaint No 27/2004, Decision of 7 December 2005.

[48] *Ibid.*, para 21.

obligation to collect accurate data where a group is vulnerable to discrimination; the obligation to demonstrate that its policies are not in fact discriminatory where evidence suggests that discrimination might be occurring; the obligation of oversight and regulation of local action; and the obligation 'to take due and positive account of all relevant differences, or adequate steps to ensure their access to rights and collective benefits that must be open to all'. In addition, the Committee noted specific positive obligations under Article 31 (right to housing) of the Revised Charter, including the obligation to ensure that evictions are carried out in a way that respects the dignity of the affected persons.[49]

The Committee also rendered several decisions on the austerity measures in Greece.[50] In the latest decision, the complainant trade union, GSEE, alleged that some of the new legislation enacted as part of the austerity measures adopted in Greece during the economic and financial crisis affected workers' rights in a manner contrary to the Charter. The Committee held that there was a breach of a number of rights, *inter alia* fair remuneration and workers' representation in collective relations. It emphasized that

> having regard to the context of economic crisis, the Committee recalls that ensuring the effective enjoyment of equal, inalienable and universal human rights cannot be subordinated to changes in the political, economic or fiscal environment.

The Committee has previously stated that

> the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most.[51]

The Committee subsequently reiterated this analysis and stated that

> doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems […] (GENOP-DEI and ADEDY v. Greece, Complaint No. 65/2011, op.cit., §18).[52]

In its final observations of the decision,[53] the Committee drew attention to the exceptional features of the situation giving rise to this complaint. It also emphasized the fact that the violations of the 1961 Charter were particularly serious due to the large number of provisions concerned and the effects for persons protected by the rights violated; the number of victims of these violations, affecting a significant part of the population; and the persistent nature of some of these violations, already identified in the examination of previous complaints.[54] It further

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[49] *Ibid.*, para 41.

[50] See also Karin Lukas, 'Austerity and the European Social Charter' in Margot Salomon and Bruno De Witte, Bruno (eds), *Legal Trajectories of Neoliberalism: Critical Inquiries on Law in Europe* (2019) 2019/43 RSCAS 26.

[51] General introduction to Conclusions XIX-2 (2009).

[52] *Greek General Confederation of Labour (GSEE) v Greece*, ESCR, Complaint No 111/2014, Decision of 23 March 2017, para 88.

[53] *Ibid.*, paras 246–51.

[54] *Ibid.*, para 247.

underlined that the legislature's inaction, under strong pressure from the creditor institutions, with respect to amending the laws for a period from April 2012 until September 2015 despite the violations of the Charter to which they gave rise, had led to a worsening of the situation over the years, contrary to the obligation for state parties to undertake both legal and practical measures that will allow the full exercise of the rights recognized by the Charter.[55]

The impacts of the financial and economic crisis following 2008 were particularly negative for social rights protection in many European countries.[56] Besides Greece, a number of other countries, such as Ireland, Portugal and Spain, were affected; this can be seen in the last conclusions of the Committee regarding Art 12 of the Charter, where the budget cuts for marginalized persons regarding the right to social security are documented,[57] and in a number of collective complaints. For example, in *FIDH v Ireland*,[58] the complainant organization alleged inadequacies in the provision of social housing under Art 16 of the Charter (right of families to legal, economic and social protection). The Irish government referred to the recent economic crisis which reduced allocating resources for social housing and it pointed out its efforts in ensuring that the most vulnerable members of society are protected.[59] In view of the legal and administrative backdrop concerning local authority housing in Ireland, the Committee acknowledged the submission of evidence regarding the poor housing conditions with problems such as mould, dampness, sewage invasion and so on.[60] The Committee held that the government had failed to take sufficient and timely measures to ensure the right to housing of an adequate standard for families living in local authority housing and decided on a violation of Article 16 of the Charter in this respect.[61]

Overall, the collective complaints procedure is an important part of the supervisory machinery of the European Social Charter. The number of complaints has risen considerably in the past couple of years. By June 2013, the number of collective complaints filed had almost reached the total number of all complaints of 2012 – and this tendency was confirmed in the subsequent years.[62] The rise in complaints has become a considerable workload for the Committee and the Secretariat of the European Social Charter and has almost doubled the time interval between the submission of the complaint and its final decision, from one to two years.

c. Changes in National Legislation of the State Parties to the Charter

Although the conclusions and decisions of the Committee have no immediate direct legal force in national legal systems, its monitoring work has led to considerable changes in law and prac-

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[55] *Ibid.*, para 249.

[56] Extensive literature has analyzed this phenomenon: see, e.g., Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014); Antonia Baraggia, 'Conditionality Measures Within the Euro Area Crisis: A Challenge to the Democratic Principle?' (2015) 4 Cambridge Journal of International and Comparative Law (2015) 268; Natalie Alkiviadou, 'Sustainable Enjoyment of Economic and Social Rights in Times of Crisis: Obstacles to Overcome and Bridges to Cross' (2017) JMMWP 1/2017 (UCLan Cyprus).

[57] Conclusions 2017, Greece, Ireland, Portugal and Spain.

[58] *FIDH v Ireland*, ESCR, Complaint No 110/2015, Decision of 12 May 2017.

[59] *Ibid.*, para 80.

[60] *Ibid.*, para 116.

[61] *Ibid.*, para 121.

[62] Lukas (n 25) 288.

tice in the countries concerned.[63] For example, Azerbaijan amended its Labour Code to repeal the provision which had allowed light work for children who have reached the age of 14.[64] In Denmark, the system of vocational training was reformed to take into account the needs of unskilled workers, immigrants, refugees and unemployed persons.[65] Finland extended the right to temporary childcare leave to non-custodial parents. In order to facilitate the reconciliation between work and family responsibilities for parents of children with disabilities or longterm illnesses, the right to partial childcare leave has also been extended until the time at which the child in need of special care and treatment reaches the age of 18.[66] In France, following the decision on *ATD Fourth World v France*, the French Parliament passed the Act on the enforceable right to housing of 2007. Germany amended its Act on Maternity Leave to include cases of premature birth in order to compensate the lost prenatal leave and to enable female employees to have 14 weeks of maternity leave in total.[67] Greece launched reforms in 2008 to improve the social assistance system with the establishment of the National Social Cohesion Fund.[68] In Lithuania, the Law on the Social Integration of the Disabled Persons now provides for general antidiscrimination provisions explicitly protecting persons with disabilities in the fields of housing, transport, telecommunications and cultural and leisure activities.[69] The Former Yugoslav Republic of Macedonia (now the Republic of North Macedonia) repealed the upper limit on the amount of compensation in discrimination cases following the adoption of the amended version of the Law on Labour Relations.[70] The amount of compensation is now determined case by case. In the field of control of air pollution to protect the right to health, the legal framework in Poland has been strengthened through the adoption of the Environmental Protection Act and through various implementing regulations.[71] In Romania, Law No 188/1999 on the status of public servants has been amended in 2006 and 2008 to the effect that all civil servants, including high ranking civil servants, are entitled to the right to establish or join trade unions.[72] Slovakia amended its legislation to guarantee equal access to continuing training and retraining also to nationals of state parties to the Charter, provided that they are legally resident in Slovakia.[73] And in Turkey, a new law on Social Insurance and Universal Health Insurance establishes a compulsory universal health insurance for all citizens.[74]

This overview shows progress in a number of labour and social rights areas mostly through legislative action. In particular, in the field of non-discrimination of specific groups such as persons with disabilities or third party nationals, progress could be made; however, a number

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[63] A detailed account of all legislative and policy changes can be found in Council of Europe, *Practical Impact of the Council of Europe Monitoring Mechanisms in Improving Respect for Human Rights and the Rule of Law in Member States* (2014) 28–33.

[64] This has been a ground of non-conformity with the Charter under Art 7: see ECSR, Conclusions 2011, Azerbaijan.

[65] See ECSR, Conclusions XVIII-2, Art 10§3.

[66] See ECSR, Conclusions 2011, Art 27§2.

[67] This amendment was made to comply with Art 8 §1, see Conclusions XVII-2 (2005).

[68] This measure was taken to comply with Art 13§1, see Conclusions XIX-2 (2009).

[69] See ECSR, Art 15§3, Conclusions 2012.

[70] This has been a ground of non-conformity with the Charter under Art 1§2: see ECSR, Conclusions 2012, Former Yugoslav Republic of Macedonia.

[71] ECSR, Art 11§3, Conclusions XVII-2 (2005).

[72] ECSR, Conclusions 2010, Art 5, Romania.

[73] ECSR, Art 10§3, Conclusions XVIII-2 (2007).

[74] ECSR, Art 11§1, Conclusions 2009.

of practical barriers concerning *de facto* discrimination remain which need to be addressed in the future.

VI. CONCLUSIONS AND TRENDS

Europe still faces a huge governance gap regarding the implementation of social rights. Due to historical and current political decisions, social rights are more hesitantly implemented than civil and political rights. Thus, there is still a long way ahead to realize the objectives stipulated in the European Social Charter, and the severe consequences of the economic crisis create more pressure on states to keep up compliance with the Charter. To this day, social rights in Europe are monitored by a quasi-judicial body, the ECSR, whereas civil and political rights are enforced by the European Court of Human Rights (ECtHR).

However, even though the decisions of the Committee are not legally binding in the same way as the judgments of the ECtHR, the abovementioned implementation of Charter standards through legislative and administrative measures demonstrates that the state parties to the Charter consider themselves bound by the provisions of the Charter and their authoritative interpretation through the European Committee of Social Rights.[75] The Committee, as the only competent body to interpret the Charter, assesses the conformity of both national legislation as well as practice with the European Social Charter. In a rapidly changing society, the Committee is called to interpret the Charter as a living instrument and has thus developed principles which are inspired by international jurisprudence and practice in order to achieve the overall purpose of the Charter in implementing a broad range of social rights. In this context, the Committee has elaborated on the effective realization of rights in a given situation, progressive realization, equality and social rights and austerity measures and social rights. Its jurisprudence can be viewed as a context-specific interpretation of social rights, tailored to the diverse national situations in Europe.[76]

A review of the practical impact of the Charter as expressed by the conclusions and decisions of the Committee renders mixed results. On the one hand, there are continuous issues of non-conformity even with states which have been parties to the Charter for many years. On the other, the decisions and conclusions of the Committee result in changes to legislation and in practical measures of compliance every year. The severe consequences for Europe of the economic crisis of 2008 have further highlighted the importance of realizing social rights to shield European citizens from poverty and social exclusion.

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[75] See Art 24(2) of the Revised European Social Charter.

[76] Colm O'Cinneide, 'Austerity and the Faded Dream of a "Social Europe"' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014) 196.

8. Social rights in the case law of the European Court of Human Rights

Eugenia López-Jacoiste

I. INTRODUCTION

The rights and freedoms recognized in the European Convention on Human Rights (ECHR) and the Additional Protocols make two important facts clear: first, that the rights and freedoms are set out through indeterminate legal categories, or categories which will become specific when applied to actual cases; second, that the Convention protects civil and political rights, although some of these have an undisputable social (and economic) dimension.

The European Court of Human Rights (ECtHR) has been very creative and active in its case law protecting social rights, especially recently. The gradual development was owed to the fact that there was a desire to proceed in stages, first to protect the fundamental rights without which the pluralist system of democratic states and the rule of law cannot function, and second to recognize social rights. Moreover, even though the (revised) European Social Charter (ESC) guarantees the social and economic rights of all individuals in their daily lives,[1] the social rights standards and particularly the monitoring system in the Charter are weaker than those in the ECHR. This double regulation in the protection of human rights undoubtedly reflects the fact that in the past there was a tendency to speak of economic, social and cultural rights as if they were fundamentally different from civil and political rights.

Despite increased awareness of the possibilities of an integrated human rights approach,[2] the ECtHR was initially a little reluctant to accept blurring the dividing line between social and civil rights. For decades the ECtHR adopted a prudent attitude, leaving states the leading role in defining their social policies with a generous application of the margin of appreciation, and avoiding deciding on those matters that were controversial among the state parties to the Convention. However, as expressed in the Vienna Declaration, 'all human rights are universal, indivisible, interdependent and interrelated. The international community must treat all human rights globally in a fair and equal manner, on the same footing and with the same emphasis.'[3] Based thereupon, the ECtHR seems to have shifted its attitude and taken on a role of leadership by affirming the social dimension of civil and political rights. For example, the right to life

[1] The revision takes the evolution which has occurred in Europe since the Charter was adopted in 1961 into account, and includes the right to protection against poverty and social exclusion; the right to housing; the right to protection in cases of termination of employment; the right to protection against sexual harassment in the workplace and other forms of harassment; the rights of workers with family responsibilities to equal opportunities and equal treatment; the rights of workers' representatives in undertakings. See also the contribution by Karin Lukas in this *Research Handbook* (Chapter 7).

[2] Martin Scheinin, 'Economic and Social Rights as Legal Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2001).

[3] World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc A/CONF.157/23, section 1 para 5.

also protects health care, which forces public authorities to act.[4] Life and physical integrity are linked to the enjoyment of an adequate environment.[5] Thus, the ECtHR in its case law emphasizes the duties to respect, protect and fulfil *all* human rights.[6] The view that all human rights are indivisible, interdependent and interrelated is also reflected in more recent human rights treaties, such as the Convention on the Rights of the Child or the Convention on the Rights of Persons with Disabilities, which both have integrated all rights, regardless of their classification as civil, political or economic, social and cultural rights.

The following briefly discusses this development from a theoretical angle (section II) before turning to case analysis of the ECtHR in two social rights-related fields: health and work-related rights (section III). This development in case law is assessed critically in section IV, before reaching a final conclusion (section V).

II. OVERCOMING THE TRADITIONAL DIVISION OF HUMAN RIGHTS OR NEW CRITERIA FOR AN INTEGRATED APPROACH OF ALL HUMAN RIGHTS?

Civil rights are generally conceived as freedoms *from* the state. In their classic conception, they define a space which remains free from state interference. This requires, accordingly, abstention on the part of the state. In human rights terminology, this is generally called the 'duty to respect' which refers to the state obligation not to interfere, in principle, with civil freedoms. Economic, social and cultural rights are considered positive resource-demanding rights in opposition to civil and political rights. Social rights require high levels of investment – both financial and human – to ensure their full enjoyment. Nevertheless, both types of rights – social and civil – require the state not only to refrain from interfering with individual freedoms, but also to ensure various measures, from (passive) non-interference to (active) coverage of the satisfaction of individual needs. The obligation to respect requires states to refrain from interfering with the right in question. The obligation to protect requires states to prevent violations by third parties, and the obligation to fulfil requires states to take appropriate measures – legislative, administrative, judicial, budgetary, and so on – towards the full realization of the rights.[7]

A further reasoning point in opting for an integrated approach of all human rights is based on their reflective nature. That is, human rights strive to reflect and protect human activity, and real life is a complex matter. Hence, speaking in terms of rights, education (as a social right) is a basic condition for making use of one's (civil) right to freedom of expression or freedom of

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[4] See, e.g., *Calvelli and Ciglio v Italy*, ECtHR, App No 32967/96, Judgment of 17 January 2002, para 49; *Vo v France*, ECtHR, App No 53924/00, Judgment of 8 July 2004, para 89; *Lopes de Sousa Fernandes v Portugal*, ECtHR, App No 56080/13, Judgment of 19 December 2017, para 166.

[5] Peter Uvin, *Human Rights and Development* (2004) 29. See in particular *Öneryıldız v Turkey,* ECtHR, App No 48939/99, Judgment of 30 November 2004, para 90; *Budayeva and Others v Russia*, ECtHR, App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment of 29 September 2008, para 132; *Kolyadenko and Others v Russia*, ECtHR, App Nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, Judgment of 9 July 2012, para 159.

[6] Sandra Fredman, *Comparative Human Rights Law* (2018) 59–78.

[7] Ida Koch, 'Social Rights as Components in the Civil Right to Personal Liberty: Another Step Forward in the Integrated Human Rights Approach?' (2002) 1 Netherlands Quarterly 29, 31.

association, and a worker's right to associate is again crucial for a number of economic, social and cultural rights. Similar arguments can be brought in relation with the right to food as well as to an adequate standard of living; in the end, both are instrumental for effective political participation. Someone who is homeless is likely to be deprived of a whole range of other human rights, alongside the violation of their right to adequate housing. Laws that criminalize homelessness, vagrancy or sleeping rough, along with street cleaning operations to remove homeless people from the streets, have a direct impact on their physical and psychological integrity. Merely by not having a secure place to live or any privacy, homeless persons are much more vulnerable to violence, threats and harassment.

In this context, there are two key questions: first, how far can or should an integrated approach to human rights be taken; and second, to what extent can a right in one instrument be linked to a right in another instrument? Apart from techniques of treaty interpretation such as Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT), which provides for systemic integration by means of interpretation, there are still no general legal principles which would guide decisions when one legal body is allowed or obliged to take into consideration the legal norms that are usually considered under another legal instrument and possibly by another legal body.

Still, mutual interchanges exist. Already in 1989 Craig Scott had referred to the 'permeability' of human rights norms and the concept of 'organic dependences' between rights. He took into consideration, first, 'the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights'.[8] Second, by organic interdependence he understood that 'one right forms a part of another right and may therefore be incorporated into that latter right'. All human rights 'are inseparable or indissoluble in the sense that the one right (the core right) justifies the other (the derivative right)'.[9] The permeability of human rights norms therefore tries to give legal effect to the abstract doctrine of interdependence.

The ECtHR attempts something similar by confirming the direct or indirect protection of different categories of human rights not expressly regulated in the Convention, including social rights. The following demonstrates this in two specific categories: health-related rights and work-related rights.

III. THE EXPANSIVE CASE LAW OF THE ECTHR

The ECHR does not incorporate social rights as such (that is, the right to health, social care or social security). Nevertheless, numerous provisions in the ECHR enshrine a social dimen-

[8] Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 Osgoode Hall Law Journal 769, 771.

[9] *Ibid.*, 779.

sion,[10] which is also recognized in the case law of the Court.[11] Examples mainly relate to Article 2 (right to life), Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) and Article 8 (right to private and family life), as well as to Article 1 of Protocol No 1 (peaceful enjoyment of one's property) and Article 2 of Protocol No 1 (right to education).

As mentioned above, the ECtHR has taken on a proactive role and applied a broad evolutionary interpretative approach to the ECHR, thereby developing new ways of understanding and promoting human rights in general, and social rights in particular. As a result, the Court has emphasized in several instances that the Convention must always be interpreted and applied in the light of current circumstances.[12] Also, the Court must take into consideration that its context is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions, including the social dimension of civil rights.[13] Furthermore, the ECtHR views the Convention as subject to evolution and change in its interpretation over time.[14]

In interpreting and applying the ECHR, account must also be taken of any relevant rules and principles of international law applicable in relations between the contracting parties, and the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part.[15] This requires certain judicial activism, which, however, should not be seen as a fault. Rather, it is essential if (international) legal instruments are to

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[10] Indeed, the notion of indivisibility is already implicit in paragraph 3 of the preamble of the ECHR. Moreover, paras 4 and 5 of the Preamble acknowledge this when it reminds us that in signing the Convention governments are reaffirming their profound belief in the fundamental freedoms, which are the foundation of justice and peace and which are best maintained by an effective political democracy and by a common observance of the human rights upon which those freedoms depend.

[11] Christina Binder and Thomas Schobesberger, 'The European Court of Human Rights and Social Rights – Emerging Trends is Jurisprudence?' (2015) Hungarian Yearbook of International Law and European Law 51.

[12] See, *inter alia*, *Cossey v The United Kingdom*, ECtHR, App No 10843/84, Judgment of 27 September 1990, para 42; *Matthews v The United Kingdom*, ECtHR, App No 24833/94, Judgment of 18 February 1999, paras 40–44; *Demir and Baykara v Turkey*, ECtHR, App No 34503/97, Judgment of 12 November 2008, paras 68–86; *Fernández Martínez v Spain*, ECtHR, App No 56030/07, Judgment of 12 July 2014, paras 123, 132; *Sindicatul 'Păstorul cel Bun' v Romania*, ECtHR, App No 2330/09, Judgment of 9 July 2013, para 159; *Christine Goodwin v The United Kingdom*, ECtHR, App No 28957/95, Judgment of 11 July 2002, para 74; *Schalk and Kopf v Austria*, ECtHR, App No 30141/04, Judgment of 22 November 2010, paras 46, 57; *E.B. v France*, ECtHR, App No 43546/0222, Judgment of January 2008, para 92; *Tyrer v The United Kingdom,* ECtHR, App No 5856/72, Judgment of 25 March 1978, para 31.

[13] *Stec and Others v The United Kingdom*, ECtHR, App Nos 65731/01 and 65900/01, Decision of 5 July 2005, para 48; *Austin and Others v The United Kingdom*, ECtHR, App Nos 39692/09, 40713/09 and 41008/09, Decision of 15 March 2012, para 54.

[14] In general terms, the Court has admitted that what constitutes privacy, the right to life and freedom of expression must evolve with technological and social developments. See, e.g., *Mamatkulov and Askaraov v Turkey*, ECtHR, App Nos 46827/99 and 46951/99, Decision of 4 February 2005; *Tyrer* (n 12); *Marckx v Belgium*, ECtHR, App No 6833/74, Judgment of 13 June 1979; *Chassagnou and others v France*, ECtHR, App No 25088/94, 28331/95 and 28443/95, Decision of 29 April 1999; *Dudgeon v The United Kingdom*, ECtHR, App No 7525/76, Judgment of 21 October 1981.

[15] Particularly with Article 31(3)(c) VCLT, see *Al-Adsani v The United Kingdom*, ECtHR, App No 35763/97, Judgment of 21 November 2001, para 55; *Demir and Baykara* (n 12), para 67; *Saadi v The*

remain relevant. This evolutionary approach is, in the mind of the ECtHR, not an overruling, but rather the logical conclusion from the object and purpose of the Convention: to provide effective and meaningful protection of individual rights.[16] Indeed, a dynamic interpretation of Convention rights can help the Court to face systematic violations of social rights that, otherwise, would be silenced – or, even worse, implicitly accepted.

Furthermore, taking into account that Article 1 ECHR states that '[t]he high contracting parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined' in the ECHR, and that Convention rights must be 'practical and effective',[17] the Court has contributed to the development of a wide range of positive obligations.[18] Indeed, without the positive doctrine on obligations, the Convention might be outmoded and ineffective. Therefore, once the relevant rights are specific and effective in practice, common legitimization for the judicial creativity of the ECtHR might be assured.[19] While this can mean an advance for the effective protection of social rights, it should be balanced against the high risk of denaturalization of the European system if the Court goes beyond its judicial mandate.

This tension is also perceptible in the case law of the ECtHR in relation to social rights. The expansion of the Court's case law on social rights can be attributed to a combination of at least two factors: the inherent social dimension of certain civil rights and the combination of dynamic interpretation with the doctrine of margin of appreciation. Against that background, in the following, this contribution focuses on some of the most central social rights – specifically, health and work-related rights, as derived from ECHR provisions.

a. Health-Related Rights Derived from ECHR Provisions

The ECtHR has gradually built its case law granting a range of specific rights related to health issues as a consequence of affirming the social dimension of a number of its provisions. Health-related cases have most frequently been argued under Articles 2, 3 and 8 ECHR. Acts and omissions of the authorities in the field of healthcare may therefore, in certain circumstances, engage the state's responsibility under the Convention.[20]

In *Vilnes and Others v Norway*, the Court held that there was a violation of the right to respect for private life (Article 8 ECHR) as the state failed to ensure that essential information regarding risks associated with use of decompression tables was available to divers. According to the Court, both the 'public's right to information' and 'information concerning risks' are

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United Kingdom, ECtHR, App No 13229/03, Judgment of 21 January 2008, para 62; *Rantsev v Cyprus and Russia*, ECtHR, App No 25965/04, Judgment of 6 January 2010, paras 273–74.

[16] Julian Arato, 'Constitutional Transformation in the ECtHR: Strasbourg's Expansive Recourse to External Rules of International Law' (2012) 37 Brooklyn Journal of International Law 349; Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System. An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (2011).

[17] Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) 5.

[18] *Inter alia*, this has been described as owed to the dynamic interpretation of the ECHR in the light of changing social and moral assumptions. See the discussion and further references in *ibid.*, 5–6.

[19] *Ibid.,* 207.

[20] See, e.g., *Byrzykowski v Poland*, ECtHR, App No 11562/05, Judgment of 27 June 2006, para 104; *Cyprus v Turkey*, ECtHR, App No 25781/94, Judgment of 10 May 2001, para 219; *Nitecki v Poland*, ECtHR, App No 65653/01, Judgment of 21 March 2002; *Oyal v Turkey*, ECtHR, App No 4864/05, Judgment of 23 March 2010.

encompassed by the preventive measures to be taken from the angle of the state's positive obligation under Article 8,[21] including in relation to occupational risks.[22] Article 8 was also found violated in *Csoma v Romania*, where the Court concluded that since the applicant had not been involved in the choice of medical treatment or properly informed of the risks, she had suffered a violation of her right to respect for her private life.[23]

State parties are required to make regulations compelling hospitals, whether public or private, to take appropriate substantive and procedural measures to protect patients' lives.[24] The procedural limb of Article 2 ECHR (right to life) has been particularly relevant in the context of medical negligence cases. That is, the Court has found that a violation of Article 2 might occur if the mechanisms in place for proving negligence were not considered adequate.[25] For the Court it was important to highlight the obligation of prompt examination of all possible cases to ensure the safety of users of all health services.[26]

The protection of the social dimension is, however, at times subject to a wide margin of appreciation by state parties. For example, in *Evans v UK*, the Court confirmed that questions of medically assisted procreation could be relevant under Article 8 ECHR. However, regarding the facts at hand, it found that domestic law protecting the right of a partner to withdraw his consent to use previously fertilized eggs in IVF treatment was not in excess of the margin of appreciation.[27]

In other cases, the Court has faced issues concerning access to lethal substances in order to end one's life and to achieve a dignified death, although in general terms the blanket ban on assisted suicide seems to be compatible with Article 8 ECHR.[28] In *Haas v Switzerland,* the Court came to the conclusion that specialists did not have any legal obligation to assist the ill applicant to suicide, and affirmed that states possessed a wide margin of appreciation on such issues.[29]

Article 3 ECHR stood at the core of a number of cases related to a lack of appropriate medical care for persons in detention, that is, whether alleged ill-treatment has a minimum level of severity.[30] Additionally, although no general obligation exists to release detainees on health grounds or to move them to a civil hospital, prolonged detention and the precarious

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[21] *Vilnes and Others v Norway*, ECtHR, App Nos 52806/09 and 22703/10, Judgment of 5 December 2013, para 242.

[22] *Ibid.*, paras 235, 244.

[23] *Csoma v Romania*, ECtHR, App No 8759/05, Judgment of 15 January 2013.

[24] *Trocellier v France*, ECtHR, App No 75725/01, Judgment of 5 October 2006, para 4; *Calvelli and Ciglio* (n 4), para 49; *Vo* (n 4), para 89; *Lopes de Sousa Fernandes* (n 4), para 166.

[25] For example, the Court has found Article 2 ECHR violated on account of the excessive length of the civil proceedings concerning a case related to medical negligence. *Šilih v Slovenia*, ECtHR, App No 71463/01, Judgment of 9 April 2009; see also *Vo* (n 4) (no violation); for a similar outcome, but under Article 8 ECHR, see *Spyra and Kranczkowski v Poland,* ECtHR, App No 19764/07, Judgment of 25 September 2012. See also CoE, *Thematic Report: Health-Related Issues in the Case-Law of the European Court of Human Rights* (2015).

[26] *Oyal* (n 20).

[27] *Evans v The United Kingdom*, ECtHR, App No 6339/05, Judgment of 10 April 2007, paras 71ff.

[28] See, e.g., *Lambert and Others v France*, ECtHR, App No 46043/14, Judgment of 5 June 2015; *Pretty v The United Kingdom*, ECtHR, App No 2346/02, Judgment of 29 April 2002.

[29] *Haas v Switzerland*, ECtHR, App No 31322/07, Judgment of 20 January 2011.

[30] See, e.g., *Kudła v Poland*, ECtHR, App No 30210/96, Judgment 26 October 2000, para 91; *Vasyukov v Russia*, ECtHR, App No 2974/05, Judgment of 5 April 2011; *Paladi v Moldova*, ECtHR, App No 39806/05, Judgment of 10 March 2009; *Amirov v Russia*, ECtHR, App No 51857/13, Judgment of 27

health of prisoners can raise a issue of Article 3 ECHR as well.[31] When it comes to force-feeding or the forced administration of substances, the Court likewise has found that Article 3 can be affected, particularly if no 'medical necessity' for the specific treatment exists.[32] When it comes to positive measures, however, the Court appears more reluctant to confirm the connection between Article 3 and health-related aspects. For example, while the ECtHR has affirmed that under certain circumstances authorities must take preventive measures to prevent contagious diseases spreading in prison,[33] the particular preventive healthcare policy remained within the margin of appreciation of the state in question.[34] Again, the level of severity is decisive in this regard.

Finally, the ECtHR has also interpreted the connection between health and the environment broadly, particularly in relation to Articles 2 and 8 ECHR. That is, if certain industrial conduct or other activities causing environmental harm reach a certain level of severity, thereby resulting in physical or mental harm of individuals, it might affect the ability to enjoy home, private or family life (Article 8 ECHR). For the Court, private and family life and home are closely interconnected.[35] The excessive and cumulative effect of noise levels generated by an airport;[36] fumes, smells and contamination emanating from a waste treatment plant;[37] toxic emissions from a factory[38] – all can interfere with a person's peaceful enjoyment of their home in such a way as to raise an issue under Article 8, even when the pollution is not seriously health-threatening. Such activities or events may even constitute a threat to the right to life (Article 2 ECHR), necessitating positive measures – that is, the taking of all appropriate steps

November 2014; *McGlinchey and Others v The United Kingdom*, ECtHR, App No 50390/99, Judgment of 29 April 2003; *Jasinskis v Latvia*, ECtHR, App No 45744/08, Judgment of 21 December 2010.

[31] *Gülay Çetin v Turkey*, ECtHR, App No 44084/10, Judgment of 5 March 2013.

[32] *Nevmerzhitsky v Ukraine*, ECtHR, App No 54825/00, Judgment of 5 April 2005; *Ciorap v Moldova*, ECtHR, App No 12066/02, Judgment of 19 June 2007; *Jalloh v Germany*, ECtHR, App No 54810/00, Judgment of 11 July 2006; *Bogumil v Portugal*, ECtHR, App No 35228/03, Judgment of 7 October 2008.

[33] *Poghosyan v Georgia*, ECtHR, App No 9870/07, Judgment of 24 February 2009.

[34] *Shelley v The United Kingdom*, ECtHR, App No 23800/06, Judgment of 4 January 2008; *Florea v Romania*, ECtHR, App No 37186/03, Judgment of 14 September 2010.

[35] A 'home', according to the Court's rather broad notion, is the place, that is, the physically defined area, where private and family life develops: see, e.g., *Fadeyeva v Russia*, ECtHR, App No 55723/00, Judgment of 9 June 2005, paras 70, 82 and 86; *Branduşe v Romania*, ECtHR, App No 39951/08, Judgment of 27 October 2015, para 64 'l'espace de vie'; *Powell & Rayner v The United Kingdom*, ECtHR, App No 38387/97, Judgment of 21 February 1990, para 40.

[36] *Hatton and Others v The United Kingdom*, ECtHR, App No 36022/97, Judgment of 8 July 2003, paras 100, 119, 123; *Dubetska and Others v Ukraine*, ECtHR, App No 42488/02, Judgment of 4 September 2014, para 143. See also *Grimkovskaya v Ukraine*, ECtHR, App No 38182/03, Judgment of 21 July 2011, para 62 as regards the cumulative noise of a runway.

[37] *López Ostra v Spain,* ECtHR, App No 16798/90, Judgment of 9 December 1994; *Giacomelli v Italy*, ECtHR, App No 59909/00, Judgment of 26 March 2007.

[38] *Guerra and Others v Italy*, ECtHR App No 116/1996/735/932, Judgment of 19 February 1998; *Tătar v Romania*, ECtHR, App No 67021/01, Judgment of 27 January 2009; *Ledyayeva and Others v Russia*, ECtHR, App Nos 53157/99, 53247/99, 53695/00 and 56850/00, Judgment of 26 October 2006; *Fadeyeva* (n 35); *Leon and Agnieszka Kania v Poland*, ECtHR, App No 12605/03, Judgment of 21 July 2009.

regarding, *inter alia*, the licensing, setting up, operating and monitoring of such activities – to safeguard the lives of those who may be endangered by the risks.[39]

Since the social and technical aspects of environmental issues are often difficult to assess the Court has found that the relevant public authorities are best placed to determine what might be the best policy.[40] Therefore, public authorities enjoy a wide margin of appreciation in determining how the balance should be struck.[41] The Court may nevertheless assess whether the public authorities have approached the problem with due diligence and have taken all the competing interests into consideration.[42] The Court has also recognized the preservation of the environment, in particular in the framework of planning policies, as a legitimate aim justifying certain restrictions by public authorities, for example, as regards Article 8 ECHR.[43]

By way of conclusion, the social dimension in relation to health-related issues has become firmly recognized by the ECtHR in its case law. Articles 2, 3 and 8 ECHR are particularly relevant in this regard. Nevertheless, the Court has highlighted that the necessary balance of values and rights must be analyzed in each concrete case in light of the specific circumstances of the persons involved. The extent of protection offered in health-related cases thus depends on specific contexts and cases.

b. Work-Related Rights Derived from ECHR Provisions

Unlike the (revised) ESC,[44] the ECHR contains no specific provision on work-related rights. However, the ECtHR has been very proactive in its interpretive role of the ECHR provisions. Moreover, in some cases the ECtHR has invoked ESC provisions in order to interpret the ECHR in cases related to social rights.[45] Thus, the Court has broadened the scope of certain political and civil rights to encompass workers' rights too. As mentioned above, the ECtHR primarily bases its position on the doctrine of positive obligations and the indivisibility of all human rights in order to incorporate the social dimension, also in work-related contexts.[46]

The ECtHR has considered a number of work-related rights under Article 8 ECHR. For example, Article 8 ECHR has been of concern in relation to the interception of calls made on the applicant's office telephones since such interception fell within the scope of notions of

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[39] See, e.g., *Hatton and Others* (n 36); *López Ostra* (n 37); *Fadeyeva* (n 35); *Budayeva and Others* (n 5); *Giacomelli* (n 37).

[40] *Powell and Rayner* (n 35), para 44; *Giacomelli* (n 37), para 80.

[41] *Hatton and Others* (n 36), paras 97–98 and 100.

[42] *Fadeyeva* (n 35), para 128.

[43] *Chapman v The United Kingdom*, ECtHR, App No 27238/95, Judgment of 18 January 2001, para 82.

[44] The (revised) ESC specifically promotes and guarantees a wide range of workers' rights, *inter alia*, the right to work (Article 1), the right to just conditions of work (Article 2), the right to safe and healthy working conditions (Article 3), the right to a fair remuneration (Article 4) and the right to bargain collectively (Article 6). In more detail see CoE, *The Right to Organize and to Bargain Collectively – Study Drawn Up on the Basis of the Case Law of the European Social Charter* (2001).

[45] Thus, as noted in *Demir and Baykara v Turkey*, the Court 'takes into account the international law background' when it considers the object and purpose of the ECHR. *Demir and Baykara* (n 12), paras 76ff.

[46] Colombine Madelaine, *La technique des obligations positives en droit de la Convention Europeenne des Droits de l'Homme* (2014) 24; Mowbray (n 17); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (2012) 204–05.

'private life' and 'correspondence'.[47] Also the installation of cameras and surveillance videos at the workplace and/or at home is not in accordance with the Convention, and was therefore found unlawful.[48]

Article 8 ECHR has likewise been used as a basis by the ECtHR to affirm a right to access to a professional career.[49] However, state parties are afforded a margin of appreciation and may grant employers a certain level of autonomy in making such work-related decisions.[50] Article 8 in connection with 14 ECHR was found relevant in cases related to dismissals on grounds of gender,[51] as well as of health.[52]

The Court has also dealt with issues relating to dismissals and freedom of thought, conscience and religion (Article 9 ECHR). It emphasized the balance that had to be reached between state or corporate interests, for example ensuring certain health and safety regulations or defining a corporate brand image, and the right to manifest one's religion. Whereas in the latter case the interests of the individual weighed stronger, no violation was found regarding the former.[53]

Work-related rights have also been addressed under Article 11 (freedom of association). The ECtHR has long defended the fact that Article 11 presents trade union freedom as a special form or aspect of freedom of association.[54] The words 'for the protection of his interests' in Article 11 are not redundant, and the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the contracting states must both permit and make possible. A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard.[55] In *Redfearn v UK*, the Court held that the dismissal of a member of the British National Party – a far right political party which, at the time, restricted membership to white nationals – from his job as a driver for a private company had disproportionately interfered with his right to freedom of

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[47] *Halford v The United Kingdom*, ECtHR, App No 20605/92, Judgment of 25 June 1997.

[48] *Antović and Mirković v Montenegro*, ECtHR, App No 70838/13, Judgment of 28 November 2017; *López Ribalda v Spain*, ECtHR, App No 1874/13, Judgment of 9 January 2018, referred to the Grand Chamber in May 2018.

[49] *Bigaeva v Greece*, ECtHR, App No 26713/05, Judgment of 28 May 2009, para 23; *Oleksandr Volkov v Ukraine*, ECtHR, App No 21722/11, Judgment of 9 January 2013, paras 165–67.

[50] See, e.g., *Fernández Martínez* (n 12), in relation to the non-renewal of a contract of priest by the Catholic Church.

[51] *Emel Boyraz v Turkey*, ECtHR, App No 61960/08, Judgment of 2 December 2014 and most recently *Hülya Ebru Demirel v Turkey*, ECtHR, App No 30733/08, Judgment of 19 June 2018.

[52] *I.B. v Greece*, ECtHR, App No 552/10, Judgment of 3 October 2013.

[53] *Eweida and Others v The United Kingdom*, ECtHR, App Nos 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013; a similar test was conducted also with regard to Article 8 ECHR (*Ebrahimian v France,* ECtHR, App Nos 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 26 November 2015).

[54] *National Union of Belgian Police v Belgium*, ECtHR, App No 4464/70, Judgment of 27 October 1975, para 38, and *Swedish Engine Drivers' Union v Sweden*, ECtHR, App No 5614/72, Judgment of 6 February 1976, para 39.

[55] *National Union of Belgian Police* (n 54), paras 39–40; *Swedish Engine Drivers' Union* (n 54), paras 40–41; *Wilson, National Union of Journalist and Others v The United Kingdom*, ECtHR, App Nos 30668/96, 30671/96 and 30678/96, Judgment of 2 July 2002, paras 12, 16, 19 and 26.

assembly and association and thus resulted in a violation of Article 11.[56] Similarly, also the dismissal of an employer for going on strike was considered a violation of said provision.[57]

Article 6 ECHR (right to access of court) has been relevant in the context of work-related rights, for example in relation to the dismissal of embassy employees and the issue of state immunity, and was thus relevant in the context of social rights.[58]

Finally, Article 4 (prohibition of slavery and forced labour) ECHR has been interpreted from a social rights perspective. For example, in *Elisabeth Kawogo v UK*, the Court stated that a domestic working visa to work daily without payment was equivalent to forced labour and a clear breach of Article 4 ECHR.[59] Moreover, the lack of a legislative and administrative framework to fight effectively against servitude, forced labour and other kinds of slavery was also found incompatible with Article 4.[60]

IV. A BRIEF CRITICAL ANALYSIS

In the case law of the ECtHR, the rights and freedoms guaranteed by the ECHR have been interpreted as applying to an ever widening range of contexts and the positive obligations for state parties have been progressively expanded. As some scholars have pointed out,[61] when the rules of the VCLT do not provide clearcut solutions to all problems of treaty interpretation, it is reasonable to appeal to the creativity of the ECtHR.[62] For decades, the Court has stated that the Convention is a living instrument which must 'be interpreted in the light of present-day conditions'. Both the so-called living instrument doctrine and the positive obligations of states deriving from ECHR provisions enable the ECtHR to read social rights dimensions into the provisions of the ECHR.

More particularly, it has permitted the Court to state that governments must provide good quality health-related services, in addition to public information on hazardous activities if such activities may have longterm effects on human health. The Court has likewise recognized the obligation to fight effectively against servitude and forced labour. It is also well known that Article 8 ECHR includes a right to be protected against certain cases of environmental pollution or noise, thus indirectly upholding the right to health. Moreover, the Court has noted that

> in the particularly sensitive field of environmental protection, mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others. […] States are required to

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[56] *Redfearn v The United Kingdom*, ECtHR, App No 47335/06, Judgment of 6 December 2012.

[57] *Ognevenko v Russia*, ECtHR, App No 44873/09, Judgment of 20 November 2018.

[58] *Cudak v Lithuania*, ECtHR, App No 15869/02, Judgment of 23 March 2010; *Sabeh El Leil v France***,** ECtHR, App No 34869/05, Judgment of 29 June 2011; *Wallishauser v Austria*, ECtHR, App No 156/04, Judgment of 17 July 2012.

[59] *Elisabeth Kawogo v The United Kingdom*, ECtHR, App No 56921/09, Judgment of 3 September 2013.

[60] *C.N. and V. v France*, ECtHR, App No 67724/09, Judgment of 11 October 2012.

[61] See Pieter van Dijk and Fried van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998) 72.

[62] Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57.

> minimise, as far as possible, the interferences with these rights, by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights.[63]

The Court has thus made considerable steps in its interpretation of the ECHR.

However, the line between legitimate dynamic interpretation and illegitimate judicial law-making in case of effective social rights protection through the ECtHR's dynamic jurisprudence is thin. A critical analysis thus needs to focus on whether the Court has exceeded its legitimate judicial function in the exercise of interpretation and whether the Court is empowered to protect social rights as they are guaranteed in other instruments, particularly the ESC. Indeed, there is no clear consensus on the limits of the judicial function of the ECtHR. In general terms, activist judges tend to adopt a liberal interpretation of the jurisdiction of their Court and of the material provisions they apply. Conservative judges, on the contrary, show more respect for the intentions of the authors of the treaties, constitutions and laws they apply. Not surprisingly, scholars are divided as to the still legitimate extent of judicial activism of the ECHR to achieve specific results derived from the doctrine of positive obligations of states under the ECHR.[64]

I fully agree with Golsong, a former Registrar of the Court, who has argued that the institutional or procedural articles of the Convention should not be interpreted in the light of contemporary perceptions.[65] On the contrary, only substantial rights should be subject to the updating of their meaning and the new manners or technical mechanisms which may be used to carry out acts expressly prohibited in the Convention.

Furthermore, it should be borne in mind that if the Court does not maintain a dynamic and evolving approach, it runs the risk of converting the judicial function into an obstacle to reforming or improving the high level of human rights protection which is so laudable in the work of Strasbourg. Although every demand is unique and different, the ECtHR should also consider the significant legal and social developments in the domestic sphere. Thus, the Court should propose how to reassess 'in the light of present-day conditions' in order to determine the appropriate interpretation and application of the Convention in every concrete case. All these approaches to interpretation call on the Court to consider the fair and real balance of legal rights protected in the Convention, in accordance with its structural principles, in particular Article 14 ECHR. Indeed, in every case, the key task for the Court is to consider and justify whether the state can be said to have struck a fair balance between all interests at play, such as the economic wellbeing of the state, by considering adequate preventive measures and the conflicting interests of the persons affected in their social rights.

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[63] *Hatton and Others v The United Kingdom,* ECtHR, App No 36022/97, Judgment of 2 October 2001, para 97.

[64] See, e.g., Jukka Viljanen, 'Comparative Approach to Limitations: From European Standard to International Trends' in Peter Wahlgren (ed.), *Human Rights, Their Limitations and Proliferation* (2010), 285; Daria Sartori, 'Gap-Filling and Judicial Activism in the Case Law of the European Court of Human Rights' (2014) 29 Tulane European & Civil Law Forum 1; Marc Bossuyt, 'Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations' (2007) 28 Human Rights Law Journal 321; Marc Bossuyt, 'Judicial Activism in Strasbourg' in Karen Wellens (ed.), *International Law in Silver Perspective: Challenges Ahead* (2015) 31.

[65] Heribert Golsong, 'Interpreting the European Convention on Human Rights beyond the Confines of the Vienna Convention on the Law of Treaties' in Ronald St J MacDonald, Franz Matscher and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (1993) 147, 150.

Otherwise, the Court would clearly be trespassing on the policy-making powers of member states if it sought to circumvent the Convention's amendment process by interpreting the existing text in a way as to read overly far reaching social rights developments into the Convention's rights and freedoms. Hence, the Court should not invoke the 'living instrument' doctrine to update the interpretation of the Convention to accord with contemporary standards of democratic societies where the relevant provision falls totally within the rights protected in the ESC. But at the same time, the interpretation of the Court should be in accordance with the developments in the case law and avoid taking a step backwards.

I would like to further emphasize two additional points, already mentioned in this chapter. The first concerns the Court's reference to the fact that in certain cases health and work-related rights are within the scope of different ECHR provision. Moreover, in relation to the social dimension of civil and political rights, the ECtHR has established positive state obligations precisely to cover such social dimension. The second point concerns, as a matter of fact, that in the very early days of the Convention, this creative interpretation and attitude was not shared by all the judges of the Court. In 1979, Judge Sir Gerald Fitzmaurice described the extension of a Convention provision as 'virtually an abuse of the powers given to the Court'.[66] Nowadays, most of the Strasbourg judges expressly recognize that the Court's 'supervisory function' has an inevitable 'creative, legislative element comparable to that of the judiciary in common law countries'.[67] This creativity of the Court cannot be discriminatory or disproportionate as otherwise, by neglecting the distinction between classical freedoms and social rights, the Court risks going beyond its competence.

From a practical point of view, Warbrick's clarification is quite successful.[68] He has highlighted that 'the Convention sometime protects *economic and social aspects* of explicit Conventions rights'. At the same time, he emphasized that 'of more practical significance is the protection of collateral aspects of economic and social *interest,* where these involve civil and political rights, notably regarding procedural provisions and protection against discrimination'.[69] In short, in the cases studied in the previous sections, the Court confirmed the protection of the social interests derived from the political and civil rights of the Convention.

The ECtHR demonstrates self-restraint with regard to the protection of social rights, including certain monetary benefits such as pensions or unemployment subsidies. Such self-restraint may also be observed when it comes to extending the scope of protection of particular provisions. For example, the invocation of Article 3 to guarantee protection against poverty is very controversial. It is quite difficult for the Court to affirm that the terms 'inhuman or degrading treatment' (Article 3 ECHR) could encompass situations of extreme poverty, social exclusion or homelessness as guaranteed in Articles 30 and 31 ESC. That this situation is not totally illusory can be seen in cases such as *Larioshina v Russia* where the Court dealt with the question of the applicants' entitlement to social benefits under domestic law,[70] with the claim, however, ultimately being declared inadmissible.

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[66] *Marckx* (n 14), Dissenting opinion of Judge Sir Gerald Fitzmaurice, para 31.

[67] Sartori (n 64), 16.

[68] Colin Warbrick, 'Economic and Social Interest and the European Convention on Human Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (2004) 241, 241.

[69] *Ibid.*, 241 [emphasis added].

[70] *Larioshina v Russia*, ECtHR, App No 56869/00, Decision of 23 April 2002.

Depending on the approach pursued by the ECtHR, the outcome of the cases could produce some very welcome results for applicants, but may also be met with significant criticism by defendant governments if perceived as too far-reaching.

V. FINAL REMARKS

The starting point of this chapter was that on paper the ECHR does not incorporate economic and social rights, explicitly or implicitly. Over time, however, the ECtHR has increasingly protected (economic and) social aspects of the ECHR rights and freedoms. As a necessary consequence, the assumption of a positive account of freedom as capability breaks down traditional dichotomies between civil and social rights, and calls on the monitoring bodies of the Convention to adopt an integrated approach towards the interpretation of the ECHR.

As the analysis thus reveals, the Court has affirmed, *inter alia*, that there is a violation of the right to respect private and family life when a state has failed to provide essential information of the risks regarding dangerous occupations such as the use of certain of decompression tables, particularly when risks were well known for the state authorities (*Vilnes and Others v Norway*). The Court has also highlighted the procedural limb of the right to life in cases of investigations into medical negligence (*Šilih v Slovenia*). In many studied cases, the living instrument doctrine has furthermore resulted in the recognition of the connection between health and environmental human rights, and their link to provisions enshrined in the ECHR, for example, in cases of excessive noise levels from airports, industrial pollution or town planning. In relation to social rights, this implies a dynamic approach to Convention interpretation (*Hatton v UK*).

The scope of 'medical care', 'pollution', 'noise', 'domestic work', 'property', 'extreme material poverty', 'a workplace accident' or 'decent material conditions for impoverished asylum seekers' has been increasing. This becomes clear when we consider the broad interpretation mechanisms and arguments of the ECtHR. More important than the nature of the rights themselves were the objectives of the required protection in the cases heard before the Court, which are not carried out purely for the explicit or implicit purpose of overlapping the functions of the European Committee of Social Rights (ECSR) but rather to provide a precise, effective and realistic protection of all Convention rights at all times, no matter the cost.

This interpretive trend of the Court is not free of limitations and criticisms. The ECtHR only makes specific references to the case law of the ECSR in very few cases when interpreting and applying the social rights recognized in the revised ESC. The absence of any attempt by the ECtHR to coordinate with the ECSR is striking. Some scholars stress the ECtHR's expansive interpretation trend and tend to downplay the effective role of the complaints system within the ESC. Even during the decade of the Protocol's operation establishing collective complaints under the ESC, it was criticized for its structural and procedural weaknesses.[71] The ECSR has

[71] Robin Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 EJIL 417; Holly Cullen, 'The Collective Complaints Mechanism of the European Social Charter' (2000) 25 European Law Review Human Rights Survey HR/18; TA Novitz, 'Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter' (2002) 1 European Human Rights Law Review 50.

nevertheless also developed a set of principles of reasoning, largely drawn from the ECtHR's case law, which enable it to balance the protection of human rights and the need for state discretion in social policy-making in democratic states. Thus, overall, there is a form of judicial dialogue between the ECtHR and the ECSR which should be developed with the objective of increasing the social dimension inherent in most ECHR rights.

9. The protection of social rights by the Inter-American Commission on Human Rights

Flávia Piovesan, Mariela Morales Antoniazzi and Julia Cortez da Cunha Cruz

I. INTRODUCTION: CONTEXT AND PREMISES

a. Human Rights: A Holistic Concept

The Universal Declaration of Human Rights (UDHR) of 1948 proclaimed a holistic concept of human rights, and the universal human rights system has consistently reaffirmed the notion that economic, social and cultural rights (ESCR) and civil and political rights (CPR) are interdependent and indivisible. Nevertheless, there has been a marked separation between ESCR and CPR, which are proclaimed by separate conventions, with different characteristics, and particular monitoring procedures.

The history of the Inter-American system of human rights is part of the broader context of social rights development. Even before the UDHR, the American Declaration on the Rights and Duties of Man proclaimed a broad bill of rights, which includes social rights such as health,[1] as well as education.[2] Nevertheless, the American Convention on Human Rights (ACHR) does not follow a similar path. It proclaims civil and political rights in thorough detail, but includes a single general mention of ESCR:

> Chapter III – Economic, Social and Cultural Rights
> Article 26. Progressive Development
> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

In fact, the *travaux préparatoires* to the American Convention indicate that the first draft proposal presented by the Inter-American Commission on Human Rights (IACHR) did not expressly protect ESCR, but rather recognized such rights as objectives to be pursued by domestic law.[3] States regarded this proposal as insufficiently protective of ESCR and

[1] American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992), Art XI.

[2] *Ibid.*, Art XII.

[3] Conferencia Especializada Interamericana sobre Derechos Humanos (1969) OEA/Ser.K/XVI/1.2, Art 25 <www.oas.org/es/cidh/mandato/Basicos/actas-conferencia-interamericana-Derechos-Humanos-1969.pdf> (20 October 2019).

decided that the American Convention should include direct protections of these rights.[4] The Colombian delegation even suggested that the Convention include a thorough list of ESCR, similar to the American Declaration and correspondent to the 23 articles on CPR.[5] The Colombian proposal was corroborated by propositions from other delegations and by recommendations made by the Inter-American Council of Jurists.[6] Nevertheless, the Working Group formed to analyze the issue did not adopt the Colombian suggestion, but rather opted for a commitment to progressively achieve the full realization of ESCR (as embodied in Article 26 ACHR).[7] The reasoning behind this decision was multifaceted, including issues such as the varying degrees of ESCR legal protection in the region, as well as the relation between ESCR implementation and the availability of economic resources.[8]

Twenty years after the ACHR, the state parties to the American Convention adopted an Additional Protocol in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador. The Protocol complements the Convention, establishing a comprehensive roll of ESCR and determining that the right to education and the right to form and join trade unions are subject to the individual petition mechanism of the Inter-American system of human rights.[9] Therefore, the IACHR and the Inter-American Court of Human Rights (IACtHR) may analyze petitions on alleged violations of these two rights.[10] Other ESCR proclaimed by the Protocol of San Salvador are monitored through the submission of periodic reports.[11]

This chapter discusses the work of the IACHR towards the realization of social rights through reporting, thematic hearings, and promotional activities. Alongside these activities,

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[4] *Acevedo Buendía et al ('Discharged and Retired Employees of the Comptroller') v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 1 July 2009, para 99.

[5] Conferencia Especializada Interamericana (n 3), 303.

[6] Antônio A Cançado Trindade, *La cuestión de la protección internacional de los derechos económicos, sociales y culturales: evolución y tendencias actuales* (1992) 22.

[7] The Working Group was formed by Argentina, Brazil, Chile, Colombia, Ecuador, Guatemala and the United States of America. See Conferencia Especializada Interamericana (n 3), 303.

[8] See, e.g., the position of Brazil at the Conferencia Especializada Interamericana (n 3), 125.

[9] The monitoring tools of the Protocol are listed in Article 19 ('means of protection'). It determines that states are to submit periodic reports on the progressive measures they adopt to fulfil the duties set forth in the document. Article 19(6) singles out Article 8 (trade union rights, including the right to strike) and Article 13 (right to education), clarifying that violations of those two rights may give rise to application of the system of individual petitions at the Commission and, when applicable, at the Court. Reference to the *travaux préparatoires* indicate that the Commission itself defended such provision, stating that 'the Commission considers that three rights defined in the Protocol – trade union rights, the right to strike and freedom of education – should enjoy the same protection system that has been established for civil and political rights', although the reasoning behind the choice of these rights was not expressly provided. See Comisión Interamericana de Derechos Humanos, *Informe Anual 1985–1986* (1986) OEA/Ser.L/V/II.68 <www.cidh.org/annualrep/85.86span/Cap5.htm> (20 October 2019).

[10] As discussed further in this chapter and in the contribution by Eduardo Ferrer Mac-Gregor in this *Research Handbook* (Chapter 10), recent jurisprudential developments have clarified that there are also other rights that may be analyzed within the petition system. On the direct justiciability of the right to health, see *Poblete Vilches et al v Chile* (Merits, Reparations and Costs), IACtHR, Judgment of 8 March 2018.

[11] Article 19(1) reads: '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.'

a long debate has ensued on whether and how the Commission should approach social rights within its individual petition mechanism. Likewise, the protection of social rights by the IACtHR has been a topic of constant discussion. Both institutions adhere to the integral and holistic view of human rights. The operationalization of this concept, however, has changed and evolved over time, as this article shall demonstrate with special focus on the IACHR.

b. Social Rights and Intersectionality in the Inter-American System

In addition to indivisibility, the contemporary notion of human rights also encompasses universality. The universal nature of human rights refers to the extension of protection: it covers all human beings irrespective of nationality, ethnicity, class, gender, sexual orientation or any other condition. This notion is central to international human rights law and is embodied, first and foremost, in the principles of equality and non-discrimination. Equality before the law, equal protection before the law and non-discrimination are fundamental principles that permeate all international human rights norms and guide the actions of the Inter-American system.[12]

Accordingly, in the field of social rights, states have a duty to guarantee their exercise 'without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[13] Because discrimination is complex, guaranteeing the equal enjoyment of social rights requires a comprehensive view of whether these rights are equally accessible to different groups. Under certain circumstances, a mere uniform public policy (a policy that applies equally 'across the board') will be insufficient, requiring measures that target the causes and consequences of discrimination.[14] In these cases, as expressed by Ferrajoli,

> the value of equality is confirmed and reaffirmed, albeit in a more complex and articulated sense […], by virtue of the analysis of difference and the implications that must be drawn from an equal and effective valuation of the various identities.[15]

Effective social rights policy requires a diagnosis of how different types of discrimination may impact the exercise of these rights, and the adoption of measures that address such inequalities. In Latin America, historical and structural forms of discrimination imply that effective protection of social rights requires disaggregated data, enabling the identification of inequalities and the elaboration of measures targeted at the protection of groups in situations of vulnerability.

Even more, it is not enough to consider how differences impact the enjoyment of social rights *in isolation*. The Inter-American Convention against Racism, Racial Discrimination and

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[12] That is why the IACtHR considers non-discrimination a *ius cogens* norm. See *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion OC-18 of 17 September 2003, para 101.

[13] International Covenant on Economic Social and Cultural Rights (16 December 1966) 993 UNTS 3, Art 2(2).

[14] Leiry Cornejo Chávez, 'El derecho a la educación como instrumento contra la exclusión: avances en la práctica de la Corte Interamericana de Derechos Humanos' in Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Rogelio Flores Pantoja (eds), *Inclusión, Ius Commune y justiciabilidad de los DESCA en la jurisprudencia interamericana* (2018) 235, 253.

[15] Luigi Ferrajoli, 'Igualdad y diferencia' (2005) 2 Colección Miradas (20 October 2019).

Related Forms of Intolerance highlights that there are situations of multiple discrimination, defined as

> any preference, distinction, exclusion, or restriction based simultaneously on two or more of the criteria set forth in Article 1.1 [race, color, lineage, or national or ethnic origin], or others recognized in international instruments, the objective or result of which is to nullify or curtail, the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties, in any area of public or private life.[16]

These drivers of discrimination may interact and aggravate each other, producing complex and unique forms of inequality.[17] This interaction causes situations of intersectional discrimination, a concept defined as 'a situation where several grounds [including age, disability, ethnic, indigenous, national or social origin, gender identity, political or other opinion, race, refugee, migrant or asylum seeker status, religion, sex and sexual orientation] interact with each other at the same time in such a way as to be inseparable'.[18] States must take intersectionality into account in the implementation of social rights, collecting disaggregated data, identifying vulnerabilities and acting to hamper inequalities in the enjoyment of ESCR.

II. THE MANDATE AND TOOLS OF THE INTER-AMERICAN COMMISSION

The Organization of American States (OAS) created the IACHR in 1959.[19] As a principal and autonomous organism within the OAS, the Commission is tasked with the promotion and protection of human rights in all member states. It is composed of seven members (the Commissioners), who are assisted by an Executive Secretariat based in Washington DC.[20] Although member states nominate and elect the members of the Commission, Commissioners are independent and do not represent their state of nationality or the country which put their nomination forward.[21]

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[16] Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (6 May 2013) OAS Treaty Series A 68, Art 1(3).

[17] See, e.g., *Gonzales Lluy et al v Ecuador* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 1 September 2015, para 290, concerning a small child who had been infected with HIV following a blood transfusion when she was three years old. *Inter alia*, the Court analyzed the continuing effects of the infection over the girl's life, including access to education and to specialized medical care. Under these circumstances, the Court noted that 'in Talía's case, numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV. The discrimination experienced by Talía was caused not only by numerous factors, but also arose from a specific form of discrimination that resulted from the intersection of those factors.'

[18] CRPD Committee, 'General Comment No 3 on Women and Girls with Disabilities' (2 September 2016) CRPD/C/GC/3.

[19] Acta Final de la Quinta Reunion de Consulta de Ministros de Relaciones Exteriores, Secretaria General de la Organización de los Estados Americanos (August 1959) <www.oas.org/es/cidh/mandato/Basicos/Acta-final-Quinta-reunion-Chile-1959.pdf> (20 October 2019).

[20] Statute of the Inter-American Commission on Human Rights, OAS General Assembly, Resolution No 447 (October 1979) <www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp> (20 October 2019).

[21] *Ibid.*

The Commission has a range of tools that enable it to work towards its mission.[22] It can request information from member states, issue resolutions, make recommendations and speak out on issues of concern. It serves as a convening forum for human rights stakeholders in the region, holds promotional activities and engages the media. It echoes and amplifies the human rights situation throughout the Americas while also interacting with other international human rights institutions. Although activities are broad and adapt to changing circumstances, the core work of the Commission focuses on three mechanisms.

The first is the case system. Any individual, group of individuals or organization may send a petition reporting a human rights violation to the Commission.[23] When the communication refers to a state which, although member to the OAS, has not ratified the ACHR, the Commission analyzes the petition based on the American Declaration.[24] Commissioners issue decisions on admissibility and merits of the petition and, if they find a violation of the Declaration, make recommendations on remedies.[25] When the petition refers to a state that is a party to the ACHR, the Commission uses this treaty as the standard of analysis.[26] If Commissioners decide that the state violated the ACHR and the state does not implement the remedies recommended by the Commission, Commissioners may refer the case to the IACtHR.[27] The Commission participates in the procedure at the Court, advocating for its positions in all stages of a case. If the Court rules that there is a violation of the ACHR, it issues a final decision, which includes binding reparation measures. There is no direct access to the IACtHR, meaning that all cases decided by the Court start at the Commission.[28]

In cases of urgent and serious situations that may cause irreparable harm the Commission may issue precautionary measures, which follow an expedite procedure and do not constitute a prejudgment on possible violations of the Convention or the Declaration.[29] The situation may or may not be connected to an existing petition.[30]

The second core mechanism at the Commission is the set of special rapporteurships, thematic rapporteurships and units.[31] Their aim is to both systematize and to strengthen the work of the Commission on a given issue. Currently, there are eleven thematic rapporteurships (indigenous peoples, women, migrants, children, human rights defenders, persons deprived of liberty, afro-descendants, LGBTI, memory truth and justice, older persons and persons with disabilities).[32] Each of them is led by a Commissioner, who undertakes monitoring and

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[22] For an overview, see Flávia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional* (2018) chapter VII.c.

[23] Rules of Procedure of the Inter-American Commission on Human Rights (147th regular period of sessions, 2013) <www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> (20 October 2019), Art 23.

[24] *Ibid.*, Art 51.

[25] *Ibid.*, Art 52.

[26] *Ibid.*, Art 27.

[27] Provided that the state has recognized the jurisdiction of the IACtHR pursuant to Article 62 ACHR.

[28] This rule applies only to petitions submitted by individuals, groups of individuals or organizations. States may access the Court directly, in accordance with Article 61 ACHR.

[29] IACHR Rules of Procedure (n 23), Art 25.

[30] *Ibid.*, Art 25(1).

[31] The rules applicable to the rapporteurships are determined in Article 15 IACHR Rules of Procedure (n 23).

[32] For an updated list of thematic rapporteurships and units, see IACHR, Thematic Rapporteurships and Units <www.oas.org/en/iachr/mandate/rapporteurships.asp> (20 October 2019).

promotional activities on the topic, and is tasked with contributing to the development of consistent standards. The Commission also has two special rapporteurships: one on freedom of expression,[33] and one on ESCR.[34] Unlike the thematic rapporteurships, they are not led by one of the seven Commissioners, but by a special rapporteur exclusively dedicated to the issue.[35]

The third core type of activity is monitoring. The Commission writes an annual report to the OAS General Assembly, which describes not only its activities but also the human rights situation on the continent. In addition, the Commission writes country reports and thematic reports, led by rapporteurships, which describe the current human rights situation in a particular country or in relation to a priority issue, and consolidate the legal standards applicable to it. Three times per year, the Commission holds public hearings, either in Washington DC or elsewhere in the region, during which Commissioners receive information about violations and other issues of interest.

a. Protection of Social Rights under the Petition System

Long before the IACtHR determined the direct justiciability of Article 26 ACHR in *Lagos del Campo v Peru*,[36] the IACHR had developed case law on economic, social and cultural rights. As early as 1978, the Commission analyzed the case *Jehovah's Witnesses v Argentina*, whose victims included three hundred children dismissed from school due to religious discrimination.[37] The Commission found that the state had violated both the right to religious freedom and the right to education.[38]

In other cases, the Commission determined indirect violations of social rights. For example, when deciding the admissibility of *Inmates at the Mendoza Penitentiary v Argentina*, the IACHR considered the right to health as a dimension of Articles 4 and 5 of the ACHR (right to life and to personal integrity).[39]

Interestingly, unlike the Court, in some cases the Commission analyzed CPR indirectly, using ESCR as the central norm (instead of the other way around). In *Jorge Odir Miranda Cortez v El Salvador* (concerning access to HIV medication), the Commission decided that violations of the right to life and to personal integrity were 'secondary in nature' and 'contingent' on the conclusion reached about violations of the right to health.[40] In this particular case the Commission concluded that the actions of El Salvador had been compatible with the obli-

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[33] For more information, see IACHR, Office of the Special Rapporteur for Freedom of Expression <www.oas.org/en/iachr/expression/index.asp> (20 October 2019).

[34] For more information, see IACHR, Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights (ESCER) <www.oas.org/en/iachr/desc/> (20 October 2019).

[35] IACHR Rules of Procedure (n 23), Art 15(4).

[36] See the contribution by Eduardo Ferrer Mac-Gregor in this *Research Handbook* (Chapter 10).

[37] *Jehovah's Witnesses*, IACHR, Case 2137, 18 November 1978.

[38] Because Argentina had yet to ratify the ACHR, the Commission based its decision on the American Declaration, which protects the right to education directly (Article XII).

[39] *Inmates at Mendoza Penitentiary* (Admissibility), IACHR, Petition 1231/04, Report No 70/05, 13 October 2005.

[40] *Jorge Odir Miranda Cortez et al v El Salvador*, IACHR, Case 12.249, Report No 29/01, 20 March 2009.

gation to progressively develop ESCR; in other petitions,[41] however, it reached the conclusion that Article 26 ACHR had been autonomously violated.[42]

Therefore, in the precedents of the Commission, one can find an interesting combination of: (i) cases that simultaneously analyze autonomous violations of CPR and of ESCR; (ii) cases that analyze ESCR as dimensions of CPR; and (iii) cases that analyze CPR as dimensions of ESCR. It is a composition that reinforces the indivisibility and the interdependence of human rights, demonstrating that the line between rights categories is, at best, a blurry one.

This unique 'case law mosaic' was modified by the *Five Pensioners* case, which discussed pecuniary losses resulting from pension reform.[43] The Commission issued a decision on the merits determining a violation of Article 26 ACHR, decided to take the case to the IACtHR, and there argued autonomous violations of ESCR. However, the Court did not agree with this approach, ruling that violations of the duty to progressively develop ESCR could be determined only in relation to the entire population, not a particular set of victims.[44]

In the period immediately after the Court's decision, the Commission started applying the standard developed in *Five Pensioners* to its own cases, refraining from using ESCR norms if the experience of the victim could not be linked to the general situation of the population.[45] For example, in *Cuscul Pivaral (Persons living with HIV/AIDS) v Guatemala*, the Commission stated:

> Regarding the alleged violation of article 26 of the American Convention, the Commission considers that since the present case involves the right to health, there is an obligation to provide the general population with a progressive fulfillment in both preventive and curative medical care. In that sense, the Commission agrees with what the Court has stated: '[…] progressive development […] should be measured in function of the growing coverage of economic, social and cultural rights […] of the entire population […].[46]

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[41] *Milton García Fajardo et al v Nicaragua*, IACHR, Case 11.381, Report No 100/01, 11 October 2000.

[42] The obligation to progressively develop ESCR established by Article 26 ACHR is one of the chief entry points for social rights in the Inter-American system, forming a triad with indirect protection of social rights and the Protocol of San Salvador.

[43] *'Five Pensioners' v Peru* (Merits, Reparations and Costs), IACtHR, Judgment of 28 February 2003.

[44] Reinforcing its case law on indirect ESCR protection, in *Five Pensioners* the Court declared only indirect ESCR violations; that is, although the case involved the right to social security, it determined violations of the right to property and to due process. However, unlike previous decisions, the Court did analyze whether Peru had committed direct violations of ESCR. It abstained from declaring the international responsibility of the state for violating Article 26 given that 'progressive development [...] should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.' *'Five Pensioners' v Peru* (n 43), para 147.

[45] Oscar Parra Vera, 'La justiciabilidad de los derechos económicos, sociales y culturales en el Sistema Interamericano a la luz del artículo 26 de la Convención Americana. El sentido y la promessa del caso Lagos del Campo' in Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Rogelio Flores Pantoja (eds), *Inclusión, Ius Commune y justiciabilidad de los DESCA en la jurisprudencia interamericana* (2018) 181, 198.

[46] *Luis Rolando Cuscul et al (Persons living with HIV/AIDS) v Guatemala* (Admissibility) IACHR, Petition 642-03, Report No 32/05, 7 March 2005.

As a result, the Commission concluded that access to retroviral medication should be analyzed within the framework of the right to life, not as an ESCR.[47]

In 2009, this position evolved. In *National Association of Ex-Employees of the Peruvian Social Institute v Peru*, which also discussed pension reform, the IACHR once again determined that progressive development of ESCR – and, in particular, the obligation of non-regression – 'implies a joint analysis of the individual affectation in relation to the collective implication of the measure'.[48] This time, the IACHR applied this standard in more detail, determining that the reform did not violate article 26 because any regression was justified by 'strong reasons'.[49]

Like the IACtHR's findings in *Five Pensioners*, the IACHR report in *National Association of Ex-Employees of the Peruvian Social Institute* guided future Commission decisions on pensions.[50] In cases relating to other social rights, the Commission adapted the *Five Pensioners* standard, maintaining the essence that ESCR should be analyzed with reference to the situation of the population as a whole. For example, in a case about violence against homeless people, the Commission declared Article 26 inadmissible because the victims had failed to demonstrate that their homeless condition represented 'any regression or restriction on the right of the whole population to adequate housing'.[51]

This standard marked the positions of the IACtHR and the Commission for several years. Because it seemed to indicate that Article 26 could only be monitored *vis-à-vis* the rights of the population as a whole, it hampered the analysis of ESCR in the petition system, which by definition is dedicated to the experiences of specific individuals or groups.

After more than ten years operating under this paradigm, recent developments in the case law of both institutions indicate that this approach is changing.[52] First, in *Acevedo Buendia v Peru*, the Court again analyzed changes in a pension regime. This time, it highlighted the interdependence and indivisibility of human rights, clarifying important issues that had been grey areas in the discussion about ESCR rights in the Inter-American system. The Court affirmed its jurisdiction over potential violations of Article 26,[53] determining that the general obligation to protect and guarantee the rights of the ACHR (established in Articles 1 and 2) apply to ESCR. However, the Court did not find a violation of Article 26 in the case at hand, and the right to social security was affirmed only indirectly, that is, within the scope of the

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[47] When the case reached the Court, judges reverted this position, deciding to rule directly on violations of the right to health. *Cuscul Pivaral et al v Guatemala* (Preliminary Objections, Merits, Reparations, and Courts), IACtHR, Judgment of 23 August 2018.

[48] *National Association of Ex-Employees of the Peruvian Social Institute et al v Peru*, IACHR, Case 12.670, Report No 38/09, 27 March 2009, para 140.

[49] Elements considered in the analysis included: (i) the pensioners affected were not representative of the development stage of the right to social security in Peru; (ii) the reform had the legitimate aims of improving the exercise of the right to social security by other beneficiaries, of ensuring the future sustainability of the pension system, and of removing inequality within the system; and (iii) the reform did not impair the essential content of the right to social security. *Ibid.*, paras 141–47.

[50] *E.g. Social Security Contributions of Retired and Pensioned Civil Servants – UNAFISCO, CONAMP et al v Brazil* (Inadmissibility) IACHR, Petitions 1133-04 and 115-05, Report No 134/09, 12 November 2009; Parra Vera (n 45), 208.

[51] *Ivanildo Amaro Da Silva et al v Brazil* (Admissibility), IACHR, Petition 1198-05, Report No 38/10, 17 March 2010, para 42.

[52] See also the contribution by Eduardo Ferrer Mac-Gregor in this *Research Handbook* (Chapter 10).

[53] *Acevedo Buendía et al v Peru* (n 4), para 17.

right to property and to judicial protection. In the following years, ESCR were not absent from the Court's case law – but they were included as interpretative references, not as the central norm in the analysis of the international responsibility of states.[54]

In 2013, the Court heard *Suarez Peralta v Ecuador*, a case about medical malpractice in a private health centre. The Court analyzed the case within the framework of the right to personal integrity, not the right to health. However, Judge Eduardo Ferrer Mac-Gregor, who had recently been appointed to the Court, disagreed with this indirect approach. He wrote a concurring opinion arguing that the Court should have analyzed the right to health directly, as an autonomous right, as stemming from Articles 1 and 26 of the Convention.[55] The opinion reopened a discussion that had been put to rest for several years, disturbing a somewhat uncritical inertia in favour of indirect protection.[56] In *Canales Huapaya v Peru*, Judge Roberto Caldas joined Judge Ferrer Mac-Gregor in arguing that the Court should have analyzed the case within the framework of ESCR.[57] Shortly thereafter, the Court issued its judgment in *Gonzales Lluy v Ecuador*, concerning the contamination of a three-year-old girl with HIV, as well as its continuous effects on her rights to health and education. In a concurring opinion, Judge Ferrer Mac-Gregor indicated again that the Court had erred in analyzing the right to health through the rights to life and to personal integrity.[58] Judges Caldas and Manuel Ventura adhered to the opinion. The movement towards direct justiciability of Article 26, which had started with one judge in *Suarez Peralta* and increased to two in *Canales Huapaya*, now was supported by three.[59]

Finally, in 2017, their opinion would gain a five judge majority in *Lagos del Campo v Peru*.[60] The case related to questions of labour stability and the right of workers to associate in order to defend their common interests. The Court held that impairments to these rights constituted a direct violation of Article 26. The Court also reaffirmed the indivisibility of human rights, highlighting that ESCR and CPR must be seen as part of a holistic concept. A similar outcome (affirmations of direct violation of Article 26) was also reached in *Dismissed Employees of Petroperú v Peru* concerning the failure to guarantee access to judicial protection within the

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[54] See, e.g., *Artavia Murillo et al (In Vitro Fertilization) v Costa Rica* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 28 November 2012.

[55] Judge Ferrer Mac-Gregor followed the steps of Judge Macaulay, who had written an opinion arguing for the direct justiciability of ESCR in *Furlan and family v Argentina* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 31 August 2012.

[56] Parra Vera (n 45), 183.

[57] *Canales Huapaya et al v Peru* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 24 June 2015.

[58] *Gonzales Lluy et al v Ecuador* (n 17), para 17.

[59] In 2016, there was also other concurring opinion on the direct justiciability of ESCR. Judges Ferrer Mac-Gregor and Caldas each wrote one concurring opinion arguing for the direct analysis of the right to health in *Chinchilla Sandoval et al v Guatemala* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 29 February 2016. The case discussed health-related violations within the context of people deprived of liberty. Judge Ferrer Mac-Gregor argued for the direct justiciability of the right to adequate housing in *Yarce et al v Colombia*, IACtHR, Judgment of 22 November 2016, and wrote a concurring opinion about the right to health in *I.V. v Bolivia*, IACtHR, Judgment of 30 November 2016.

[60] *Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 31 August 2017.

context of labour relations, and in *San Miguel Sosa et al v Venezuela* on a violation of the right to work of individuals who had been arbitrarily dismissed from their jobs.[61]

In 2018, the Court ruled for the first time on an autonomous violation of the right to health. In *Poblete Vilches v Chile*, it determined that the state failed to guarantee access to health without discrimination, since it did not provide basic and urgent care to a victim in a situation of vulnerability as an older person. Based on international norms on the right to health, the Court determined that states must guarantee health services that meet standards of quality, accessibility, availability and acceptability. The case was also an opportunity to clarify specific rights of older persons in the context of healthcare. In *Cuscul Pivaral and others v Guatemala*, the Court went even further and declared for the first time the international responsibility of the state for failing to progressively develop the right to health.[62] The case refers to people living with HIV in Guatemala – a situation which the Commission had chosen to analyze exclusively within the framework of the rights to life and to integrity. The ruling analyzes the specific obligations of the state in relation to persons living with HIV, as well as circumstances of intersectional discrimination within this context.

These cases indicate the emergence of Inter-American precedent on the protection of social rights, with a special focus on individuals and groups in situations of vulnerability. They also demonstrate that gradually the IACtHR has moved towards the effective protection of ESCR.

Likewise, in the past few years, the Commission has indicated a renewed focus on ESCR across its activities. In 2018, this momentum reached the case system: in *Employees of the fireworks industry in Santo Antonio de Jesus and their families v Brazil*, the IACHR determined that Brazil had committed a direct violation of Article 26.[63] The decision reversed the longstanding position of avoiding direct analysis of ESCR, unequivocally affirming their direct justiciability. In its decision, the Commission highlighted that the interpretation of Article 26 must adhere to the language therein and, and at the same time, take into account the development of international law since the adoption of the ACHR.[64] Accordingly, it developed a two tier methodology to analyze possible violations of Article 26. First, the Commission must decide whether the particular ESCR is protected by Article 26. This analysis is based on whether the right derives from 'the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States', interpreted jointly with other international standards.[65] Then, the Commission must analyze whether the state fulfilled its duty to progressively develop such right.[66]

In relation to the obligation of progressive development, the Commission highlighted that any analysis of the Convention must abide by the norms of interpretation established in Article 29.[67] In accordance with the *pro persona* principle, interpretation must not restrict rights established by other norms, including domestic legislation, international treaties and

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[61] *Dismissed Employees of Petroperú et al v Peru* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 23 November 2017; *San Miguel Sosa et al v Venezuela* (Merits, Reparations, and Costs), IACtHR, Judgment of 8 February 2018.

[62] *Cuscul Pivaral et al v Guatemala* (n 47).

[63] *Employees of the Fireworks Industry in Santo Antonio de Jesus and their Families v Brazil*, IACHR, Case 12.428, Report No 25/18, 2 March 2018.

[64] *Ibid.*, para 128.

[65] *Ibid.*, para 129.

[66] *Ibid.*, para 130.

[67] *Ibid.*, para 131.

Inter-American standards like the American Declaration.[68] Therefore, in order to establish the enforceable obligations stemming from 'progressive development', the Commission relied on the Protocol of San Salvador, the precedents of the UN Committee on Economic, Social and Cultural Rights and related sources of public international law.

Building upon the international *corpus iuris* on ESCR, the Commission determined that the duty of progressive development entails at least four immediate obligations: (i) to respect and ensure the exercise of such rights; (ii) to apply the non-discrimination principle to ESCR; (iii) to take steps towards the fulfilment of such rights; and (iv) to offer effective remedy.[69] These duties are directly enforceable, meaning that although the full realization of ESCR may take time, the state must demonstrate that it has been fulfilling the obligations of conduct that stem from Article 26.

After developing this methodology, the Commission proceeded to apply it to the facts of the case. The circumstance under analysis was the explosion of a firework factory in Brazil, resulting in deaths and injuries of 70 individuals, of which 22 were children. The Commission concluded that Article 45(b) of the OAS Charter protects the right to work, and therefore the protection under Article 26 ACHR encompasses such right. Moreover, the right to decent working conditions is protected by both the American Declaration and the Protocol of San Salvador, meaning that it cannot be restricted through interpretation, as mandated by the *pro persona* principle. The Commission concluded that

> [t]he right to work constitutes one of the economic and social standards referred to in article 26 of the Convention and, in this regard, States parties are under an obligation to pursue its progressive development and to respect, ensure and adopt the measures necessary for the realization of this right.[70]

In the second part of the two tier analysis, the Commission decided that the obligation to progressively develop the right to work applies to private activities, since the state must require companies to exercise due diligence in order to identify, prevent and mitigate human rights violations, including labour rights violations.[71] The state must also monitor whether labour conditions are compatible with the core of the right to work, which includes safe working conditions. The Brazilian state failed to fulfil these immediate duties in the firework factory in Santo Antonio de Jesus, resulting in the events that killed and injured the victims.[72] The IACHR also took into account the situation of poverty of the victims, who 'had no alternative but to accept a high-risk job, with low pay and without adequate security measures'.[73] Accordingly, the Commission concluded that Brazil violated Article 26, along with other articles of the ACHR.[74]

The decision in the firework factory case is an important milestone for the Commission. It consolidates the jurisprudential turn in favour of the direct justiciability of ESCR. This marks

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[68] For more information on the *pro persona* principle, see Flavia Piovesan, *Temas de Direitos Humanos* (2018) 140–43.

[69] *Employees of the Fireworks Industry* (n 63), para 134.

[70] *Ibid.*, para 139.

[71] *Ibid.*, para 144.

[72] *Ibid.*, para 151.

[73] *Employees of the Fireworks Industry in Santo Antonio de Jesus and their Families v Brazil*, IACHR, Case 12.428, Letter of submission of 19 September 2018.

[74] *Employees of the Fireworks Industry* (n 63), para 175.

the return of the Commission to a position it had adopted historically. The decision also goes further, establishing a methodology that corresponds to the particular characteristics of ESCR protection within the Inter-American system. This decisive approach and clear methodology for ESCR analysis opens the door to future developments in the field of social rights.

b. Thematic Reports

Alongside the individual petition system, the mandate of the IACHR also includes monitoring the situation of human rights in the Americas. An important part of this work takes the form of thematic reports, which document the situation of particular rights in the region, consolidate normative standards and disseminate knowledge. Thematic reports approach social rights both as the focus-topic of specific studies and as transversal themes. Recently, there has been a particular emphasis on ESCR. For example, the Commission's most recent thematic report, a study on the 'Recognition of the Rights of LGBTI People in the Americas', launched by the LGBTI rapporteurship in May 2019, includes the right to education and the right to health as priority issues.[75]

In 2017, the Commission issued a thematic report on Poverty and Human Rights, characterizing poverty as a structural problem, which both impairs the exercise of human rights and causes human rights violations.[76] It adopts a human rights approach to the issue, meaning poverty is analyzed in light of the rights of individuals and the international duties of states. This perspective is conducive for standards and policies that identify and address the particular needs of groups in situations of vulnerability, especially those who have been historically discriminated against. Accordingly, the report strengthens the call for policies that target structural inequality and intersectional discrimination. It also recognizes that overcoming poverty requires attention to not only ESCR but also CPR, strengthening the notion of indivisibility. The report includes social rights both as standards of analysis and as end results of social policies targeted at overcoming poverty.

The report 'Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities' also approaches the issue of social rights, this time in a more specific context. It recognizes that extractive industries have repeatedly affected the territorial rights and natural resources of traditional communities: given that land is a key source of livelihood, the living conditions of these communities deteriorate, with significant impacts on social rights. This includes especially the right to access food and water. In addition, the report highlights that many extractive industries also submit traditional communities to abusive working conditions. For example, the Miskito divers in Honduras and Nicaragua have been victims of severe labour abuse by fishing companies, resulting in physical disabilities and even death.[77]

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[75] *Report on Recognition of the Rights of LGBTI People in the Americas*, IACHR (7 December 2018) OEA/Ser.L/V/II.170 Doc 184.

[76] *Report on Poverty and Human Rights in the Americas*, IACHR (7 September 2017) OEA/Ser.L/V/II.164 Doc 147, para 101.

[77] *Report on Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, IACHR (31 December 2017) OEA/Ser.L/V/II. Doc 47/15, para 296.

The issue of extractive industries has also been included in IACHR Resolution 1/18 on Corruption and Human Rights.[78] ESCR are particularly dependent on the fight against corruption, as their effectiveness is contingent on proper budget allocation and high quality policies. As highlighted by the Commission:

> Corruption in the management of public resources jeopardizes the capacity of governments to comply with their social rights obligations, including health, education, water, transportation or sanitation, which are essential for the realization of economic, social, cultural and environmental rights and in particular, of the most vulnerable populations and groups. Among these groups, women, social leaders, land rights defenders, Afro-Descendant peoples and indigenous peoples are the most affected.[79]

The resolution recommends states to adopt strong mechanisms to eradicate corruption, strengthen transparency and upgrade monitoring systems in the implementation of social policies. It also calls for effective oversight of extraction, exploitation and development activities, with the aim of protecting the rights of local communities, including the right to meaningfully participate in decision making processes.[80]

Earlier thematic reports have played an important role in ESCR standard setting as well. These include 'The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights', 'Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights' and 'Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights'. In an era when the possibility to litigate social rights under the Inter-American system was uncertain, these reports diagnosed the situation of social rights in the Americas, clarified the obligations of the states and prompted improvements through recommendations.

c. Country Reports

Like thematic reports, recent country reports have incorporated a particular focus on social rights. In its 2018 report on Gross Human Rights Violations in the Context of Social Protests in Nicaragua, the Commission dedicated a specific section to the right to health, documenting impacts of violent government action on the population's mental health and emotional wellbeing.[81] The document also reports denial of medical care and obstructions of the work of humanitarian health personnel. These add to a context of arbitrary dismissals, suspension of educational activities and scarcity of food, all related to a crisis installed after the government started repressing protests. Commissioners characterized these issues as violations of social rights, and highlighted the ESCR duties of the state, especially in relation to individuals

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[78] Although not a thematic report in itself, the resolution draws on findings from previous reports and lays the ground for future action on the topic.

[79] IACHR Resolution 1/18 on Corruption and Human Rights (16 March 2018).

[80] *Ibid*.

[81] *Report on Gross Human Rights Violations in the Context of Social Protests in Nicaragua*, IACHR (21 June 2018) OEA/Ser.L/V/II. Doc 86, Chapter 3b (right to health and health care).

and groups in situations of vulnerability, such as children and adolescents, persons living in poverty, older adults, persons living with HIV, the sick and persons with disabilities.[82]

In its 2017 country report on Venezuela, the Commission documented the prevalence of poverty and serious impairments on economic, social, cultural and environmental rights. The economic and social crisis in the country is marked by intertwined violations of CPR and ESCR, which reinforce and aggravate each other in a vicious cycle. According to the Commission, human rights violations and disruptions to the rule of law feed into the context of increasingly weak institutions in Venezuela, which lack the means to ensure proper living conditions for the population.[83] The consequences include a dramatic increase in poverty, as well as difficulties in accessing essential components of the rights to food, to health and to housing.

These examples demonstrate that the Commission is on the path towards full embrace of human right indivisibility. In all its activities, the Commission has been striving to incorporate the notion that human rights constitute an indissoluble whole, and that social rights must be a crosscutting concern.

III. EMERGING TRENDS AND OUTLOOK

a. Working Group of the Protocol of San Salvador and the System of Indicators

After the adoption of the Protocol of San Salvador, the OAS General Assembly created a working group to examine the periodic reports of state parties to the protocol. The working group is formed by representatives of the IACHR, government experts and independent specialists. Among other functions, the General Assembly tasked them with developing a set of indicators,[84] enabling measurement of ESCR progress (as well as setbacks). The indicators were based on guidelines developed by the IACHR, and their elaboration received inputs from states and civil society.

The set of indicators established by the working group measures all aspects of the realization of economic, social and cultural rights. This includes access to ESCR, quality of social policy and proper budget allocation. They also consider whether and how ESCR are incorporated into national law, as well as the capacity of state agents to abide to international standards during policy implementation. In addition, the working group established equality and non-discrimination, access to justice and access to information and participation as transversal principles that permeate all work done within the framework of the indicators.[85]

The indicators offer a substantial contribution to the protection of social rights. By fostering the generation of data, they enable the elaboration of evidence-based diagnosis about the enjoyment of social rights. Based on this assessment, interested stakeholders (including the institutions of the Inter-American system, as well as civil society and the media) may analyze

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[82] *Ibid*.

[83] *Report on Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, IACHR (31 December 2017) OEA/Ser.L/V/II. Doc 209, para 405.

[84] Discussed in more detail in the contribution by Laura Pautassi in this *Research Handbook* (Chapter 16).

[85] *Indicadores de Progreso para Medición de Derechos Contemplados en el Protocolo de San Salvador*, Grupo de Trabajo para el análisis de los informes nacionales previstos en el Protocolo de San Salvador (12 December 2011) OEA/Ser.L/XXV.2.1 GT/PSS/doc.2/11 rev.2, para 43.

whether state conduct complies with the international duties in the area of social rights. They may critically evaluate programmes and policies within the framework of international human rights law, identifying both good practices and issues of concern. Therefore, indicators may act as drivers of transparency and accountability in relation to international commitments in the area of social rights.[86]

For states, these indicators help to integrate human rights norms into policy design and implementation, enabling the formulation of strategies and priorities in the area of social rights. They also allow states to identify problems and to improve their policies promptly.

A key aspect of the indicators is that they require disaggregated data, with criteria that encompasses gender, race, ethnicity, sexual orientation, socio-economic class, income, residence (urban–rural), migration status, among others. Therefore, in every step of social policy design and implementation, the state and relevant stakeholders may identify the impacts of structural discrimination over the enjoyment of social rights, enabling the development of measures to protect individuals and groups in situations of vulnerability. This approach allows the state to develop policies universal in scope (whose objective is to improve ESCR for the population as a whole), while simultaneously taking action to address the needs of people with aggravated risk – especially those who face multiple and intersectional forms of discrimination.

The indicators can also be a powerful tool for the IACHR. By integrating them into each of its forms of action, the Commission would increase its methodological rigour. The use of indicators may propel the Commission's ability to document social rights enjoyment in the region, especially within country reports and thematic reports. As the case law on social rights expands, it may also boost the quality of analysis within the individual petition mechanism, contributing to the formation of precedents based on accurate evidence, which consider structural patterns of discrimination and take into account inequalities in access to ESCR throughout the region.

b. Special Rapporteurship on Economic, Social, Cultural and Environmental Rights

In 2017, a new Special Rapporteur on Economic, Social, Cultural, and Environmental Rights started acting within the Commission.[87] The special rapporteur works full time on the promotion and protection of ESCR, increasing the Commission's ability to delve deeper into social rights as a crosscutting issue across all its activities. Building upon the prior work of the Unit on Economic, Social and Cultural Rights, the new rapporteurship adds institutional capacity on this theme. It also takes a step forward in the state of the art of ESCR, by expressly incorporating environmental rights as a key part of its mandate.[88]

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[86] Piovesan (n 68), 28.

[87] IACHR, 'IACHR chooses Soledad García Muñoz as Special Rapporteur on Economic, Social, Cultural, and Environmental Rights (ESCER)' (5 July 2017) <www.oas.org/en/iachr/media_center/PReleases/2017/090.asp> (20 October 2019).

[88] In 2017, the IACtHR took another step in this direction and issued Advisory Opinion OC 23-17, which analyzes state duties in relation to the environment. The Court emphasized that environmental rights (which are protected by Article 11 of the Protocol of San Salvador) are encompassed by the roll of ESCR protected by Article 26 ACHR. See *The Environment and Human Rights*, IACtHR, Advisory Opinion OC-23/17 of 15 November 2017, para 57.

Like the Special Rapporteur on Freedom of Expression, the rapporteur is fully dedicated to the Commission and, jointly with her team, uses reports, public hearings and other promotional mechanisms as tools to advance ESCR in the Americas. Importantly, the Office of the Special Rapporteur also examines the decisions of the Commission on petitions and precautionary measures that relate to ESCR, guaranteeing a social rights perspective in all relevant cases. This increases the technical quality of Commission decisions, adding specific ESCR expertise. It also prevents ESCR issues from being overlooked, guaranteeing that the Commission will apply ESCR standards that are in line with the most recent developments in the field.

The institutionalization of ESCR within the structure of the Commission indicates a commitment with robust protection of social rights within the Inter-American system. As observed by Oscar Parra Vera:

> It is not a minor issue that the case Lagos del Campo happened precisely in the year in which the Commission created a Special Rapporteurship on ESCR. To a certain extent, the Inter-American institutions are trying, by interpretation and institutional design, to offer the best basis for a full reconsideration of our understanding of ESCR, as well as for the development of a still inexistent Inter-American dogmatic that is specific to ESCR.[89]

Such full reconsideration and specific dogma may yet be long term objectives. But in a region still marked by widespread poverty, which holds the highest inequality levels in the world, these goals require urgent action. The developments highlighted in this article are first steps, which must be followed up on by the Commission and the Court as well as by other stakeholders of the system, including states, academia, and civil society.

c. Direct Litigation of Social Rights

For many years, the possibility of directly litigating social rights at the Inter-American system remained uncertain. Drawing from the standards established the Court, in many cases the Commission relied on indirect protection of social rights within the petition system, using instruments such as reports to approach the issue more thoroughly. Since 2017, this picture has substantially changed. The IACtHR's recent case law opened a new horizon for strengthening the indivisibility of human rights at the Inter-American system. This also led to the IACHR consolidating its position in favour of direct litigation.[90] By enabling the direct litigation of social rights, the Inter-American institutions settled the debate on the justiciability of Article 26: now, there is no doubt that both the Court and the Commission do analyze potential violations of ESCR obligations through their case systems.

This analysis is based upon the obligation to progressively develop ESCR, which entails the state's duty to respect and ensure the full exercise of social rights, as provided by Article 1(1) ACHR.[91] This general duty must be interpreted in light of the *pro persona* principle, enshrined

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[89] Parra Vera (n 45), 232.

[90] *Employees of the Fireworks Industry* (n 63).

[91] American Convention on Human Rights (22 November 1969) OAS Treaty Series 36, Art 1(1): 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.'

in Article 29 ACHR.[92] According to this principle, the Convention shall not be interpreted in a manner that restricts the enjoyment of rights recognized nationally or internationally. In other words, when there is a normative conflict or legitimate doubt about interpretation, the interpreter must choose the solution that is most protective of the victim's rights. The interpreter may also refer to other instruments as reference points, especially the American Declaration, the OAS Charter, the Protocol of San Salvador and the international *corpus iuris* on economic, social and cultural rights.

These interpretative references indicate that, in addition to the general obligation to respect and ensure social rights, states have more specific duties that stem from their commitment to progressively develop ESCR. States must not adopt unjustified regressive measures and must take concrete steps towards the realization of social rights.[93] These steps shall be 'deliberate, concrete and targeted as clearly as possible' towards the fulfillment of ESCR.[94] States must also guarantee access to effective remedies, which shall be cognizant of the specificities of ESCR.[95] Finally, there is an immediate obligation to prevent discrimination in the enjoyment of social rights.[96] Given the structural patterns of inequality in the region, states should take active steps to identify and address situations of discrimination, as well as the needs of individuals and groups in conditions of vulnerability.

Latin America is the most unequal region in the world. Poverty and violence are widespread, affecting especially individuals who are in situations of vulnerability due to their gender, race, origin, age or sexual orientation.[97] These structural challenges call for urgent improvement in the protection of social rights. In the past years, the Inter-American system has taken promising steps in this direction, indicating a decisive lead in the adoption of a holistic notion of human rights. Now, these steps must be followed up on.

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92 *Employees of the Fireworks Industry* (n 63), para 131. See also Piovesan (n 68), 140–43.

93 CESCR, 'General Comment No. 3 on the Nature of States Parties' Obligations' (14 December 1990).

94 *Ibid.*, para 2.

95 *Employees of the Fireworks Industry* (n 65), para 134.

96 *Ibid*.

97 *Report on Poverty and Human Rights in the Americas* (n 76), para 105.

10. Social rights in the jurisprudence of the Inter-American Court of Human Rights

Eduardo Ferrer Mac-Gregor

I. INTRODUCTION

The American Convention on Human Rights (ACHR) contains only one provision that refers to economic, social and cultural – and now environmental – rights (ESCER or social rights) and therewith to social rights. Article 26 ACHR establishes that

> [t]he States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, subject to available resources and by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The Inter-American Court of Human Rights (IACtHR) has considered this provision – and any other treaty norm concerned with 'economic', 'social', 'cultural' or 'environmental' rights – as the source of 'social rights'. Therefore, to this day there is no clearcut conceptual distinction in the Court's jurisprudence between the category of 'ESCER' and 'social rights'.

In 1988, the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) was adopted. This instrument contains a much broader and more detailed list of social rights.[1] However, Article 19(6)[2] of the Protocol establishes that trade union rights (Article 8(1)(a)) and the right to education (Article 13) are directly enforceable before the organs of the Inter-American human rights system, excluding (apparently) the other rights. The result of this situation has been that, under the Inter-American system, the direct justiciability of ESCER – *of rights that are not explicitly contemplated* in Article 19(6) – did not come about until 2017 when the IACtHR found an autonomous violation of the right to work by a new interpretation of the aforementioned Article 26 ACHR.[3] Prior to that judgment, the Court had chosen to develop the content of social rights through the civil and political rights recognized in the American Convention; in other words, indirectly.

It is important to emphasize that, at the regional level, it is not only the actions of institutions of the Inter-American system that monitor compliance with ESCER/social rights. In 2005 the OAS General Assembly adopted the Standards for the Preparation of Periodic Reports

[1] The Protocol of San Salvador recognizes the rights to work, trade unions, social security, health, healthy environment, food and education, among others.

[2] Article 19(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.'

[3] *Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 31 August 2017, para 153.

Pursuant to the Protocol of San Salvador,[4] and instructed the OAS Permanent Council to create a Working Group.[5] The latter has prepared documents on the progress indicators for the rights included in the Protocol, when reviewing the national reports presented by states.[6]

Another endeavour was introduced in June 2012, when the Foreign Ministers of the hemisphere adopted the Social Charter of the Americas in Cochabamba, Bolivia. The Social Charter – which might be considered as a source of soft law in the Inter-American system – is based on the recognition that

> [t]he peoples of the Americas legitimately aspire to social justice and their governments have a responsibility to promote it. Development with equity strengthens and consolidates democracy, since the two are interdependent and mutually reinforcing.[7]

The jurisprudence of the Inter-American Commission on Human Rights (IACHR) follows a similar line and has examined precedents relating to ESCER/social rights under Article 26 ACHR.[8] Moreover, in 2012 the IACHR decided to establish the Unit on Economic, Social and Cultural Rights. As of 2014, this Unit became the Special Rapporteurship on Economic, Social Cultural and Environmental Rights (SRESCER), and the first Special Rapporteur was appointed in 2017.[9]

This article is a reflection on the most relevant contributions that the IACtHR has made to the protection of ESCER, and strives to identify the most relevant issues in the recent jurisprudence on the subject. It also seeks to be a starting point for further reflections on the future of the jurisprudence of the Inter-American system in this regard, which will be crucial in a region in which – and at a time when – there is still so much to be done as regards equality, and protection of a decent life for the most vulnerable groups. The lack of protection of social rights for women, children or migrants has – in some instances – a disproportionate impact on their dignity due to the social, economic or cultural conditions in which they live. The protection of social rights is thus particularly important for these groups.

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[4] OAS, 'Standards for the Preparation of Periodic Reports Pursuant to the Protocol of San Salvador' (5–7 June 2005) GA AG/RES.2074(XXXV-O/05).

[5] The Working Group commenced its functions in March 2010 and currently consists of four government experts, two independent experts and two IACHR commissioners.

[6] See the OAS website for information on the Working Group and its activities: <www.oas.org/en/sare/social-inclusion/protocol-ssv/working-group.asp> (25 June 2019). See also the contribution by Laura Pautassi in this *Research Handbook* (Chapter 16).

[7] OAS, 'Social Charter of the Americas' (4 June 2012) GA OEA/Ser.P AG/doc.5242/12 rev.1, Article 1.

[8] Óscar Parra Vera, *Justiciabilidad de los derechos económicos, sociales and culturales ante el Sistema Interamericano* (2011) 60. See the contribution by Flávia Piovesan *et al* in this *Research Handbook* (Chapter 9).

[9] The first Special Rapporteur on Economic, Social Cultural and Environmental Rights (SRESCER) is Soledad García Muñoz, appointed by the IACHR in plenary session.

II. THE FIRST CASES ON ESCER BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS

In 2000, in *'Street Children' (Villagrán Morales et al) v Guatemala*, former judges Antônio Cançado Trindade and A Abreu Burelli highlighted the relationship between civil and political rights and economic, social and cultural rights.[10] In 2003, in '*Five Pensioners*' *v Peru* – in relation to Article 26 ACHR – the Court considered that ESCER had both an individual and a collective dimension, and that in order to analyze this provision in a particular case it would be necessary that a large part of the collectivity and not merely a specific group was affected.[11]

In 2009, in *Acevedo Buendía et al (Discharged and Retired Employees of the Office of the Comptroller) v Peru*, the IACtHR found it pertinent to recall the *interdependence* that existed between civil and political rights and economic, social and cultural rights since they had to be understood, integrally, as human rights, without any ranking, enforceable before the competent authorities in all cases. In addition, the Court noted that it would take time to achieve the full realization of economic, social and cultural rights and, thus, referring to their progressive realization was 'a necessary flexibility device reflecting the realities of the real world and the difficulties involved for any country in ensuring [this] realization'.[12] Lastly, it considered that the foregoing resulted in an obligation – although conditioned – not to adopt regressive measures, which should not always be understood as a prohibition of measures that restrict the exercise of a right.[13] However, in this case, the Court did not declare that the said article had been violated. The relevance of this *obiter dictum* is that it opened the door to declare an autonomous violation to Article 26 ACHR, both in its *immediate* dimension (see discussion below*, Lagos del Campo v Peru*) and in its *progressive* dimension (see discussion below, *Cuscul Pivaral et al v Guatemala*).

Starting with *Furlan and family v Argentina* (2012), members of the IACtHR began to issue concurring and dissenting opinions setting out the reasons why they considered that it was – or was not – possible to make ESCER directly justiciable under Article 26 ACHR. The main discussions occurred in the opinions issued in the following cases: *Suárez Peralta v Ecuador* (2013), *Canales Huapaya et al v Peru*, *Gonzales Lluy et al v Ecuador* (2015), *Chinchilla Sandoval et al v Guatemala*, *Workers of the Hacienda Brasil Verde v Brazil*, *Yarce et al v Colombia* and *I.V. v Bolivia* (2016).[14]

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[10] *'Street Children' (Villagrán Morales et al) v Guatemala* (Merits), IACtHR, Judgment of 19 November 1999, Concurring Opinion of Judges AA Cançado Trindade and A Abreu Burelli, 2.

[11] *'Five Pensioners'* (Merits, Reparations and Costs), IACtHR, Judgment of 28 February 2003, para 147.

[12] *Acevedo Buendía et al ('Discharged and Retired Employees of the Comptroller') v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 1 July 2009, para 102.

[13] *Ibid.*, paras 101–03.

[14] For an analysis of the discussions that took place in these concurrent and dissenting opinions, see Óscar Parra Vera, *La justiciabilidad de los derechos económicos, sociales y culturales en el Sistema Interamericano a la luz del artículo 26 de la Convención Americana. El sentido y la promesa del caso Lagos del Campo* (2018) 181.

III. THE DIRECT AND INDIRECT PROTECTION OF ESCER IN THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The judges' discussions in their opinions were peripheral to the IACtHR's methodological approach in most of its jurisprudence, since the cases that involved potential violations to social rights were analyzed in their relationship with civil and political rights (that is, a violation of the right to health was analyzed in its relationship with the violation to the right to personal integrity). The Court used different elements of the national and international *corpus juris* on social rights as grounds for its arguments on the scope of civil and political rights contemplated in the American Convention (such as, for example, the rights to life, personal integrity, privacy, and so on). This strategy was productive and has permitted the Inter-American human rights jurisprudence to make significant progress. Thus, the IACtHR analyzed cases that involved social rights by linking them to a civil or political right. The main problem with this line of arguments is that it prevented an indepth analysis of the scope of the obligations to respect and to ensure social rights in several judgments delivered by the IACtHR prior to the 2017 case of *Lagos del Campo v Peru* (discussed below).[15]

Despite the practical benefits of the Court's methodology of analyzing the principles of the interdependence and indivisibility of social rights by connectivity (this means in its relationship with some civil and political right protected by the American Convention), it would appear that the IACtHR confuses the essence of these principles because, in reality, they encompass human rights violations integrally, rather than partially.

The main difficulty is that there are some components of social rights that cannot be linked to standards for civil and political rights,[16] since 'the specificity could be lost of both civil and political rights (which begin to cover everything) and social rights (which are unable to project their specificities)'.[17] In this regard, in *Acevedo Buendía*, the IACtHR explicitly referred to the 'interdependence' of rights in order to analyze the economic, social and cultural rights referred to in Article 26 ACHR.[18] However, it remains impertinent that, together with their interdependence, the 'indivisible' nature of human rights should be emphasized, as expressly established in the judgment in *Suárez Peralta v Ecuador*, by considering both concepts: 'interdependence and indivisibility'.[19]

Based on this hypothesis (that is, the insufficiency of connectivity as an element of analysis), this section is divided into two parts. First, and as an example, some pre-2017 precedents where the IACtHR protected social rights by means of other rights contained in the American Convention are mentioned: in other words, jurisprudence by connectivity. Then, in a second

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[15] Regarding this important judgment and its transcendence within the Inter-American system, see the articles included in Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Rogelio Flores Pantoja (eds), *Inclusión, ius commune y justiciabilidad de los DESCA en la jurisprudencia interamericana. El caso Lagos del Campo y los nuevos desafíos* (2018), *in totum*.

[16] Tara Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in Comparative and International Law* (2008) 372.

[17] Parra Vera (n 8), 15.

[18] *Acevedo Buendía* (n 12), para 101.

[19] *Suárez Peralta v Ecuador* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 21 May 2013, para 131.

part, the new era of the Court's jurisprudence with regard to the direct justiciability of ESCER through Article 26 ACHR is referred to.[20]

a. ESCER or Social Rights Protected by Connectivity

With regard to the right to health, the IACtHR has examined such issues frequently under Article 4 ACHR (right to life). This includes, for example, a woman's right to sexual and reproductive health (for example in cases of rape or of women who are pregnant),[21] and the right to health of indigenous children who have been displaced from their territories,[22] and of children who have been deprived of liberty and who need medical care within detention centres;[23] it has also examined these issues in relation to adults (deprived of liberty, and members of indigenous peoples[24]). The IACtHR has examined the right to health of persons with disabilities from the perspective of their treatment or their rehabilitation, and from the point of view of reasonable adjustments and accessibility.[25]

Similarly, with regard to health, the Court has relied on Article 2 ACHR (domestic legal effects) and established concrete obligations when medical care services are provided by private individuals, which may entail state responsibility in certain circumstances when the state fails to adequately regulate, monitor or supervise the provisions of such services.[26] The Court has also examined medical confidentiality,[27] medical records and their significance for the patient, the importance of medical professional associations when they act as bodies that supervise the role of the physician,[28] and informed consent in sexual and reproductive matters.[29]

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[20] For a detailed analysis of this evolution in the perspective of international human rights law, see Isaac de Paz González, *The Social Rights Jurisprudence in the Inter-American Court of Human Rights – Shadow and Light in International Human Rights* (2018).

[21] *Xákmok Kásek Indigenous Community v Paraguay* (Merits, Reparations and Costs), IACtHR, Judgment of 24 August 2010, para 233; *Fernández Ortega et al v Mexico* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgment of 30 August 2010, para 129. Similarly, *Rosendo Cantú et al v Mexico* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgment of 31 August 2010, para 119.

[22] *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs), IACtHR, Judgment of 29 March 2006, paras 150ff.

[23] *Mendoza et al v Argentina* (Preliminary Objections, Merits and Reparations), IACtHR, Judgment of 14 May 2013.

[24] *Vera Vera et al v Ecuador* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 19 May 2011, para 42 and *Sawhoyamaxa Indigenous Community* (n 22), para 167.

[25] *Ximenes Lopes v Brazil* (Merits), IACtHR, Judgment of 4 July 2006, para 107; see also *Chinchilla Sandoval v Guatemala* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 29 February 2016, paras 166–99.

[26] *Ximenes Lopes* (n 25), para 98; see also *Gonzales Lluy et al v Ecuador* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 1 September 2015, paras 177, 184.

[27] *De la Cruz Flores v Peru* (Merits, Reparations and Costs), IACtHR, Judgment of 18 November 2004, para 95.

[28] *Albán Cornejo et al v Ecuador* (Merits, Reparations and Costs), IACtHR, Judgment of 22 November 2007, paras 76, 86.

[29] *I.V. v Bolivia* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 30 November 2016.

In the case of social security, the Court's jurisprudence has referred to the pension regime (adjustable or based on sexual orientation). In this regard, the IACtHR has protected this right mainly by means of the right to property – under the mechanism of acquired rights (Article 21 ACHR), judicial protection (Article 25 ACHR) and the principles of equality and non-discrimination before the law (Articles 1(1) and 24 ACHR).[30]

Regarding the right to education, this is one of the two rights that explicitly may be invoked directly by means of the Protocol of San Salvador as established in Article 19(6) of the Protocol (*Caso Gonzales Lluy*). However, this right was not developed for a long time and the Court protected it by connectivity, mainly under the specific obligations derived from Article 19 ACHR (rights of the child), supplemented by the United Nations Convention on the Rights of the Child.[31]

In the same way as the preceding right, trade union rights may be directly justiciable because this is established in Article 19(6) of the Protocol of San Salvador, but this has not been dealt with directly by the IACtHR yet. Matters relating to trade unions have concerned the dismissal of union members and executions of trade union leaders. In *Baena Ricardo v Panama*, *Huilca Tecse v Peru* and *Cantoral Huamaní and García Santa Cruz v Peru*, the IACtHR developed the content not of Article 8(1)(a) of the Protocol, but rather of the right to freedom of association recognized in Article 16 ACHR, taking into account the indirect effects of the dismissal or execution of trade union leaders.[32]

Regarding the right to work – and the prerequisites to exercise this right – the most relevant precedents can be found in the cases *Dismissed Congressional Employees* and *Canales Huapaya et al*, both against the Peruvian state.[33] Moreover, given the characteristics of this right, the IACtHR has also ruled on it when protecting the tenure of judges in the performance of their functions, because one of the facets of the right to work is job stability.[34] The protection of this right has also been examined from the perspective of contemporary forms of slavery, human trafficking and forced labour.[35]

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[30] *'Five Pensioners'* (n 11), para 94; *Acevedo Buendía* (n 12), para 72; and *Duque v Colombia* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 26 February 2016, para 124.

[31] *'Juvenile Re-education Institute' v Paraguay* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 2 September 2004, paras 172, 174; *Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs), IACtHR, Judgment of 17 June 2005, para 164; *Xákmok Kásek Indigenous Community* (n 21), para 258, and *Yean and Bosico Girls v Dominican Republic* (Merits), IACtHR, Judgment of 8 September 2005, paras 109.34–109.37.

[32] *Baena Ricardo et al v Panama* (Merits, Reparations and Costs), IACtHR, Judgment of 2 February 2001, para 156; *Huilca Tecse v Peru* (Merits, Reparations and Costs), IACtHR, Judgment of 3 March 2005, para 73, and *Cantoral Huamaní and García Santa Cruz v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 10 July 2007.

[33] *Dismissed Congressional Employees (Aguado Alfaro et al) v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 24 November 2006, para 129, and *Canales Huapaya et al v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 24 June 2015, para 108.

[34] *López Lone et al v Honduras* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgment of 5 October 2015, para 190, and *Reverón Trujillo v Venezuela* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 30 June 2009, para 67.

[35] *Ituango Massacres v Colombia* (Merits), IACtHR, Judgment of 1 July 2006, para 159, and *Workers of the Hacienda Brasil Verde v Brazil* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 20 October 2016, para 280.

The right to a healthy environment is a right that has been protected indirectly under Article 21 (based on the collective ownership of property by indigenous and tribal peoples), Article 23 (based on effective participation in consultations)[36] and Article 13 (based on access to information) of the ACHR.[37]

As regards the right to food, the IACtHR has made less reference to it in its jurisprudence. However, under this heading, the Court has ruled on the traditional alimentation of indigenous communities,[38] and on the alimentation of persons deprived of their liberty.[39]

Regarding the right to culture, this has been developed from different angles in Inter-American jurisprudence, including the use of scientific advances (medical practices)[40] and individual participation in cultural life.[41] The Court has also addressed the impossibility of indigenous and tribal communities performing their funeral rites,[42] the use of native language and the loss of cultural identity owing to the indirect effects of the enforced disappearance of persons.[43]

Lastly, the right to housing has been protected – mainly – by Articles 11 and 21 of the American Convention (prohibition of interference in the home and right to property). The Court has ruled in cases of indigenous peoples in provisional settlements,[44] but has most developed this aspect in other related cases.

The importance of the analysis by connectivity is twofold. It allowed the IACtHR to develop a deeper analysis of the cases presented before them by the IACHR, which impacted the protection offered by the Inter-American system to the victims of human rights violations (this can be seen, for instance, in the reparations ordered by the Court). Equally important, it opened the door for the jurisprudential evolution of social rights both in terms of substance (the development of the content of rights) and methodology (the type of analysis made in connection with those rights).

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[36] *Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs), IACtHR, Judgment of 25 November 2015, para 172; *Yakye Axa* (n 31); *Xákmok Kásek Indigenous Community* (n 21), para 187.

[37] *Claude Reyes et al v Chile* (Merits, Reparations and Costs), IACtHR, Judgment of 19 September 2006, para 77.

[38] *Yakye Axa* (n 31), para 164.

[39] *Pacheco Teruel et al v Honduras* (Merits, Reparations and Costs), IACtHR, Judgment of 27 April 2012, para 67.d, and *López Álvarez v Honduras* (Merits, Reparations and Costs), IACtHR, Judgment of 1 February 2006, para 9.

[40] *Artavia Murillo et al ('In vitro fertilization') v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 28 November 2012, para 150.

[41] *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations), IACtHR, Judgment of 27 June 2012, para 217.

[42] *Plan de Sánchez Massacre v Guatemala* (Merits), IACtHR, Judgment of 29 April 2004, para 36.4; *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 15 June 2005, paras 100, 103; *Bámaca Velásquez v Guatemala* (Reparations and Costs), IACtHR, Judgment of 22 February 2002, para 81, and *Río Negro Massacres v Guatemala* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgment of 4 September 2012, para 155.

[43] *Chitay Nech et al v Guatemala* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 25 May 2010.

[44] *Yakye Axa* (n 31), para 164 and *Sawhoyamaxa Indigenous Community* (n 22), para 168.

b. Direct Justiciability under Article 26 ACHR

The trend of the IACtHR's jurisprudence concerning the protection of the ESCER shifted significantly starting with the judgment in *Lagos del Campo v Peru* in 2017.[45] This case represented a clear evolution as regards protection under the Inter-American system because it asserted the Court's competence to declare direct violations of ESCER. It also opened a jurisprudential pathway for later judgments, which have so far included issues related to a healthy environment, the right to job stability and the right to health.

i. *Lagos del Campo v Peru*

The step forward made in *Lagos del Campo v Peru* was fundamental for reaching an understanding of internal social dynamics,[46] because it gave social rights that the Protocol of San Salvador did not consider justiciable a channel through which they could be claimed before an international court, that is, the IACtHR. In its judgment, the IACtHR declared a violation of Article 26 based on work-related matters from two perspectives: (a) as regards job stability, and (b) as regards the association of workers in order to defend and promote their interests.

To arrive at the assertion that Article 26 ACHR contained social rights, the IACtHR set out four steps/elements. The Court (a) noted that the article mandates that rights should be derived from the standards set forth in the OAS Charter; (b) referred to Advisory Opinion OC-10/89, because it established that the American Declaration of the Rights and Duties of Man defines the rights recognized in the OAS Charter with greater precision; (c) referred to the national and international *corpus iuris* on the matter; and (d) verified domestic law – at the constitutional level or, if this was not possible, in the regulations.[47]

In its judgment, the IACtHR for the first time introduced obligations aimed at protecting a social right – rather than focusing on the obligations from the perspective of civil and political rights – and considered that, in principle, in work-related matters and in relations between private individuals, special considerations were required, particularly from the viewpoint of the obligation to ensure rights in order to protect workers against unjustified dismissal.

It should be noted that, in this case, the IACtHR did not create a specific test (where the four elements taken into account by the Court were present) to determine when the justiciability of the social rights by means of Article 26 ACHR would be applicable. This would have been inappropriate because some social rights can be found in national constitutions but not in international instruments (as in the case of the right to water or environmental rights) and, inversely, because the right is included in an international instrument to which the state is a party (such as the International Covenant on Economic, Social and Cultural Rights), but not in the national constitution. Consequently, it will not be necessary in future cases that the said four elements set out in this case are present, and the justiciability of the other social rights will have to be evaluated on a case by case basis in order to identify the norms on which their protection can be found.

Regarding the second aspect – the association of workers to defend and promote their interests – the IACtHR has gone into less detail than it has with regard to job stability, noting that

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[45] *Cf.* Ferrer Mac-Gregor *et al* (n 15).
[46] The case related to the victim's arbitrary dismissal from a private company.
[47] *Lagos del Campo v Peru* (n 3), paras 143–49.

> this Court finds that the sphere of protection of the right to work-related freedom of association is not only subsumed into the protection of trade unions, their members and their representatives, so that the protection that recognizes the right to freedom of association in the workplace extends to organizations that, even though their nature may differ from that of trade unions, seek to represent the legitimate interests of the workers.[48]

If the Court had not chosen this integral vision, it would have created distinctions between workers who are members of trade unions and those who are not. Thus, while in the case of the former the matter would have been examined from the angle of a social right under the Protocol of San Salvador (Article 8(1)(a)), because Article 19(6) of the Protocol in conjunction with Article 16 ACHR provides for this), in the latter case – even though both associations had the same objectives (promotion and defence of the workers' interests) – only Article 16 of the Pact of San José would have been applied. Fortunately, the IACtHR opted for an integral vision in this case.

ii. *Dismissed Employees of PetroPeru et al v Peru*

Two aspects of this case should be underlined:[49] (a) the need for an appropriate nature of judicial remedies that call social rights into question, and (b) the facts that made this case different to *Lagos del Campos*.

On the first point, when evaluating the judicial guarantees and judicial protection of the 15 employees of institutions attached to the Peruvian Ministry of Economy and Finance, the IACtHR noted that the judgment of the Constitutional Court of 29 January 2001 had declared that the *amparo* filed was without grounds because no violation of a constitutional right had been proven. In relation to this argument, the IACtHR remarked that the Peruvian Constitutional Court had not analyzed the alleged violations of the right to work as a result of the dismissals. Based on this, the IACtHR found

> that States have the obligation to ensure to all persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental rights. This means that the judicial remedy must be appropriate to combat the violation; thus, the competent authority must examine the reasons cited by the plaintiff and rule on them.[50]

Consequently, the IACtHR determined that, by failing to consider the right to work as part of its analysis, the constitutional rights and convention-based rights in question had been violated as the Peruvian Constitutional Court disassociated the substantial right from the procedural right, thus failing to evaluate the main purpose of the dispute.[51]

Second, although both the case *Dismissed Employees of PetroPeru* and *Lagos del Campo* related to a violation of the right to work, there is a fundamental difference: while the one case related to obligations concerning the public sphere (*Dismissed Employees of PetroPeru*

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[48] *Ibid.*, paras 157–58.

[49] The case related to the mass dismissal of employees from different institutions of the Peruvian Government.

[50] *Dismissed Employees of PetroPeru et al v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 23 November 2017, paras 175, 177.

[51] *Ibid.*, para 178.

et al), the sphere of work-related relations between private individuals was at issue in *Lagos del Campo*.[52]

iii. Advisory Opinion OC-23/17 – *The Environment and Human Rights*

Advisory Opinion OC-23/17 can be divided into two main sections:[53] (a) the relationship that exists between the environment and other human rights such as the rights to life, personal integrity, health and access to information, among others, and (b) the obligations that result from the duty to respect and to ensure rights in the context of the environment. A central aspect of this Advisory Opinion is that the IACtHR stipulated that the right to a healthy environment 'should also be considered included among the [ESCER] protected by Article 26 of the Convention'.[54]

One element of the Advisory Opinion that should be underscored is that it clarified the relationship between the environment and other human rights. Thus, it described it as follows: (a) *the rights that are particularly vulnerable in the face of the degradation of a healthy environment* (for example, to life, personal integrity, health or property) and, on the other hand, (b) *the procedural or substantive rights* (such as freedom of expression, freedom of association, the right to participate in politics, access to information and effective remedies).[55] The linkage made with regard to these series of rights allows, first, that when an individual's rights are affected, this may refer to multiple rights (interdependence and indivisibility) and, second, that the procedural rights may become vehicles to ensure effective protection of the right to a healthy environment.

Moreover, the IACtHR linked the right to a healthy environment to the principle of equality and non-discrimination given its special effects on certain groups that have traditionally been identified as vulnerable. Regarding these vulnerable groups, the IACtHR added, for the first time,

> communities that, essentially, depend economically or for their survival on environmental resources from the marine environment, forested areas and river basins, or run a special risk of being affected owing to their geographical location, such as coastal and small island communities.[56]

In addition, the Advisory Opinion constituted the IACtHR's first opportunity to establish various obligations with regard to the right to a healthy environment as an autonomous right. In this regard, it considered that, under the American Convention, states must observe the obligations of prevention, precaution, cooperation and procedure (existence of a judicial remedy). Regarding the obligation of prevention, the IACtHR indicated that this included: (a) regulation; (b) supervision and monitoring; (c) making environmental impact assessments; (d) the duty to establish a contingency plan; and (e) the duty to mitigate if environmental damage occurs.[57]

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[52] *Ibid.*, para 193.

[53] The Advisory Opinion was requested by Colombia to know the specific obligations in relation to the right to life and to personal integrity.

[54] *The Environment and Human Rights*, IACtHR, Advisory Opinion OC-23/17 of 15 November 2017, para 57.

[55] *Ibid.*, para 64.

[56] *Ibid.*, para 68.

[57] *Ibid.*, paras 123ff.

The IACtHR's analysis of the rights – such as procedural rights – that 'transform themselves' into means (guarantees) should be emphasized because the Court recognized that there are certain rights that have an instrumental nature, such as the right of access to information, insofar as they allow for the realization of other rights, such as environmental rights.[58]

iv. Advisory Opinion OC-24/17 – *Gender Identity and the Rights of Same-Sex Couples*

With regard to Advisory Opinion OC-24/17 on gender identity and equality and non-discrimination towards same sex couples,[59] it should be emphasized that none of the questions raised by Costa Rica were directed at ESCER; nevertheless, among its general considerations, the IACtHR ruled on social rights, especially in the case of transgender persons. In particular, the IACtHR indicated that the discrimination (of a structural nature) suffered by transgender persons had individual but also societal effects, because these individuals were deprived of access to *rights such as to work, health, education and housing*.[60]

v. *San Miguel Sosa et al v Venezuela*

In *San Miguel Sosa et al*,[61] three fundamental steps were taken to continue developing respect for and guarantee of the right to work as a right protected by the ACHR. First, protection was provided to a contractual relationship under a regime that differed from those analyzed in *Lagos del Campo* and *Dismissed Employees of PetroPeru* (that is, contracts renewed for different periods of time, such as 3, 6 or 12 months, without referring specifically to the possibility of job stability). Second, the case related to discrimination in the workplace; and third, the violations were based on the right to work, in general, and not on job stability.

Regarding the first point, although the victims had a direct work relationship with the state, the contractual regime differed from that of the two preceding cases (which allowed for job stability). The IACtHR considered that, regardless of the nature of the employment relationship, the state had the obligation to justify the non-renewal of contracts and not merely argue the existence of a discretional faculty under a clause in the contract, and reorganization; to the contrary, the action would be considered arbitrary.[62] In other words, the IACtHR protected the right to work, irrespective of whether or not job stability was possible. Consequently, even in the case of dismissals under renewable temporary contracts, there must be certain minimum obligations, such as adequate grounds for decisions or the possibility of judicial remedies that protect access to justice in the case of the violation of constitutional or treaty-based rights (specifically those protected by Article 26 ACHR).

On the second matter, the case revealed that states may not discriminate against their employees for manifesting or expressing their political opinions. This is of fundamental

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[58] *Ibid.*, para 211.

[59] The Advisory Opinion was requested by Costa Rica. In it the state wished to know the procedure for recognition of sex/gender and the sphere of protection of the patrimonial rights of same sex couples.

[60] *Gender Identity and the Rights of Same-Sex Couples*, IACtHR, Advisory Opinion OC-24/17 of 24 November 2017, para 41.

[61] The case related to the dismissal of the three victims because they had signed the petition to hold a referendum to annul the term of office of Hugo Chávez, who was President at the time, owing to which their contracts had not been renewed for their political posts.

[62] *San Miguel Sosa et al v Venezuela* (Merits, Reparations and Costs), IACtHR, Judgment of 8 February 2018, para 149.

importance, because, traditionally, the IACtHR has approached discrimination in light of treaty-based civil and political rights; however, the case reveals that discrimination also affects the enjoyment and exercise of ESCER understood as autonomous rights.[63]

Third, in the judgment, the IACtHR based the violation on respect for the right to work rather than on job stability, as in the two preceding cases. This aspect is of particular importance, because the IACtHR extended protection to this right without this 'condition of stability' necessarily existing.[64]

vi. *Poblete Vilches et al v Chile*

Poblete Vilches,[65] decided in 2018, was the first case within this new era of direct justiciability that made the right to health enforceable under Article 26 ACHR.[66] Three aspects should be underlined in this regard: (a) the series of obligations that are protected by Article 26; (b) for the first time, the case encompasses older persons as a group in a situation of vulnerability (age-based discrimination); and (c) the nature of informed consent in the case of medical emergencies and within the sphere of the right to health.

On the first point, a difference is made in the judgment between obligations of a *progressive* nature as opposed to obligations of an *immediate* nature. Thus, it defines those obligations as follows: progressive realization means that state parties have the specific and constant obligation to make progress as promptly and effectively as possible towards the full realization of ESCER; this should not be interpreted to mean that, during the implementation period these obligations are deprived of specific content, or that states may postpone indefinitely the adoption of measures to make the rights in question effective, especially almost 40 years after the entry into force of the American Convention. Regarding the obligations of an immediate nature, these consist in taking effective measures in order to ensure access without discrimination to the entitlements recognized by each right. These measures should be adequate, deliberate and specific in order to achieve the full realization of such rights.[67]

Regarding the second point, the Court understands that 'age' is not one of the categories explicitly mentioned in Article 1(1) ACHR, but it can be understood as included in the category of 'or any other social condition'. Thus, the prohibition of discrimination in relation to age in the case of the older person is protected by the American Convention. This results, among other matters, in the application of inclusive policies for the whole population and easy access to public services.[68]

Last, the Court analyzed informed consent under the guarantee provided by Article 13 ACHR (access to information), and considered that informed consent formed part of the right to health rather than part of the right of access to information because, in possible medical

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[63] *Ibid.*, para 151.

[64] *Ibid.*, para 221.

[65] The case refers to the poor medical care received by the victim – who was an older person – in a Chilean public hospital, where neither his consent nor that of his next of kin had been obtained for the medical procedures that were carried out.

[66] Regarding this significant judgment and its importance in Inter-American jurisprudence, see articles included in Mariela Morales Antoniazzi and Laura Clérico (eds), *Interamericanización del derecho a la salud. Perspectivas a la luz del Caso Poblete de la Corte IDH* (2019).

[67] *Poblete Vilches et al v Chile* (Merits, Reparations and Costs), IACtHR, Judgment of 8 March 2018, para 104.

[68] *Ibid.*, para 122.

emergencies, access to information mutates from a right to a guarantee. Furthermore, the Court pointed out that, in the context of medical emergencies, the rule is that the person who should grant the informed consent is the person who will undergo the intervention, but if this person is not in a condition to give this consent – since it relates to an emergency situation – substituted consent comes into play.[69]

vii. *Cuscul Pivaral et al v Guatemala*

Cuscul Pivaral et al is fundamental in the IACtHR's jurisprudence for the following reasons:[70] (a) the case provided a more detailed justification of the reasons why the Court has competence to hear violations of ESCER; (b) it dealt with application of the obligation of progressiveness; and (c) it called for the creation of a participative mechanism as a measure of reparation. A brief description of these elements is provided in the following.

In the first place, the case is extremely relevant because it provided rigorous grounds for this requirement (competence), taking into consideration the literal, systematic, teleological and other complementary methods of interpretation. This was essential because a more concise justification had been demanded for a tangential change in the traditional jurisprudence of the IACtHR (which, up until 2017, had refused to examine direct violations of social rights).[71] Before this, the debate about the direct justiciability of social rights had taken place first and foremost within the IACtHR, and in *Cuscul Pivaral* some of the arguments presented by the dissenting judges were addressed.[72]

Second, the IACtHR declared the international responsibility of the state party to the American Convention based on the lack of progress – progressivity – in the effectiveness of the right to health in the specific case of 43 victims. Two elements should be underscored: (i) not only was there a failure to comply with the international obligations of progressive realization by failing to develop public policies or programmes (which were developed in this case); (ii) but there was also a failure to comply with the international obligations of progressive realization when, despite the existence of such public policies or programmes in legal provisions, it cannot be proven that efforts have been made to implement real progress to ensure the full effectiveness of a right.[73]

Last, an innovative measure of reparation was introduced, consisting in the design of a mechanism of accessibility, availability and quality of antiretroviral drugs, diagnostic testing and health services for the population living with HIV. The most significant aspect of this measure of reparation was that the IACtHR emphasized that, to ensure the effectiveness of the design and implementation of this mechanism, the state had to call on the participation of the medical community, persons living with HIV who were users of the health care system and organizations representing them, and the Ombudsman of Guatemala for the establishment of

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[69] *Ibid.*, paras 160, 173.

[70] The case refers to the deficiency in, or lack of, the medical care required by patients with HIV/AIDS in Guatemala, as well as the intersectoral discrimination (based on gender, pregnancy and living with HIV/AIDS) suffered by women who needed preventive medical care.

[71] *Cuscul Pivaral et al v Guatemala* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgment of 23 August 2018.

[72] *Lagos del Campo v Peru* (n 3), dissenting opinion of Judges Humberto Sierra Porto and Eduardo Vio Grossi; *Dismissed Employees of PetroPeru* (n 50), dissenting opinions of judges Humberto Sierra Porto and Eduardo Vio Grossi.

[73] *Cuscul Pivaral* (n 71), para 146.

care priorities, decision-making and the planning and evaluation of health care improvement strategies.[74] This measure of reparation also represented a means to create better channels of dialogue between the government and society in general, in an endeavour to rectify the existing inequality among broad sectors of the population, establishing real participative mechanisms for dialogue and deliberation.

viii. *Muelle Flores v Peru*

In *Muelle Flores v Peru*,[75] the Court considered that the right to social security could be fully derived from the referral made by Article 26 ACHR to the economic, social and educational, scientific and cultural norms contained in the OAS Charter. This was the first time that the Court considered the justiciability of the right to social security as an autonomous right. Henceforth, the Court analyzed this article on the same basis as the right to employment stability in *Lagos del Campo, PetroPeru* and *San Miguel Sosa*, or the right to health in *Poblete Vilches* and *Cuscul Pivaral*. In this regard, the IACtHR analyzed a series of norms of the OAS Charter to find that the right to social security was a justiciable human right through Article 26, in order to later establish with greater precision its content and state obligations, resorting to the American Declaration of Rights and Duties of Man, the international *corpus iuris* and the internal constitutional norms of the state parties to the OAS.[76]

Even though the IACtHR had ruled on social security (pensions) in the cases of *Cinco Pensionistas* and *Acevedo Buendía*, the differences between those judgments and *Muelle Flores* are palpable. For example, in a first approximation from the point of view of the previously mentioned cases, the IACHR defines in *Muelle Flores* that social security is a right that seeks to protect the individual from future contingencies, which, if they occur, would have harmful consequences for the person, so according measures of protection should be adopted. More particularly and in the case at hand, the right to social security seeks to protect the individual from situations that will arise when it reaches a certain age in which it is physically or mentally unable to obtain the means of subsistence necessary to live an appropriate standard of living, which in turn could deprive him of his ability to fully exercise the rest of his rights. The latter also accounts for one of the constituent elements of the right, since social security must be exercised in such a way as to guarantee conditions that ensure life, health and a decent economic level.[77]

Another differentiating aspect – and this is true regarding any social right – is that the IACtHR can now deepen the obligation regime on specific rights without having to link it to another civil or political right. The IACtHR identifies that social security, derived from the general obligations of respect and guarantee contained in Articles 1(1) and 2 ACHR, is applicable to both immediate obligations (such as non-discrimination) and those obligations that require a lapse of time for their implementation, as are obligations of a progressive nature – and, therefore, obligations of non-regression. Obviously, each case under study requires determining what kind of obligations are at stake against the right to social security, whether obligations of respect for the law, guarantee obligations (such as progressivity) or a combi-

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[74] *Ibid.*, para 226.

[75] *Muelle Flores v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 6 March 2019.

[76] *Ibid.*, paras 170–79.

[77] *Ibid.*, para 183.

nation of both. This categorization is fundamental because it shows that it is not the case that in all the cases in which a social right is involved, it necessarily brings only a violation of the 'progressivity obligation' – as was shown in the cases of *Poblete Vilches* and *Cuscul Pivaral*.[78]

IV. CONCLUSION

This chapter has provided a brief outline of the jurisprudence developed by the IACtHR in the area of ESCER. It referred to the role played by separate opinions of some of the judges who called on the Court to consider the need to protect the ESCER. Then, the Court's first steps to protect social rights by connectivity to civil or political rights were examined. Finally, focus was placed on the autonomous protection of social rights under Article 26 of the Convention, starting with the case of *Lagos del Campo*. The evolution of the Court's jurisprudence shows how it went from an interpretation of Article 26 that denied the autonomous analysis of violations of social rights to an approach based on a progressive understanding of the normative content of that provision. The justification for this new approach – besides the legal reasoning as explained in *Cuscul Pivaral* – is the social need that exists in a region like Latin America and the Caribbean. The Inter-American system needs to continue strengthening the protection of the rights to employment stability, health and the environment, among others. The most recent development of the Court's jurisprudence was the admission, for the first time, of a violation of the principle of progressivity and the ordering of cooperative measures of reparation. These are the first steps in a transformative jurisprudence that seeks to progress towards the integration of the different legal systems of Latin America and the Caribbean,[79] with the final goal of ensuring a greater protection of (social) rights and an improved social justice regime.[80] It is also in harmony with several Goals of the United Nations 2030 Agenda for Sustainable Development.[81]

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[78] *Ibid.*, paras 190, 191, 202.

[79] *Cf.* Armin von Bogdandy *et al* (eds), *Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune* (2017).

[80] According to the most recent annual report published by the Economic Commission for Latin America and the Caribbean (ECLAC), Latin America continues to be the most unequal region in the world. Furthermore, more than ten million people live in extreme poverty. This report indicates, worryingly, that although the region has achieved significant progress over the period between the past decade and the middle of this decade, setbacks have occurred since 2015, particularly in the case of extreme poverty. *Cf.* UN and ECLAC, *Social Panorama of Latin America 2018* (2019), 17, 22, 81.

[81] UNGA Res A/70/1 (25 September 2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development'.

11. Social rights in the African system for the protection and promotion of human and peoples' rights

Frans Viljoen

I. INTRODUCTION

This chapter understands social rights as the basic necessities of life. It asks to what extent the African regional human rights system has contributed to expanding social rights protection for those most in need of these necessities.[1]

At the core of the African system for the protection and promotion of human and peoples' rights – established under the auspices of the Organization of African Unity, which was in 2001 replaced by the African Union (AU) – are two treaties: the African Charter on Human and Peoples' Rights (African Charter)[2] and the African Charter on the Rights and Welfare of the Child (African Children's Charter).[3] On these two normative pillars hinge two separate treaty bodies: the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). A third institution, the African Court on Human and Peoples' Rights (African Human Rights Court), was subsequently added to complement the protective mandate of the Commission.[4] The African Charter was supplemented by three substantive protocols and other selfstanding treaties, which together constitute the normative basis of the African regional human rights system.[5]

[1] See also Obiora Okafor and Basil Ugochukwu, 'Have the Norms and Jurisprudence of the African Human Rights System Been Pro-Poor?' (2011) 11 African Human Rights Law Journal 396.

[2] African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS 217.

[3] Adopted on 11 July 1990, entered into force on 29 November 1999. By the end of 2018, 54 of 55 AU members have become state parties to the African Charter, Morocco being the single non-state party.

[4] Art 2 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol). The African Children's Rights Committee does not have the competence to refer cases to the African Human Rights Court. The African Human Rights Court may in the future become a chamber in a two-chambered African Court of Justice and Human Rights, if the Protocol on the Statute of the African Court of Justice and Human Rights (Sharm el-Sheikh Protocol), adopted on 1 July 2008, enters into force; or it may become a chamber in the three-chambered African Court of Justice and Human and Peoples' Rights, alongside a chamber endowed with criminal jurisdiction, if the Protocol on Amendments to the Sharm el-Sheikh Protocol (Malabo Protocol), adopted on 27 June 2014, enters into force. By the end of 2019, the Sharm el-Sheikh Protocol has been ratified by seven states, and the Malabo Protocol by none. Both require 15 ratifications to enter into force.

[5] On the African regional system see, e.g., Frans Viljoen, *International Human Rights Law in Africa* (2012), 213–88.

Taking into account that the Court is a recent addition, and has had scant opportunity to deal with social rights, the focus in this contribution is on the Commission and the Committee.[6] As quasi-judicial bodies, they not only adjudicate communications (cases) but also oversee state reporting, and engage in standard setting and other promotional activities. While the spotlight is on the African Charter and Commission, given their more prolonged existence and greater productivity, an effort is made to provide a more integrated and holistic view of the various norms and institutions constituting the system. A coordinated view makes more sense, as it provides greater coherence and clarity. The chapter first sets out the relevant AU treaties. To a large extent, one normative picture can be painted for all AU member states, since the two core treaties enjoy almost universal ratification.[7] It then traces how the issue of social rights has evolved under the auspices of the three bodies, before identifying some major emerging trends and approaches, and providing a brief conclusion.

II. LEGAL FRAMEWORK: AU TREATIES

The AU normative framework consists of a general treaty (the African Charter), which provides for the rights of 'every individual', complemented by a number of specific treaties dealing with the rights of particular, situated categories of individuals (the African Children's Charter, the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (IDP Convention), the Protocol to the African Charter on the Rights of Older Persons (Older Persons Protocol) and the Protocol to the African Charter on the Rights of Persons with Disabilities (RPD Protocol)).

The African Charter was adopted in 1981 and entered into force relatively soon thereafter, in 1986. Informed by the disdain for social rights in the colonial period, during which social control rather than social justice drove colonialism's extractive appetite, and the enduring need for social development on the continent, the Charter embraced the position that all rights are indivisible and interrelated. In its Preamble, the Charter affirms that 'civil and political rights cannot be dissociated from economic, social and cultural rights' and that the 'satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. In its substantive part, the Charter includes the following rights with a very clear social

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[6] For previous studies, mainly focused on the African Commission, see Chidi Anselm Odinkalu, 'Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002) 178; and Danwood M Chirwa, 'African Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 323.

[7] By 31 December 2019, the African Charter was accepted by 54 out of 55 AU member states (Morocco being the single non-state party) and the African Children's Charter by 49 states.

dimension: the right to property,[8] work,[9] health,[10] and education.[11] Significantly, these rights are not limited by a general clause introducing concepts such as 'within limited resources' or 'progressive realization', or 'within the law'. The Charter's guarantee of social rights as equal to and on par with all other (mostly civil and political) rights contradicted the bifurcated approach of the then fledgling UN human rights system, which codified two 'categories' or 'generations' of rights into two separate treaties, the ICCPR and ICESCR. The two regional human rights systems in existence at the time also reflected this position.[12] Significantly, the Charter also became the first international treaty to provide for a binding and justiciable right to 'economic, social and cultural' development.[13] Under the Charter, access to social rights 'forms a central concern of the right to development'.[14]

However, misgivings about the Charter were expressed on two grounds. First, the included social rights (the right to property, work, health and education) are, particularly when compared to the ICESCR, formulated in vague and succinct terms.[15] Second, the catalogue of

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[8] Art 14 African Charter. Wedged between the 'civil and political' rights and those generally accepted as social rights, Article 14 seems at first blush to fit uncomfortably into the category of 'social rights'. Although the right to property featured in the Universal Declaration of Human Rights, it was not included in either of the two subsequent Covenants. Insofar as this right serves to uphold existing privilege, particularly by confirming land dispossession in a post-colonial context, the apprehension is that it would serve to insulate any claims for land restitution or redistribution. However, the right to property is also a strategic right that often serves to protect basic necessities of the poor, e.g., widows at risk of losing their livelihood upon the death of a husband (Rhoda Howard-Hassmann, 'Reconsidering the Right to Own Property' (2013) 12 Journal of Human Rights 180). In its case law the Commission has had occasion to dispel the misgiving that upholding ownership would serve neoliberal privilege. As far as it guaranteed the rights of owners, it did so to protect publishers critical of the Nigeria military dictatorships against arbitrary 'sealing up of premises', and human rights defenders from 'seizure', of their property (*Media Rights Agenda and Others v Nigeria (Malaolu)*, ACHPR, Communication No 224/98 (2000), para 77; *Huri-Laws v Nigeria*, ACHPR, Communication No 225/98 (2000), para 52); by not requiring formal legal title to qualify as rights-holder, the Commission allowed indigenous peoples to benefit from this right (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois)*, ACHPR, Communication No 276/03 (25 November 2009).

[9] Art 15 African Charter.

[10] Art 16(1) and (2) African Charter.

[11] Art 17(1) African Charter. The remainder of Art 17 deals with 'cultural' rather than 'social' rights.

[12] Within the Council of Europe, the 1950 European Convention on Human Rights coexisted with the 1961 European Social Charter, and in the Organization of American States, the 1969 American Convention on Human Rights was in 1988 supplemented by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador). It should be noted that Art 26 ('progressive development') of the American Convention on Human Rights, while not initially viewed as such, has since 2017 been accepted by the Inter-American Court of Human Rights as justiciable, see *Lagos del Campo v Peru* (13 November 2017).

[13] Art 22 African Charter. At the UN level, only a Declaration on the Right to Development could be agreed upon in 1986. See *Gunme and Others v Cameroon (Southern Cameroon)*, ACHPR, Communication No 266/03 (27 May 2009), para 206; *Sudan Human Rights Organisation and Another v Sudan (Darfur)*, ACHPR, Communication No 279/03-296/05 (27 May 2009), para 224.

[14] Danwood M Chirwa, 'Group Rights and the Protection of Economic, Social and Cultural Rights in Africa' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 212, 230.

[15] Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (2003) 183, 186, 188–89.

social rights is – compared to other similar treaties – very limited, as it does not guarantee the right to an adequate standard of living (comprising the right to housing, nutrition, water and sanitation) or the right to social security.[16] According to Keba MBaye, who chaired the committee of drafting experts, these rights were omitted so as 'not to overburden our young States with excessively heavy, even if important, obligations'.[17] However, this defect has to some extent been ameliorated when the Commission 'read' some of them 'into' the Charter, as is discussed more fully in section IV.a of this chapter. These 'individual' rights should however be viewed together with the peoples' rights in the Charter,[18] in particular the right of peoples to 'freely dispose of their wealth and natural resources',[19] and their right to 'economic, social and cultural development'.[20]

The African Children's Charter, adopted in 1990, entered into force in 1999. It provides comprehensive social rights protection for children that goes beyond the scope of the African Charter. Education is central to children's development. The Children's Charter distinguishes between basic, secondary and higher education.[21] A state's obligation in respect of 'free and compulsory' basic education is immediate and unqualified. Its obligation with respect to secondary education is to 'encourage' its development, and to 'progressively' make it 'free and accessible to all'. Although the state must also take 'every appropriate means' to ensure access to higher education, access is qualified based on institutional 'capacity' and individual 'ability'. The Children's Charter deals in some detail with the right of the child to health by providing for clear state obligations, such as the reduction of child mortality rates and the development of 'primary health care'.[22] As Sloth-Nielsen observes, realizing this expansive catalogue of rights may be difficult to achieve in the light of 'limited resources'.[23] The African Children's Charter provides for nutrition, clothing and housing, not as self-standing rights, but as part of the state's subsidiary obligation to assist parents in their 'primary responsibility' to secure living conditions 'necessary for the child's development'.[24]

The AU Assembly in 2003 adopted the Maputo Protocol, which entered into force in 2005, as a normative complement to the African Charter. While not specifically concerned with social rights, the Maputo Protocol elaborates on the social rights of women as guaranteed in the Charter. In its elucidation of how the right to education and health relate to women in particular, the Maputo Protocol provides a detailed and expansive inventory of rights. In

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[16] Joe Oloka-Onyango, 'Beyond the Rhetoric: Reinvigorating the Struggle for Struggle for Economic and Social Rights in Africa' (1995) 26 California Western International Law Journal 1, 51 ('significant letdown from the promise of the Preamble, and belies what could have been an altogether novel and radical approach to the interconnectedness of the two categories of rights').

[17] Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/Draft Rapt. Rpt. (II) Rev.4, reproduced in Christof Heyns (ed.), *Human Rights Law in Africa 1999* (2002) para 13.

[18] See Chirwa (n 14).

[19] Art 21 African Charter.

[20] Art 22 African Charter.

[21] Art 11(3) African Children's Charter.

[22] Art 14(2) African Children's Charter.

[23] Julia Sloth-Nielsen, 'The Protection of Children's Economic, Social and Cultural Rights under the African Children's Charter' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 155, 161.

[24] Art 20 African Children's Charter.

respect of the right to education, for example, the Maputo Protocol stipulates that state parties must 'take specific positive action to promote literacy among women';[25] and in respect of health, it requires states to take 'all appropriate measures' to 'provide adequate, affordable and accessible health services'.[26] Pivoted on the right to work in the Charter, the Maputo Protocol provides for an extensive array of 'economic and social welfare rights', including social security for women 'working in the informal sector'.[27] The right to property is given a gender-specific reformulation; in its revamped form, it emphasizes the right of a woman to an equitable share in the inheritance of her husband's property.[28] Building on and consolidating the Commission's 'implied rights' approach in *Ogoniland*, the Maputo Protocol gives statutory embodiment to the rights to 'food security' and 'adequate housing'.[29]

The IDP Convention, which was adopted in 2009 and entered into force in 2012, departs from the premise that internal displacement is caused by socio-economic exclusion, among other factors.[30] State parties are under an obligation to provide IDPs with 'adequate humanitarian assistance', including food, water, shelter, medical care and services, sanitation and education. Cognizant of the possibility that the provision of such services to IDPs may exceed the services provided to the local population, the IDP Convention stipulates that 'where appropriate', assistance must be extended to 'local and host communities'.[31]

Two recent normative additions to the African Charter add an array of social rights in respect of older persons and persons with disabilities.[32] The Older Persons Protocol, adopted in 2016, is still to enter into force.[33] It contextualizes the Charter's social rights in respect of 'older persons', which it defines as anyone over the age of 60.[34] The right to property is made specific to older women by stipulating the need for legislation to curb abuse of their property and land rights;[35] and the right to health obliges states to 'facilitate medical insurance coverage' for older person 'within reasonable resources'.[36] Over and above complementing Charter rights, the Older Persons Protocol also provides for the right to social protection,[37] and the right to residential care.[38] The RPD Protocol, adopted in 2018, is also not yet in force.[39] Complementing the right to work in the Charter, the RPD Protocol reiterates the need for non-discrimination, as well as for special measures in the form of 'minimum job-quotas for

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[25] Art 12(2)(a) Maputo Protocol.
[26] Art 14(2)(a) Maputo Protocol.
[27] Art 13(f) Maputo Protocol.
[28] Art 21(1) Maputo Protocol.
[29] Arts 15 and 16 Maputo Protocol.
[30] Art 3(1)(b) IDP Convention.
[31] Art 9(2)(b) IDP Convention.
[32] Lilian Chenwi, 'Protection of the Economic, Social and Cultural Rights of Older Persons and Persons with Disabilities in the African Regional System' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 180.
[33] As of 31 December 2019, two states have become party to this Protocol. Entry into force requires acceptance by 15 state parties (Art 26(1)).
[34] Art 1 Older Persons Protocol.
[35] Art 9(2) Older Persons Protocol.
[36] Art 15(2) Older Persons Protocol.
[37] Art 7 Older Persons Protocol.
[38] Art 12 Older Persons Protocol.
[39] As at 31 December 2019, no state has become party to this Protocol. Entry into force requires acceptance by 15 state parties (Art 38(1)).

employees with disabilities'.[40] The right to health is restated, with emphasis being placed on substantive equality and adaptation to the specific needs of persons with disabilities.[41] In this context, the right to education means 'inclusive quality' education, of which a number of features are listed.[42] The RPD Protocol mirrors the ICESCR and Convention on the Rights of Persons with Disabilities (CRPD) by providing for the right to an adequate standard of living, including 'adequate food, *access to* safe drinking water, housing, sanitation and clothing', but adds to that list 'the continuous improvement of living conditions' and 'social protection'.[43]

III. EVOLVING SOCIAL RIGHTS PRACTICE

a. The African Commission

Four phases in the African Commission's engagement with social rights are identified.

In the first phase (1987 to 1994), the modest optimism generated by the adoption of the African Charter was soon eclipsed by a period of inertia. In this initial period, the Commission's practice did not prioritize social justice. At the end of this period, the Commission had not dealt with any communication alleging the violation of social rights, and it largely disregarded social justice issues in its tentative normative elaboration of Charter rights.[44] The reasons for this neglect can be found in the explicit approach by the Commission to prioritize civil and political rights;[45] in the nature of complaints the Commission faced, which almost exclusively concerned fair trial rights and political repression; and in the narrow (civil and political) focus of NGOs working on human rights in the continent, exacerbated by the schism between developmental civil society organizations and human rights NGOs. One very early set of soft law standards, the Commission's 1989 Guidelines for National Periodic Reports, stands out as an exception to the prevailing neglect of social rights. These Guidelines deal in more detail with social rights than with civil and political rights,[46] and provide an extensive elaboration on state obligations in respect of the right to work,[47] health,[48] and education.[49] Going much further, the

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[40] Art 19(2)(d) RPD Protocol.

[41] Art 17 RPD Protocol.

[42] Art 16 RPD Protocol.

[43] Art 20(1) RPD Protocol; see also Art 11 ICESCR, Art 28 CRPD [my emphasis].

[44] Oloka-Onyango (n 16), 52.

[45] See, e.g., Oji Umozorike, 'The Protection of Human Rights under the Banjul (African) Charter on Human and People's Rights' (1988) 1 African Journal of International Law 65, 81.

[46] See Malcolm Evans and Rachel Murray, 'The State Reporting Mechanism of the African Charter' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice* (2008) 49, 60. The authors do not pay any attention to the extension of the Guidelines beyond the scope of the Charter rights.

[47] See, e.g., para II.14: States are required to report on 'legal or other provisions governing or affecting the exercise of the right to strike'.

[48] See, e.g., para II.A.35: 'Measures taken to reduce the still-birth rate and infant mortality'.

[49] See, e.g., para II.A.47: 'Measures taken to achieve the full realisation of the rights of everyone to receive compulsory and free primary education'.

Guidelines also expand the Charter 'catalogue' to include – and require states to report on – the right to social security,[50] and to an adequate standard of living.[51]

The second phase (1995 to 2000) represents tentative advances. In this phase, the Commission found a number of social rights violations, but it did so in the context of cases dealing with political repression or military dictatorship.[52] In its findings, the Commission made a mere finding of violation; it did not elaborate or expand on the meaning or scope, or the nature of the state obligation.[53] In *Zairian Mass Violations*, for example, faced with allegations of a shortage of medicine, the Commission in 1995 found a violation of the right to health in Article 16. More than that, it also found that Article 16 was violated by the government's failure 'to provide basic services such as safe drinking water and electricity'.[54] It further found that the closure, for two years, of universities and secondary schools violated the right to education in Article 17. Laudable as the outcomes are, the articulation of the findings leaves much to be desired as they are overly brief and arrived at abruptly, with the Commission making no effort to refer to the relevant factual basis in order to substantiate its conclusion.[55] To fully understand the nature of these findings, it should be kept in mind that they emanated from a fledgling and underresourced Commission (including its secretariat). Its initial approach to judgment writing was influenced by the succinctness of the 'civil law' approach, the failure of states to respond to complaints and the fact that social rights issues were largely subsumed into issues of more immediate concern, such as the wideranging implications of military rule.

The third phase (2001 to 2007) saw the adoption of the first normative expansions in the form of a resolution and declaration, and two decisions that made a definite impact on the adjudication of international social rights, unambiguously announcing the Commission's commitment to uphold social rights. In 2001, as the HIV epidemic started to decimate parts of Africa, the Commission adopted its first resolution speaking directly to a social right: it contains a brief statement of principle on the HIV/AIDS pandemic (describing it as 'a threat against humanity') and directs itself at African governments (to allocate resources and take other appropriate measures), 'international pharmaceutical industries' and 'international aid agencies'.[56] In the same year, the African Commission decided a landmark case, in which it for the first time provided comprehensive insights into its understanding of social rights in the

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[50] In paras II.17–19, reporting is required about all 'arrangements relating to the social security system'.

[51] Paras II.A.31–33.

[52] See also Christopher 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, who discusses these cases as part of what he terms a 'redundancy' phase.

[53] *Free Legal Assistance Group and Others v Zaire (Zairian Mass Violations)*, ACHPR, Communication Nos 25/89, 47/90, 56/91 & 100/93 (1995) (Arts 16 and 17 violated); *Union Interafricaine des Droits de l'Homme and Others v Angola*, ACHPR, Communication No 159/96 (1997) (Arts 15 and 17 violated); *International PEN, Constitutional Rights Project and Others (on behalf of Ken Saro-Wiwa) v Nigeria (Saro-Wiwa)*, ACHPR, Communication Nos 137/94-139/94-154/96-161/97 (1998) (Art 16 violated); *Malaolu* (n 8); *Malawi African Association and Others v Mauritania (Mauritanian Widows)*, ACHPR, Communication Nos 54/91, 61/91, 98/93, 164-196/97, 210/98 (2000).

[54] *Zairian Mass Violations* (n 53), para 47.

[55] Mbazira (n 52), 345.

[56] ACHPR Res 53 on the HIV/AIDS Pandemic – Threat against Human Rights and Humanity (23 April to 7 May 2001).

Charter. The case, *Ogoniland*,[57] dealt with the responsibility of the Nigerian government for oil pollution by the Nigerian National Petroleum Company – a government-controlled consortium with Shell – and victimization of the affected populations in the Niger Delta. This case testified to the categorical acceptance of socio-economic rights as justiciable guarantees,[58] and was the first ever exposition by the Commission of the nature and extent of a state party's obligations to 'respect', 'protect', 'promote' and 'fulfil'. In this finding, an adventurous Commission also extended the limited scope of the set of explicitly guaranteed socio-economic rights to include the right to housing and food, on the basis of the 'implied rights' theory.[59] In conclusion, the Commission found that Nigeria had violated the right to health, in addition to other rights, prominently among which the right to a generally satisfactory environment.[60]

Some two years later, the Commission, in *Gambian Mental Health*,[61] for the first time squarely dealt with the states' obligation to 'fulfil'. This case concerned a series of human rights violations resulting from the colonially inherited 'Lunatics Detention Act'. The stigmatizing nomenclature of the Act, reinforced by provisions allowing persons who have been declared as 'lunatics' to be automatically and indefinitely institutionalized, led the Commission to find violations based on an abuse of due process. As far as the right to health is concerned, the Commission took into account the economic reality prevailing in the Gambia in assessing the measures adopted by the state, applying the test of 'concrete and targeted steps, while taking full advantage of its available resources'.[62]

Both these findings differ markedly from those in the previous period. In these findings, the Commission elaborated on the content and nature of state obligations. In the process, it placed extensive reliance on research, based on its Charter mandate to be guided by international human rights law standards. In both cases, the Commission also directed comprehensive remedial recommendations to the states. These findings as much reflected as fuelled a new jurisprudential approach by the Commission. In 2004, further impetus came from the adoption by the Commission of the Pretoria Declaration on Economic, Social and Cultural Rights in Africa,[63] and the bringing into being of the Commission's Working Group on Economic, Social and Cultural Rights in Africa.[64]

The fourth phase (2008 to the present) is a period of jurisprudential consolidation and accelerated normative expansion.

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[57] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (Ogoniland)*, ACHPR, Communication No 155/96 (27 October 2001).

[58] *Ibid.*, para 52.

[59] *Ibid.*, paras 60, 64.

[60] Art 21 African Charter.

[61] *Purohit and Another v The Gambia (Gambian Mental Health)*, ACHPR, Communication No 241/01 (29 May 2003).

[62] *Ibid.*, para 84.

[63] Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) <www.achpr.org/files/instruments/pretoria-declaration/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf> (4 June 2019); and 'Statement From Seminar on Social, Economic and Cultural Rights in the African Charter' (2005) 5 African Human Rights Law Journal 182; see also Sibonile Khoza, 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria' (2004) 4 African Human Rights Law Journal 334. The seminar was organized by the Commission together with civil society organizations.

[64] ACHPR Res 73 on Economic, Social and Cultural Rights in Africa (7 December 2004).

On the one hand, the Commission modestly expanded its social rights jurisprudence. The *Darfur* case,[65] decided in 2009, deals with the complicity of the Sudanese government, working in tandem with the Janjaweed in a campaign of terrorizing the black African Fur, Marsalit and Zaghawa groups in the Darfur region in western Sudan. Here, a violation of the right to health is based primarily on the underlying determinants of health, including safe water, as well as adequate sanitation, housing and food.[66] The demolition of the houses and other property of members of these groups, depriving them of their livelihood, led to a finding that the right to property was violated – even in the absence of them holding legal title.[67] The cumulative effect of these and other violations was to infringe the right to development of these groups.[68] While the groups in Darfur also lived in close proximity to the land, their plight was couched as that of marginalized minorities rather than indigenous peoples. It was in *Endorois*,[69] decided later in 2009, that the Commission squarely dealt with the rights of indigenous peoples' rights, finding (among others) a violation of the Endorois peoples' right to property, to freely dispose of their resources and to development. In the *Egyptian Female Journalists* case,[70] the right to health of four female journalists was found to be violated by the Egyptian security police. In the *Sudanese Human Rights Defenders* case,[71] the Commission found that the denial of medication to a detainee violates the right to health. Discriminatory practices in the acquisition of identity documents of Nubians in Kenya led the Commission, in the *Nubian Community in Kenya* case,[72] to find a violation of the Nubians' equal protection under the law. On this basis the Commission found, 'consequent' to the violation of non-discrimination, that the rights to work, health and education were also violated.

On the other hand, in the most significant area of normative expansion, the Commission started and accelerated its elaboration of 'soft law' standards pertaining to social rights. In November 2008, at its session in Abuja, Nigeria, it adopted two very significant resolutions, both in terms of the thematic issues addressed and the detailed nature of the articulation: Resolution 135 on Maternal Mortality in Africa,[73] and Resolution 141 on Access to Health and Needed Medicines in Africa.[74] In 2012, the African Commission adopted its first General Comment, the General Comment on Article 14(1)(d) and (e) of the Maputo Protocol, and in 2014, its General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Maputo Protocol, both expanding on women's sexual and reproductive rights.[75]

The year 2011 saw the adoption of the two very significant and detailed sets of guidelines. The first is the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Implementation

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65 *Darfur* (n 13).
66 *Ibid.*, paras 210–12.
67 *Ibid.*, para 205.
68 *Ibid.*, para 224.
69 *Endorois* (n 8).
70 *Egyptian Initiative for Personal Rights and Another v Egypt*, ACHPR, Communication No 323/06 (2011).
71 *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan (Sudanese Human Rights Defenders)*, ACHPR, Communication No 379/09 (2014).
72 *The Nubian Community in Kenya v Kenya*, ACHPR, Communication No 317/06 (2015).
73 ACHPR Res 135 (24 November 2008).
74 ACHPR Res 141 (24 November 2008).
75 ACHPR, 'General Comments' (6 November 2012); ACHPR, 'General Comment No 2' (28 November 2014).

Guidelines). These Implementation Guidelines, 58 pages in length, set out the nature of states' obligations, and under each social right the 'minimum core obligations', and the specific entitlement of vulnerable groups. These Guidelines coexist with the second set of guidelines, the State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Tunis Reporting Guidelines). These specific reporting guidelines have however not been integrated into the general reporting guidelines, and the usefulness of the overly detailed draft Implementation Guidelines and Principles remain unclear.

Demonstrating the infusion of social rights into the mandate of the Commission as a whole (and into the work of NGOs around the continent), the Commission's normative elaborations increasingly pay attention to the socio-economic dimensions of all rights. The crosscutting nature of social rights appears from most of the soft law standards adopted over the past decade or so. The African Commission's Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, adopted in 2015,[76] deal with measures to counter terrorism but depart from the premise that effective counterterrorism strategies in Africa 'requires a commitment to development and the promotion of economic, social, and cultural rights'.[77] In 2017, when it adopted the Guidelines on Combating Sexual Violence and its Consequences in Africa,[78] the Commission acknowledged the social rights-related implications of sexual violence. These Guidelines place detailed obligations on states in respect of the right to sexual and reproductive health. For example, states must ensure that women and girls who are victims of sexual violence have access to emergency contraception such as emergency contraception pills,[79] and that rape victims have access to post-exposure prophylaxis (PEP) within 72 hours of the rape.[80] The 2018 Principles on the Decriminalisation of Petty Offences in Africa (Petty Offences Principles) are aimed at rectifying legal regimes that perpetuate the 'stigmatisation of poverty by mandating a criminal-justice response to what are socio-economic and sustainable development issues'.[81] Its recommendations to states include the abolition of legal measures criminalizing the 'status of a person or their appearance',[82] and the need to address the 'root causes of poverty and other marginalisation'.[83] Further testimony of this shift towards infusing social rights into its mandate can be found in the Commission's 2018 State Reporting Guidelines on Articles 21 and 24 of the African Charter Relating to the Operations of Extractive Industries, Human Rights and the Environment (Reporting Guidelines on Articles 21 and 24).

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[76] ACHPR, 'Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (3 August 2016).

[77] *Ibid.*, part 13A.

[78] ACHPR, 'Guidelines on Combating Sexual Violence and its Consequences in Africa' (5 November 2017).

[79] *Ibid.*, para 29.

[80] *Ibid.*, para 33.1.

[81] ACHPR, 'Principles on the Decriminalisation of Petty Offences in Africa' (25 October 2018), para 3.7.

[82] *Ibid.*, para 14.1.2.

[83] *Ibid.*, para 14.3.

b. African Children's Rights Committee

In parallel to the evolution at the African Commission, the African Children's Committee developed its own jurisprudence. The Committee started off falteringly, and decided its first 'communication', *Nubian Children in Kenya*,[84] only in 2011. In this case, the Committee found that restrictions that impeded the Nubian children's ability to acquire birth registration constituted discrimination. On the basis of the 'consequential impact' to this violation, the Committee found violations of the right to health and education.[85] In its finding concerning the *Talibés* (children attending Qur'anic schools who were forced to beg) in Senegal,[86] the Committee concluded that the state's failure to effectively regulate these schools violated the children's right to survival and development, education and health. In its remedial recommendation, the Committee required regular inspection of *daraas*; if upon inspection they do not uphold minimum standards, states would be directed to close them down. In addition to considering complaints, the Committee also examines initial and periodic reports submitted by state parties to the African Children's Charter. While describing advances in state reporting and providing examples of Concluding Observations pertaining to social rights, Sloth-Nielsen in 2016 pronounced that 'it cannot yet be concluded' that social rights have 'played a dominant role in comparison to other Charter rights'[87] in the Committee's work.

c. The African Court on Human and Peoples' Rights

The advent of the African Human Rights Court was met with high expectations about the binding nature of its decisions (compared to recommendatory powers of the Commission), the clarity of its mandate to adopt remedial orders (compared with the Commission's ad hoc practice emerging from the lack of such a mandate) and the establishment of an explicit compliance framework.[88] Its prospective role in social rights adjudication was rightly identified as a specific cause for enthusiasm.[89] Not only does the Court have jurisdiction over AU treaties that deal in detail with social rights, but its substantive jurisdiction also allows the Court to decide on alleged violations of 'any other relevant human rights instrument ratified' by the concerned states.[90] By virtue of this expansion, UN treaties containing elaborate social rights provisions – such as the ICESCR, the Convention on the Rights of the Child (CRC) and the CRPD – fall within the Court's purview. Most AU member states have become party to these UN treaties.[91]

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[84] *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya (Nubian Children in Kenya)*, ACHPR, Communication No 2/09 (22 March 2011).

[85] *Ibid.*, paras 58–68.

[86] *Centre for Human Rights and la Rencontre Africaine pour la Defence des Droits de l'Homme (RADDHO) (on behalf of Senegalese Talibés) v Senegal*, ACHPR, Communication No 1/12 (15 April 2014).

[87] Sloth-Nielsen (n 23), 174 (she was a previous Committee member).

[88] See, e.g., Viljoen (n 5), 414-20.

[89] See, e.g., Mbazira (n 52), 354: the 'jurisprudence of the African Court in the area of socio-economic rights is likely to have an indelible impact on the African continent and to inspire the African Commission and domestic courts'.

[90] Art 3(1) African Court Protocol.

[91] As at the end of 2019, 50 AU members were state parties to the ICESCR; all 54 UN member states were party to the CRC; and African membership to the CRPD had grown to 49 <http://indicators.ohchr.org> (accessed 14 May 2020).

This situation allows the African Court to protect social rights that are guaranteed under UN treaties but not under AU treaties, such as the right to social security. It is remarkable that the African Human Rights Court has jurisdiction over these three UN treaties in respect of state parties, even though none of these treaties allowed for individual communications when they were adopted. While it is true that they have all subsequently been complemented by optional protocols allowing for individual communications, not many AU member states have accepted these complaints mechanisms.[92] The African Court thus has jurisdiction over treaties in respect of which most states have not accepted even the optional quasi-judicial complaints procedure.

Thus far, not much has been done to bring the Court's expanded jurisdiction to life. A major problem has been the limited access to the Court.[93] Only when a state has made an optional declaration to accept the right of individuals (and NGOs) to bypass the Commission,[94] enabling them to submit cases directly to the African Court, can cases be instituted directly before the Court. So far, only two states have ever made such a declaration.[95] In respect of other state parties to the Court Protocol,[96] cases can reach the Court only once they have been submitted to the Commission, and the Commission then exercises its discretion to refer the case to the Court.[97] The Commission has not yet referred to the Court any case in which it had found a violation. A pertinent example relevant to social rights is the *Endorois* case, which the Commission finalized in 2009. Despite the government's failure to fully implement the Commission's remedial recommendation, the Commission has not referred the case to the Court.[98]

However, in a number of cases, some aspects of social rights have surfaced before the Court. In *African Commission v Kenya* (*Ogiek* case),[99] the African Court found that the Ogiek, an indigenous community in Kenya, constituted a 'people' under the African Charter. As a people, the Ogiek successfully claimed that Kenya violated their right to development by evicting them from the Mau Mau Forest, where they have been living for centuries, without effectively consulting them. The Court found a violation of Article 22 on the basis that the evictions 'adversely impacted on their economic, social and cultural development', and that the Ogiek were not 'actively involved in developing and determining health, housing and

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[92] As at the end of 2019, a small number of African states have become parties to ICESCR-OP (4: CAR, Cape Verde, Gabon, Niger) and to the CRC-OP on Communications (3: Benin, Gabon, Tunisia); the number was much higher for the CRPD-OP (28: among them Benin, Burkina Faso, The Gambia, Ghana, Côte d'Ivoire, Mali, Tunisia, Tanzania).

[93] See Frans Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 ICLQ 63.

[94] Under Art 34(6) of the Court Protocol.

[95] Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Mali, Malawi, Rwanda, Tanzania, Tunisia. While Rwanda had also made such a declaration, it subsequently withdrew it, effective from 1 March 2017 (see the ruling of the African Human Rights Court: *Umuhoza v Rwanda*, App No 3/2014, Ruling on Withdrawal of Declaration (3 June 2016), in which the Court ruled that the withdrawal was valid). Tanzania, Benin and Côte d'Ivoire also subsequently withdrew their declarations.

[96] By 31 December 2019, 30 AU member states had become party to the Court Protocol.

[97] According to Rule 118 of the 2010 Rules of Procedure of the African Commission.

[98] On reasons for non-referral, see Frans Viljoen, 'Regional Institutional and Remedial Arrangements for the Judicial Enforcement of Economic Social and Cultural Rights' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 243.

[99] *African Commission v Kenya (Ogiek)*, ACtHPR, App No 6/2012, Judgment (26 May 2017).

other economic and social programmes affecting them'.[100] In *APDH and Another v Mali*,[101] the Court held that provisions of the Malian Persons and Family Code that discriminate against women and children 'born out of wedlock' were in violation of the right to inheritance in the Maputo Protocol and the 'best interest of the child' principle in the African Children's Charter. In *Guehi v Tanzania*,[102] the Court found that not providing regular food to a detainee constituted inhuman and degrading treatment. In *Konaté v Burkina Faso*,[103] the applicant requested provisional measures to address his deteriorating health and lack of medical care. Although it is relatively rare for international bodies to order provisional measures outside the framework of threat to life and limb, the Court ordered the state to provide the applicant with 'the medication and health care required'.[104] By finding Tanzania in violation for failing to provide indigent accused persons facing serious offences with free legal aid,[105] the Court added a social rights dimension and a fulfilment obligation to the right to a fair trial. It did so by applying the ICCPR standard (Article 14(3)(d)) to complement the Charter (Article 7(1)(c)).

Under its advisory jurisdiction, a request to the Court to give its opinion on the question whether extreme, systemic and widespread poverty violates certain provisions of the African Charter was declined due to the applicant's lack of standing.[106]

IV. EMERGING TRENDS AND APPROACHES

a. Progressive Interpretation Informed by International Law

The extent of international social rights protection is largely dependent of the treaty body's approach to the interpretation of its overall mandate. Initially, as the Commission started exploring the contours of its protective mandate, its findings generally – and in respect of social rights, specifically – demonstrated a 'mechanical application' and 'low quality of reasoning' that 'stunted its jurisprudence relating to models of review'.[107] The Commission also often did not formulate appropriate remedies. Over time, as the Commission generated more confidence and adopted a more expansive approach, it underscored the interdependence and indivisibility of all rights in the Charter. In respect of the right to health, it adopted the 'underlying determinants of health' approach.[108] For the first time, in *Ogoniland*, the Commission issued elaborate remedial recommendations entailing 'fulfilment' obligations.[109]

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[100] *Ibid.*, para 210.

[101] *APDH and Another v Mali*, ACtHPR, App No 46/2016, Judgment (11 May 2018).

[102] *Guehi v Tanzania*, ACtHPR, App No 1/2015, Judgment (7 December 2018).

[103] *Konaté v Burkina Faso*, ACtHPR, App No 4/2013, Order for Provisional Measures (4 October 2013).

[104] *Ibid.*, para 23(ii).

[105] *Jonas v Tanzania*, ACtHPR, App No 11/2015, Judgment (28 September 2017).

[106] *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project*, ACtHPR, App No 1/2013, Advisory Opinion (26 May 2017).

[107] Sisy A Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theories, Laws, Practices and Prospects* (2011) 350, 370.

[108] Ebenezer Durojaye, 'The Approaches of the African Commission to the Right to Health under the African Charter' (2013) 17 Law, Democracy & Development 393, 408–12.

[109] Frans Viljoen, 'The African Human Rights System and Domestic Enforcement' in Malcolm Langford, César Rodríguez-Gravito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (2017) 351, 370–91.

The Children's Rights Committee adopted an expansive approach in line with that of the Commission,[110] drawing on the 'best interests of the child' principle, and similarly made far-reaching remedial recommendations to states.[111]

The *Ogoniland* finding broke new ground, not only in its elaborate reasoning and remedial recommendations, but also in its embrace of the 'implied rights' theory. As previously indicated, due to a 'minimalist' approach adopted during its drafting, the number of social rights in the Charter was limited. However, the Commission filled this lacuna by adopting a theory of 'implied' rights, initially seemingly unconsciously in its Guidelines for National Periodic Reports, and later more elaborately in *Ogoniland*. In this case, the Commission held that some social rights that are not provided for in the Charter can be derived from expressly provided Charter rights. According to the Commission, the right to food is 'implied' by the rights to life, health and development;[112] and the right to housing can be construed from the right to property, health and the protection of the family.[113] This interpretive approach embodies the interconnectedness and interdependence of all rights. Progressive as this interpretation is, it has been elaborated without the government apparently being given an opportunity to provide its views. It may be questioned whether the Commission was not putting its relative institutional fragility (as a body dependent on the consent and willingness of states to implement recommendations) at risk by steering away from the Charter's textual basis. Arguably, a *pro homine* and 'living instrument' approach, expansively and progressively interpreting *expressly guaranteed* Charter rights (such as the right to property – in respect of the villages and crops), may have equally guaranteed an adequate level of protection to the Ogoni people.

In the *Darfur* case, decided almost a decade later in 2009, the Commission was invited to find that the poisoning by the Janjaweed of the wells of the people in Darfur amounted to a violation of the right to water.[114] As the right to water is not explicitly provided for in the Charter, accepting this argument required a further extension of the rights in the Charter on the basis of the 'implied rights' theory.[115] Rather than reinforcing the 'implied rights' theory, the Commission interpreted the right to health as encompassing access to water as part of the underlying determinants of health, thus facilitating a finding that the poisoning of the wells violated an existing Charter provision – the right to health.[116]

International human rights law served as an important source of inspiration to the Commission. Through the prism of Articles 60 and 61 of the Charter, it increasingly placed reliance on instruments such as General Comments of the ESCR Committee,[117] other soft law standards,[118] and case law of the European and Inter-American Courts.[119] The Committee

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[110] See in particular *Nubian Children in Kenya* (n 84), para 58.

[111] See, e.g., *Talibé* (n 86), para 82.

[112] *Ogoniland* (n 57), para 64.

[113] *Ibid.*, para 62.

[114] *Darfur* (n 13), para 124.

[115] *Ibid.*, para 126: 'The Complainant invites the Commission to develop further its reasoning in the SERAC Case by holding that the right to water is also guaranteed by reading together Articles 4, 16, and 22 of the African Charter.'

[116] *Ibid.*

[117] See, e.g., *ibid.*, paras 49, 57, 63; *Ogoniland* (n 57), paras 49, 57, 63.

[118] Such as the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Care (*Gambian Mental Health* (n 61), paras 60, 81) and the UN Declaration on the Rights of Indigenous Peoples (*Endorois* (n 8), paras 204–08).

[119] *Endorois* (n 8), paras 204–08.

and Court followed this example and also frequently refer to international human rights law to guide their interpretation.[120] It is apparently mainly on this basis that the Commission adopted its far-reaching and expansive Implementation Guidelines (and the Tunis Reporting Guidelines). In these Guidelines, the Commission once again embraced the 'implied rights' theory, deriving the implied existence of the right to water and sanitation from 'rights to life, dignity, work, food, health, economic, social and cultural development and to a satisfactory environment'.[121] In the absence of a Charter basis or any relevant case law or state practice, the identification of 'minimum core obligations',[122] such as the obligation to 'ensure […] an adequate number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household',[123] can only be explained as resulting from a cursory and eclectic incorporation of international standards into the African regional human rights system.

There is a definite need for social rights in the African human rights system to be interpreted progressively, also by seeking guidance from international best practice. However, these interpretations should be rooted primarily in AU treaties, and should draw also on interpretations by domestic courts within Africa,[124] so as to ensure both realistic responses to African realities, and the development of an autochthonous African social rights jurisprudence.

b. Direct Justiciability of Social Rights Affirmed at the International Level

Direct and indirect justiciability should be clearly distinguished. On the one hand, direct justiciability of social rights is possible when a judicial body (such as the African Court) or quasi-judicial body (such as the African Commission) has jurisdiction over explicitly and clearly articulated social rights contained in the legal text (such as the African Charter) that it is mandated to interpret.[125] Making social rights directly justiciable is 'legally straightforward' and ensures certainty and predictability. On the other hand, indirect justiciability of social rights entails the 'indirect protection' of these rights 'through legal provisions and mechanisms created for civil and political rights'.[126] This form of justiciability is called for in the context of legal frameworks that guarantee 'civil and political' but no social rights, such as, to a large extent, the ICCPR or the European Convention on Human Rights.[127] This approach departs

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[120] See, e.g., *Ogiek* (n 99), para 181.

[121] Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Implementation Guidelines), para 87.

[122] See discussion below in section IV.e.

[123] Implementation Guidelines (n 121), para 92(b).

[124] The Commission arguably could, in arriving at its finding in *Ogoniland*, have drawn on the decision of the South African Constitutional Court in *Government of the Republic of South Africa & Others v Grootboom & Others*, 2000 11 BCLR 1169 (CC) (see also, e.g., Sisy A Yeshanew, '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' (2011) 11 African Human Rights Law Journal 317, 327, 329).

[125] Yeshanew (n 124), 320; and Yeshanew (n 107), 305.

[126] Martin Scheinin, 'Indirect Protection of Economic, Social and Cultural Rights in International Law' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 72, 73.

[127] Subsequent 'Protocols' have extended the substantive content of the Convention. Through the first of these, Protocol No 1, adopted in 1952, and entered into force in 1954, the Convention was extended to include the entitlement of 'peaceful enjoyment of his possessions', stipulating that no one 'shall be

from the premise that 'civil and political' rights (such as life, dignity or privacy) embody elements or dimensions of social rights. Following this logic, the Human Rights Committee and European Court of Human Rights adopted 'an indirect' or 'elements-based' approach.[128]

At a time when indirect justiciability of social rights dominated international law, the African human rights system took the lead by unequivocally affirming the direct justiciability of these rights. Even if an initial draft of the African Charter differentiated between the implementation of 'socio-economic' and 'civil and political' rights,[129] the final version draws no such distinction, thus making all rights equally justiciable. Despite this textual reality, the context prevailing at the time still led some commentators to skepticism about the prospect of direct justiciability.[130] In the *Ogoniland* case, the Commission made it clear that it exercises direct justiciability over social rights, when it stated unequivocally that 'there is no right in the African Charter that cannot be made effective'.[131] In the operative paragraph of this finding, the Commission found that the right to health, together with a number of other rights, had been violated. The *Ogoniland* finding, handed down in 2001, is by no means the first time that the Commission engaged in direct justiciability of social rights. Some five years earlier, in 1995, the Commission in the *Zairian Mass Violations* case found a violation of Articles 16 (health) and 17 (education). The difference between these earlier cases and the *Ogoniland* case is the reasoned substantiation of the later finding. In *Endorois*, the Commission affirmed the direct justiciability of a related right, the right to development.[132]

Under the African Charter, only a limited number of social rights are explicitly protected. While direct justiciability is called for in respect of these explicitly protected social rights, indirect justiciability should be employed as a tool to achieve the realization of the remaining (non-enumerated) social rights. In the Commission's case law, the rights to electricity, food and payment for unremunerated work have been made indirectly justiciable through Article 5, the right to human dignity and prohibition of cruel, inhuman or degrading punishment and treatment.[133] By finding a violation of Article 5 'with respect to deprivation of food',[134] the African Court also gave indirect effect to an unenumerated social right. An early example of

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deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'; and the right to education.

[128] Eva Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights' in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (2011) 135.

[129] Frans Viljoen, 'The African Charter on Human and Peoples' Rights/The Travaux Preparatoires in the Light of Subsequent Practice' (2005) 25 Human Rights Law Journal 313, 320.

[130] See, e.g., B Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 HRQ 141, 147.

[131] *Ogoniland* (n 57), para 68: The Commission added that it 'will apply any of the diverse rights contained in the African Charter'. See also Fons Coomans, 'The *Ogoni* Case before the African Commission on Human and Peoples' Rights' (2003) 52 ICLQ 749, 757.

[132] *Endorois* (n 8), para 298 (finding that the Endorois community suffered a violation of Art 22 at the hands of the Kenya government, because it did not 'adequately provide for the Endorois in the development process').

[133] See, e.g., *Mauritanian Widows* (n 53), para 135 (the Commission found that unremunerated work was 'tantamount to a violation of the right to respect for the dignity inherent in the human being'). The Commission did not refer to Art 15, though.

[134] *Guehi v Tanzania* (n 102), para 136.

indirect justiciability of social rights is the *Nigerian Detained Plotters* case.[135] The relevant facts are that the military government arrested a number of civilians, held them in dark military detention cells, and gave them insufficient food and no medicine or medical attention.[136] The Commission held: 'Deprivation of light, insufficient food and lack of access to medicine or medical care also constitute violations of article 5.'[137] While using Article 5 as an indirect vehicle to address the issue of electricity and food is appropriate, the issues of medicine and medical care would have been best dealt with as violations of Article 16 of the Charter. The preference for indirect justiciability – in the face of the possibility of direct justiciability – suggests an initial disinclination to fully appreciate the implications of a feature of the Charter that ran contrary to most of international human rights law and associated legal culture.

A finding that a social right, as such, is violated amounts to direct justiciability, even if that violation is linked to, derived from or a consequence of the violation of a 'civil and political' right. In the *Nubian Community in Kenya* case, the Commission held that the principle of non-discrimination was violated by denying Nubians easy access to identity documents. This discrimination left the Nubians in a precarious situation that led to the 'consequential' violation of other rights intricately linked to citizenship, including social rights such as the right to work, health and education.[138] As the Commission found a violation of Articles 15, 16 and 17(1) of the Charter, this case is an example of direct justiciability.

Provided that the burdens to accessibility are overcome, the African Human Rights Court holds the promise of direct judicialized justiciability over social rights not only in AU but also in UN human rights treaties.

c. States Have the Duty to Respect, Protect, Promote and Fulfil All Social Rights[139]

The Commission does not subscribe to a typology of categorizing rights into 'generations', or creating a hierarchy of rights. Traditionally, 'civil and political' (or 'first generation') rights were associated with states' obligation to 'respect' and 'protect', and 'socio-economic' (or 'second generation') rights with their obligation to 'fulfil'. In the *Ogoniland* case, and elsewhere,[140] the Commission has used as its foundational logic the nature of the state obligations imposed by rights, rather than the 'nature' or 'generation' of the rights itself, emphasizing that all rights may, depending on the context, entail any one (or more) of these obligations. As a result, the Commission has made it clear that social rights do not exclusively imply fulfilment obligations, as is sometimes 'feared', and that 'civil and political' rights may and indeed often do also imply such obligations. What follows illustrates how the Commission ascribed

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[135] *Civil Liberties Organisation v Nigeria*, ACHPR, Communication No 151/96 (1995).

[136] *Ibid.*, para 5.

[137] *Ibid.*, para 27.

[138] *Nubian Community in Kenya v Kenya* (n 72).

[139] The African Charter also places duties on individuals (Arts 27 to 29); and the Commission has followed suit: e.g., the Resolution on HIV/AIDS pandemic directs itself to the 'international pharmaceutical industries' to make affordable and comprehensive health care available to African governments and calls on 'international aid agencies' to increase donor partnership programmes; the Resolution on Maternal Mortality in Africa calls for 'community led emergency transport systems'.

[140] See, e.g., Reporting Guidelines on Articles 21 and 24, Explanatory Notes, paras 41–55.

state responsibility across the four layers of state responsibility (to respect, protect, promote, fulfil) in respect of social rights.

First, the duty to respect requires states to refrain from interfering with rights-holders in the enjoyment of their guaranteed rights. Most of the Commission's findings pertaining to social rights have spoken to this obligation. In the *Ogoniland* case, for example, the violation of the implied 'right to shelter' was occasioned by the security forces destroying the Ogoni's houses and villages. The violation was thus a result of the government's failure to respect the housing that was already in place. Similarly, by preventing people from cultivating their crops and feed themselves, the security forces violated their duty to respect the right to food.

Second, the duty to protect requires that states ensure that non-state actors (such as other individuals or 'subjects') do not impede rightholders in the enjoyment of their rights.[141] Insofar as the Nigerian government has 'allowed private oil companies to destroy food sources',[142] it fell short of its duty to protect the Ogoni people (related to the 'right to food'). In the *Darfur* case, the Commission found that the failure of the Sudanese government to curtail the effect of the 'rampaging attacks' by a non-state entity – an 'Arab militia', the Janjaweed – on the local population's land and livelihood violated the right to property.[143] Examples are also provided by some of the Commission's soft law instruments. One is its 2008 resolution on access to medicines, in which it called on states to 'protect' access to medicines 'from actions by third parties through regulatory systems' by ensuring that 'only medicines that have met scientifically appropriate standards for quality, safety and efficacy are available'. A more recent resolution calls for state regulation as a means to curb human rights violations resulting from the actions of unregulated private actors that have become involved in delivering health and educational services.[144]

Third, the duty to promote requires the state to ensure that rightholders are, for example through awareness raising, 'able to exercise' their rights,[145] and to infuse administrative and judicial decision-making with an appreciation for socio-economic rights.[146] In its 2008 resolution on access to medicines, the Commission called on states to 'promote' access to medicines by 'implementing intellectual property policies that do not take full advantage of all flexibilities in the WTO Agreement on Trade Related Aspects of Intellectual Property that promote access to affordable medicines'.

Fourth, the duty to fulfil requires the state to take positive action, by moving its 'machinery' towards the actual realization of the rights-holder's rights guarantees, for example through the 'direct provision of basic needs such as food'.[147] The facts and findings in *Ogoniland* do not

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[141] *Ogoniland* (n 57), para 46.

[142] *Ibid.*, para 66.

[143] *Darfur* (n 13), para 205.

[144] Resolution on the Obligation of States to Regulate the Involvement of Private Stakeholders in the Delivery of Health and Education Services, adopted at the Commission's 64th Ordinary Session from 24 April to 14 May 2019 in Sharm el-Sheikh, Arab Republic of Egypt. See also Resolution 434 on the Need to Develop Norms on States' Obligations to Regulate Private Actors Involved in the Provision of Social Services, adopted at the Commission's 27th Extraordinary Session, on 4 March 2020, in Banjul, The Gambia, mandating the Commission's Working Group on Economic, Social and Cultural Rights to 'develop norms on States' obligation to regulate private actors' involvement in the provision of social services'.

[145] *Ogoniland* (n 57), para 46.

[146] Implementation Guidelines (n 121), para 9.

[147] *Ogoniland* (n 57), para 47.

reveal a failure in the state's duty to fulfil. Some pronouncements of the African Commission, in *Gambian Mental Health*,[148] are clearer in placing an obligation to fulfil on the government, in that it found that the conditions under which patients were detained for reasons of mental health in a public health facility in The Gambia violated the right to health in the African Charter.

d. Progressive Realization and Immediate Enforceability

While it is clear that direct justiciability renders all Charter rights immediately enforceable in respect of the state's obligation to respect and protect, it is unclear if this is also true for the obligation to fulfil. The Charter does not as a rule make the fulfilment of any of its provisions dependent on available resources or progressive realization. In this respect – as far as social rights are concerned – the Charter deviates from the ICESCR, which introduces the concepts of 'steps to the maximum of its available resources', 'achieving progressively the full realization of the right' and 'all appropriate means'.[149] Many commentators have on this basis concluded that all the social rights in the Charter are 'immediately enforceable', rather than merely to be realized 'progressively'. While the immediate enforceability of states' duties to respect, protect and promote is, generally speaking, uncontroversial, it has been suggested that resource constraints make the 'positive obligation' to fulfil dependent on available resources, and thus realizable only progressively.[150]

One Charter social right, the right to health, is an excellent candidate for this approach, as it mirrors the ICESCR's sensitivity to context by including the qualification of the '*best attainable* standard of physical and mental health'.[151] Clearly, *resource availability* is a crucial factor on which the extent of *attainability* depends, thus distinguishing this right from other Charter rights.[152] The Commission's announcement in the *Gambian Mental Health* case that it 'would like to *read into* article 16' the obligation to 'take concrete and targeted steps, while taking full advantage of its available resources'[153] is therefore inaccurate. Taking account of 'available resources' depends not so much on a reading in of anything into Article 16 as on a mere interpretation of the phrase 'best attainable'. At the same time, the Commission imported from the ESCR Committee the notion that states retain the core obligation to take concrete, targeted and non-discriminatory steps.[154]

While the question may be posed whether the finding in the *Gambian Mental Health* case establishes a test applicable to all social rights in the Charter, or only to the right to health, the

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[148] *Gambian Mental Health* (n 61).

[149] ICESCR, Art 2(1): 'Each State Party to the present Covenant undertakes to *take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to *achieving progressively* the *full realization of the rights* recognized in the present Covenant by *all appropriate means*, including particularly the adoption of legislative measures' [emphasis added].

[150] See, e.g., Chirwa (n 6), 338.

[151] In the African Charter (Art 16(1)) [my emphasis], the only difference is that the word 'highest' is replaced by 'best'.

[152] Ouguergouz (n 15) describes Art 16 as 'indicative (rather than 'binding') and questions its immediate enforceability in the light of states' inability to muster the 'major resources' necessary for its implementation (at 186, 200).

[153] *Gambian Mental Health* (n 61), para 84 [my emphasis].

[154] CESCR, 'General Comment No 3' (14 December 1990) UN Doc E/1991/23.

Commission's Implementation Guidelines seem to accept that the principle of 'progressive realization', derived from Article 16, applies to all the social rights in the Charter. Conceding that the African Charter 'does not expressly refer to the principle of progressive realisation', the Commission, guided by wide international acceptance thereof, in these Guidelines concludes that the Charter 'implies' this principle.[155] In its view, immediate obligations are the *exceptions* to the *rule of progressive realization*.[156] The following obligations are 'immediate': taking steps, not taking retrogressive steps, meeting minimum core obligations and preventing discrimination in the enjoyment of social rights.[157]

A majority of commentators seem to favour the view that a 'progressive realization' approach applies to the social rights under the African Charter. Mbazira supports this approach as 'realistic', given the 'resource constraints of African countries', and as contradicting 'perceptions that the socio-economic rights obligations in the African Charter are immediate'.[158] To do differently – that is, to regard the obligations as of immediate effect – would in his view be 'idealistic and out of touch with reality'.[159] Yeshanew's view is that social rights should 'realistically be understood as incorporating' this standard.[160]

Formulations in other AU treaties and by the Committee also support a progressive realization/reasonableness approach. When it obligates states to assist parents in providing assistance in respect of nutrition, housing and clothing, the Children's Charter seems to aim for a balance between the obligation to 'take all appropriate measures' and the flexibility to do so 'in accordance with their means and national conditions'.[161] The Older Persons Protocol emphasizes throughout the need of the state to adopt policies, legislation and other measures, lending support to the view that these rights are not realizable immediately, but only through programmatic means. The Children's Rights Committee in the *Nubian Children in Kenya* case held that measures to 'fully implement' the 'best attainable state of health' through integrating basic health programmes into national development plans has to be ensured 'within available resources'.[162]

While this approach is taking shape, the Commission should further develop it.[163] In determining whether a violation of a social right had occurred, the Commission should articulate more clearly the test to assess the reasonableness of the measures taken, taking into account all relevant factors including available resources. A reasonableness approach fits well with the Commission's 'proportionality' approach to limitations (including 'clawback' clauses), generally. The African Charter contains a number of right-specific provisions (referred to as 'clawback' clauses) that at face value seem to allow for an unqualified limitation of the

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[155] Implementation Guidelines (n 121), para 13. The Commission incorrectly refers to Articles 61 and 62; obviously, it has in mind Articles 60 and 61.

[156] *Ibid.*, para 16: '*Despite the obligation to progressively realise* economic, social and cultural rights, *some of the obligations imposed on States parties to the African Charter are immediate* upon ratification of the Charter' [emphasis added].

[157] *Ibid.*

[158] Mbazira (n 52), 353.

[159] *Ibid.*; see also Chirwa (n 6), 338.

[160] Yashenew (n 107), 378.

[161] Art 20(2) African Children's Charter.

[162] *Nubian Children in Kenya* (n 84), para 61; see also paras 62, 65 (violations found 'even in the context of the resources available for this fulfilment of this right').

[163] See, e.g., Chirwa (n 6), 338 ('progressive realization and available resources ought to be implied' in social rights provisions).

particular right on the basis of any domestic law whatsoever.[164] However, in its interpretation of these provisions, the African Commission, based on Article 27(2) of the Charter, devised a proportionality test, requiring that all limitations of Charter rights be 'strictly proportionate' and 'necessary' for the achievement of a legitimate public interest, and do not render the limited rights illusory.[165] The Commission's interpretation of the limitation clause in Article 14 provides a basis on which it could elaborate a comprehensive 'reasonableness' approach.[166]

The *Southern Cameroon* case illustrates the dangers of not having a clearly articulated and principled approach in place.[167] Faced with an allegation that the state had violated the right to development of the Southern Cameroonians, the Commission noted that realizing the right is a 'big challenge' to the state, due to its 'scarce resources'.[168] In answering the question whether the state invested its resources in the 'best way possible to attain the progressive realization of the right', the Commission allowed the state considerable leeway. It concluded that, on the facts before it, the right to development was not violated merely because there are some grievances due to its investment of resources not reaching 'all parts of its territory to the satisfaction of all individuals and peoples'.[169] The implications of this 'test' are at best unclear, and at worst very disconcerting.

e. Minimum Core Obligations

Neither the Charter nor any other AU treaty provides for the concept of 'minimum core obligations' that states have to meet in realizing social rights. In the *Ogoniland* case, the Commission for the first time made reference to the concept of a 'minimum' level in social rights protection, concluding that government conduct fell short of 'minimum conduct expected of governments' under Article 21,[170] and failed in its duty 'not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes'.[171] The Commission described these failures as 'massive violations'.[172] It appears from these observations that the Commission did not embark on a systematic attempt to identify a set of minimum requirements of what each right entails, but registered its exasperation at the flagrant disregard for basic requirements of human dignity.

Without making any specific reference to *Ogoniland*, the Implementation Guidelines fully embrace the notion of 'minimum core obligations'. They describe minimum core obligations as 'the obligation of the State to ensure that no significant number of individuals is deprived of the essential elements of a particular right', and characterize them as 'non-derogable'.[173]

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[164] See, e.g., 'for reasons […] previously paid down by law' (Art 6); 'within the law' (Art 9); 'provided he abides by the law' (Arts 10(1) & 12(1)).

[165] See, e.g., *Malaolu* (n 8); and Viljoen (n 5), 329–33.

[166] Art 14 allows for a two-pronged test: a limitation on property rights has to be in the public interest, and 'in accordance with appropriate laws': for the Commission's interpretation, see *Endorois* (n 8), paras 213–18; for a similar approach by the African Court, see *Ogiek* (n 99), paras 213–18.

[167] *Southern Cameroon* (n 13).

[168] *Ibid.*, para 206.

[169] *Ibid.*

[170] *Ogoniland* (n 57), para 58.

[171] *Ibid.*, para 61.

[172] *Ibid.*, para 62.

[173] Implementation Guidelines (n 121), para 17.

They set out state obligations (thus adopting the 'principle' approach), rather than specifying with exactitude what a minimum level entails (thus rejecting the 'quantitative' approach).[174] Although states are directed as to what elements of each social right they should prioritize, they are generally left with some measure of discretion in regard to domestic implementation. In some respects, an apparent discretion may in fact be significantly curtailed. For example, the obligation to ensure that 'essential drugs' be provided to all in need of them is in fact clearly delineated, as a list of these drugs is provided in the WHO Action Programme on Essential Drugs.[175] In other respects, the content of the obligation is indeterminate to the extent of being unhelpful. An example is the minimum core obligation to 'ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic use, including preventing disease, together with access to adequate sanitation'.[176]

f. Prioritizing Vulnerable and Disadvantaged Groups

A recurring feature of the Implementation Guidelines is the stipulation that the needs of 'vulnerable and disadvantaged groups' (that is, groups 'who have faced and/or continue to face significant impediments' in enjoying social rights) have to be met, or planned for.[177] Once again adopting a very expansive approach, these Guidelines list more than 30 such groups.[178] In its jurisprudence, the Commission and Children's Rights Committee have dealt specifically with three of these groups: detainees, persons with (mental) disabilities and children living in slum areas. In a series of cases, the Commission explained that the state has a heightened responsibility to uphold the rights – including social rights – of detainees, because their 'integrity and well-being is completely dependent on the actions of the authorities',[179] and because 'detention centres are its exclusive preserve'.[180] In *Gambian Mental Health*, the Commission expressed the view that 'mental health patients should be accorded special treatment' due to their 'condition and by virtue of their disabilities'.[181] The Children's Rights Committee, in *Nubian Children in Kenya*, indicated that governments have a 'more urgent responsibility' towards children living in informal settlement and slum areas due to the 'heightened risk' to their health.[182] A number of AU treaties also serve as the basis for 'vulnerability' and 'marginalization', such as the Women's Rights Protocol calling for specific attention to the rights of 'poor and rural women',[183] and the requirement under the Older Persons Protocol that states must ensure that older persons are given 'preferential treatment' in the provisions of service delivery.[184]

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[174] Lilian Chenwi and Danwood M Chirwa, 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 33, 55.

[175] Implementation Guidelines (n 121), para 67.

[176] *Ibid.*, para 92(a).

[177] *Ibid.*, para 1(e).

[178] *Ibid.*

[179] *Saro-Wiwa* (n 53), para 112.

[180] *Mauritanian Widows* (n 53), para 122.

[181] *Gambian Mental Health* (n 61), para 81.

[182] *Nubian Children in Kenya* (n 84), para 61.

[183] See, e.g., Women's Rights Protocol, Arts 14(2)(a), 24(a).

[184] *Ibid.*, Art 10(3).

While this need for prioritization fits into a progressive human rights-based approach, it is not clear how competing claims involving various prioritized groups would be dealt with, and how this long list of vulnerable groups relates to the notion of minimum core obligations. On the one hand, the Implementation Guidelines require that even states that 'suffer from demonstrable resource constraints' should be '*prioritising them* in all interventions'.[185] Arguably, this formulation is unhelpful as it equates the various 'groups' with each other and accords them all equal priority in settings where resources constraints may require some form of ordering. On the other hand, the Implementation Guidelines also expect states to 'prioritise the realisation of the rights for the *poorest and most vulnerable* in society'.[186] By prioritizing the 'poorest', this formulation adopts a pro-poor approach, but by adding 'most vulnerable', a degree of vagueness and flexibility is reintroduced. However, the Commission's approach confirms that in contexts where extreme poverty intersects with – and exacerbates – other forms of vulnerability and disadvantage, a state's obligation to intervene to secure the realization of social rights is urgent and undeniable.

V. CONCLUSION

The African Charter, which spearheaded the recognition of the justiciability and immediate enforceability of both social rights and the related right to development at the international level, inspired the establishment of an African Commission Working Group dedicated to social rights and the adoption of further treaties and soft law standards. Most comprehensive among these are the 2011 Implementation Guidelines and Tunis Reporting Guidelines. Since *Ogoniland* in 2001 and *Nubian Children in Kenya* in 2009, the Commission and Committee developed a progressive jurisprudence based on the indivisibility and interrelatedness of all rights, and issued far-reaching remedial recommendations. The Court is also slowly forging a social rights-related jurisprudence. Despite these advances, the treaty bodies remain in search of a clear and coherent approach to positive obligations attached to social rights in resource-constrained contexts, and a balance to reconcile progressive realization, minimum core obligations and the needs of the most vulnerable groups.[187]

It is striking that the cases in which wideranging social rights violations were found and far-reaching remedies recommended were brought by groups (such as the Ogoni, Darfurian and Ogiek people). These cases starkly illustrate that the largely unexplored avenue of public interest pro-poor litigation based on the peoples' rights provisions in the Charter holds immense potential.

There is, however, a serious disjuncture between what the African human rights system requires and what states deliver. At the collective (AU) level, states have repeatedly committed themselves to accord at least the same importance to social rights as to 'civil and

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[185] Implementation Guidelines (n 121), para 17 [emphasis added].

[186] *Ibid*.

[187] See, e.g., Yashenew (n 107), arguing for an approach combining 'the minimum core and reasonableness models' (at 326).

political' rights,[188] and to devote resources to their realization.[189] The actual benefit of the normative and institutional advances has not reached Africa's poor, due largely to the lack of effective implementation of remedial recommendations in decided cases and of holding states accountable to the standards provided for in a plethora of treaties and soft law instruments. Adjudication has played a limited role mainly because very few cases have reached the treaty supervisory bodies, especially the African Human Rights Court. State reporting has been ineffectual because states report irregularly, and when they do they mostly neglect social rights and disregard the Implementation Guidelines, as well as the 1989 and Tunis Reporting Guidelines. The Commission's Implementation Guidelines still need to be better integrated into the Commission's own work and into state practice.[190] In the relatively rare instances where states reported, social rights were not accorded adequate attention in the examination, the Concluding Observations and follow up. Much wider dissemination, and increased awareness of the various standards and procedures, are required to ensure more significant domestic impact.

Social rights realization is to an important extent dependent on the *availability* and *allocation* of national resources. Resource availability is influenced by factors such as international financial policies, multilateral and bilateral trade arrangements, the efficiency of tax collection and the regulation of the activities of multinational companies operating in Africa. Budgetary allocation must be guided by a reduction in military spending and increased spending on social development.[191] More emphasis should therefore be placed on the economy and the macroeconomic environment. With its focus on extractive industries and the broader socio-political landscape, the Commission's 'Reporting Guidelines on Articles 21 and 24' and its concern about illicit financial flows are steps in the right direction.[192] Social rights realization should be pursued in tandem with realizing the Sustainable Development Goals, but without allowing hallmarks of the human rights-based approach, such as accountability through justiciability, to be subsumed within the developmental framework. The African human rights system should foster an intimate and mutually reinforcing relationship between the right to development and social rights, in order to support a human-centred approach maximally attuned to basic welfare and survival – not to economic growth measured in terms of constantly increasing consumption.

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[188] See, e.g., 1999 Grand Baie Declaration, para 1; 2003 Kigali Declaration, para 4; Arts 3(j), 4(n); AU Constitutive Act; Agenda 2063.

[189] See, e.g., the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (undertaking to allocate 15 per cent of their national budgets to the health sector).

[190] An example of its integration is *Sudanese Human Rights Defenders* (n 71), para 34, in which the Commission refers to the Implementation Guidelines.

[191] See, e.g., Art 10(3) Maputo Protocol.

[192] ACHPR Res 236 on Illicit Capital Flight from Africa (9–23 April 2013).

C. Social Rights as a Tool to Fight Inequality

12. The social rights of African descendants – with focus on the Americas

Manuel Góngora-Mera

I. INTRODUCTION

Today, people of African descent live in many countries of the world, either dispersed among the local population or in communities; for instance, Ethiopian Jews in Israel, Siddis in India, or British Jamaicans. This contribution mainly refers to the Afro-descendant population of the Americas, characterized as descendants of people forcibly taken from Africa to be enslaved in the Americas by Europeans, and who identify themselves as people of African descent. Between the fifteenth and the nineteenth centuries, millions of Africans were forcibly captured to be enslaved in other continents. Although thousands were taken to destinations as diverse as Portugal, Spain, Arabia, Yemen or India, the vast majority was transported in European vessels to be enslaved in European colonies in the Americas. According to the most recent estimates of slave voyages,[1] of the more than 12 million Africans who were transferred to the Americas from 1501 to 1867, almost six million were taken to Brazil, which became the largest destination of captive Africans in America between 1560 and 1850. On the other hand, one and a half million Africans were taken to the Spanish colonies, almost three million were shipped to the Caribbean islands (excluding the islands under Spanish control) and around 400,000 Africans landed in North America. In colonial times, they were subjected to oppression, exploitation and inhuman treatment; and even after the abolition of slavery, they were structurally excluded from the enjoyment of basic human rights. As descendants of the victims of the transatlantic slave trade, they still constitute some of the poorest and most marginalized groups in the continent; they often suffer racial discrimination, exclusion, wage gaps, high unemployment, lack of political participation and systemic violation of their most basic social rights (such as access to quality education, health services and adequate housing).[2]

Since the end of the twentieth century, there has been a growing consensus on the need to seek internationally coordinated strategies, including protections and guarantees against racial disparities and discrimination in international human rights law (IHRL). At the initiative of several newly independent African republics, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted in 1965, which outlawed racial discrimination with binding force at the international level. After the end of apartheid in South Africa, the UN General Assembly convened in 1997 the World Conference against Racism,

[1] *Cf.* David Eltis *et al, The Transatlantic Slave Trade: An Expanded and Online Database* (2008) <www.slavevoyages.org>; David Eltis and David Richardson, 'A New Assessment of the Transatlantic Slave Trade' in David Eltis and David Richardson (eds), *Extending the Frontiers: Essays on the New Transatlantic Slave Trade Database* (2008) 1.

[2] See Marta Rangel, *Propuestas para el análisis comparado de temas destacados de los derechos humanos de los afrodescendientes en América Latina* (2005); CELADE, *Situación de las personas afrodescendientes en América Latina y desafíos de políticas para la garantía de sus derechos* (2017).

Racial Discrimination, Xenophobia and Related Intolerance (WCAR), held in Durban in 2001. At this conference the term 'Afro-descendant' was adopted internationally, and in the conference's Declaration and Program of Action (DPA) states were urged to promote public policies to eradicate poverty and reduce the social disparities that affect the victims of racism. By Resolution 64/169 of 2009, the UN General Assembly proclaimed 2011 as the International Year for People of African Descent, and by Resolution 68/237 of 2013 it proclaimed an International Decade for People of African Descent from 2015 to 2024, to take effective measures for the implementation of the Durban Programme of Action. Additionally, there is a series of international instruments (conventions, declarations, judgments of the Inter-American Court of Human Rights, or IACtHR) that are relevant in defining the content and scope of the social rights of Afro-descendants. The objective of this study is to comprehensively, but also concisely, summarize this legal framework (Section II), including some case examples of the Inter-American human rights system (Section III).

II. LEGAL FRAMEWORK

a. Universal System

The first issue that needs to be clarified is the tension between universal rights and group differentiated rights (that is, rights that are recognized to a particular group but not to the larger society within which the group exists).[3] The UN system was founded on the vigorous defence of a universal conception of human rights, as outlined in the preamble and Article 1 of the 1948 Universal Declaration of Human Rights (UDHR):

> Whereas 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, […] All human beings are born free and equal in dignity and rights.

This approach is understandable given the historical framework: universality was a vigorous response to the racist ideas of fascism and Nazism, whose hierarchical conception of humanity allowed the systematic denial of rights and the dehumanization of certain peoples and groups. In the 1960s, in the context of the decolonization of Africa, Asia and the Caribbean, as well as the civil rights movement in the United States, this universalist approach was complemented with special protections, guarantees and measures to compensate for unequal treatment against oppressed and marginalized ethnic groups. This led to theoretical debates between universalist and cultural relativist approaches on human rights. The most radical universalist position considers that the idea of universality and of special group rights are mutually exclusive: the

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[3] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995). For further reading on the universalism/relativism debate on group rights, see Abdullahi Ahmed An-Na'im and Francis Deng (eds), *Human Rights in Africa: Cross-Cultural Perspectives* (1990); Allen Buchanan, 'Liberalism and Group Rights' in Jules Coleman and Allen Buchanan (eds), *In Harm's Way: Essays in Honor of Joel Feinberg* (1994) 1; Gregorio Peces-Barba Martínez, 'La universalidad de los derechos humanos' (1994) 15–16 Doxa 613. For a general review of the variety of controversies on group rights in international law, see Corsin Bisaz, *The Concept of Group Rights in International Law: Groups as Contested Rights-Holders, Subjects and Legal Persons* (2012).

essential factor to define something as a right is the fact that it is inherent to human nature. Recognizing a right only to a specific ethnic group would then be incompatible with the idea that all individuals have the same rights, without racial, colour or ethnic distinctions. In contrast, for cultural relativism, there are no universal human rights; rights depend on the moral and justice systems of each culture; in this sense, the way in which rights have been conceived in the universal system would be only another expression of Eurocentrism and a legacy of European colonialism, in its efforts to impose its moral system on the other peoples of the world.

In practice, the complementarity between universal rights and group differentiated rights has been assumed in IHRL, providing that the latter are special protections that impose additional state obligations to compensate for situations of marginalization and historical discrimination suffered by certain groups.[4] This has resulted in the gradual adoption of international instruments that recognize special rights for Afro-descendants – initially in their condition as ethnic minorities, and subsequently through their characterization as 'tribal peoples' in the terms of ILO Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).[5] As minorities, Afro-descendant individuals and communities enjoy the rights enshrined in Article 5 of the 1960 UNESCO Convention against Discrimination in Education (CDE); Article 27 of the International Covenant on Civil and Political Rights (ICCPR); Article 30 of the Convention on the Rights of the Child (CRC); the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (DRM): that is, the rights to enjoy their own culture, to profess and practise their own religion, to use their own language and to carry on their own educational activities (including the maintenance of schools and the use or the teaching of their own language), provided however that (i) this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the larger community; (ii) that the standard of education is not lower than the general standard; and (iii) that attendance at such schools is optional (Article 5 CDE).

On the other hand, as peoples covered by ILO 169, rural Afro-descendant communities also possess collective rights, including the right to communal land (Article 14); to prior consultation with respect to decisions which may affect them (Article 6); to autonomy over their own economic, social and cultural development (Article 7); to maintain their social, cultural, religious and spiritual values and practices (Article 5); not to be subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude (Article 20.c); to the protection of their subsistence economy and traditional activities (Article 23); and to establish their own educational institutions (Article 27.3) and community-based health services (Article 25), among others.[6] Some Latin American countries (for example, Brazil, Colombia, Ecuador

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[4] On the complementarity of group rights, see Koen De Feyter and George Pavlakos (eds), *The Tension Between Group Rights and Human Rights: A Multidisciplinary Approach* (2008).

[5] ILO Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989) 1650 UNTS 383, Art 1: '1. This Convention applies to: a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.'

[6] In detail see, among many others, ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), Direct Request adopted 2013, published 103rd ILC session (2014), ILO 169 (Colombia); Direct Request adopted 2014, published 104th ILC session (2015), ILO 169

and Nicaragua) have recognized, during the past two decades, these collective rights to certain rural Afro-descendant communities with an ancestral possession of lands – in particular, maroon communities (descendants of Africans who escaped from slavery and formed independent settlements of free people in isolated areas, called *quilombos*, *mocambos* or *palenques*). These collective rights can only be exercised by the group as a whole.

A second major point is the characterization of non-discrimination for reasons of race or colour in exercising each of the ESC rights as an immediate and crosscutting state obligation, as stated by the UN Committee on ESC Rights.[7] This means that this duty must be implemented immediately, notwithstanding the state parties' level of development, and that discrimination must be eliminated both formally (eliminating discrimination in laws and policy documents) and substantively (through measures that attenuate or suppress conditions that perpetuate *de facto* discrimination, for instance, ensuring that all individuals have equal access to adequate housing, water and sanitation). State parties should ensure that strategies, policies and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and private actors in the area of social rights. Moreover, they are explicitly encouraged to adopt temporary special measures in order to accelerate the achievement of equality.[8] This in turn leads to discussion of the legitimation of special measures, as stated in CERD (Articles 1(4) and 2(2)), CRC (Article 2) and DRM (Articles 4 and 8(3)), and in the 1958 ILO Convention No 111 concerning Discrimination in Respect of Employment and Occupation (Article 5). According to the doctrine of 'legitimate differentiation', making distinctions among groups shall not be deemed racial discrimination, provided that they are taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure that such groups or individuals obtain equal enjoyment of human rights and fundamental freedoms. Thus, such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and shall not be continued after the objectives for which they were taken have been achieved.

In the 2001 WCAR the approach moved from 'legitimate differentiation' to a more comprehensive approach, by urging states to undertake policies of affirmative action. After that point, the UN Special Rapporteur on the Concept and Practice of Affirmative Action defined affirmative action as

> a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.[9]

(Ecuador); Observation adopted 2015, published 105th ILC session (2016), ILO 169 (Honduras); Direct Request adopted 2016, published 106th ILC session (2017), ILO 169 (Nicaragua); Direct Request adopted 2017, published 107th ILC session (2018), ILO 169 (Nicaragua).

7 CESCR, 'General Comment No 20' (2 July 2009) UN Doc E/C.12/GC/20, 2 July 2009, paras 6–8.

8 *Ibid.*, paras 37–40.

9 UN Special Rapporteur on the Concept and Practice of Affirmative Action, Final report submitted by Marc Bossuyt (SR) (17 June 2002) UN Doc E/CN.4/Sub.2/2002/1, para 6. In its resolution 1998/5, the UN Sub Commission on the Promotion and Protection of Human Rights decided to appoint Marc Bossuyt as Special Rapporteur with the task of preparing a study on the concept of affirmative action, considering that the subject required 'careful and comprehensive inquiry' in view of the upcoming 2001 WCAR.

Therefore, affirmative measures were not merely conceived as exceptions to the right to equality or as palliative mechanisms in response to transitory disparities between majority and minority groups, but rather as a comprehensive set of measures to achieve substantive equality.

Affirmative measures can be carried out not only by public authorities at different levels but also by private actors (such as employers or private universities) and the beneficiaries are always a specific disadvantaged group. Affirmative or positive measures should not be confused with permanent rights pertaining to certain categories of person or communities, such as the right to land or to use their own language. These measures basically aim to compensate the disparities in the enjoyment of permanent rights (in particular, education, health and housing). The Durban Programme of Action recognized that combating racism, racial discrimination, xenophobia and related intolerance is a primary responsibility of states and therefore urged states to adopt affirmative action to ensure non-discrimination, in particular regarding access to social services, employment, housing, education, health care and so on.[10] It requested states specifically to consider positively concentrating additional investments in health care systems, education, public health, electricity, drinking water and environmental control, as well as other affirmative or positive action initiatives, in communities of primarily African descent.[11]

In addition to the obligation of non-discrimination, states have the obligation (of immediate effect) to take steps (including designing specific plans and strategies) targeted deliberately towards the full realization of ESC rights. According to the Committee on the Elimination of Racial Discrimination (CERD Committee), the state parties have, among others, the following obligations: (1) take steps to remove all obstacles that prevent the enjoyment of ESC rights by people of African descent especially in the areas of education, housing, employment and health; (2) take measures to eradicate poverty among communities of people of African descent within particular state parties' territories and combat social exclusion or marginalization; (3) ensure equal access to health care and social security services and involve Afro-descendants in designing and implementing health-based programmes and projects; (4) design and implement programmes aimed at creating opportunities for the general empowerment of people of African descent; (5) adopt or make more effective legislation prohibiting discrimination in employment and to promote their employment in the public administration; (6) develop and implement policies aimed at avoiding the segregation of people of African descent in housing and in the education system; and (7) take measures to reduce the school dropout rate for children of African descent and to guarantee equitable access to higher education for people of African descent.[12]

b. Inter-American System

The Inter-American human rights system has four major instruments that are relevant for the analysis of the social rights of Afro-descendants: (1) the 1948 American Declaration of the Rights and Duties of Man, which universally recognizes the rights to health (Article XI), education (Article XII), work and fair remuneration (Article XIV), leisure time (Article XV), social security (Article XVI) and association (Article XXII); (2) Article 26 of the 1969 American Convention on Human Rights (ACHR), stating the principle of progressive develop-

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[10] Durban Programme of Action (2001), paras 99–102.
[11] *Ibid.*, para 5.
[12] CERD, 'General Recommendation No 34' (3 October 2011) CERD/C/GC/34, paras 50–66.

ment and non-regression clause with regard to social rights; (3) the 1988 Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), establishing the state obligation of non-discrimination (Article 3) and recognizing the rights to a healthy environment, health, food, social security, work and education, and the right to organize/join trade unions (Article 19(6) Protocol of San Salvador); and (4) Articles 5–7 of the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance (A-68) and of the Inter-American Convention against all Forms of Discrimination and Intolerance (A-69), recognizing affirmative actions, antidiscrimination laws (particularly in the areas of employment, education, housing, health and social protection) and other equality policies as binding state obligations, following the 2001 WCAR comprehensive approach. Moreover, according to Article 4 A-68 and A-69, the states undertake to prevent, eliminate, prohibit and punish all acts and manifestations of discrimination and intolerance, including:

> x. Preparing and introducing teaching materials, methods, or tools that portray stereotypes or preconceptions'; 'xi. Denying access to public or private education, to fellowships, or to educational loan programs'; or 'xii. Denying access to any social, economic, and cultural rights

based on any of the discriminatory criteria set forth in Article 1(1) A-68 and A-69.

III. CASE EXAMPLES IN THE INTER-AMERICAN SYSTEM

Overall, the Inter-American system has followed two major trends with regard to state obligations on social rights that are crucial for people of African descent. On the one hand, it has established several standards regarding non-discrimination related to the enjoyment of human rights and the duty to take steps against racial discrimination as obligations of immediate effect (that is, not subject to resource availability). This includes the consideration of 'race' as a suspect category of discrimination and the reversal of the burden of proof in cases when the distinction is based on racial categories; the concepts of indirect and structural discrimination; the states' obligations to adopt affirmative actions to eradicate discrimination in the workplace and in remuneration, and in the access to education, medical care and basic social services (paying special attention to the needs of Afro-descendants); the protection of Afro-descendants against discrimination on the grounds of nationality and migratory status; and obligations to take steps with regard to the impact of extractive and development activities on the full enjoyment of the rights of Afro-descendant communities.[13]

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[13] See *William Andrews v United States*, IACHR, Case 11.139, Report No 57/96, 6 December 1996; IACHR, 'The Situation of People of African Descent in the Americas' (5 December 2011) OAS/Ser.L/V/II. Doc 62; *Benito Tide Mendez et al v Dominican Republic*, IACHR, Case 12.271, Report No 64/12, 29 March 2012, paras 248–49, 268–70; IACHR, 'Fourth Report on the Human Rights Situation in Colombia' (31 December 2013) OAS/Ser.L/V/II. Doc 49/13, paras 615–68; IACHR, 'Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities' (23 December 2015) OAS/Ser.L/V/II.Doc 47/15; see also Fourth Summit of the Americas, Declaration of Mar del Plata, 5 November 2005, paras 30–32; Regional Conference of the Americas (Declaration of Santiago), 5–7 December 2000, paras 84–92, 103–19.

The Inter-American Court has developed most of these standards in relation with the situation of Haitians and persons of Haitian descent in the Dominican Republic.[14] In *Girls Yean and Bosico* (2005), the Inter-American Commission alleged that the state, through its Registry Office authorities, had refused to issue birth certificates for the children Dilcia Yean and Violeta Bosico, two girls of Haitian origin, even though they were born within the state's territory and the Constitution of the Dominican Republic establishes the principle of *ius soli* to determine those who have a right to Dominican citizenship. For the Commission, this refusal curtailed their rights to education and health, because, among other matters, without a birth certificate it is not possible to attend school in the Dominican Republic, and restricted their access to healthcare and social assistance services. And in *Expelled Dominicans and Haitians* (2014), a case based on a 2013 ruling of the Dominican Constitutional Tribunal that retroactively stripped thousands of Dominicans of Haitian descent of their nationality, which legitimized the ongoing arbitrary detentions and state-enforced expulsions of thousands of Haitians and Dominicans of Haitian descent, the Inter-American Commission alleged, among other issues, that the expulsion of schoolage children adversely affected the normal and full development of their persona and their life projects as it disrupted their education (many of them were unable to continue their studies in Haiti) and their access to basic health. In both cases, the Court ruled that the Dominican state violated the rights to legal personality (Article 3 ACHR), nationality (Article 20 ACHR) and equal protection (Article 24 ACHR) in relation to the prohibition of non-discrimination (Article 1(1) ACHR). Thus, the Court recognized the structural discrimination against Haitian descendants, but through applying an equality argument, and not on the grounds of the state violation of the right to education or any other social right. Moreover, due to the fact that some of the victims were children at the time of the violations, the Court applied principles of the CRC, in particular the perspective of the 'best interests of the child', which must be defined according to the particular circumstances of this specific case. Consequently, it recognized that children of Haitians in the Dominican Republic enjoy the special measures of protection established in Article 19 ACHR.

On the other hand, the Inter-American Court has followed an evolutive jurisprudential interpretation regarding other obligations linked with social rights, as explained in Part 2 (subsection 'the Americas') in this *Research Handbook*.[15] Initially, the Court denied having jurisdiction to analyze such obligations in contentious cases for its characterization as duties of progressive realization. In subsequent decisions, it indirectly granted protection to social rights by enforcing civil and political rights (such as invoking the right to life in Article 4 ACHR, and personal integrity in Article 5(1) ACHR to protect the right to health). As will be discussed below, in these cases the Court has used reparations as instruments to redress the harm caused but also to improve the situation of the victims' social rights, although without explicitly declaring these rights violated. Just recently, it has granted direct and autonomous protection

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[14] See *Girls Yean and Bosico v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 8 September 2005; *González Medina and family v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 27 February 2012; *Nadege Dorzema et al v Dominican Republic* (Merits, Reparations and Costs), IACtHR, Judgment of 24 October 2012; *Expelled Dominicans and Haitians v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 28 August 2014.

[15] See the contributions in this *Research Handbook* by Flávia Piovesan *et al* (Chapter 9) and Eduardo Ferrer Mac-Gregor (Chapter 10).

for social rights by invoking Article 13 Protocol of San Salvador (*Gonzales Llui*)[16] and Article 26 ACHR (*Lagos del Campo*;[17] *Poblete Vilches*;[18] *Cuscul Pivaral et al*[19]). However, the Court has not yet taken a similar decision with regard to social rights of Afro-descendant individuals or communities.

The Inter-American Court has four main cases on rural Afro-descendant communities, three of which are related to maroon communities in Suriname: *Aloeboetoe et al* (1991 and 1993),[20] *Moiwana Community* (2005),[21] and *Saramaka* (2007).[22] In *Aloeboetoe* (on the detention and killing of several maroons by the Suriname army in 1987), the Court adopted an individual approach to human rights, without taking into account the violation of collective social rights of the Saramaka people. As reparatory measures, the Court ordered the state of Suriname to reopen the school and to make the medical dispensary already in place in the locality operational. In contrast, during the 2000s, the Court indirectly protected social rights of maroon groups by recognizing the violation of their collective civil rights. In *Moiwana* (related to the forced displacement of the Moiwana community and the murder of dozens of their members by the Suriname army), the Court recognized the collective dimension of human rights of Afro-descendant communities, including the liberty of movement (Article 22 ACHR) and the right to property (Article 21 ACHR). The Court extended its recognition of communal rights to property in favour of indigenous peoples to the Moiwana community as a tribal people. The forcible eviction of the community from its traditional territory produced a disastrous harm to basic social rights, individually and collectively. Most members of the Moiwana community became internally displaced persons in other regions of Suriname or refugees in the neighbouring French Guiana, where they were deprived of their customary means and since then, most of them have lived in poverty. Consequently, the Court ruled that Suriname shall establish a developmental fund, to consist of US$1,200,000, which must be directed to health, housing and educational programs for the Moiwana community members. Similarly, in *Saramaka* (on exploitation of natural resources in maroon territories), the Court ruled that Suriname violated the right to juridical personality (Article 3 ACHR, due to the lack of recognition of the Saramaka people as tribal community with collective juridical capacity); and the right to

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[16] *Gonzales Lluy et al v Ecuador* (Preliminary Objections, Reparations and Costs), IACtHR, Judgment of 1 September 2015.

[17] *Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 31 August 2017. In detail, see Óscar Parra Vera, 'La justiciabilidad de los derechos económicos, sociales y culturales en el Sistema Interamericano a la luz del artículo 26 de la Convención Americana. El sentido y la promesa del caso Lagos del Campo' in Eduardo Ferrer Mac-Gregor *et al* (eds), *Inclusión, Ius Commune y justiciabilidad de los DESCA en la jurisprudencia interamericana. El caso Lagos del Campo y los nuevos desafíos* (2018) 181.

[18] *Poblete Vilches et al v Chile* (Merits, Reparations and Costs), IACtHR, Judgment of 8 March 2018.

[19] *Cuscul Pivaral et al v Guatemala* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgment of 23 August 2018.

[20] *Aloeboetoe et al v Suriname* (Merits), IACtHR, Judgment of 4 December 1991; *Aloeboetoe et al v Suriname* (Reparations and Costs), IACtHR, Judgment of 10 September 1993.

[21] *Moiwana Community v Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 15 June 2005; *Moiwana Community v Suriname* (Interpretation of the Judgment of Merits, Reparations and Costs), IACtHR, Judgment of 8 February 2006.

[22] *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 28 November 2007.

property (Article 21 ACHR, interpreted as communal property); therefore, the Court ordered the state to allocate US$600,000 for a community development fund to finance educational, housing, agricultural and health projects, as well as provide electricity and drinking water, if necessary, for the benefit of the Saramaka people.

The fourth case on collective rights of rural Afro-descendant communities was against Colombia.[23] In February 1997, around 3,500 inhabitants of the Cacarica river valley and the Bajo Atrato (Chocó) were displaced as a result of acts of collaboration between members of the armed forces (who led a major military operation called 'Genesis') and paramilitary units. After the displacement, banana and palm oil businessmen set up operations in the usurped lands. The process at the Inter-American system started with an individual focus on the victims, as the original name of the case illustrates (*Marino López et al v Colombia*); but during the process the Court opted for a collective focus (as displaced communities and as people of African descent), which explains the title change (*Case of the Afro-descendant Communities displaced from the Cacarica River Basin v Colombia*). As displaced groups, they suffered several social rights violations, including loss of home, unemployment, deterioration in living conditions, increase in diseases and mortality, food insecurity, social dislocation and impoverishment, and an accelerated deterioration of living conditions (para 317). The measures of basic assistance provided by the state during the period of displacement were insufficient; the overcrowding, the food, the supply and management of water, as well as the failure to adopt measures with regard to health care, reveal non-compliance with the state's obligation to ensure humanitarian assistance and a safe return, within the framework of the right to freedom of movement (Article 22 ACHR), and the protection of the right to personal integrity.[24] In addition, the Court recognized the violation of the right to personal integrity of the displaced children, because the state failed to take sufficient positive measures in their favour within a context of greater vulnerability, in particular while they were far from their ancestral territories, a time during which they were affected by the lack of access to education and health care, by overcrowding and by a lack of adequate nutrition.[25]

IV. CONCLUSIONS AND OUTLOOK

An overview of the legal framework on the social rights of Afro-descendants in the universal human rights system leads to the following conclusions: (1) all social rights enshrined in UN declarations and treaties are applicable to Afro-descendants as individuals without discrimination; (2) some of these rights are only recognized to individuals if they relate to the application of a group practice. For example, as minorities, Afro-descendants enjoy the rights to enjoy their own culture, to profess and practise their own religion, to use their own language and to carry on their own educational activities; and (3) as subjects covered by ILO 169, rural Afro-descendant communities also possess group rights (that is, rights that can only be exercised by the group as a whole), including the right to autonomy over their own

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[23] *Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 20 November 2013.

[24] *Ibid.*, paras 323–24.

[25] *Ibid.*, para 330.

economic, social and cultural development; the right not to be subjected to bonded labour and other forms of debt servitude; and the right to establish their own educational institutions and community-based health services, among others. Moreover, several human rights instruments allow temporary affirmative measures in education, employment and housing (among other social rights) to compensate for historic disparities and structural discrimination, and to achieve more egalitarian societies. Currently, states are required to do much more than merely abstain from adopting discriminatory measures; multilateral commitments establish positive duties to eliminate or reduce disparities associated with racism and racial discrimination in the enjoyment of social rights.

In addition, the Inter-American system has established several standards regarding non-discrimination in the enjoyment of social rights and the duty to take steps against racial discrimination as obligations of immediate effect. With regard to other obligations linked with social rights, the Inter-American Court has basically followed an indirect protection of social rights by enforcing civil and political rights and has used reparations as instruments to redress the harm caused and to improve the situation of the victims' social rights, although without explicitly declaring these rights violated. In recent decisions, the Inter-American Court has granted a direct and autonomous protection for social rights, but not yet in specific cases involving Afro-descendant individuals or communities.

Despite significant progress in the consolidation of an international and Inter-American human rights framework for the protection of social rights of people of African descent, they continue to face structural racial discrimination in their enjoyment of basic social rights. Enslavement and postcolonial injustices have had a longlasting impact on the wellbeing of African descendants in the Americas. Since 1948, discrimination based on ethnic, racial, skin colour, lineage or national origin has been explicitly proscribed in IHRL. However, in American societies, the disparities associated with these ascriptions are still part of the everyday life. In several countries, people of African descent are overrepresented among the poorest population; their life expectancy and the infant mortality rates of their children are usually worse than those of the rest of the population; their schooling and retention rates in the education system are lower; the quality of education, health infrastructure, housing and public services in areas with a predominantly Afro-descendant population is lower than the national average; and they generally have greater difficulties in accessing the labour market, often being relegated to precarious jobs and below average incomes. Current international law standards have not prevented the global strengthening of racism, racial discrimination, hate speech towards migrants and the rise of nationalist ideologies based on racial prejudices. Such trends reinforce the enduring violations of social rights of African descendants in different countries: housing segregation and other racial inequalities in the United States; dismantling of affirmative action policies and suspension of the titling procedures of communal lands for the *quilombos* in Brazil; or xenophobic exclusion against Afro-Colombians and Haitians in Chile. The challenge is not just for certain countries; combating racial discrimination should be one of the priorities for the international community. One crucial strategy that was outlined in the Durban Programme of Action is inclusive education. States must ensure that people of African descent have access to quality education, especially in contexts where racial exclusion, intolerance and racism are endemic. The education system must serve as a convivial space for promoting the principles of human rights, tolerance and respect for diversity. This includes trained teachers and quality curriculums with a view to combating prejudices that lead to racial discrimination (Article 7 CERD).

Looking to the future, international law must also address serious problems that up to now have not been adequately covered by the existing human rights instruments, such as the rising frequency of natural disasters and the disproportionate effects of anthropogenic climate change on poorer communities because of their greater vulnerability. With regard to international disaster prevention and reaction, due consideration should be given to social rights concerns (including specific vulnerabilities of historically marginalized groups).[26] In the Americas, many Afro-descendant communities are likely to be particularly vulnerable to natural disasters, due to the scarce resources they have at their disposal to limit their exposure, the lack of health infrastructure (first aid, rescue systems, ambulances, hospitals and so on) in the areas where they live, their lack of preparedness for hazards, their dependency on natural resources, their precarious housing situation and their place of residence. Most maroon communities precisely chose very remote, inhospitable areas in order to be inaccessible (such as jungles and swamps in Colombia, Ecuador, the Guianas, Nicaragua and the southern United States). Currently, many of the settlements of their descendants are highly exposed to flooding and landslides, and belong to the most affected by deforestation and pollution caused by changes in land use brought about by largescale farmers, logging and mining companies. Natural disasters have both an immediate and a longterm impact on housing conditions and other social rights: health, continuity of education, access to drinking water and work. Eventually, disasters could force people to migrate in large numbers, which puts enormous stress on the social services of receiving countries, leading to social tensions and xenophobia. This is the case of the 2010 Haiti earthquake, which has caused a massive migration to a large variety of countries, including the Dominican Republic, Brazil, Chile, Ecuador and the United States.

Despite the extent to which disasters affect the social rights of vulnerable groups, international law still lacks a thorough integration of these rights into the local (governmental) and international preventive strategies and responsive plans (disaster management). For instance, there should be clarification as to the minimum content of social rights that must be protected to affected individuals, and how to protect already marginalized groups from suffering discrimination in the provision of aid, as the US government's grossly indifferent response to the plight of low-income African-Americans during the 2005 Hurricane Katrina in New Orleans illustrates.[27] Thus, the challenges and specific risks faced by people of African descent in regard to the rising global trends of nationalism, racism and racial discrimination, and the disproportionate effects of climate change on poor communities (with disasters growing in number and severity) are key issues that the states and the international community must prioritize, not only for the wellbeing of people of African descent, but also for the interest of humanity as a whole.

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[26] Flavia Zorzi Giustiniani *et al* (eds), *Routledge Handbook of Human Rights and Disasters* (2018).

[27] In detail, see Bob Bolin, 'Race, Class, Ethnicity and Disaster Vulnerability' in Havidan Rodriguez *et al* (eds), *Handbook of Disaster Research* (2006) 113.

13. Social rights as persons with disabilities' rights

Francesco Seatzu

I. INTRODUCTION

This chapter deals with the social rights of persons with disabilities, from the perspective of both international and domestic law. It also discusses when and how the competent national judicial authorities may be called upon to implement such rights. The focus is placed on the competent national judicial authorities of developing countries since the majority of the world's disabled people – about 80 per cent – currently live in developing countries.[1]

These issues are addressed in four stages. First, the notions employed throughout the chapter are exposed. In so doing, special attention is paid to the conceptualization of persons with disabilities as social rights holders,[2] in view of the subsequent consideration of the implications of different systematizations of disabilityhood and persons with disabilities for societal, political and normative perceptions. This is also with due regard to the treatment of persons with disabilities under the UN Convention on the Rights of Persons with Disabilities (CRPD)[3] and its Optional Protocol.[4] Second, the specific situation of persons with disabilities with respect to social rights violations is discussed, with a focus on whether persons with disabilities are or should be considered a 'special case' in comparison to other vulnerable groups.[5] Third, the

[1] See the recent figures from University College London, more particularly Sophie Mitra, Aleksandra Posarac and Brandon C Vick, 'Disability and Poverty in Developing Countries: A Snapshot from the World Health Survey', available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1566&context=gladnetcollect> (15 October 2019).

[2] See below section III.

[3] Convention on the Rights of Persons with Disabilities (13 December 2006) 2515 UNTS 3. See for many Michael A Stein, 'The United Nations Convention on the Rights of Persons with Disabilities: Process, Substance and Prospects' in Félipe Gomez-Isa and Koen De Feyter (eds), *International Human Rights Law in a Global Context* (2009) 495; Tina Minkowitz, 'The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Non-consensual Psychiatric Interventions' (2006–07) 34 Syracuse Journal of International Law and Commerce 405; Mamoud Zani, 'La Convention de l'O.N.U. relative aux droits des persons handicapées' (2008) 3 Revue de droit international et de droit comparé 551; Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disabilities Rights?' (2008) 4 HRQ 494; Frédéric Mégret, 'The Disabilities Convention: Towards a Holistic Concept of Rights' (2008) 3 The International Journal of Human Rights 261; Paul Harpur, 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27 Disability & Society 1; Mona Paré, 'La convention relative aux droits des personnes handicapées: quel impact sur le droit international' (2009) 113 Revue générale de droit international public 497; Jean Dhommeaux, 'La Convention relative aux droits des personnes handicapées et son Protocole du 13 decembre 2006' (2013) 24 Revue trimestrielle des droits de l'homme 529; Francesco Seatzu, 'The Convention on the Rights of Persons with Disabilities and International Human Rights Law' (2018) 7 International Human Rights Law Review 1.

[4] Optional Protocol to the Convention on the Rights of Persons with Disabilities (13 December 2006) 2518 UNTS 283.

[5] See below section V.

scope and limits of the protection of social rights under the CRPD are considered, with the view of justifying references to international human rights law in the chapter's argumentation. Last, the role of domestic courts in the implementation of the social rights of persons with disabilities is dealt with by elucidating situations in which domestic courts should intervene and what action they could adopt.[6]

II. THE DEFINITIONS OF 'DISABILITY' AND OF 'PERSONS WITH DISABILITIES'

There is no universally agreed definition of disability and of its subjects: that is, of 'persons with disabilities'. Notwithstanding the efforts of the World Health Organization (WHO)[7] to introduce an international legal definition of disability, the meaning of 'disability' and, consequently, that of 'persons with disability' still vary significantly. Indeed, while there are similarities between the definitions of disability in some areas of social policy, legal disability definitions in each country differ with respect to non-discrimination and employment measures, income maintenance or social assistance with daily life activities.[8] Unsurprisingly, this is nothing more than an obvious corollary of the difficulties experienced by the WHO in formulating a universally applicable legal definition of disability.

The CRPD does not contain an explicit definition of disability either. Still, the Convention implicitly incorporates one through its reference to the social understanding of disability, this being the belief that disability is a socially constructed entity rather than a medicalized pathology.[9] Similar may be observed at the regional level: neither the European Court of Human Rights (ECtHR) nor the Inter-American Court of Human Rights (IACtHR) provide a workable definition of 'disability'. This notwithstanding, both courts have started to develop their own case law on disability issues. For example, the ECtHR has given a number of important judgments that have had an impact on disability laws, policies and procedures, notably in France, Poland, the United Kingdom, the Netherlands and Italy.[10] Moreover, notwithstanding the Inter-American system's failure to clarify the operative meaning of the term 'disability',[11] also

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[6] See below section VI.

[7] WHO, *The International Classification of Functioning, Disability and Health* (2011); see also Gerold Stucki *et al*, 'Application of the International Classification of Functioning, Disability and Health (ICF) in Clinical Practice' (2002) 24 Disability & Rehabilitation 281.

[8] See Helen Bolderson and Deborah Mabbett, 'Non-Discriminating Social Policy? Policy Scenarios for Meeting Needs without Categorisation' in Jochen Clasen (ed.), *What Future for Social Policy?* (2001) 13.

[9] On the social model understanding of disability see, e.g., Mike Oliver, 'Implementing the Social Model of Disability: Theory and Research' in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research Leeds* (2004) 18; Rannveig Traustadóttir, 'Disability Studies, the Social Model and Legal Developments' in Oddný Arnadóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities* (2009) 3. For some recent criticisms of this model, see Janine Owens, 'Exploring the Critiques of the Social Model of Disability: The Transformative Possibility of Arendt's Notion of Power' (2015) 37 Sociology of Health & Illness 385.

[10] See, e.g., Francesco Seatzu, 'Does the European Convention on Human Rights Protect the Disabled?' (2014) 8 Annuaire International des Droits de l'Homme 397.

[11] See Aanlía Banfi Vicque, Sofía Galván Puente, 'Los Derechos de las Personas con Discapacidad y la Comisión Interamericana de Derechos Humanos' (2014) 1 Revista Latinoamericana de Derecho Internacional <www.revistaladi.com.ar/numero1-banfi-galvan/> (16 October 2019).

here rich case law on the protection of the fundamental rights of persons with disabilities can be seen.[12] Overall, all institutions have adopted an expansive approach to 'disability'.

Likewise, the European Committee of Social Rights (ECSR) remains silent on reaching an explicit definition. However, it too has made significant findings on the issue, such as condemning the segregation of children with intellectual disabilities in educational institutions in France and Bulgaria.[13] Moreover, in *MDAC v Belgium*, the ECSR recently found Belgium in violation of the European Social Charter (ESC) for failing to provide education and training to children with intellectual and mental disabilities who are denied access to mainstream education and to the forms of support necessary to ensure such inclusion.[14] Even the fact that the ESCR is tasked to monitor an international legal instrument that, at Article 15, explicitly refers to the right of persons with disabilities to independence, social integration and participation in the life of the community has not yet led to a definition of the term 'disability'.[15] Nevertheless, given that supervisory body's extensive reliance on the case law of the ECtHR in areas of overlap between the ECHR and ESC, should a question of definition of 'disability' or of 'persons with disabilities' arise before it, it would most likely enact a corresponding approach to that expansive and inclusive one which has been implicitly adopted by the ECtHR in its disability line of cases.[16]

The EU Charter of Fundamental Rights does not define 'disability' either, but – as the Explanations relating to the Charter clarify – the disability-specific provision of that instrument, Article 26, is based on the ESC.[17] Therefore, the Charter may be assumed to be based on the ECSR's implicit understanding of disability as captured in its relevant practice.[18]

In the light of the preponderant approach of international and regional human rights law, as well as the wide diversity of approaches at national level, this chapter aligns itself to the broad notion of 'disability' that is implicitly encompassed by regional human rights institutions in Europe and the Americas, as well as in the CRPD, through its reference to the social

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[12] See Diana Guarnizo-Peralta, 'Disability Rights in the Inter-American System of Human Rights' (2018) 12 Netherlands Quarterly of Human Rights 43.

[13] On the subject, see Gauthier de Beco, '*MDAC v Belgium* before the European Committee of Social Rights: The Right to Inclusive Education Pushed by the UN Convention on the Rights of Persons With Disabilities' (EJIL: *Talk!*, 1 June 2018) <www.ejiltalk.org/mdac-v-belgium-before-the-european-committee-of-social-rights-the-right-to-inclusive-education-pushed-by-the-un-convention-on-the-rights-of-persons-with-disabilities/> (16 October 2019), who also reported the remarkable use of terminology by the ECSR which echoes that of the CRPD Committee.

[14] See Giuseppe Palmisano, 'Protecting the Rights of Persons with Autism: The Role of the European Committee of Social Rights' in Pia Acconci *et al* (eds), *International Law and the Protection of Humanity: Essays in Honor of Flavia Lattanzi* (2017) 90.

[15] Article 15 of the ESC reads as follows: 'With a view to ensuring the effective exercise of the right of the physically or mentally disabled to vocational training, rehabilitation and resettlement, the Contracting Parties undertake: 1 to take adequate measures for the provision of training facilities, including, where necessary, specialised institutions, public or private; 2 to take adequate measures for the placing of disabled persons in employment, such as specialised placing services, facilities for sheltered employment and measures to encourage employers to admit disabled persons to employment.'

[16] See Emily Hazlett, 'Disability Rights in a Post-Convention Era: Protecting Legal Capacity at the European Court and Beyond' (2014) 2 International Human Rights Internship Working Paper 2, 11.

[17] For further references on this issue, see Nikolett Hadi, 'The Rights of Disabled Persons in the EU and the Implications for the Member States' (2012) 28 Pravni Vjesnik God 191.

[18] For further references on this issue, see Dorothy Estrada-Tanck, 'Human Rights of Persons with Disabilities in International and EU Law' (2016) 1 AEL Working Papers.

model understanding of disability.[19] This is, of course, not to ignore the fact that in some domestic legal systems, the constitutional framework leads to a much less inclusive definition of 'disability'.[20] This occurs, in particular, in those legal systems that adopt, either explicitly or implicitly, the traditional medical model understanding of disability whose central tenets are that a person's 'impairment' can be diagnosed, cured or at least rehabilitated by medicine and/or medical technology and that such interventions will be provided by all-knowing professionals.[21]

III. THE EMERGENCE OF PERSONS WITH DISABILITIES AS SOCIAL RIGHTS HOLDERS

The acknowledgment of persons with disabilities as vulnerable subjects has obvious repercussions for the enjoyment of their social rights.[22] Throughout the world, especially in developing countries, disabled persons cannot exercise significant legal or strategic economic influence and are generally excluded from the large majority of societal organizations, whether labour or political in nature.[23]

Traditionally, when societies have regarded persons with disabilities it has usually been in order to set them aside as legally incompetent individuals whose enjoyment of fundamental rights was conditioned by the views of the state or legal guardians, or both.[24] Persons with disabilities were not deemed to be active actors in enhancing social processes. As a result, they did not achieve consideration as a distinct group, which was justified by the perception that they were mainly in the responsibility of their legal guardians. Classifying persons with disability in a dependent status was equal to placing them outside the socially active community. Likewise, in terms of social rights and connected resources, guardians/relatives and family caregivers were considered as the primary accountable entities.

Still, states have a crucial role to play as regards the social rights of persons with disabilities. Additional to the default task of states to supply social freedoms and rights where family caregivers have difficulties doing so or are unable to do so, there are specific social rights, such as the right to ensure maternity leave for working mothers, that only states can deliver. It is

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[19] See above (n 9).

[20] See I Leslie Rubin *et al* (eds), *Health Care for People with Intellectual and Developmental Disabilities Across the Lifespan* (2016) 413, 418ff.

[21] See Richard Scotch, 'Models of Disability and the Americans with Disabilities Act' (2000) 21 Berkeley Journal of Employment & Labor Law 21.

[22] See Corey Leshandon Moore, 'The Minority Group Model and Persons with Disabilities: Toward a More Progressive Disability Public Policy in the United States of America' (1998) 4 The Australian Journal of Rehabilitation Counselling 36.

[23] See J Neille and C Penn, 'Beyond Physical Access: A Qualitative Analysis into the Barriers to Policy Implementation and Service Provision Experienced by Persons with Disabilities Living in a Rural Context' (2015) 3 Rural and Remote Health <https://pdfs.semanticscholar.org/8b82/a3b11f3c99c3f7ee12338454f0e0f1131ae6.pdf> (16 October 2019); GC Pal, 'Disability, Intersectionality and Deprivation: An Excluded Agenda' (2011) 23 Psychology and Developing Societies 159.

[24] See, e.g., Hélène Ouellette *et al*, 'Public Attitudes towards Individuals with Intellectual Disabilities as Measured by the Concept of Social Distance' (2010) 23 Journal of Applied Research in Intellectual Disabilities 132.

therefore essential that persons with disabilities' entitlements to resources must be considered independently from the family caregiver-person. This is gradually being acknowledged.

There has been evident progress in terms of attitudes and approaches to persons with disabilities. Disabled persons, in particular intellectually disabled persons, are generally no longer seen as an extension of their relatives and legal guardians, but as individuals with their own fundamental freedoms and rights. Nevertheless, persons with disabilities are still severely disadvantaged in society in comparison with non-disabled persons.[25] Writers have termed this 'disablism': discriminatory, oppressive or abusive behaviour of non-disabled persons towards persons with disabilities. It has the same negative impact on the lives of persons with disabilities as the disability *per se*.[26] Thus, notwithstanding progress made, a number of issues remain to be addressed.

Social rights play a crucial role in this. Indeed, the interaction between social rights and disability is also recognized in the case law of the ECtHR. In *Guberina v Croatia*, the ECtHR observed that:

> the alleged discriminatory treatment of the applicant on account of the disability of his child, with whom he has close personal links and for whom he provides care, is a form of disability-based discrimination covered by Article 14 of the Convention.[27]

More clearly, in the case of *Çam v Turkey* the ECtHR held that:

> by refusing to enrol the applicant as a student at the Turkish National Music Academy without considering the possibility of accommodating her disability, the national authorities had prevented her, without any objective and reasonable justification, from benefiting from a musical education, in breach of the Convention.[28]

The ECtHR therefore perceives disability dependence as something that shall not in any case be used to prevent the effective exercise of social rights. A similar line of reasoning is found in *Enver Şahin v Turkey*,[29] where the ECtHR maintained that neither economic nor time constraints can justify the refusal or delay of the state in introducing the necessary changes to the environment that would permit any persons (including persons with disabilities) to exercise their right to education.[30]

Overall, persons with disabilities are increasingly acknowledged as rights holders, as exemplified *inter alia* in the case law of the ECtHR. Also, the particularly crucial role of social rights for persons with disabilities is increasingly recognized. This will be further detailed in what follows.

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[25] See Raymond Lang, 'The United Nations Convention on the Right and Dignities for Persons with Disability: A Panacea for Ending Disability Discrimination?' (2009) 3 Alter 265.

[26] For further references on this point see, e.g., Michael Schillmeier, *Rethinking Disability: Bodies, Senses, and Things* (2010) 5ff; Shelley Tremain, 'On the Subject of Impairment' in Mairian Corker and Tom Shakespeare (eds), *Disability/Postmodernity: Embodying Disability Theory, Continuum* (2002) 32.

[27] *Guberina v Croatia*, ECtHR, App No 23682/13, Judgment of 3 March 2016.

[28] *Çam v Turkey*, ECtHR, App No 51500/08, Judgment of 23 February 2016.

[29] *Sahin v Turkey*, ECtHR, App No 44774/98, Judgment of 10 November 2005.

[30] *Ibid.*, paras 152–55.

IV. THE SPECIAL CASE OF PERSONS WITH DISABILITIES AND SOCIAL RIGHTS

Social rights are of special relevance for persons with disabilities. This has been acknowledged since the beginning: while civil and political rights were for a long time marginal if not absent in the discussion of disability rights, social rights have always been considered of critical importance by disability activists and disability studies scholars, even during the early times of the various disability movements.[31]

The reason behind this focus on social rights is the traditional conceptualization of disability rights in terms of social and welfare rights. There is no question that social rights, such as those relating to adequate social protection, work, education and livelihood, were and still are of strategic importance for articulating demands by and for disabled persons. The expansive language of Article 24 CRPD indirectly confirms this in relation to the right to education.[32]

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[31] See Michael Stein and Janet E Lord, 'Accessing Socio-Economic Rights: The Rights of Persons with Disabilities' in Malcolm Langford (ed.), *Equality and Socio-Economic Rights: International Law in Context* (forthcoming).

[32] Article 24 CRPD reads as follows: '1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to: a. The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; b. The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; c. Enabling persons with disabilities to participate effectively in a free society. 2. In realizing this right, States Parties shall ensure that: a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability; b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live; c) Reasonable accommodation of the individual's requirements is provided; d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education; e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion. 3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including: a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring; b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community; c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development. 4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities. 5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.' For a commentary, see Dimitris Anastasiou, Michael Gregory and James Kauffman, 'Article 24' in Ilias Bantekas, Michael A Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights*

Although the type of social rights violations experienced by persons with disabilities and other socio-economically disadvantaged groups can be similar, persons with disabilities face different challenges than other vulnerable groups in terms of social rights. It is not that persons with disabilities are more fragile than other social groups but rather that they are differently fragile.[33] Indeed, persons with disabilities share certain problems faced by children, including the traditional subjection to charity and paternalistic measures. Moreover, like children, women and older persons with disabilities are not uniformly discriminated against. On paper at least, they may obtain more sympathy than other socially vulnerable groups such as prisoners or irregular migrants, who are often rejected by other more privileged segments of the society. That is why persons with disability are arguably more likely to act as lobby groups ready to ask for measures aimed at vindicating their rights than are prisoners or irregular migrants. This is also seen in the fact that discrimination on the grounds of disability is considered always unacceptable. This is indirectly confirmed by the adoption and entry into force of the CRPD,[34] and by the ECtHR's case law relating to persons with disabilities.[35] Indeed, in *Guberina*,[36] the ECtHR clarified for the first time that Article 14 ECHR covered discrimination by association, and that consequently the applicant could claim victim status based on the disability of his child 'with whom he had close personal links and for whom he provided care'.[37] Therefore, it is not hard to conclude that the specific relation between disability and social rights is at present to be considered as well-established and acknowledged.

There are other ways in which persons with disabilities are in a different position from non-disabled persons with regard to the enjoyment of social rights. First, persons with disabilities, and especially persons with intellectual disabilities and psychosocial disabilities, are often affected in a different way from non-disabled persons by violations of a similar nature. The psychological and physical effects that persons with intellectual disabilities experience as a result of social rights violations will usually be greater than those suffered by non-intellectually disabled persons due to their different level of mental development. This is certainly true with regard to the direct impact that violations of the right to an adequate standard of living can have on an intellectually disabled person's psychological state.

This is evidenced, for example, by taking the right to work and employment, where persons with disabilities are more acutely affected than non-disabled persons by violations.[38] While

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of Persons with Disabilities (2018) 656, 670, stressing that: 'paragraph 1 *of Article 28* is appropriately (and even inspiringly) expansive in its vision of educational attainment for PWD'.

[33] Accordingly, in relation to the right to education of persons with disabilities, see Johan Lievens and Marie Spinoy, '*Dupin v. France*: The ECtHR Going Old School in its Appraisal of Inclusive Education?' (*Strasbourg Observers*, 11 February 2019) <https://strasbourgobservers.com/2019/02/11/dupin-v-france-the-ecthr-going-old-school-in-its-appraisal-of-inclusive-education/#more-4304> (16 October 2019), stressing that 'education for children with a disability concerns a complex service to organise in a world of finite resources'.

[34] See Lang (n 25), 265.

[35] See, e.g., Seatzu (n 10), 397.

[36] *Guberina v Croatia* (n 27).

[37] For a commentary, see Constantin Cojocariu, '*Guberina* and *Gherghina*: The Two Sides of the Court's Disability Jurisprudence' (*Strasbourg Observers*, 17 May 2016) <https://strasbourgobservers.com/2016/05/17/guberina-and-gherghina-the-two-sides-of-the-courts-disability-jurisprudence/> (16 October 2019).

[38] Marco Fasciglione, 'Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism' in Valentina Della Fina and Rachele Cera (eds), *Protecting the Rights of People with Autism in the Fields of Education and Employment* (2015) 145.

doubtless the violation of non-disabled persons' right to work may impact negatively on their lives in terms of, for instance, their capability to gain a living, the violation of a disabled person's right to work and employment will most probably also have more serious consequences. In fact, employment opportunities for persons with disabilities are generally lower than those of non-disabled persons. This shows in the fact that statistically the labour force inactivity rate of workers with disabilities tends to be much higher than that of other workers.[39] Also, as highlighted by the current UN Special Rapporteur on the Rights of Persons with Disabilities, persons with disabilities are disproportionately fragile to the negative consequences of insecure living and working conditions.[40]

Finally, persons with disabilities who belong to other vulnerable groups are plausibly more exposed to social rights violations than persons with disabilities who do not belong to them.[41] They may suffer double or even triple discrimination as disabled, foreign, indigenous and/or female sections of the population, since disadvantages and fragilities of their condition as persons with disabilities add to those deriving from non-citizenship, status as an indigenous person, gender, and so on. Accordingly, it is likely that women with disabilities will experience social rights violations more often, given the particular exclusion experienced by such women.[42] It can be argued that persons with disabilities who suffer such multiple disadvantages are the victims of various discriminations at once. Indeed, social rights violations of persons with disabilities are generally the result of systemic discriminations and structural inequalities.[43]

V. THE PROTECTION OF SOCIAL RIGHTS OF DISABLED PERSONS THROUGH THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

At the time of their adoption, the CRPD and its Optional Protocol were (and, with the exception of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CIADDIS), still are[44]) the only international legally binding instruments in the field of disability rights and freedoms. Unlike the CIADDIS, the CRPD

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[39] See Arthur O'Reilly, 'The Right to Decent Work of Persons with Disabilities' (2007) <www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_091349.pdf/> (16 October 2019).

[40] Catalina Devandas (Special Rapporteur), 'Report on the Right of Persons with Disabilities' UN Doc A/70/297 (2015).

[41] See also Neta Ziv, 'The Social Rights of Persons with Disabilities' in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (2007) 369.

[42] See Rangita de Silva de Alwis, 'Mining the Intersections: Advancing the Rights of Women and Children with Disabilities within an Interrelated Web of Human Rights' (2009) 1697 Faculty Scholarship Paper <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2698&context=faculty_scholarship/> (16 October 2019).

[43] See Steven J Hoffman, Lathika Sritharan and Ali Tejpar, 'Is the UN Convention on the Rights of Persons with Disabilities Impacting Mental Health Laws and Policies in High-Income Countries? A Case Study of Implementation in Canada' (2016) BMC International Health and Human Rights 28.

[44] Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (7 June 1999) AG/RES 1608 (XXIX-O/99).

furnishes rights holders with economic, social and cultural, as well as civil and political, rights. Socio-economic rights under the CRPD include: the right to education (Article 24); the right to health, habilitation and rehabilitation (Articles 25 and 26); the right to employment and work (Article 27); the right to adequate living and social protection (Article 28); and the obligation of state parties to ensure the full and effective participation and inclusion of disabled persons in society (Article 6(2)). Elements of socio-economic rights are also addressed or encompassed implicitly in the rules of the CRPD outlining children with disabilities' rights (Article 7), women with disabilities' rights (Article 6), the right to participate in cultural life, recreation, leisure and sport (Article 30) and the right to freedom from exploitation, violence and abuse (Article 16).

Unsurprisingly, the socio-economic rights and standards in the CRPD to some degree resemble those encompassed in the most influential UN treaty on socio-economic rights and freedoms, the International Covenant on Economic, Social and Cultural Rights (ICESCR).[45] Nevertheless, while this Convention was clearly a source of inspiration, the socio-economic rules under the CRPD are considerably more disability-specific than those under the rights granted to 'everyone' by the ICESCR.[46] Two examples can be useful to elucidate this concept. While both Article 12 ICESCR and Article 25 CRPD set out detailed steps to give effect to the right to health, the latter, unsurprisingly, is entirely focused on promoting the right to health of persons with disabilities. In a similar vein, while both Article 2 ICESCR and Article 5 CRPD require that all of the protected rights and freedoms must be applied without discrimination, only the latter explicitly prohibits discriminations on the grounds of disability.

Despite the insertion of socio-economic rights into the CRPD on an equal footing with civil and political rights, it is evident from the general duties provision of the CRPD, Article 4, that the duties imposed by social (and economic rights) are not identical in scope to those imposed by civil and political rights under that treaty. Article 4 prescribes states to 'adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention'. But socio-economic rights are subject to the second paragraph of Article 4, which provides that

> [w]ith regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

The language of Article 4 reveals only half of the story, nevertheless, and it is indispensable to look beyond it to the case law of the CRPD Committee if the heterogeneity and scope of the duties imposed by socio-economic rights under the CRPD are to be fully appreciated.

Prior to August 2016, the Committee had not issued a rights-thematic General Comment on any of the socio-economic rights under the CRPD. While it had dealt with issues related to

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[45] On the ICESCR standards relating to disability see, e.g., Francesco Seatzu, 'The UN Committee on Economic, Social and Cultural Rights and Disability: The General Comment No. 5 and Beyond' (2011) 12 Diritti Umani e Diritto Internazionale 356. See also the contribution by Dzidek Kędzia in this *Research Handbook* (Chapter 5).

[46] International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3.

socio-economic rights in its General Comment No 3 on women and girls with disabilities,[47] it had not explicated the duties and obligations imposed by a particular socio-economic right in detail. The Committee's General Comment on the right to inclusive education therefore represented an important addition to its work on socio-economic rights.[48] The same is true of the General Comment on the right to live independently and to be included in the community that was adopted one year later.[49] Still, international standards remain vague.

VI. THE ROLE OF DOMESTIC COURTS IN THE ENFORCEMENT OF SOCIAL RIGHTS OF PERSONS WITH DISABILITIES

Courts may play a crucial role as regards the implementation of the rights of persons with disabilities. This is particularly so given two shortcomings generally encountered in terms of disability: the acknowledged general 'lack of effective national disability policies'[50] and 'the lack of political will among policy-makers for full implementation of the social rights of persons with disabilities'.[51] With these two considerations as the point of departure, this section proceeds to argue that domestic courts may and indeed must play a strategic role in the domestic protection of the social rights of persons with disabilities.

It is likewise maintained that the 'direct protection of social rights as justiciable entitlements offers the best opportunity to develop a jurisprudence which engages seriously with the content of these rights and the nature and scope of the obligations they impose'.[52] Still, differences exist between these rights and other justiciable human rights such as civil and political rights.[53] Differences relate to the respective state obligations and the role that domestic courts play in the enforcement and implementation phase. In fact, the role of domestic courts is harder in the enforcement of social rights since courts are not the best placed state entities to choose between priorities and select potential policy options.[54]

Three situations may be distinguished. Indeed, the role of courts in the protection of social rights of disabled persons, especially when the executive does not respect them, is largely

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[47] CRPD Committee, 'General Comment No 3 on Women and Girls with Disabilities' (2 September 2016) CRPD/C/GC/3.

[48] CRPD Committee, 'General Comment No 4 on the Right to Inclusive Education' (2 September 2016) CRPD/C/GC/4.

[49] CRPD Committee, 'General Comment No 5 on Living Independently and Being Included in the Community' (31 August 2017) CRPD/C/GC/5.

[50] See Raymond Lang, Maria Kett, Nora Groce and Jean-Francois Trani, 'Implementing the United Nations Convention on the Rights of Persons with Disabilities: Principles, Implications, Practice and Limitations' (2011) 5 Alter 206.

[51] *Ibid.*, 211.

[52] See Aoife Nolan, Bruce Porter and Malcom Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (2009) CHRGJ Working Paper No 15.

[53] For a résumé of the differences between the enforcement of social rights and the enforcement of civil and political rights see, e.g., David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 190.

[54] See Natasha G Menell, 'Judicial Enforcement of Socio-economic Rights: A Comparison between Transformative Projects in India and South Africa' (2018) 49 Cornell International Law Journal 724.

undisputed.[55] In such a circumstance, the court will be asked to order a stop to the violation in question: this will generally not comprise the imposition of positive measures by the state in order to guarantee the rights in question.[56] Still, the executive's failure to prevent hindrances of third parties in the enjoyment of disabled persons' social rights may result in asking the court to order a state's adoption of positive steps to put an end to the violation by third parties. So, indirectly, positive measures may well be imposed/required. Nevertheless, these are aimed at preventing violations of the right. Therefore, as with the first situation, the outcome of proceedings is to restore the *status quo ante*. This is likely to prove not as controversial as situations where the executive has failed to adopt positive steps to enhance disabled persons' social rights, since in such cases the proceedings are aimed at changing the *status quo ante*. The reason for this is clear: the release of a mandatory order by a court in response of a breach of constitutional rights by the state will lead the relevant state agents to perform their constitutional obligations in the manner indicated by the court.

In any case, it is also clear that the strict linkage between the three situations mentioned above in particular instances implies that the courts can have a certain degree of flexibility in terms of how they decide to classify the social rights violations by a state. A particularly instructive example can be seen in the approach of the Supreme Court of India in *Ranjit Rajak*.[57] This decision centred on the right of access to work and employment of a man who was denied the right to apply to a probationary post in the State Bank of India due to his having undergone a renal transplant in 2004. The right of access to work of persons with medical disabilities was initially considered not to be covered under the prevailing disability law, the Persons with Disabilities Act (PWD Act). Later, however, the Supreme Court found that disabled persons' right to earn a livelihood had to be considered as part of the PWD Act since India had ratified the CRPD. The applicant brought an action seeking, essentially, to be allowed to apply to the post of a probationary post in the Bank on the basis that such denial would deprive him of his right to life and work guaranteed by the national constitution. This action was based on a threatened breach by a state organ, namely the State Bank of India, of its duty to respect (that is, not to interfere with) the medically disabled person's enjoyment of his right to access to public employment and posts. However, the Supreme Court's judgment focused extensively on the wider and more encompassing duty of the state to take steps to enhance the medically disabled person's right to work by eradicating discriminatory practices.[58] This decision shows

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[55] See Anna Lawson and Lisa Waddington, 'Setting the Scene' in Lisa Waddington and Anna Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (2018) 1, 3; see also Marco Fasciglione, 'The Protection of Economic, Social and Cultural Rights of Persons Belonging to Marginalized and Vulnerable Groups in Times of Financial Crisis: How to Reconcile the Irreconcilable?' (2014) 11 European Yearbook of Minority Issues 1.

[56] In relation to children's rights, see Aoife Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (2011) 39ff; see also Dennis Davis, 'The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?' (2012) 46 Potchefstroom Electronic Law Journal.

[57] *Ranjit Kumar Rajak v State Bank of India*, 2009 (5) Bom CR 227.

[58] See Anna Lawson and Lisa Waddington, 'Interpreting the Convention on the Rights of Persons with Disabilities in Domestic Courts' in Lisa Waddington and Anna Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (2018) 466, 470.

courts' ability to approach breaches of disabled persons' social rights from a variety of angles where they are demanded to do so.

VII. CONCLUSIONS

This chapter has been framed around its three major *foci*: persons with disabilities, social rights and freedoms and the national courts of developing countries.

Having clarified the terminology used throughout the sections, the chapter has demonstrated the emergence of persons with disabilities as social rights holders. As the analysis above illustrates, the CRPD's use of the social model of disability instead of the medical model combined with its innovative use of non-discrimination, equality and social participation provisions and mechanisms have introduced new tools that move social rights closer to civil and political rights.[59]

However, although the innovations within the implementation and monitoring provisions are relevant to the fostering, realization and 'justiciability' of the social rights of persons with disabilities, they are not sufficient *per se* to achieve that end. In our view, for this end, it seems indispensable to develop a broad understanding of persons with disabilities with due appreciation of the vital importance social rights have for them and in consideration of the fact that achieving these rights shall become a prioritized goal of the disability rights movements and care agencies.[60] International law provides some guidance on this. However, it is also necessary to identify and promote a more precise role for domestic courts in relation to the enforcement of disabled persons' social rights. This could be done, for example, by following the abovementioned example of the Supreme Court of India in the *Ranjit Rajak* case concerning the right to work and employment of a person suffering a physical disability.[61]

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[59] See also Maša Anišić, *Innovative Aspects of the UN Convention on the Rights of Persons with Disabilities* (LLM thesis 2013) <http://cadmus.eui.eu/handle/1814/28025> (16 October 2019).

[60] See Jerry A Winter, 'The Development of the Disability Rights Movement as a Social Problem Solver' (2003) 23 Disability Studies Quarterly 33.

[61] See above section VI.

14. Stateless persons and social rights

Marija Dobrić and Philipp Janig

I. INTRODUCTION

The situation of stateless persons has long attracted limited attention from states, international institutions and scholars. However, their numbers are by no means negligible and the protection of their human rights by no means secure. Pursuant to estimates of the United Nations High Commissioner for Refugees (UNHCR), there are currently at least ten million stateless persons around the world;[1] most likely numbers are much higher.[2] In general, a stateless person is defined as 'a person who is not considered as a national by any State under the operation of its law'.[3] Historically speaking, statelessness has usually arisen during and following decolonization,[4] or the breakup of states.[5] The newly independent states often awarded nationality on ethnic grounds, leaving minority populations resident on their territory stateless. However, also outside of circumstances of state succession, people are at threat of being born or becoming stateless due to the operation of domestic legislation. For instance, laws may only award nationality based on citizenship of the father, generally fail to provide for comprehensive registration systems at birth or allow for arbitrary withdrawal of citizenship.[6] So far, the

[1] See the official website of UNHCR, 'Ending Statelessness' <www.unhcr.org/stateless-people.html> (25 June 2019).

[2] The Institute on Statelessness and Inclusion speaks of at least 15 million stateless persons in the world, referring to numbers from 2014. See Institute on Statelessness and Inclusion, 'Statelessness in Numbers: 2018. An Overview and Analysis of Global Statistics' <www.institutesi.org/ISI_statistics_analysis_2018.pdf> (25 June 2019); see also Kristy A Belton, 'Statelessness and Economic and Social Rights' in Lanse Minkler (ed.), *The State of Economic and Social Human Rights: A Global Overview* (2013) 221, 221.

[3] Art 1(1) Convention relating to the Status of Stateless Persons (28 September 1954) 360 UNTS 117. According to the International Law Commission this definition has become part of customary international law, see ILC, Articles on Diplomatic Protection with Commentaries, 2006 YILC (Vol II, Part 2), UN Doc A/61/10, at 36; Alice Edwards, 'The Meaning of Nationality' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (2014) 11, 27.

[4] Since Myanmar (formerly Burma) became independent from British control in 1948, the country holds a stance which treats the Muslim Rohingya population as illegal migrants from Bangladesh. The 1982 Citizenship Act still denies the Rohingya population access to full citizenship. Similarly, Bedouins have been left stateless after Middle Eastern countries gained independence from the Osman Empire. See for further details on the Rohingya, Human Rights Watch, '"The Government Could Have Stopped This". Sectarian Violence and Ensuing Abuses in Burma's Arakan State' (2012) <www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf> (25 June 2019).

[5] Pertinent examples are minority populations living in other constituent republics of Yugoslavia and the Soviet Union: see, e.g., UNHCR 'Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia' (1997) 3(1) European Series <www.unhcr.org/46e660582.pdf> (25 June 2019) for more details.

[6] See Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time has Come' (2016) 28 International Journal of Refugee Law 564, 567; David Weissbrodt and

pertinent international legal framework has neither eradicated the reasons to become stateless, nor provided effective paths to end existing statelessness. Given that the decision to award citizenship falls in the sovereignty of states, stateless persons themselves are hardly able to improve their situations.[7]

In terms of human rights protection, stateless persons remain a particularly vulnerable group. This results from a variety of legal and political factors, both international and domestic. In essence, nationality often serves as a prerequisite to accessing human rights. From a purely legal perspective, stateless persons are granted fewer rights than nationals of their host states and, potentially, those of other states.[8] As will be seen, stateless persons fall in the ambit of various non-discrimination provisions. More important, however, are gaps in the implementation and enforcement of stateless persons' human rights. Given the financial costs commonly associated with social rights protection as well as a general lack of political influence of stateless persons on the domestic level, these issues might well be considered more pertinent in the context of social rights, which are central to allowing humans to live a decent life.

This contribution opens by giving an overview of the international legal framework relating to social rights of stateless persons, including issues of enforcement. Thereafter, it addresses issues of implementation by examining the pertinent practice of various universal and regional bodies, as well as specific problems faced by stateless persons in enjoying their social rights. These often involve very practical problems, in particular the difficulties of stateless persons in obtaining legal documentation. Often they will also find themselves without a legal residence in the host state. The contribution concludes by making observations on the approach of international bodies and highlights potential room for improvement.

Clay Collins, 'The Human Rights of Stateless Persons' (2006) 28 HRQ 245, 254 *et seq*, see in particular at 258.

[7] See, e.g., Art 1 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws (13 April 1930) 179 LNTS 89 ('it is for each State to determine under its own law who are its nationals'); see also *Slivenko and Others v Latvia*, ECtHR, App No 48321/99, Decision of 23 January 2002, para 77; see, however, *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, IACtHR, Advisory Opinion OC-4/84 of 19 January 1984, para 32 ('despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights').

[8] Access to social security systems of foreign nationals are often safeguarded through (bilateral) reciprocal agreements between the states involved. Stateless persons necessarily fall outside the scope of such agreements, see Laura van Waas, *Nationality Matters: Statelessness under International Law* (2008) 324; *cf.* James C Hathaway, *The Rights of Refugees under International Law* (2005) 773; while Art 7(2) 1954 Statelessness Convention provides for an exemption from legislative reciprocity after three years of residence, that does not apply to reciprocity resulting from treaties, see *Caisse Régionale D'Assurance Vieillesse des Travailleurs Salariés de Paris v Tani*, France, Court of Cassation, 13 April 1967, 48 ILR 165, 165–66.

II. LEGAL FRAMEWORK

a. International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR does not explicitly address the status of stateless persons. Nevertheless, Article 2(2) ICESCR prohibits discrimination in relation to the enjoyment of economic, social and cultural rights based on national origin.[9] Additionally, the Committee on Economic, Social and Cultural Rights (CESCR) considers that 'birth' as a prohibited ground for discrimination entails being 'born to stateless parents'.[10] Moreover, the ground of 'other status' also prohibits discrimination on the basis of nationality,[11] including discrimination of stateless persons.[12] Thus, differences in treatment based on these grounds with respect to the rights of the CESCR are prohibited unless they are reasonable and objective.[13] Nevertheless, the enjoyment of social rights might be negatively affected by Article 2(3) ICESCR, which stipulates that developing countries 'may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals'.[14] This provision is also relevant for social rights protection of stateless persons, as, first, the majority presumably resides in developing countries,[15] and, second, 'economic rights' may not always be neatly separated from 'social rights'. This arguably gives developing countries considerable discretion to discriminate against stateless persons by classifying pertinent rights as being economic rights. However, the provision appears to have limited practical significance, as it has so far never been explicitly invoked by any state.[16]

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[9] Art 2(2) ICESCR ('The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status').

[10] CESCR, 'General Comment No 20 on Non-Discrimination in Economic, Social and Cultural Rights' (2 July 2009) UN Doc E/C.12/GC/20, para 26.

[11] *Ibid.*, para 30.

[12] *Ibid.*; see also CESCR, 'Concluding Observations on the Dominican Republic' (21 October 2016) UN Doc E/C.12/DOM/CO/4, para 21; CESCR, 'Concluding Observations on Indonesia' (19 June 2014) UN Doc E/C.12/IDN/CO/1, para 13; CESCR, 'Concluding Observations on Kuwait' (19 December 2013) UN Doc E/C.12/KWT/CO/2, para 9; CESCR, 'Concluding Observations on the Sudan' (27 October 2015) UN Doc E/C.12/SDN/CO/2, para 27; CESCR, 'Concluding Observations on Thailand' (19 June 2015) UN Doc E/C.12/THA/CO/1-2, para 14; CESCR, 'Concluding Observations on Uzbekistan' (13 June 2014) UN Doc E/C.12/UZB/CO/2, para 9.

[13] CESCR (GC 20) (n 10), para 13. Note the interpretive declarations and reservations of the Bahamas, Belgium and Monaco regarding differences in treatment of nationals and non-nationals, see United Nations Treaty Collections (UNTC), 'Chapter IV 3. International Covenant on Economic, Social and Cultural Rights' <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en> (26 February 2018).

[14] The Limburg Principles, a set of rules drafted by the International Commission of Jurists which clarify the nature and scope of the ICESCR, stipulate that Art 2(3) 'should be interpreted narrowly' since its purpose 'was to end the domination of certain economic groups of non-nationals during colonial times'. See International Commission of Jurists, 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 127 (para 43); Belton (n 2), 229.

[15] See Institute on Statelessness and Inclusion (n 2).

[16] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (2014) 217.

While the CESCR has so far not been concerned with an individual complaint of a stateless person in its case law, it has addressed their social rights situation in its concluding observations and general comments, as will be seen further below.

b. 1954 Statelessness Convention

On the universal level, the issue of statelessness is addressed by two UN conventions, namely the 1954 Convention relating to the Status of Stateless Persons,[17] and the 1961 Convention on the Reduction of Statelessness.[18] While the latter aims at decreasing statelessness,[19] the 1954 Statelessness Convention addresses the legal status of stateless persons in their country of residence, including their social rights.

To a large degree, however, the 1954 Convention does not grant stateless persons specific rights as such, but provides for a minimum standard of treatment. The actual level of protection differs from one right to another.[20] Pursuant to Article 7(1) 1954 Convention, stateless persons shall in principle enjoy the same treatment as non-nationals generally.[21] This is explicitly reaffirmed with regard to a number of social rights, such as with regard to rights concerning non-political and non-profit associations and trade unions (Article 15), the right to engage in wage-earning employment (Article 17), the right to self-employment (Article 18), the right to housing (Article 21) and the right to public education apart from elementary education (Article 22(2)). Moreover, stateless persons shall be treated no less favourably than nationals with regard to the freedom of religion and religious education (Article 4), artistic rights and industrial property (Article 14), rationing (Article 20), elementary education (Article 22(1)), public relief (Article 23) and labour regulation and social security, including compensation for illness or death (Article 24). Overall, the 1954 Convention protects stateless persons by prohibiting discriminatory treatment *vis-à-vis* nationals or non-nationals generally, depending on the right in question.[22] While the 1954 Convention is similarly structured as the 1951 Refugee Convention, after which it is modelled, it generally foresees lower protection standards.[23]

However, the effectiveness of the 1954 Statelessness Convention is especially inhibited by two factors. First, the Convention so far has only 94 state parties, mostly in Europe, Latin America and parts of Africa. Thus, it fails to cover several countries with large populations

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[17] 1954 Stateless Persons Convention (n 3).

[18] Convention on the Reduction of Statelessness (30 August 1961) 989 UNTS 175.

[19] The 1961 Convention *inter alia* sets forth several rules on granting (Arts 1–4), loss (Arts 5–6), renunciation (Art 7) and withdrawal of citizenship (Arts 8–9), as well as stipulating safeguards when territory is transferred between state parties (Art 10).

[20] Laura van Waas, 'The UN Statelessness Conventions' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (2014) 64, 73.

[21] In effect, Art 7(1) 1954 Statelessness Convention constitutes a 'non-discrimination clause' but not a 'most-favoured-nation clause'; see also *ibid.*

[22] There are also several absolute rights, which are granted to stateless persons regardless of whether they also exist for nationals. See van Waas (n 20), 73.

[23] For instance, Art 17 1951 Refugee Convention foresees that states must 'accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances', while stateless persons are only on par with other non-nationals, see van Waas (n 8), 310 (calling the treatment of stateless persons regarding their right to work a 'minimalist commitment at the lowest common denominator').

of stateless persons,[24] and regions in which a rise in statelessness might be expected by the end of the twenty-first century.[25] Second, even where the Convention is applicable, many of its provisions – in particular those relating to social rights – are limited to stateless persons that reside legally in the state. Thus, stateless persons unlawfully residing in a state party to the 1954 Convention are only able to enjoy an extremely limited number of rights.[26] As will be discussed below, this proves to be a major weakness of the 1954 Statelessness Convention.

With regard to enforcement, Article 34 of the 1954 Statelessness Convention provides for a compromissory clause, which stipulates that any dispute arising between the parties falls in the jurisdiction of the International Court of Justice (ICJ).[27] While the Convention does not incorporate any treaty-specific enforcement mechanism, its implementation has featured in the work of the CESCR and the UNHCR.[28] The latter has been granted the mandate to work on the issue of statelessness by the UN General Assembly. While there is no specific complaint body for stateless persons, in particular within the framework of the UNHCR, they may have recourse to the general human rights treaty mechanisms (see on these points in more detail below).

c. Other Legal Instruments

The issue of statelessness is also addressed in a number of other subsequent treaties. However, similarly to the 1961 Statelessness Convention mentioned above,[29] these do not address the legal status of stateless persons as such, but are rather concerned with tackling the emergence of statelessness. Such provisions may be found in the core human rights conventions,[30] and in

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[24] Of the ten countries that reported the highest number of stateless persons residing in their territory by the end of 2017, only two (Côte d'Ivoire and Latvia) are members of the 1954 Statelessness Convention. See Institute on Statelessness and Inclusion (n 2); *cf.* Katja Göcke, 'Stateless Persons' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (August 2013) para 4.

[25] This concerns the projected rise in statelessness due to disappearing island states. By 2100, scientists expect that several low-lying islands in the Pacific will vanish due to rising sea levels, including Tuvalu, Kiribati, Fiji and the Maldives. See generally for a discussion on disappearing island states, UNHCR, 'Climate Change and Statelessness: An Overview', 6th session of the Ad Hoc Working Group on Long-term Cooperative Action under UNFCC 1–12 June 2009, Bonn, Germany; Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (2015); also Jane McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law' (2010) UNSW Law Research Paper No 2010-2.

[26] Belton (n 2), 226.

[27] See, however, the potential general issues regarding enforcement discussed below.

[28] Different to the 1954 Statelessness Convention, Art 35 1951 Refugee Convention stipulates UNHCR's responsibility of supervising the application of the Convention's provisions. See also Art 8(a) Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the General Assembly on 14 December 1959 as Annex to Resolution 428 (V); van Waas (n 20), 74. See also Matthew Seet, 'The Origins of UNHCR's Global Mandate on Statelessness' (2016) 28 International Journal of Refugee Law 7, 9.

[29] Convention on the Reduction of Statelessness (n 18).

[30] See Art 5(d)(iii) International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965) 660 UNTS 196; Art 24 International Convention on Civil and Political Rights (16 December 1966) 999 UNTS 171; Art 9 Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1971) 1249 UNTS 13; Arts 7–8 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3; Art 29 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990) 2220 UNTS 3.

regional (human rights) treaties.[31] In general, these provisions are limited to stipulating a right to nationality with regard to children born on the territory of a state, if they would otherwise be stateless.[32] While they thus prevent persons from becoming stateless, they do not serve to protect the social rights of existing stateless populations.

An exception to that rule might be Article 5(e) International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which prohibits discrimination with regard to a number of economic, social and cultural rights, *inter alia* on the basis of national origin.[33] This provision has to be read in light of Article 1(2) CERD, which provides that 'the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'.[34] However, the Committee on the Elimination of Racial Discrimination (CERD Committee) has construed Article 1(2) CERD narrowly in its work so 'as to avoid undermining the basic prohibition of discrimination' and emphasized that the provision should not be interpreted as to restrict rights recognized in other human rights instruments, such as the ICESCR.[35] In light thereof, the CERD Committee has already noted its concern with regard to stateless persons' access to social security, health care and education under Article 5(e) CERD.[36]

On the regional level, stateless populations in Africa, Latin America and Europe might additionally be protected by the regional human rights systems. Within the European system, social rights protection might either be derived from the European Convention on Human Rights (ECHR), insofar as civil and political rights enshrined therein overlap with social rights, or from the (revised) European Social Charter (ESC). However, the rights of the latter generally only apply to non-nationals if they are 'nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'.[37] In addition, stateless persons lawfully staying in the territory of a state party should receive 'treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the' 1954 Statelessness Convention or other applicable instruments.[38] As will be seen below, the bodies within these regional systems have generated some case law on the social rights protection of stateless persons.

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[31] See Art 20 American Convention on Human Rights (ACHR) (22 November 1969) 1144 UNTS 123; Art 6 African Charter on the Rights and Welfare of the Child (11 July 1990) OAU Doc CAB/LEG/24.9/49; European Convention on Nationality (6 November 1997) ETS No 166; Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession (19 May 2006) ETS No 200; Art 7 Covenant on the Rights of the Child in Islam (2005) OIC/9-IGGE/HRI/2004/Rep.Final.

[32] An exception would be Art 20 ACHR, which stipulates a right to nationality of 'every person'.

[33] Art 5(e) CERD.

[34] Art 1(2) CERD.

[35] CERD Committee, 'General Recommendation XXX on Discrimination against Non-Citizens' (2004) CERD/C/64/Misc.11/Rev.3, para 2; see also Patrick Thornberry, *International Convention on the Elimination of All Forms of Racial Discrimination* (2016) 145–46.

[36] CERD Committee, 'Concluding Observations on Canada' (25 May 2007) CERD/C/CAN/CO/18, para 23 (further recommending that Canada should ratify the 1954 Statelessness Convention); CERD Committee, 'Concluding Observations on Kuwait' (9 March 2012) CERD/C/KWT/CO/15-20, para 17.

[37] European Social Charter (Revised) (3 May 1996) ETS No 163, Appendix, para 1.

[38] *Ibid.*, para 3; see also Ulrich Becker, 'European Social Charter' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012 – Vol III) 969, 975 (para 38).

d. Issues of Enforcement

Even where the social rights of stateless persons are protected under international law, there are significant obstacles to their enforcement. As already noted above, the 1954 Statelessness Convention itself establishes no treaty-based monitoring or enforcement mechanism, such as the possibility of individual complaints. More generally, the enforcement regarding human rights violations on an inter-state level is entrusted to the state of nationality, through the exercise of diplomatic protection.[39] In the case of stateless persons, enforcement via diplomatic protection is thus necessarily impossible. While Article 8(1) ILC Articles on Diplomatic Protection foresees the exercise of diplomatic protection for stateless persons by the state of residence, the provision has not become part of customary international law.[40]

States not entitled to exercise diplomatic protection may seek to enforce violations of *erga omnes (partes)* norms.[41] In 1970, the ICJ held in *Barcelona Traction* that 'on the universal level, the instruments which embody human rights do not confer on states the capacity to protect the victims […] irrespective of their nationality'.[42] However, treaty regimes may well enshrine obligations *erga omnes partes*, for example insofar as they allow inter-state complaints also in the absence of a link of nationality of the victim.[43] It is debatable whether the ICJ's holding should apply to the 1954 Statelessness Convention, which might well be regarded as enshrining obligations *erga omnes partes*. The Convention contains a compromissory clause in its Article 34, allowing state parties to bring claims against other parties before the ICJ, but apparently enshrines no clear inter-state obligations. Given that a party thus could neither invoke a violation of its own rights, nor be entitled to exercise diplomatic protection, the only disputes that could conceivably be brought before the ICJ would have to be based on norms *erga omnes partes*.[44]

On an individual level, stateless persons themselves have only limited access to international institutions regarding social rights violations. The Optional Protocol to the ICESCR has so far only been ratified by 24 states,[45] none of which have a significant stateless population.[46] While

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[39] Diplomatic protection as a customary rule is reflected in Article 1 Draft Articles on Diplomatic Protection: see, e.g., *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) 2007 ICJ 582, 599, para 39 (Judgment of 24 May).

[40] 2006 ILC Articles on Diplomatic Protection (n 3), 36. Even if that were the case, the state of residence would arguably be responsible for a stateless person's human rights violations in most circumstances.

[41] See *Obligation to Prosecute or Extradite (Belgium v Senegal)* 2012 ICJ 422, 449, paras 67–70 (Judgment of 20 July).

[42] *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain)* 1970 ICJ 3, 47, para 91 (Judgment of 5 February).

[43] See, e.g., Art 33 ECHR (allowing any state party to 'refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto').

[44] Article 48(1)(a) ILC, UNGA Res A/56/83 (12 December 2001) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

[45] See for the ratification status of the Optional Protocol the website of the United Nations Treaty Collections (UNTC), 'Chapter IV 3. a Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&clang=_en> (25 June 2019).

[46] While UNHCR has identified statelessness as a problem in the Democratic Republic of Congo and Madagascar, which are both parties to the Optional Protocol, there is no data available with regard to the

the stateless populations in Africa, Latin America and Europe might have recourse to regional human rights systems, this is not possible for the large populations on the Asian continent.[47]

Beyond enforcement in specific cases, the United Nations also has the issue of statelessness on its agenda, as it was increasingly dealt with by the UNHCR over the years. The UNHCR's mandate to do so does not derive from any of the pertinent conventions, but was awarded by the UN General Assembly through several resolutions, beginning in 1995.[48] The mandate has four different aspects: (1) the prevention of statelessness, (2) the reduction of statelessness,[49] (3) the protection of stateless persons and (4) their identification.[50] Moreover, the UNHCR continuously works to encourage states to ratify both Statelessness Conventions,[51] and thus also raises awareness of the issue of statelessness among the international community.

In essence, the social rights of stateless persons may not be enforced via diplomatic protection, and also the possibility of making use of individual complaint mechanisms is limited.

III. CHALLENGES AND CASE EXAMPLES

The CESCR has so far not been concerned with any individual complaint of a stateless person. However, while the status of stateless persons has not yet featured as prominently in its work as that of other marginalized groups, the Committee has nevertheless dealt with their social rights situation in its concluding observations and general comments. The CESCR has recognized that statelessness may lead to the denial of social rights,[52] specifically the right to social security (Article 9),[53] the rights of families, mothers and children and young persons (Article

number of stateless persons in these countries. See Institute on Statelessness and Inclusion, 'The World's Stateless' (December 2014) <www.institutesi.org/worldsstateless.pdf> (25 June 2019) 60.

[47] See Tae-Ung Baik, *Emerging Regional Human Rights Systems in Asia* (2012) for an analysis on the (emerging) human rights mechanisms in Asia.

[48] See the website of UNHCR, 'How UNHCR Helps Stateless People' <www.unhcr.org/how-unhcr-helps-stateless-people.html> (25 June 2019).

[49] In November 2014, UNHCR has launched the #ibelongcampaign to end statelessness until 2024. Accordingly, the Global Action Plan to End Statelessness: 2014–2024 foresees ten actions to be undertaken by states to achieve the goal of eradicating statelessness within those ten years. See UNHCR, 'Global Action Plan to End Statelessness: 2014–2024' (4 November 2014) <www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html> (26 February 2018).

[50] Seet (n 28), 8. For a summary on the UNHCR's mandate on statelessness, see also the website of UNHCR, 'Stateless People' (n 48).

[51] Seet (n 28), 23.

[52] CESCR (Thailand) (n 12), para 14 (referring to Arts 2, 9–10, 12–14 ICESCR); see also CERD Committee (Kuwait) (n 36), para 17 (noting concern that not all stateless Bidoons in Kuwait 'enjoy some basic human rights such as […] access to adequate social services, education, housing, property, business registration and employment').

[53] CESCR, 'Concluding Observations on the Russian Federation' (16 October 2017) UN Doc E/C.12/RUS/CO/6, para 36; see also CESCR, 'Concluding Observations on the Syrian Arab Republic' (24 September 2001) UN Doc E/C.12/1/Add.63, para 23; CESCR, 'General Comment No 19 on the Right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19, para 38.

10),[54] the right to health (Article 12)[55] and the right to education (Articles 13–14).[56] As already explained above, stateless persons often face differential treatment in relation to nationals and other non-nationals.[57] In the context of social rights, states usually try to justify distinctions in treatment on the basis of nationality due to the 'finite nature of the available resources for the provision of the benefits and/or the desire to avoid mass immigration'.[58] Such differential treatment may be lawful under Article 2(2) ICESCR,[59] if 'the justification for differentiation is reasonable and objective' and when there is 'a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects'.[60]

Beyond these general remarks, the CESCR has so far not been directly concerned with an issue of discrimination against stateless persons. There is, however, some more specific case law, in particular from regional human rights bodies dealing with social rights of stateless persons.[61] The case law of the European Court of Human Rights (ECtHR) may be especially useful in this regard. More precisely, the ECtHR prominently dealt with the right to social security of a stateless person in its decision in *Andrejeva v Latvia*.[62] In that case, the applicant had been born in Kazakhstan and had resided in Latvia since 1954.[63] Following the breakup of the Soviet Union, she was left stateless but was granted the status of a 'permanently resident non-citizen'.[64] In determining her public pension, the respondent state disregarded the periods in which she was employed by entities based in other parts of the USSR,[65] a restriction which only applied to non-citizens.[66] The ECtHR considered it legitimate to restrict access to social

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[54] CESCR, 'Concluding Observations on Djibouti' (30 December 2013) UN Doc E/C.12/DJI/CO/1-2, para 24; CESCR, 'Concluding Observations on South Africa' (12 October 2018) UN Doc E/C.12/ZAF/CO/1, para 50; CESCR, 'Concluding Observations on Viet Nam' (15 December 2014) UN Doc E/C.12/VNM/CO/2-4, para 26.

[55] CESCR (Thailand) (n 12), para 29; see also CESCR, 'General Comment No 22 on the Right to Sexual and Reproductive Health' (4 March 2016) UN Doc E/C.12/GC/22, paras 16, 31.

[56] CESCR (Thailand) (n 12), para 33.

[57] In particular, differences in treatment in relation to (other) non-nationals may result from reciprocal agreements between the states involved: see *supra* n 8.

[58] Equal Rights Trust, 'Economic and Social Rights in the Courtroom. A Litigator's Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights' (December 2014) 66.

[59] Saul, Kinley and Mowbray (n 16) 197.

[60] CESCR (GC 20) (n 10), para 13; see also in Edwards (n 3), 38–39; *Andrejeva v Latvia*, ECtHR, App No 55707/00, Judgment of 18 February 2009, para 81 with further references.

[61] Insofar as the jurisprudence of the Inter-American Court of Human Rights touches on social rights in this context, it largely deals with violations resulting from an unlawful deprivation of citizenship under Art 20 ACHR (see e.g. *Expelled Dominicans and Haitians v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 28 August 2014). However, see also *Girls Yean and Bosico v Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 8 September 2005, para 109(11) ('In the Dominican Republic there have been cases in which the public authorities have placed obstacles in the way of Dominican children of Haitian origin obtaining birth certificates. Consequently, these children have had difficulty in obtaining an identity card or a Dominican passport, attending public schools, and having access to healthcare and social assistance services').

[62] *Andrejeva* (n 60).

[63] *Ibid.*, para 10.

[64] *Ibid.*, para 13.

[65] *Ibid.*, para 15.

[66] *Ibid.*, para 78.

security systems for the protection of the economic system of the state.[67] However, it found that there was no 'reasonable relationship of proportionality', as the 'difference of treatment [was] based exclusively on the ground of nationality' and Latvia was the only state with which the applicant had any stable legal ties.[68] Based thereon, the ECtHR found a violation of Article 14 in conjunction with Article 1 First Additional Protocol to the ECHR.[69] Arguably, the factors taken into account by the ECtHR might also be relevant to determine the lawfulness of differentiations in treatment under other legal regimes.

On its face, domestic legislation relating to social rights may often appear non-discriminatory.[70] This is because the root of the problem is deeper. In practice, the human rights situation of stateless persons in general, as well as their social rights protection, is often impaired by two ulterior factors leading to differences in treatment *vis-à-vis* nationals or other non-nationals: their uncertain legal status in the countries of residence and their frequent inability to acquire identification documents.[71] These issues may well be intertwined, as exemplified by the decision of the ECtHR in *Hoti v Croatia*, in which the ECtHR was concerned with the residence status of a stateless person of Albanian origin, born in Kosovo in 1962 and living in Croatia since 1979.[72] The applicant was unable to apply for temporary residence on humanitarian grounds as that, in practice, required producing a valid national biometric passport, which he was unable to obtain.[73] While stateless persons could also qualify for permanent residence permits, this required a five-year uninterrupted temporary residence, which, again, hinged on showing a valid travel document.[74] The ECtHR found that that practice was 'contrary to the principles flowing from the [1954 Statelessness] Convention',[75] and further in violation of Article 8 ECHR.[76] A similar point was made by the ECtHR in *Apleyeva and Dzhalagoniya v Russia*, where it expressly reiterated

> that Russian citizens had to prove their identity unusually often in their everyday life, even when performing such mundane tasks as exchanging currency or buying train tickets, and that the internal passport was also required for more crucial needs, such as finding employment or receiving medical care.[77]

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[67] *Ibid.*, para 86.

[68] *Ibid.*, paras 87–89.

[69] *Ibid.*, para 92.

[70] See Christian Tomuschat, 'International Covenant on Civil and Political Rights (1966)' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (October 2010) para 28 ('Likewise, concerning social rights, national laws normally draw many distinctions which a layperson in that field cannot easily review as to their justification.').

[71] *Cf.* CESCR, 'Concluding Observations on Pakistan' (20 July 2017) UN Doc E/C.12/PAK/CO/1, para 25; with regard to legal status, see CESCR, 'Concluding Observations on Azerbaijan' (5 June 2013) UN Doc E/C.12/AZE/CO/3, para 9.

[72] *Hoti v Croatia*, ECtHR, App No 63311/14, Judgment of 26 April 2018, paras 5–7.

[73] *Ibid.*, para 126.

[74] *Ibid.*, paras 135–37.

[75] *Ibid.*, para 137.

[76] *Ibid.*, para 143.

[77] *Apleyeva and Dzhalagoniya v Russia,* ECtHR, App Nos 7549/09 and 33330/11, Judgment of 12 June 2018, para 113.

The failure to provide the applicants with Russian citizenship and thus their deprivation of valid identity documents 'resulted in consequences for the applicants so severely affecting their private life' over several years, that it constituting a violation of Article 8 ECHR.[78]

The CERD Committee has likewise noted with concern the inability of stateless Bidoons in Kuwait to 'enjoy some basic human rights such as the right to obtain civil documentation'.[79] Also, the African Commission on Human and Peoples' Rights recognized with regard to the Nubians in Kenya that the 'denial of access to identity documents which entitles an individual to enjoy rights associated with citizenship violates an individual's right to the recognition of his juridical personality'.[80]

Both of these factors, however, are often crucial in the ability of stateless persons to access social services.[81] As already noted above, the legality of residence is already relevant to determine the level of protection, as many provisions of the 1954 Statelessness Convention only apply to 'stateless persons lawfully staying' in the territory of a state. Given that the legality of residence is a result of domestic legislation, this awards states considerable discretion. In practice, stateless persons have at least partly been considered 'illegal migrants' or 'illegal residents' by their country of residence. For example, this is the case with regard to the Bidoons living in Kuwait,[82] or the Rohingya living in Myanmar.[83]

As was already stated above, also the ESC requires stateless persons to be lawfully resident in the host state in order to enjoy the rights stipulated therein. In this regard, the European Committee of Social Rights (ECSR) has already discussed the serious consequences of the requirement of lawful presence for the enjoyment of economic, social and cultural rights in its case law. The ECSR repeatedly emphasized in its decisions, such as *DCI v Belgium*, that the restriction in the personal scope of the ESC should not deprive foreigners unlawfully present

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[78] *Ibid.*, paras 115–27.

[79] CERD Committee (Kuwait) (n 36), para 17.

[80] See *The Nubian Community in Kenya v The Republic of Kenya*, ACHPR, Communication No 317/2006 (2015), para 140 (referring to the IACtHR case *Yean and Bosico v The Dominican Republic* at para 139). The Commission considered that Kenya failed to recognize the legal status of Nubians through its arbitrary administrative practices, which affected their ability to obtain ID cards. This was in violation of Article 5 African Charter of Human and Peoples' Rights (at para 151); see also *IHRDA and OSJI (on behalf of children of Nubian descent in Kenya) v Kenya*, ACERWC, Decision 002/COM/002/09, Decision of 22 March 2011, paras 37–54, *inter alia* with regard to Kenya's failure to register children of Nubian descent after birth and to issue birth certificates; see also *ibid.* at para 42 ('In this respect, the African Committee is of the view that there is a strong and direct link between birth registration and nationality'); *Yean and Bosico* (n 61), para 185 ('It was precisely because she had no birth certificate that she was forced to study at evening school, for individuals over 18 years of age, during this period. This fact also exacerbated her situation of vulnerability, because she did not receive the special protection, due to her as a child, of attending school during appropriate hours together with children of her own age, instead of with adults').

[81] van Waas (n 8), 380.

[82] See CESCR (Kuwait) (n 12), para 9. For more details see Clarisa Bencomo, 'Kuwait, Promises Betrayed: Denial of Rights of Bidun, Women, and Freedom of Expression' (2000) 12, No 2E Human Rights Watch <www.hrw.org/reports/2000/kuwait/> (25 June 2019).

[83] Samuel Cheung, 'Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience' (2011) 25(1) Journal of Refugee Studies 50, 51. Note, however, that Kuwait and Myanmar are not parties to the 1954 Statelessness Convention. Myanmar, which does not recognize the Muslim Rohingya population as its nationals, ratified the ICESCR in 2017. The CESCR has not made concluding observations on Myanmar yet; however, a state party report is scheduled for 2020.

in the host state 'of the protection of the most basic rights enshrined in the Charter' nor should 'their fundamental rights such as the right to life or to physical integrity or the right to human dignity' be impaired.[84] The ECSR based this on a teleological interpretation of the ESC, the purpose of which 'is to give life and meaning in Europe to the fundamental social rights of all human beings'.[85] Nevertheless, the provisions of the ESC that may apply to unlawful residents in certain circumstances will rather be exceptional. The ECSR specifically ascertained the applicability of 'Articles 7§10, 11, 13, 17, 30, 31§2 of the Charter' to minors unlawfully staying in the host state.[86] However, the ECSR has been less inclined to extend this jurisprudence also to irregular migrants of age.[87] While these decisions so far concerned irregular migrants (falling under Appendix para 1),[88] rather than stateless persons (under Appendix para 3), it appears uncontroversial to assume that the ECSR would adopt a similar approach also in the context of stateless persons not lawfully staying in the host state.

Moreover, the difficulty for stateless persons to obtain and, ultimately, present identity, residence or work documents is also a crucial factor. Such documents are often prerequisite in accessing basic social services, such as medical care, social security or basic education.[89] Many states do not provide for comprehensive birth registration, making it impossible to subsequently obtain pertinent certificates.[90] The problems connected with the inability to obtain birth certificates have been highlighted by the Inter-American Court of Human Rights (IACtHR) in *Yean and Bosico v Dominican Republic*, pointing to the difficulties persons face in accessing education, healthcare or social services resulting therefrom.[91] Also more generally, stateless persons are 'often not issued identity documents by their States of habitual

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[84] *Defence for Children International (DCI) v Belgium*, ECSR, Collective Complaint No 69/2011, Decision of 23 October 2012, paras 28–35. See also *Defence for Children International (DCI) v The Netherlands*, ECSR, Collective Complaint No 47/2008, Decision of 20 October 2009, para 19; *International Federation of Human Rights Leagues v France*, ECSR, Collective Complaint No 14/2003, Decision of 8 September 2004, paras 30–31.

[85] *DCI* (n 84), para 30 (further referring to the ESC as 'a living instrument dedicated to the values of dignity, equality and solidarity').

[86] *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France*, ECSR, Collective Complaint No 114/2015, Decision of 24 January 2018, para 57.

[87] See, e.g., *European Federation of National Organisations working with the Homeless (FEANTSA) v The Netherlands*, ECSR, Collective Complaint No 86/2012, Decision of 2 July 2014, para 211 ('With regard to migrants in an irregular situation, the Committee observes that States Parties are not obliged to apply to migrants in an irregular situation the range of economic, social and cultural measures that are to be taken in order to secure the right to protection against poverty and social exclusion. The co-ordinated approach required by Article 30 involves the adoption of positive measures, most of which cannot be regarded as being applicable to groups not covered by the personal scope of the Charter. Article 30 is thus not applicable with regard to migrants in an irregular situation (*DCI v Belgium*, cited above, §145–147)').

[88] See in particular *EUROCEF* (n 86), para 56.

[89] David Weissbrodt, *The Human Rights of Non-Citizens* (2008) 97–98.

[90] CESCR (Dominican Republic) (n 12), para 46; CESCR (Kuwait) (n 12), para 9; CESCR, 'Concluding Observations on Rwanda' (10 June 2013) UN Doc E/C.12/RWA/CO/2-4, para 11; CESCR (Thailand) (n 12), para 14.

[91] *Yean and Bosico* (n 61), para 109(11) ('In the Dominican Republic there have been cases in which the public authorities have placed obstacles in the way of Dominican children of Haitian origin obtaining birth certificates. Consequently, these children have had difficulty in obtaining an identity card or a Dominican passport, attending public schools, and having access to healthcare and social assistance services').

residence'.[92] In that regard, the 1954 Statelessness Convention provides that parties shall issue travel documents to stateless persons legally residing in their territory (Article 28), and identity papers to all stateless persons in their territory (Article 27). Under domestic law, however, national authorities might not be required to issue such documentation to stateless persons and often will not feel responsible for their needs.[93] As has been seen in the case law above, these more practical problems might in effect often lead to differential and, potentially, discriminatory treatment of stateless persons. Thus, facilitating procedures to obtain documentation and requiring states of residence to issue identity documents, as well as to implement mandatory birth registration in general, would greatly increase the possibilities of stateless persons to enjoy their social rights.[94]

IV. CONCLUSIONS AND OUTLOOK

There is a long way to go in order to effectively ensure social rights to stateless persons. Given the close links between citizenship and the enjoyment of social rights, an evident solution would be to require states to grant stateless persons a nationality. However, international law foresees no such right to nationality (yet).[95] The furthest reaching provision on the universal level remains Article 32 of the 1954 Statelessness Convention, requiring state parties to 'facilitate' the naturalization of stateless persons.

However, there are positive signs of improvement on the issue of statelessness over the past years. The number of state parties to both UN Statelessness Conventions mentioned above has steadily and considerably risen, which is likely due to increased attention paid to the issue by both the CESCR as well as the UNHCR. The CESCR has particularly actively promoted awareness on statelessness during the state reporting procedures.[96] It remains to be seen whether the CESCR will also be able to address specific violations of social rights of stateless persons in its future case law.

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[92] Weissbrodt (n 89), 97.

[93] UNHCR, 'Nationality and Statelessness: A Handbook for Parliamentarians' (2000) No 11 <www.un.org/ruleoflaw/files/Nationality%20and%20Statelessness.pdf> (25 June 2019) 17.

[94] Accordingly, improving the situation concerning legal identity at the global level is also a Sustainable Development Goal: SDG 16.9 aims to provide legal identity for all, including birth registration by 2030. See for more details, Institute on Statelessness and Inclusion, 'Statelessness, Human Rights and the Sustainable Development Agenda. A Working Paper' (February 2017) 15 *et seq*.

[95] There are isolated claims in legal scholarship that the right to nationality is already widely recognized as a human right. Indeed, Art 15 UDHR and Art 20 ACHR both foresee that everyone has a right to nationality. However, the UDHR is a non-binding instrument and Art 20 ACHR – which is comparatively progressive in that regard – only binds state parties to the ACHR and is thus only recognized in the Latin American region. Therefore, 'a right to nationality for everyone' has not acquired customary status yet. See, e.g., Oliver Dörr, 'Nationality' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2012) paras 7–8. Even if there were such a right, it would be problematic to determine which states would incur the duty to confer its nationality on stateless persons.

[96] See, e.g., CESCR, 'Concluding Observations on Croatia' (5 December 2001) UN Doc E/C.12/1/Add.73, para 22; CESCR (Dominican Republic) (n 12), para 22; CESCR (Kuwait) (n 12), para 9; CESCR, 'Concluding Observations on Belarus' (13 December 2013) UN Doc E/C.12/BLR/CO/4-6, paras 4(b)–(c).

Generally speaking, the CESCR in conjunction with the 1954 Statelessness Convention provide for a solid framework on the social rights of stateless persons. In addition, while the regional human rights bodies are often not fully equipped to respond to the violations of social rights of stateless persons, they have addressed these issues within their jurisdictional limitations.

However, as so often in international law, the problem largely lies with its implementation and enforcement. As stateless persons, due to their situation, often have limited to no political influence on the domestic level, effective international mechanisms are of even greater importance.

15. Social rights of minorities

Aristoteles Constantinides

I. INTRODUCTION

Minorities are among the most vulnerable and marginalized communities. They tend to face high and disproportionate levels of poverty, having experienced persistent discrimination, exclusion, denial of basic rights, even physical violence.[1] Such poverty is both a cause and a manifestation of their diminished rights and opportunities, which is the result of longstanding unequal access to education, health care, employment and land.[2] The situation is exacerbated for certain groups within minorities, which may face multiple and intersectional forms of discrimination that add to their marginalization, such as women, children, older persons, persons with disabilities and lesbian, gay, bisexual and transgender persons.[3] In an era of rising populism, racism and extremism, they are confronted with increasing discrimination and exclusion on the grounds of their distinct characteristics and, more alarmingly, calls by elected leaders to legitimize such discrimination and the violations of their rights.

Despite such tremendous challenges, states have been reluctant to adequately address minority rights in international law, fearing disruptions and secessionist claims that would threaten their national unity and territorial integrity.[4] The resurgence of interest in minorities in the 1990s did witness some strengthening of minority rights, particularly in Europe, but there was no significant development on the global level. The main areas of concern and the relevant norms and legal debate focused on the protection of their existence and integrity, their culture and identity, equality and non-discrimination, and effective participation in public life. The social rights dimension has been largely peripheral and gained attention mostly in relation to non-discrimination.[5]

This chapter presents an overview of the fragmented legal landscape on the social rights of minorities. Section II examines the legal framework and section III presents an overview of the existing international case law on the rights of minorities to education,[6] housing and health.

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[1] Gay McDougall, The First United Nations Mandate on Minority Issues (2016) 14.

[2] HRComm, 'Report of the Independent Expert on Minority Issues' (6 January 2006) UN Doc E/CN.4/2006/74, paras 64–65.

[3] HRC, 'Report of the Special Rapporteur on Minority Issues' (9 January 2017) UN Doc A/HRC/34/53, para 67.

[4] Guðmundur Alfreðsson, 'Minority Rights and the United Nations' in Ugo Caruso and Rainer Hofmann (eds), *The United Nations Declaration on Minorities: An Academic Account on the Occasion of its 20th Anniversary (1992–2012)* (2015) 19, 19–20.

[5] Among the few exceptions, see Margot Salomon, 'Socio-Economic Rights as Minority Rights' in Marc Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (2007) 431.

[6] Although the cultural dimension of education is predominant in the context of minorities, it is closely linked with the socio-economic dimension and hence education of minorities falls squarely within the present chapter.

The chapter focuses on 'traditional' or 'old' minorities,[7] and does not survey the social rights of 'new' minorities stemming from migration or those of sexual minorities; it also does not address the social rights of indigenous peoples.[8] The concerns and challenges facing each of those groups are not always common, and oftentimes they enjoy protection under distinct instruments, although there are obviously also common rules and increasing blurring of the dichotomy.[9] Indeed, some of the instruments and institutions discussed in this chapter protect the rights of such groups without much distinction.

II. LEGAL FRAMEWORK

The international legal framework on the social rights of minorities by and large consists of non-discrimination provisions in universal and regional human rights instruments whose relevance to minorities is made plain in the practice of the respective monitoring bodies. There are only a few explicit provisions on minorities, let alone on their social rights, and just a couple of (European) treaties. This contrasts with the more elaborate legal framework during the League of Nations (LoN) era.

a. The League of Nations System

The League of Nations system of minority protection was based on various special treaties, treaty chapters and declarations that were largely identical and were guaranteed and monitored by the League. They aimed to provide comprehensive minority protection but were limited to Central and Eastern European states. In addition to identity issues, equality and non-discrimination, the LoN framework also addressed the educational rights of minorities at a time when such rights were non-existent in general international law.

The Permanent Court of International Justice (PCIJ) determined the scope of minority protection under those instruments in a series of judgments and Advisory Opinions with enduring resonance. In *Greco-Bulgarian Communities*, the Court linked the identity of a minority with the education of minority children in accordance with minority traditions.[10] In the *Rights of Minorities in Upper Silesia (Minority Schools)* case, the Court held that there was no unrestricted right to choose the language of instruction or the corresponding school under the 1922 German–Polish Convention concerning Upper Silesia.[11] In *Minority Schools in Albania*, the

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[7] These have been defined as numerically inferior non-dominant groups, whose members are nationals of the state and possess distinct ethnic, religious or linguistic characteristics and a sense of solidarity towards preserving their culture, traditions, religion or language. See Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities' (1979) UN Doc E/CN.4/Sub.2/384/Rev.1, para 568. The nationality requirement is particularly controversial.

[8] The rights of those groups are touched upon elsewhere in this *Research Handbook* (particularly Chapter 12).

[9] See, e.g., Roberta Medda-Windischer, 'Integration of New and Old Minorities: Beyond a Janus-Faced Perspective' (2017) 14 European Yearbook of Minority Issues 3.

[10] *Greco-Bulgarian Communities*, 1930 PCIJ Series B No 17, p 33 (Advisory Opinion of 31 July).

[11] *Rights of Minorities in Upper Silesia (Germany v Poland*) 1928 PCIJ Series A No 15, p 46 (Judgment of 26 April).

PCIJ held that the right of members of the Greek minority in Albania to maintain, manage and control (at their own expense) or to establish schools and other educational establishments 'which alone can satisfy the special requirements of the minority groups' illustrated 'the application of the principle of identical treatment in law and in fact', and that their abolition and replacement by government institutions would destroy this equality of treatment; accordingly, the relevant provision, 'far from creating a privilege in favour of the minority', 'ensures that the majority shall not be given a privileged position as compared with the minority'.[12] The Court explained that the notion of equality in fact between members of the majority and of the minority 'must be an effective, genuine equality' and 'may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'.[13] This was a compelling early endorsement of substantive equality in the context of minorities. The substantive equality approach lost prominence in the aftermath of the Second World War, gradually resurfacing in the past few decades.

b. Norms and Instruments of Global Reach

In the post-Second World War era, minority protection was based on granting equal human rights to persons belonging to minorities without discrimination of any kind. That avenue, however, did not guarantee the realization of substantive equality and offered weak protection.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) is the only legally binding provision on minorities of universal reach but its wording does not cover social rights. Yet, through the combined effect of Articles 2, 26 (an autonomous provision prohibiting 'discrimination in law or in fact *in any field* regulated and protected by public authorities'[14]) and 27, the Human Rights Committee has been able to address the social rights of minorities in the state reporting procedure. Thus, the Committee has routinely expressed concern about ongoing discrimination against the Roma regarding access to housing, health services, social assistance, education and employment,[15] and has even urged state parties to ensure that all members of minorities have access to all social rights.[16]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) has no minority-specific provision but the Covenant's Committee (CESCR) has addressed minority issues and concerns in its general comments and in the state reporting procedure. Some of the Covenant obligations of immediate effect are of paramount relevance to minorities, especially the non-discrimination guarantee and the minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each Covenant right.[17] Thus, despite the lack of explicit references, several ICESCR provisions resonate with minority protection to

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[12] *Minority Schools in Albania*, 1935 PCIJ Series A/B No 64, p 20 (Advisory Opinion of 6 April).

[13] *Ibid*., 19.

[14] HRCttee, 'General Comment No 18 on Non-Discrimination' (10 November 1989) HRI/GEN/1/Rev.9, para 12 (emphasis added).

[15] See, e.g., HRCttee, 'Concluding Observations on Bulgaria' (15 November 2018) CCPR/C/BGR/CO/4, para 13; HRCttee, 'Concluding Observations on Lithuania' (29 August 2018) CCPR/C/LTU/CO/4, para 7.

[16] See, e.g., HRCttee, 'Concluding Observations on Albania' (2 December 2004) CCPR/CO/82/ALB, para 22.

[17] CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23, paras 1 and 10 respectively.

such an extent that the Covenant has been characterized as 'a basic instrument of minority protection'.[18]

Other universal human rights treaties are also relevant. The authoritative definition of racial discrimination in Article 1 of the International Convention on the Elimination of Racial Discrimination (CERD) covers the economic, social and cultural fields,[19] and has been endorsed by other treaty bodies.[20] Additionally, Article 5(e) guarantees the enjoyment of economic, social and cultural rights without racial discrimination. The Committee on the Elimination of Racial Discrimination (CERD Committee) has adopted various general recommendations of relevance to the social rights of minorities,[21] and routinely addresses discrimination against minorities, especially the Roma, in the areas of housing, education and health care.[22]

The Convention on the Rights of the Child is a holistic treaty covering civil and political rights as well as economic, social and cultural rights without discrimination of any kind. It has a minority-specific provision (Article 30) which is almost identical to Article 27 ICCPR, but also includes indigenous children. The Committee on the Rights of the Child (CRC Committee) pays special attention to minority children, addressing discrimination in their enjoyment of social rights and calling for specific measures, including affirmative action, to address disparities and enable the full and equal enjoyment of their rights.[23] Discrimination is most often *de facto* and is reflected, for example, in higher mortality rates of minority children,[24] the disproportionately high number of dropouts in education and weaker education outcomes of Roma children,[25] and so on.

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[18] María Amor Martín Estebanez, 'The United Nations International Covenant on Economic, Social and Cultural Rights' in Kristin Henrard and Robert Dunbar (eds), *Synergies in Minority Protection: European and International Law Perspectives* (2008) 214.

[19] Article 1 CERD defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field'.

[20] See, e.g., HRCttee (GC 18) (n 14), para 7.

[21] See especially CERD Committee, 'General Recommendation XX on Article 5 of the Convention' (14 March 1996) CERD/48/Misc.6/Rev.2; CERD Committee, 'General Recommendation XXVII on Discrimination against Roma' (16 August 2000) UN Doc A/55/18, Annex V; and CERD Committee, 'General Recommendation No 32 on the Meaning and Scope of Special Measures in the Convention' (24 September 2009) CERD/C/GC/32.

[22] See, e.g., CERD Committee, 'Concluding Observations on Slovakia' (12 January 2018) CERD/C/SVK/CO/11-12, paras 21–26; CERD Committee, 'Concluding Observations on Serbia' (3 January 2018) CERD/C/SRB/CO/2-5, paras 20–23.

[23] Jaap E Doek, 'The United Nations Convention on the Rights of the Child and Children Belonging to Minority Groups' in Kristin Henrard and Robert Dunbar (eds), *Synergies in Minority Protection: European and International Law Perspectives* (2008) 278, 284. See, e.g., CRC Committee, 'Concluding Observations on Tajikistan' (4 October 2017) CRC/C/TJK/CO/3-5, para 14: 'continue to take prompt measures to end instances of discrimination in practice against […] Roma/Jughi children […] through targeted programmes to ensure their equal access to all public services, and particularly to education and health services'.

[24] CRC Committee, 'Concluding Observations on Laos' (1 November 2018) CRC/C/LAO/CO/3-6, para 31.

[25] CRC Committee, 'Concluding Observations on Spain' (5 March 2018) CRC/C/ESP/CO/5-6, para 39.

The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) also enshrines socio-economic rights and prohibits discrimination against women in all its forms, but has no minority-specific provision. The CEDAW Committee has frequently expressed concern at discrimination facing minority women in respect of social rights (such as segregation of Roma women from other patients in maternity hospitals in Slovakia,[26] high rates of maternal mortality among ethnic minority groups in Thailand,[27] limited access to sexual and reproductive health services for Kurdish and other minority women in Turkey,[28] and so on). The Committee has routinely recommended the adoption of targeted measures, including temporary special measures, to combat intersecting discrimination against women and girls belonging to minority groups in education, employment, health care and housing,[29] with a view to accelerating the realization of substantive equality.[30] Such measures are in line with Article 4(1) of the Convention and the Committee's General Recommendation No 25 (2004) on temporary special measures.

As to the specialized organizations, the most important instrument is the 1960 UNESCO Convention against discrimination in education.[31] The Convention aims to promote equality of opportunity and treatment for all in education, and contains a minority-specific provision (Article 5(1)(c)) recognizing the right of members of national minorities to carry on their own educational activities. Article 2 also clarifies that separate educational institutions established for religious and linguistic reasons do not constitute discrimination. However, the Convention has a weak monitoring system and rather limited potential.[32]

Turning to soft law instruments, the only dedicated universal instrument on minority protection is the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[33] The Declaration emphasizes non-discrimination and has no provision on economic, social and cultural rights other than some educational rights, which it links with the protection of the existence, identity and culture of minorities. In weak language ('states should', 'where appropriate', 'wherever possible'), Article 4 addresses instruction of persons belonging to minorities in their mother tongue, and educational measures encouraging knowledge of their history, tradition, language and culture.[34]

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[26] CEDAW Committee, 'Concluding Observations on Slovakia' (25 November 2015) CEDAW/C/SVK/CO/5-6, paras 26 and 30(f).

[27] CEDAW Committee, 'Concluding Observations on Thailand' (24 July 2017) CEDAW/C/THA/CO/6-7, para 38.

[28] CEDAW Committee, 'Concluding Observations on Turkey' (25 July 2016) CEDAW/C/TUR/CO/7, para 47(a).

[29] CEDAW Committee, 'Concluding Observations on Laos' (14 November 2018) CEDAW/C/LAO/CO/8-9, para 22(c); CEDAW Committee, 'Concluding Observations on Nepal' (14 November 2018) CEDAW/C/NPL/CO/6, para 41(c).

[30] CEDAW Committee, 'Concluding Observations on Romania' (24 July 2017) CEDAW/C/ROU/CO/7-8, para 37(a); CEDAW Committee, 'Concluding Observations on the Czech Republic' (10 March 2016) CEDAW/C/CZE/CO/6, para 37.

[31] Convention Against Discrimination in Education (14 December 1960) 429 UNTS 93. As at March 2019, there were 104 state parties to the Convention.

[32] Fons Coomans, 'UNESCO's Convention against Discrimination in Education' in Kristin Henrard and Robert Dunbar (eds), *Synergies in Minority Protection: European and International Law Perspectives* (2008) 297, 313.

[33] UNGA Res 47/135 (18 December 1992).

[34] Sub-Commission on the Promotion and Protection of Human Rights, 'Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic

Lastly, various UN Special Rapporteurs with mandates on minorities, racial discrimination, social rights and other human rights issues have addressed the situation of minorities in relation to social rights in both thematic and country reports.

c. Regional Protection

i. Europe

The European Convention on Human Rights (ECHR) does not enshrine economic, social and cultural rights, apart from the right to education (Article 2 of Protocol 1). It lists 'association with a national minority' among the prohibited grounds of discrimination under Article 14, which applies only in conjunction with other Convention rights, and under Article 1(1) of Protocol 12, an autonomous non-discrimination guarantee that is not limited to the enjoyment of substantive Convention rights.[35] There have only been a few cases on Protocol 12 thus far. Thus, the ECHR mostly addresses the social rights of minorities indirectly, when persons belonging to minorities allege discrimination in social matters linked to Convention substantive rights. Indeed, the European Court of Human Rights (ECtHR) has read health and housing-related rights in various provisions and even protects the core of social rights in case of vulnerable groups such as minorities,[36] as shown in the next section. Most importantly, the ECtHR has departed from its earlier, much criticized strict adherence to formal equality and direct discrimination,[37] by embracing substantive notions of equality and addressing indirect discrimination.[38]

The (Revised) European Social Charter provides the broadest – albeit flexible – protection of social rights in Europe. In addition to the reporting procedure, the ESC system has a collective complaints procedure that enables, *inter alia*, international NGOs holding participatory status with the CoE to lodge applications before the European Committee of Social Rights (ECSR) against states that have accepted the procedure. This procedure has been widely used with respect to minorities (*vide* the Roma) and has led to considerable case law, as detailed in the next section.

The Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) is the only comprehensive treaty on minority protection. It is monitored by an Advisory Committee (ACFC), which has adopted detailed thematic commentaries summarizing its key experience and findings and aiming to assist state parties in implementing the Convention. Article 4 guarantees equality and non-discrimination and specifies that special measures for the promotion of full and effective equality of persons belonging to a national minority in all areas of economic, social, political and cultural life do not constitute discrim-

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Minorities' (2 April 2001) UN Doc E/CN.4/Sub.2/AC.5/2001/2, para 28. Under Article 2(4), 'persons belonging to minorities have the right to establish and maintain their own associations', which includes educational institutions.

[35] CETS No 177. However, less than half of CoE member states are party to Protocol 12.

[36] Christina Binder and Thomas Schobesberger, 'The European Court of Human Rights and Social Rights – Emerging Trends in Jurisprudence?' (2015) Hungarian Yearbook of International Law and European Law 51, 60–61.

[37] For a forceful criticism of the early jurisprudence, see Marie Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (2006) 134–35.

[38] Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR' (2009) 29 Legal Studies 211, 214ff.

ination. The Convention enshrines standard (individual) rights, including linguistic rights of special relevance to minorities, but does not recognize collective rights.[39] Article 15 provides for effective participation in economic, social and cultural life, such participation being predominantly concerned with the enjoyment of economic, social and cultural rights.[40] According to the Committee, effective participation requires states not only to remove any barriers preventing equal access of minorities to social services, but also to promote their participation in the delivery of benefits and outcomes.[41]

Education is given predominance in the Convention because of its instrumental role for the full spectrum of human rights of persons belonging to national minorities.[42] Article 12 requires state parties to promote equal access to education at all levels; Article 13 recognizes the right to set up educational establishments without financial implications for states; and Article 14 is a flexibly worded provision on instruction in a minority language subject to available state resources.[43] Discrimination can result from exclusion of minority languages from education, from inadequate possibilities to learn (in) minority language(s) and from language-based segregation into 'special schools' or 'special classes' where the curriculum is often significantly reduced in scope, volume and quality.[44] The Committee encourages the inclusion of minority languages in public schools, but acknowledges that such instruction faces various problems and obstacles and may vary according to specific local parameters.[45]

Other political organs of the Council of Europe (Committee of Ministers, Parliamentary Assembly, Commissioner for Human Rights) and the European Commission against Racism and Intolerance (ECRI), as well as the Organization for Security and Cooperation in Europe (OSCE) and its High Commissioner on National Minorities, also play a role in shaping the legal landscape on the social rights of minorities in Europe through a series of resolutions, recommendations, thematic or country reports and other action.

ii. Other Regions

The African Charter on Human and Peoples' Rights is the only regional human rights treaty that puts economic, social and cultural rights at par with civil and political rights and recognizes group (peoples') rights as well as 'third generation' rights to development, environment and peace. In addition to the rights to health and education, which are enshrined in the Charter, the African Commission on Human and Peoples' Rights (ACHPR) has also read the right

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[39] Council of Europe, Explanatory Report to the Framework Convention for the Protection of National Minorities, 1 February 1995 (ETS No 157), paras 13, 31.

[40] Kristin Henrard, 'Minorities, Identity, Socio-Economic Participation and Integration: About Interrelations and Synergies' in Kristin Henrard (ed.), *The Interrelation Between the Right to Identity of Minorities and Their Socio-Economic Participation* (2013) 21, 33.

[41] ACFC, 'Thematic Commentary No 2, The Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs' (27 February 2008) ACFC/31DOC(2008)001, 4.

[42] ACFC, 'Thematic Commentary No 1, Education under the Framework Convention' (2 March 2006) ACFC/25DOC(2006)002, paras 1, 14. See extensively Petra Roter, 'Minority Children and Education in the Work of the Advisory Committee' (2015) 22 International Journal on Minority and Group Rights 202.

[43] Council of Europe (n 39), paras 75–77.

[44] ACFC, 'Thematic Commentary No 3, The Language Rights of Persons belonging to National Minorities under the Framework Convention' (24 May 2012) ACFC/44DOC(2012)001 rev, para 68.

[45] *Ibid*., paras 72–74.

to housing and the right to food into the Charter, both being essential for the enjoyment and fulfilment of other rights.[46] Socio-economic rights in the African system are subject to the complaints procedure, and NGOs can submit communications on behalf of individuals and groups. In the landmark *Ogoni* case, which concerned the serious environmental degradation and human rights violations suffered by the Ogoni community in the context of ruthless oil exploitation and related suppression in Nigeria, the Commission articulated the obligations to respect, protect and fulfil social rights under the Charter.[47] Although the Charter makes no reference to minorities and the minority concept remains unpopular in Africa,[48] to the extent that non-dominant ethnic (minority) groups in Africa can claim protection under the Charter as peoples,[49] there is considerable potential for the protection of their social rights.

Despite pressing minority issues in Asia and in the Arab world, they lack any developed human rights instruments providing adequate minority protection.[50] Hence, minorities in those regions can only rely on the universal protection regime, to the extent applicable. Lastly, conceptualization of 'minorities' in the elaborate Inter-American system by and large refers to indigenous peoples and afro-descendants,[51] which are discussed elsewhere in this book.[52]

III. CASE LAW

International jurisprudence on the social rights of minorities relates to both direct litigation, which relies on legal provisions explicitly enshrining social rights (especially under the ESC and the CEDAW), and indirect litigation, that is, adjudication of social rights claims under non-discrimination and other provisions of human rights treaties enshrining civil and political rights (such as prohibition of torture and the right to private life, family life and home under the ECHR and the ICCPR). This case law illustrates the social vulnerability of minorities, compounded by (structural) discrimination, which prevents their equal access to social services and their effective participation in social life.

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[46] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, ACHPR, Communication No 155/96 (27 October 2001), paras 60, 65.

[47] *Ibid*., paras 44–47. The Ogoni were referred to in the decision as a people.

[48] Solomon Dersso, 'The African Human Rights System and the Issue of Minorities in Africa' (2012) 20 African Journal of International and Comparative Law 42, 66–68.

[49] Kristin Henrard, 'The Right to Equality and Non-Discrimination and the Protection of Minorities in Africa' in Solomon Dersso (ed.), *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 207, 239.

[50] Li-ann Thio, 'Battling Balkanization: Regional Approaches toward Minority Protection beyond Europe' (2002) 43 Harvard International Law Journal 409, 420.

[51] *Ibid*., 420–22; see also Alexandra Tomaselli, 'The UN Declaration and the Organization of American States' in Ugo Caruso and Rainer Hofmann (eds), *The United Nations Declaration on Minorities: An Academic Account on the Occasion of its 20th Anniversary (1992–2012)* (2015) 319, 321.

[52] See the contribution by Manuel Góngora-Mera in this *Research Handbook* (Chapter 12).

a. Right to Education

The first Strasbourg case on the right to education was the landmark *Belgian Linguistics* case, where the ECtHR first interpreted Article 14.[53] The case concerned Belgium's legislation preventing the establishment or operation, in the Dutch unilingual region of Belgium, of official or subsidized schools providing education in the minority (French) language, or the operation of mixed language schools. The ECtHR held that Article 2 of Protocol 1 did not guarantee education in a language of one's choice,[54] and did not require states to establish or subsidize schools providing education in a given language.[55] Hence, the Court ruled unanimously that, despite the harsh consequences for French-speaking families, the contested legislation was not arbitrary but served the legitimate aim of achieving linguistic homogeneity within the two large regions of Belgium where a large majority spoke only one of the two national languages.[56] This broad deferential approach to the state and its margin of appreciation has been praised by proponents of consociations,[57] but the Court's ruling that there is no right to mother tongue education for minority children under the ECHR would seem to be at variance with contemporary standards on minority language education, especially those enshrined in the Framework Convention.

The ECtHR found a violation of Article 2 of Protocol 1 in *Cyprus v Turkey*, in respect of the abolition by the 'Turkish Republic of Northern Cyprus' authorities of Greek language secondary schools for Greek Cypriots living in Turkish-occupied north Cyprus; the Court held that, since primary education of Greek Cypriot children living there was in Greek, they should continue to receive secondary education in Greek.[58] In *Catan and Others v Moldova and Russia*, the Court found that the forced closure of Moldovan language schools using the Latin script in Moldova's breakaway region of Transdniestria, as a result of legislation aiming at the Russification of the Moldovans living there, constituted an unjustified interference with the pupils' right to education in their national language and a breach of Article 2 of Protocol 1, attributable to Russia.[59] Interestingly, the Court also pointed out that the right to education should be read in the light of Articles 8, 9 and 10 of the Convention and should be interpreted in harmony with the international rules and principles set out in relevant conventions.[60]

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[53] *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics case)*, ECtHR, App Nos 1474/62 *et al*, Judgment of 23 July 1968.

[54] *Ibid*., 32, para 11.

[55] *Ibid*., 30, para 9, 39, para 7.

[56] *Ibid*., 40, para 7, 45, para 13. The Court did however narrowly (8–7) find a violation of Article 2 in conjunction with Article 14, in respect of the French-speaking children that were denied access to French-language schools in six predominantly Dutch-speaking communes, which were accorded a special status and offered bilingual education. The sole ground for the denial was that their parents were not living in those communes but in the (nearby) Dutch unilingual region, which was discriminatory treatment because the same residence condition did not apply to the Dutch-speaking children resident in the French unilingual region (*ibid*., 65–67, para 32).

[57] Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (2013) 64–65.

[58] *Cyprus v Turkey*, ECtHR, App No 25781/94, Judgment of 10 May 2001, para 278.

[59] *Catan and Others v Moldova and Russia*, ECtHR, App No 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012, paras 143-144, 150.

[60] *Ibid*., para 136.

The educational segregation of Roma children in many European countries has given rise to several cases before the ECtHR, starting with the landmark *D.H. and Others v The Czech Republic*.[61] The case concerned the placement of Roma children in special schools for children with learning difficulties, where they received inferior education, based on psychological tests (apparently with their parents' consent) that did not take Romany specifics into consideration. The Grand Chamber found (by a 13–4 majority) a violation of Article 14 read in conjunction with Article 2 of Protocol 1. The Court reaffirmed that

> the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases[62]

and that 'as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority' requiring special protection, also in the sphere of education.[63] The Court endorsed the concept of indirect discrimination in the context of minorities and, in breakthrough from its prior jurisprudence, accepted that applicants were not required to prove a discriminatory intent but could rely on any means, including valid and significant statistical evidence, to establish a *prima facie* case (a rebuttable presumption) when alleging indirect discrimination.[64] As to the consent of the parents, the Court doubted whether they had made an informed decision and, in any case, stressed that the right not to be subjected to racial discrimination cannot be waived, as this would counter an important public interest.[65] The judgment abounds with references to international sources (ACFC, ECRI, CERD etc.) and has even been compared with the iconic *Brown v Board of Education* of the US Supreme Court, which outlawed racial segregation in public schools in the US.[66]

D.H. and Others has been followed in several similar cases.[67] An example of permissible differential treatment is to facilitate the school enrolment of Roma children even if some of

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[61] *D.H. and Others v The Czech Republic*, ECtHR, App No 57325/00, Judgment of 13 November 2007.

[62] *Ibid*., para 181.

[63] *Ibid*., para 182.

[64] *Ibid*., paras 184–89. According to the Court, 'it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof' (para 189).

[65] *Ibid*., paras 203–04.

[66] Antonia Eliason, 'With No Deliberate Speed: The Segregation of Roma Children in Europe' (2017) 27 Duke Journal of International and Comparative Law 191, 227–28.

[67] A breach of Article 14 in conjunction with Article 2 of Protocol 1 was found in the following cases: *Sampanis and Others v Greece*, ECtHR, App No 32526/05, Judgment of 5 June 2008 (unanimous judgment concerning the placement of Roma pupils in special Roma-only classes, in an annex to the main school building, following protests by non-Roma parents who did not want Roma pupils in their children's classes); *Oršuš and Others v Croatia*, ECtHR, App No 15766/03, Judgment of 16 March 2010 (9–8 judgment concerning the temporary placement of Roma children in Roma-only classes in regular schools, ostensibly because of their inadequate command of Croatian); *Sampani and Others v Greece*, ECtHR, App No 59608/09, Judgment of 11 December 2012 (a unanimous followup to Sampanis and Others concerning the placement of Roma children in a school with substandard conditions, attended only by Roma children and offering inferior education); *Horváth and Kiss v Hungary*, ECtHR, App No 11146/11, Judgement of 29 January 2013 (unanimous judgment concerning the placement of two Roma children in a remedial school, where Roma children were overrepresented and received inferior education, as a result of systematic misdiagnosis of mental disability based on culturally inappropriate tests); and *Lavida and Others v Greece*, ECtHR, App No 7973/10, Judgment of ECtHR 30 May 2013 (unani-

the requisite administrative documents are missing.[68] Significantly, the ECtHR has called for positive measures to undo structural deficiencies and a history of racial segregation in special schools, such as raising awareness of the importance of education among the Roma and assisting them with any difficulties in following the school curriculum,[69] or active and structured involvement by relevant social services, including safeguards against misdiagnosis of mental disability.[70]

Turning to case law under the ESC, in *European Roma and Travellers Forum (ERTF) v France*, the ECSR examined the impact of (successive) evictions on the schooling of Roma children and found that the insecurity of evictions undermines the application of the right to education and does not provide a secure environment for the enjoyment of the right, in breach of Article 17(2) of the Revised Charter.[71] Lastly, in *Equal Rights Trust v Bulgaria*, the Committee held that legislation discontinuing family allowances when a minor stops attending school or becomes a parent was a punitive and disproportionate measure to fight school absenteeism and guarantee the right to education, which increased the economic and social vulnerability of the children concerned,[72] and amounted to indirect discrimination against Roma, particularly female minors,[73] in breach of Article 16 (right of the family to social, legal and economic protection) in conjunction with Article E (non-discrimination).

b. Right to Housing

i. Direct litigation: adequate housing and related rights under the ESC

Discrimination and segregationist practices against the Roma, the Travellers and the Sinti in the field of housing were the subject of several complaints brought before the ECSR by NGOs, mostly the European Roma Rights Center (ERRC), against Greece (twice), Italy (twice), France (twice), Bulgaria, Portugal, Ireland and the Czech Republic.[74] In all cases, the housing situation of those minorities (insufficiency of permanent dwellings, lack of temporary stopping facilities or camping sites, forced evictions without effective legal safeguards and without provision of alternative housing or resettlement in substandard housing, residential segregation)

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mous judgment concerning the restriction of Roma children to an ordinary school attended exclusively by Roma children despite them living closer to another school).

[68] *Sampanis and Others* (n 67), para 86.

[69] *Oršuš and Others* (n 67), para 177.

[70] *Horváth and Kiss* (n 67), paras 104, 119, 127.

[71] *ERTF v France*, ECSR, Complaint No 119/2015, Decision of 5 December 2017, paras 74, 81–82.

[72] *Equal Rights Trust v Bulgaria*, ECSR, Complaint No 121/2016, Decision of 16 October 2018, paras 59–61.

[73] *Ibid*., para 95.

[74] *ERRC v Greece*, ECSR, Collective Complaint No 15/2003, Decision of 8 December 2004; *ERRC v Italy*, ECSR, Collective Complaint No 27/2004, Decision of 7 December 2005; *ERRC v Bulgaria*, ECSR, Collective Complaint No 31/2005, Decision of 18 October 2006; *ERRC v France*, ECSR, Collective Complaint No 51/2008, Decision of 19 October 2009; *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Greece*, ECSR, Collective Complaint No 49/2008, Decision of 11 December 2009; *Centre on Housing Rights and Evictions (COHRE) v Italy*, ECSR, Collective Complaint No 58/2009, Decision of 25 June 2010; *ERRC v Portugal*, ECSR, Collective Complaint No 61/2010, Decision of 30 June 2011; *ERTF v France*, ECSR, Collective Complaint No 64/2011, Decision of 24 January 2012; *ERRC v Ireland*, ECSR, Complaint No 100/2013, Decision of 1 December 2015; *ERTF v The Czech Republic*, ECSR, Complaint No 104/2014, Decision of 17 May 2016.

was found in breach of the ESC, particularly Article 16 and/or Article 31 (right to adequate housing), taken together with Article E. In these decisions, the Committee emphasized that one of the underlying purposes of social rights protection under the Charter is to express solidarity and promote social inclusion, which entails that states must respect difference and ensure that social arrangements would not lead to or reinforce social exclusion.[75]

The Committee adopted a commendable approach to adequate housing, underlining the interdependence of human rights: 'the right to housing permits the exercise of many other rights – both civil and political as well as economic, social and cultural' and is 'of central importance to the family'.[76] Thus, adequate housing means

> a dwelling which is structurally secure; safe from a sanitary and health point, i.e. it possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity; not overcrowded and with secure tenure supported by law.[77]

Inadequate standards of housing lead to poor health and higher incidences of diseases.[78] Under Article 31 of the Revised Charter, states must ensure access to social housing for disadvantaged groups,[79] which should be, as far as possible, culturally suited to them,[80] and should also be vigilant to prevent spatial or social segregation of ethnic minorities or immigrants when implementing housing policies.[81] Spatial segregation, in the sense of social exclusion in the enjoyment of the right to housing, entails 'inadequate access to schooling, fewer opportunities for employment or more difficult access to medical facilities'.[82]

The ECSR stressed that equal treatment requires the prohibition of all forms of indirect or systemic discrimination,[83] and noted that positive measures are needed for the integration of an ethnic minority as the Roma into mainstream society.[84] Discrimination may arise

> by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[85]

In this respect, it found that Bulgaria had discriminated against Roma families by applying its legislation on legalizing illegal dwellings in a strict manner that did not give due consideration to the specific living conditions of the Roma and their higher risk of eviction.[86] Conversely, it found no violation of Article E by Ireland because, despite a shortfall in sufficient accommo-

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75 *ERRC v Greece* (n 74), para 19; ERRC v Italy (n 74), para 19.
76 *ERTF v The Czech Republic* (n 74), para 70.
77 *ERRC v Italy* (n 74), para 35; ERRC v Bulgaria (n 74), para 34.
78 *ERRC v Portugal* (n 74), para 66.
79 *ERRC v Italy* (n 74), para 45.
80 *ERRC v Portugal* (n 74), para 49.
81 *Ibid*., para 41.
82 *Ibid*., para 66.
83 *ERTF v France* (n 74), para 41.
84 *ERRC v Bulgaria* (n 74), para 42.
85 *Ibid*., para 40; ERRC v France (n 74), para 83.
86 *Ibid*., para 55.

dation for Travellers in breach of Article 16, the Irish Government had paid due attention to their needs.[87]

In *COHRE v Italy*, the Committee chastised Italy for not implementing its earlier decision in *ERRC v Italy* and for the effects of the infamous state of emergency it had declared on the rights of its Roma and Sinti populations, including Roma and Sinti migrants from other CoE states. The Committee found that the substandard living conditions of the Roma and Sinti had deteriorated as a result of the contested security measures, which had directly targeted, stigmatized and discriminated against those vulnerable groups,[88] in violation of Article E in conjunction with Articles 16, 19, 30 and 31. What is more, the participation of public authorities in violent evictions amounted to 'aggravated responsibility' (a concept borrowed from the Inter-American Court of Human Rights),[89] challenging the community interest and requiring urgent attention from all CoE member states.[90]

In the cases against Portugal and France, the Committee also found a violation of Article 30 (right to protection from poverty and social exclusion). The Committee stressed again the interdependence of socio-economic rights, by pointing out that Article 30 requires the adoption of positive measures to ensure the ability of excluded or disadvantaged groups, such as the Roma, to access rights such as housing, 'which in turn will have an impact on access to other rights such as education, employment and health'.[91]

ii. Indirect litigation: housing as private life, family life and home under the ECHR and the ICCPR

The first cases on the housing of the Roma (referred to as Gypsies in the early judgments of the ECtHR[92]) were brought against the UK in the 1990s by individual applicants who were refused planning permission to live with their families in caravans in land they owned (in environmentally protected or attractive rural areas) and were fined for unauthorized camping. They claimed that the planning and enforcement measures violated Article 8 ECHR (right to private life, family life and home) by preventing them from pursuing the Gypsy traditional lifestyle of living in mobile homes which allow travelling. In *Buckley v UK*, the Court found that there were adequate procedural safeguards in the process that duly considered the applicant's special needs, and ruled by a 6–3 majority that the UK did not overstep its wide margin of appreciation in implementing its planning policy.[93] In *Chapman v UK*, the Grand Chamber first articulated that the vulnerable position of Gypsies as a minority entails a positive obligation under Article 8 to facilitate the Gypsy way of life.[94] Yet, by a 10–7 majority, the Court

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87 *ERRC v Ireland* (n 74), paras 67, 71.

88 *COHRE v Italy* (n 74), paras 58, 74. The 'nomad emergency' (or the 'Roma emergency') was in force from May 2008 until November 2011.

89 *Ibid*., paras 75–77.

90 *Ibid*., para 78.

91 *ERRC v Portugal* (n 74), para 65.

92 Although 'Gypsy' is considered by the Roma as a pejorative label, the British travelling communities seem to commonly self-identify as 'Gypsy' and 'Traveller'. See Helen O'Nions, *Minority Rights Protection in International Law: The Roma of Europe* (2007) 3–4.

93 *Buckley v UK*, ECtHR, App No 20348/92, Judgment of 29 September 1996.

94 *Chapman v UK*, ECtHR, App No 27238/95, Judgment of 18 January 2001, para 96. The following similar cases were decided in the same manner on the same day: *Beard v UK*, ECtHR, App No 24882/94; *Coster v UK*, ECtHR, App No 24876/94; *Lee v UK*, ECtHR, App No 25289/94; and *Jane Smith v UK*, ECtHR, App No 25154/94.

found no violation of Article 8, by adhering to its strictly supervisory role and deferring to the evaluation made by the national authorities, which had concluded that the general interest of preserving the rural character of the countryside prevailed over the personal circumstances of the applicant, which had been duly considered.[95]

The ECtHR found a violation of Article 8 in *Connors v UK*, which concerned the summary eviction of the Roma/Gypsy applicant and his family from the site where they had lived for years, based on a regulatory framework that was found deficient for not allowing applicants to contest the (dis)proportionality of the eviction in light of personal circumstances.[96] The Court clarified that – although in principle states enjoy a wide margin of appreciation in the socio-economic sphere such as housing – in the context of Article 8, which concerns rights of central importance to the individual, the scope of the margin is context-specific and depends on the extent of the intrusion into the applicant's personal sphere.[97]

Subsequent cases were brought by large numbers of applicants representing entire communities. In *Yordanova and Others v Bulgaria*,[98] the Roma applicants complained about the threatened expulsion from the unauthorized and hazardous makeshift dwellings where they were living for decades; in *Winterstein and Others v France*,[99] the applicant Travellers complained about their eviction from the land (classified as a natural protection zone) where they had lived in mobile homes for years; and in *Bagdonavicius and Others v Russia*,[100] the Roma applicants complained about their forced evictions and the demolition of almost an entire village, which destroyed their community. In all three cases, the ECtHR found a violation of Article 8. The Court held that while evictions from unlawfully occupied land are in principle allowed, proportionality requires particular consideration of the consequences of the eviction; the risk of homelessness, especially if the authorities had long tolerated the occupation; and the needs and different lifestyle of an unprivileged, socially disadvantaged and vulnerable minority group such as the Roma.[101] According to the Court, such consideration could be given by assisting the Roma and Travellers to become eligible for available social dwellings,[102] or relocating them in social housing that corresponds to their lifestyle.[103] Remarkably, although the Court reaffirmed that, in principle, 'Article 8 does not in terms recognise a right to be provided with a home',[104] it recognized that 'an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases'.[105] In this respect, the Court cited various CoE instruments and General Comment 7 of the CESCR, stressing the

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[95] *Ibid*., paras 94, 109–10.

[96] *Connors v UK*, ECtHR, App No 66746/01, Judgment of 27 May 2004, para 95. In *Buckland v UK*, ECtHR, App No 40060/08, Judgment of 18 September 2012, para 68, the Court further clarified that the requisite procedural safeguards are inadequate when courts are empowered to only suspend eviction.

[97] *Connors* (n 96), para 82.

[98] *Yordanova and Others v Bulgaria*, ECtHR, App No 25446/06, Judgment of 24 April 2012.

[99] *Winterstein and Others v France*, ECtHR, App No 27013/07, Judgment of 17 October 2013.

[100] *Bagdonavicius and Others v Russia*, ECtHR, App No 19841/06, Judgment of 11 October 2016.

[101] *Ibid*., para 104; *Yordanova and Others* (n 98) paras 121, 126, 129, 133; *Winterstein and Others* (n 99), paras 150, 159–60.

[102] *Yordanova and Others* (n 98), para 132.

[103] *Winterstein and Others* (n 99), para 161.

[104] *Chapman* (n 94), para 99; *Winterstein and Others* (n 99), para 159.

[105] *Yordanova and Others* (n 98), para 130.

need to provide Roma and Travellers with housing in the event of forced evictions, save in cases of force majeure.[106]

In *Naidenova and Others v Bulgaria*, a case with similar facts to those of *Yordanova*, the HRCttee was even more explicit and found that Bulgaria would violate Article 17 ICCPR (right to privacy, family and home) if it enforced the eviction order 'so long as satisfactory replacement housing is not immediately available'.[107] Lastly, in *Georgopoulos and Others v Greece*, the HRCttee found that the demolition of the shed where the Roma family were living violated Articles 17 and 23 (protection of family) of the Covenant and infringed on the right to enjoy their way of life as a minority under Article 27, read alone and in conjunction with Article 2(3) (effective remedy).[108]

It is remarkable that the ECtHR and the HRCttee refused to consider any of these cases under the non-discrimination provisions (Article 14 ECHR and Articles 2 and 26 ICCPR), insisting that, having found a breach of the right to private life, family life and home, no separate issue had arisen.[109] It was only in the extreme circumstances of *Moldovan and Others v Romania*, involving racist attacks against the Roma applicants and severe hardship and destitution following the destruction of their houses, compounded by discriminatory remarks by the authorities, that the ECtHR found a violation of Article 14, in conjunction with Articles 6 (fair trial) and 8.[110]

iii. Destruction of houses as cruel, inhuman or degrading treatment

In *Moldovan and Others v Romania*, the ECtHR also found that, in the special circumstances of the case, the applicants' appalling living conditions, which had detrimental effect on their health and wellbeing, compounded by the racially discriminatory way the authorities dealt with their grievances, amounted to 'degrading treatment' under Article 3.[111] In similar circumstances, the Committee Against Torture found that the burning and destruction of a Roma settlement by non-Roma local residents, with the acquiescence of the police, amounted to cruel, inhuman or degrading treatment.[112]

The deliberate destruction of houses and property belonging to members of minorities in conflict situations, depriving them of their livelihoods and forcing them to leave their villages, was also found to violate the right to respect for their family lives and homes and the right to property as well as, depending on the circumstances, the prohibition of inhuman or degrading

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[106] *Winterstein and Others* (n 99), para 159; *Bagdonavicius and Others* (n 100), para 104.

[107] *Naidenova and Others v Bulgaria*, HRCttee, Communication No 2073/2011, CCPR/C/106/D/2073/2011 (27 November 2012), para 15. See also the similar circumstances and same findings in 'I Elpida' – *The Cultural Association of Greek Gypsies from Halandri and Suburbs, and Stylianos Kalamiotis v Greece*, HRCttee, Communication No 2242/2013, CCPR/C/118/D/2242/2013 (3 November 2016), paras 12.8-13.

[108] *Georgopoulos and Others v Greece*, HRCttee, Communication No 1799/2008, CCPR/C/99/D/1799/2008 (14 September 2010), para 7.3.

[109] See, however, the convincing dissenting opinions by Judge Pettiti in *Buckley*, Judge Keller in *Bagdonavicius and Others* and Judge Power-Forde in *Winterstein and Others*.

[110] *Moldovan and Others v Romania*, ECtHR, App No 41138/98; 64320/01, Judgment of 12 July 2005, paras 139–40.

[111] *Ibid*., paras 110–13.

[112] *Dzemajl and Others v Yugoslavia*, CAT Committee, Complaint No 161/2000, CAT/C/29/D/161/2000 (2 December 2002), para 9.2.

treatment.[113] The ECtHR has decided numerous cases in the context of the Kurdish insurgency in Turkey,[114] and in the context of the Chechnya conflict in Russia.[115] The African Commission has also followed this approach in the context of the Darfur conflict.[116]

c. Right to Health

There is considerable case law concerning the coerced sterilization of Roma women in Central European countries. In *A.S. v Hungary*, the CEDAW Committee found that Hungary's failure, through public hospital doctors, to obtain the full and informed consent of the complainant when subjecting her to sterilization violated Article 10(h) CEDAW (provision of appropriate information and advice on family planning), Article 12 (appropriate services in connection with pregnancy, confinement and the postnatal period) and Article 16(1)(e) (right of women to decide on the number and spacing of their children).[117] In this early case, the Committee failed to embrace an intersectional approach, dealing with the victim's denial of her rights as a woman, not as a woman member of a minority group.[118]

The ECtHR has also adjudicated sterilization cases, all against Slovakia. In *V.C. v Slovakia*, the Court ruled that the applicant's sterilization in a public hospital in gross disregard of her right to autonomy, irrespective of any intention to ill-treat her, amounted to a violation of Article 3.[119] The Court further found a breach of Slovakia's positive obligations under Article 8 to give special consideration to the applicant's reproductive health 'as a member of the vulnerable Roma community', and thereby secure sufficient protection of her right to respect for her private and family life.[120] This finding was apparently sufficient for the Court to once again forego a separate determination of a breach of Article 14. The Court was not convinced that the vulnerability of Roma women and the systemic shortcomings in sterilization practices were sufficient to meet its – very high – threshold of strong objective evidence of an organ-

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[113] See extensively Gilles Giacca, *Economic, Social, and Cultural Rights in Armed Conflict* (2014) 97–99.

[114] See, *inter alia, Akdivar and Others v Turkey*, ECtHR, App No 21893/93, Judgment of 16 September 1996; *Selçuk and Asker v Turkey*, ECtHR, App Nos 23184/94, 23185/94, Judgment of 24 April 1998; *Dulaş v Turkey*, ECtHR, App No 25801/94, Judgment of 30 January 2001.

[115] See, *inter alia, Khamidov v Russia*, ECtHR, App No 72118/01, Judgment of 16 October 2007; *Esmukhambetov and Others v Russia*, ECtHR, App No 23445/03, Judgment of 29 March 2011.

[116] *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, ACHPR, Communication Nos 279/03, 296/05 (27 May 2009), holding that the forced evictions and demolition of houses and other property of the indigenous Black African tribes in Darfur violated multiple human rights, including the prohibition of torture and inhuman or degrading treatment and the right to property.

[117] *A.S. v Hungary*, CEDAW Committee, Communication No 4/2004, CEDAW/C/36/D/4/2004 (29 August 2006), paras 11.2–11.4.

[118] Christine Chinkin, 'Gender and Economic, Social and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014) 134, 144.

[119] *V.C. v Slovakia*, ECtHR, App No 18968/07, Judgment of 8 November 2011, para 119. The Court noted that the applicant's inability to have children was the reason of her ostracism by the Roma community and among the reasons for her divorce (para 118).

[120] *Ibid*., paras 154, 179.

ized policy or intentionally racially motivated conduct,[121] prompting criticism for failing to embrace an intersectional approach.[122] Identical findings were made in *N.B. v Slovakia*,[123] and in *I.G. and Others v Slovakia*.[124]

Furthermore, in *Alyne da Silva Pimentel Teixeira v Brazil*, the first maternal mortality case before the CEDAW Committee, the Committee adopted an intersectional approach to minority women's social rights. It found that the lack of appropriate maternal health services in Brazil, that failed to meet the specific, distinctive health needs and interests of women, constituted a violation of Article 12(2) of the Convention as well as discrimination against women under Articles 12(1) and 2; the victim was discriminated not only because of her sex, but also because of her status as a woman of African descent and her socio-economic background.[125]

Turning to collective complaints, in *ERRC v Bulgaria* the ECSR found that, although there was no systematic discrimination against the Roma in the health care system, the failure of the authorities to adequately address the exclusion, marginalization and environmental hazards facing Romani communities in Bulgaria, compounded by the difficulties of many Roma in accessing health care services, violated Article 11 (right to health) of the Revised Charter in conjunction with Article E.[126] The Committee noted that the rights protected under Article 11 and Article 13 (right to social and medical assistance) are closely related.[127] In a followup case ten years later, the Committee found that health care for Roma was still inferior to that of the rest of the population and that discrimination in accessing health care had not been redressed.[128] It also found that Roma women in Bulgaria did not benefit from adequate access to health care in respect of maternity, which constituted indirect discrimination in violation of Article E in conjunction with Article 11(1).[129]

Lastly, the African Commission, by reference to CESCR's General Comment 14 on the right to health, found that the destruction of homes, livestock and farms as well as the poisoning of water sources in Darfur had exposed the indigenous Black African tribes living there to serious health risks, in violation of Article 16 (right to health) of the African Charter.[130]

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[121] *Ibid*., paras 177–80. See however Judge Mijović's dissent that the Article 14 complaint 'was the very essence of this case'.

[122] Alexandra Oprea, 'Toward the Recognition of Critical Race Theory in Human Rights Law: Roma Women's Reproductive Rights' in Jacqueline Bhabha, Andrzej Mirga and Margareta Matache (eds), *Realizing Roma Rights* (2017) 39, 51–52.

[123] *N.B. v Slovakia*, ECtHR, App No 29518/10, Judgment of 12 June 2012.

[124] *I.G. and Others v Slovakia*, ECtHR, App No 15966/04, Judgment of 13 November 2012. In this case, the ECtHR specified that the first applicant had suffered degrading treatment (para 123).

[125] *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW Committee, Communication No 17/2008, CEDAW/C/49/D/17/2008 (27 September 2011), paras 7.6–7.7.

[126] *ERRC v Bulgaria*, ECSR, Collective Complaint No 46/2007, Decision of 3 December 2008, para 44. See also similar conclusions in *ERTF v The Czech Republic* (n 74), paras 127–28.

[127] *Ibid*., para 39.

[128] *ERRC v Bulgaria*, ECSR, Complaint No 151/2017, Decision of 19 April 2019, para 85.

[129] *Ibid*., para 86.

[130] *Sudan Human Rights Organisation* (n 116), para 212.

IV. CONCLUSIONS AND OUTLOOK

Despite a promising start during the LoN era, the social rights of minorities in international law is a story of certain international actors (political organs, courts, expert bodies, NGOs) incrementally remedying the shortcomings of a fragmented international legal framework which was failing minorities. For the most part, there is no explicit mention of minorities in social rights instruments and, conversely, no explicit mention of social rights in minority rights instruments. This is consequent on the reluctance of states to recognize minority rights, both concepts (social rights, minority rights) being unpopular to various governments and parts of their constituencies.

Having said that, the legal landscape in Europe, which has historically been at the epicentre of minority rights (and the focus of this chapter, not discussing indigenous peoples), has improved considerably since the mid-1990s. The members of the institutional arsenal of the Council of Europe (ECtHR, ECSR, ACFC, ECRI, various political organs) have interacted in a commendable way with each other and with other actors to identify and specify state obligations in the field of social rights of minorities, which on first reading of the relevant legal texts would seem rudimentary. Such interaction has been fuelled by NGOs, which play a prominent role in bringing attention to the (social) rights of minorities in Europe, especially the Roma. Indeed, in addition to the ESCR cases which were initiated by NGOs as per the ESC system, most of the relevant ECtHR cases have benefited from submissions by NGOs as third party interveners.

The analysis of the fragmented legal framework and the case law on the social rights of minorities has shown a variety of synergies, interaction, judicial dialogue and cross-fertilization of norms and concepts that corroborate the interdependence of economic, social and cultural rights and all human rights. It has also illustrated that justiciability of social rights in international law can no longer be credibly denied. Adjudication of social rights (of minorities) is both direct (under the ESC, the African Charter and the CEDAW mechanisms but also the ECtHR[131]) and indirect (mostly by the ECtHR and the HRCttee). Courts and quasi-judicial mechanisms have materialized interdependence in various ways: the HRCttee uses the non-discrimination provisions of the ICCPR to address the social rights of minorities; the ECtHR has used the broad scope of various rights, particularly the right to private life, family life and home, and the concept of positive obligations, to give effect to the rights of persons belonging to minorities in the fields of housing (forced eviction cases) and health (sterilization cases); the Strasbourg Court has read the right to education under Protocol 1 in the light of other ECHR rights and relevant conventions; the ECSR has highlighted the interdependence of economic, social and cultural rights and all human rights.

Among the challenges ahead at the normative level is to further and optimize the interdependence of human rights by engaging with powerful analytical frameworks such as intersectionality.[132] A related challenge is to overcome the persistent judicial reluctance, particularly that of the ECtHR, to consider the social rights of minorities from a non-discrimination perspective. Admittedly, the Strasbourg Court has gone a long way in this respect, but there

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[131] The CESCR has not yet considered any case concerning minorities under the Optional Protocol.

[132] Ioana Cismas, 'The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014) 448.

is considerable space for further improvement.[133] A further challenge is to consolidate gains in substantive equality jurisprudence and to exemplify acceptable differential treatment and affirmative action in concrete contexts in the face of possible societal opposition.

Positive developments at the normative level do not always make a big difference on the ground. The biggest challenge remains implementation, effective monitoring and enforcement. This challenge is exacerbated when implementation is left to the discretion of local authorities, which has sometimes witnessed increased risks of discrimination and social rejection.[134] Successful litigation and compelling judicial pronouncements do not yield compliance overnight and cannot undo deeply embedded stereotypes, structural discrimination, inequality or hostility towards minorities. Compliance can be a long process, especially in structural cases or when affirmative action is required.[135] Despite the adoption of improved legislation, national strategies and programmes to advance the social rights of minorities, the implementation record is mixed and uneven, and sometimes discouraging, particularly for the decisions of the ECSR and the African Commission.

What is more, the progress achieved at the normative level is under threat amid an increasingly populist political environment worldwide and the ensuing backlash against international (human rights) law and institutions. Minorities are among the first targets. The way ahead for the social rights of minorities is long, difficult and full of challenges.

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[133] Kristin Henrard, 'The European Court of Human Rights, Ethnic and Religious Minorities and the Two Dimensions of the Right to Equal Treatment: Jurisprudence at Different Speeds?' (2016) 34 Nordic Journal of Human Rights 157.

[134] *Cf. ERTF v France* (n 71), paras 112–13.

[135] Daniel Brinks, 'Solving the Problem of (Non)compliance in Social and Economic Rights Litigation' in Malcolm Langford, César Rodríguez-Garavito and Julieta Ross (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (2017) 475, 479.

PART III

THE IMPLEMENTATION AND ENFORCEMENT OF SOCIAL RIGHTS

16. Monitoring the implementation of social rights through indicators with special focus on the inter-American level

Laura C Pautassi[1]

I. INTRODUCTION

This chapter aims to describe and analyze the process through which social rights are monitored through human rights indicators, with special focus on the Americas. Human rights indicators are generally defined as

> specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.[2]

Accordingly, indicators are a most valuable tool to measure the implementation of economic, social and cultural rights.

The unit of measurement is defined by different legal instruments and depends on the scope of the respective rights. For this chapter, with its focus on the Americas, the unit of measurement will be the Additional Protocol to the American Convention on Human Rights in the area of Economic Social and Cultural Rights (Protocol of San Salvador). The Protocol of San Salvador provides a pioneer mechanism that includes quantitative and qualitative indicators which make it possible to measure the degree of states' compliance with their obligations as regards social rights. Indeed, indicators have already been included in relevant state reports: in addition to verifying compliance, they allow advances in terms of global accountability as proposed by the Sustainable Development Goals (SDGs).[3]

The chapter is structured as follows. After a brief glimpse at the universal level (section II), it focuses on the Inter-American human rights system and more particularly on the Protocol of San Salvador and its social rights guarantees as specific object of analysis (section III). Section IV focuses on the methodology behind the human rights indicators of use in the Inter-American system, the type of indicators, their definition and their construction. Section V discusses the body that monitors social rights in the Americas, the Working Group of the Protocol of San Salvador (WGPSS), as well as its methodology. Section VI evaluates the findings and focuses on challenges in the use of indicators. Some final considerations conclude.

[1] I am very grateful for assistance by Verónica Carmona Barrenechea.

[2] OHCHR, 'Human Rights Indicators. A Guide to Measurement and Implementation' (2012), UN Doc HR/PUB/12/5, at 16.

[3] See <www.un.org/sustainabledevelopment/sustainable-development-goals/>.

II. INDICATORS AT THE UNIVERSAL LEVEL

State obligations as incorporated in treaties on economic, social and cultural rights provide the yardstick for indicators. Economic, social and cultural rights (ESCR) are recognized and protected in universal and regional human rights instruments. At the universal level, this is, most importantly, the International Covenant on Economic, Social and Cultural Rights (ICESCR).[4] Accordingly, state parties have a legal obligation to respect, protect and fulfil social rights and are required to adopt progressive measures using 'the maximum of [their] available resources' towards the full realization of economic, social and cultural rights (Article 2 ICESCR). The Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the ICESCR through the periodic reports submitted by state parties, which number more than 160.[5] On this basis, the CESCR addresses concerns and makes recommendations (so-called Concluding Observations) to the state parties. These observations address different state obligations, ranging from the approval of regulatory measures and social policies to the need to guarantee budgetary allocation, to comply with the duty to guarantee social rights in the context of equality and non-discrimination.[6]

Hence, indicators are of vital importance. The CESCR has confirmed the need to incorporate empirical evidence, particularly because it is a central requirement to measure the progressive realization of social rights. Indicators are therefore needed as a tool to measure progress. Over time, they have also been accepted by state parties. The incorporation of indicators as an essential framework was the result of the work of special rapporteurs, in particular the first special rapporteur for the right to health, Paul Hunt, who strongly emphasized the need to develop progress indicators to measure compliance with the right to health.[7] Subsequent documents from the United Nations supported his position, in particular the work of the Office of the High Commissioner of the United Nations for Human Rights (OHCHR).[8] The value of indicators is recognized accordingly.

III. THE INTER-AMERICAN SYSTEM: OVERVIEW – LEGAL FRAMEWORK – INSTITUTIONAL SET-UP

In the regional context of the Americas, the Protocol of San Salvador is the most important instrument in terms of social rights. The Protocol incorporates the rights to health, education, social security, work, trade union rights, adequate food, environment and cultural rights, as

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[4] The Covenant has been ratified by 169 state parties, including 19 Latin American states (15 October 2019).

[5] See in more detail the contribution by Dzidek Kędzia in this *Research Handbook* (Chapter 5).

[6] For a full and updated list of all the concluding observations made by the CESCR see https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=5.

[7] HRComm, 'Economic, Social and Cultural Rights. Report of Special Rapporteur, Paul Hunt, on the right to everyone to enjoy the highest possible level of physical and mental health' (3 March 2006) UN Doc E/CN.4/2006/48; Katarina Tomaševski, 'Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable', *Education Primers* No 3 (2001).

[8] OHCHR, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (2008) UN Doc HRI/MC/2008/3; and OHCHR 2012 (n 1).

well as guarantees for the protection of children and adolescents, women's rights, the rights of elderly persons and of persons with disabilities, as well as the rights of indigenous peoples and ethnic groups, in a crosscutting manner.[9] Relevant standards are established accordingly.

In terms of monitoring compliance with these state obligations, indicators have been viewed as vital. A 2005 Resolution of the General Assembly of the Organization of American States (OAS) established that the monitoring mechanism of the Protocol of San Salvador should rely on progress indicators.[10] This was the starting point for an unprecedented process of further refinement as regards the design, validation and implementation of a mechanism that combines obligations, accountability and empirical evidence for eight rights. The Social Charter of 2012 also refers to indicators.[11] The institution tasked to monitor compliance was the WGPSS, which became operative in 2010 (see also section V of this chapter).[12] Since then the WGPSS has developed a matrix with progress indicators that constitute the basis on which state parties must rely when elaborating their national reports.

The system of indicators has also served as a model for monitoring other conventions in the region of the Americas. Once the progress indicators were approved,[13] the Committee of Experts of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (The Belém do Pará Convention, 1994) adopted the same system of progress indicators to measure compliance with the Convention. For this purpose, the Follow-up Mechanism to the Belém do Pará Convention developed specific indicators for the reports to be presented by the states.[14] The Committee for the Elimination of all Forms of Discrimination against Persons with Disabilities, which is the monitoring mechanism of the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, also incorporated indicators.[15]

Thus, the Inter-American human rights system already has three monitoring systems that are based on empirical evidence which verify the degree of compliance with state obligations, constituting a paradigm shift in terms of measuring compliance with human and more particularly social rights.

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[9] The Protocol of San Salvador was opened for signature in 1988, came into effect in 1999, and has been ratified by 16 states (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador; El Salvador, Guatemala, Honduras, México, Nicaragua, Panamá, Paraguay, Perú, Suriname, Uruguay).

[10] OAS, 'Standards for the Preparation of the Periodic Reports Pursuant to the Protocol of San Salvador' (June 2005) AG/RES 2074 (XXXV-O/05).

[11] Social Charter of the Americas (4 June 2012), adopted by OAS, 'Social Charter of the Americas: Renewal of the Hemispheric Commitment to Fight Poverty in the Region' AG/RES 2699 (XLII-O/12).

[12] In 2007, the OAS General Assembly established that the monitoring mechanism would be called the 'Working Group responsible for examining periodic reports of State parties to the Protocol of San Salvador' (<www.oas.org/en/sare/social-inclusion/protocol-ssv/working-group.asp> (15 October 2019)).

[13] Progress indicators were approved by the OAS General Assembly in Res AG/RES 2713 (XLII-O/12) (4 June 2012).

[14] See the Mechanism to the Belém do Pará Convention System of Indicators: <www.oas.org/en/mesecvi/indicators.asp> (15 October 2019).

[15] See Parameters of Measurement of Progress of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities: <www.oas.org/es/sedi/ddse/paginas/index-4_medicion.asp> (15 October 2019).

IV. MEASURING RIGHTS: THE DEFINITION AND CONSTRUCTION OF PROGRESS INDICATORS[16]

Monitoring ESCRs with indicators constitutes an innovation in the Inter-American system. The indicators provide information on advances in public policies, recognizing the principle of progressiveness and non-regression of social rights. Given the importance of the Protocol of San Salvador, as the primary instrument of social rights within the Inter-American system, the following discussion will focus on the definitions and categories that have been adopted in that system of indicators to monitor compliance with state obligations in relation to the respective rights.

In fact, progress indicators have been defined that use socio-economic information, such as statistics, census data and surveys. The mechanism therewith incorporates empirical data in the monitoring, not just general questions sent to the states. This constitutes a novelty in itself. Importantly, the indicators were discussed with states and members of civil society in an open consultation and approved by the OAS General Assembly.

A special feature of the indicators is that the universe of measurement is every economic, social and cultural right as it was defined in the Protocol of San Salvador.[17] The analytical exercise therewith implies the identification of the dimensions of the different rights, which in turn are translated into categories and variables that can be observed. This process, however, is not without complexities, since the objective of the measurement process is not only to quantify the reach of the measurements adopted or the laws passed, but also rather more specifically to qualify the state conduct of compliance with obligations, in terms of quality, quantity, adequacy, availability, diversity and universality.

In relation to each social right, a large number of progress indicators are needed that allow state conduct to be measured in the context of a full and interdependent realization of rights ('progress indicators'). These progress indicators are then divided into structural, process and outcome indicators, and in the case of the mechanism that is analyzed, advances in incorporating qualitative signs of progress.[18]

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[16] This subsection is based on Laura Pautassi, 'Access to Justice in Health Matters: An Analysis Based on the Monitoring Mechanisms of the Inter-American System' (2018) 20 Health and Human Rights Journal 185; and *ibid*, 'Monitoring Access to Information from the Perspective of Human Rights Indicators' (2013) 10(18) Sur, International Journal of Human Rights 55.

[17] The information sources that provide the data with which the states use to calculate the indicators are multiple (census, surveys, judicial databases, and so on) but they must comply with the international methodological safeguards.

[18] As an example of this, to measure the right to adequate food, a structural indicator refers to whether the Constitution recognizes the right to adequate food: in the case of process indicators, if there are policies to eradicate hunger and their results, for example, the malnutrition rate for different population sectors (boys, girls, young people, women, elderly people, people with disabilities, ethnic groups) on the global malnutrition rate. The following is used as a result indicator: 'percentage of households below the indigence or extreme poverty line, urban and rural.' For cultural rights, the following has been taken as a process indicator: 'merit-based competitive funding available for civil society aimed at providing targeted protection of cultural rights, especially for women, children and adolescents, the elderly, LGBTI persons, persons with disabilities, immigrants, indigenous peoples, persons living in poverty and all minorities.' See OAS and WGPSS, 'Progress Indicators for Measuring Rights Under the Protocol of San Salvador' (2015) OEA/Ser.D.

In this sense, according to the Protocol of San Salvador, the tables that should be completed by the states,[19] based on the calculation of progress indicators, are the following:

Structural: Structural indicators reflect the ratification or approval of basic international legal instruments to facilitate the realization of a right and provide information to aid evaluation of how the state organizes its institutional machinery and legal system to meet its obligations. The structural indicators identify the mechanisms that the state has in place to implement the rights in the Protocol; in other words, they collect information in order to evaluate how the state's institutional apparatus and legal system are organized to perform the obligations under the Protocol. They also consider whether measures, legal standards, programmes or policies exist or have been adopted, or whether public agencies have been created in order to implement those rights.

Process: Process indicators seek to measure the quality and extent of a state's efforts to implement rights, by measuring the coverage and content of specific strategies, programmes or policies aimed at achieving objectives that correspond to the realization of a particular right. These indicators help to directly monitor the application of public policies, and in many cases they can provide information on changes in the quality or coverage of social programmes during a given time period and translate this into figures or percentages, which makes them more dynamic and evolutionary than structural indicators.

Outcome: Outcome indicators seek to measure the impact of government strategies and interventions, indicating how those government activities impact the aspects that define the effectiveness of a right in the Protocol, and to provide a quantitatively verifiable and comparable measurement of the state's actions in terms of the progressive realization of rights. They capture attainments, individual and collective, that reflect the status of realization of human rights in a given context.

Signs of progress: Signs of progress represent qualitative measurements that reflect the progression in changes toward the ideal desired outcome (goal).

At the same time, other categories need to be incorporated, such as the institutional design adopted to apply the standard, the financial commitments and the state capacities, together with fundamental principles such as equality and non-discrimination, social participation and accountability, access to information and access to justice.[20] There are thus three crosscutting issues that were defined for the national reports on compliance with the obligations of the Protocol of San Salvador:

(i) *Equality and non-discrimination*: This is an obligation with 'immediate effect' arising from ESCR. States are required to guarantee that all rights are exercised in conditions of equality and

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[19] The state parties to the Protocol of San Salvador must present the reports which include the tables described. In the case of the CESCR, some indicators are requested but the reports that must be completed by the states are not based on indicators. In that sense, the use of human rights indicators is mandatory inside the Inter-American system while it is only requested in some cases inside the universal system.

[20] Continuing the example on the right to food, focusing on the justice system can be mentioned first as an structural indicator in budgetary matters (the percentage of the state public expenditure destined to the fulfilment of the obligations regarding the right to adequate food); second as a process indicator (training conducted for judges on the right to adequate food); and third as a result indicator (the number of conflicts related to the right to adequate food per year). Note that the matrix of indicators is applicable for civil and political rights as well as for social rights based on the universality, indivisibility and interdependence of human rights.

without discrimination, and do everything they can to prevent differential treatment based on factors that are expressly prohibited in the Protocol of San Salvador.

(ii) *Access to justice*: Broadly interpreted, this includes the examination of the legal and factual possibility of access to administrative and legal demand and protection mechanisms. It involves ascertaining whether the state has provided necessary and sufficient means and mechanisms for people to lodge complaints and file claims and lawsuits, and whether it has guaranteed the means to monitor the process through the execution and implementation of the ruling.[21]

(iii) *Access to information and political participation*: Understood as a key tool for public participation and democratic safeguards, as well as for accountability (horizontal and vertical responsibility) in public policies that implement the rights enshrined in the Protocol of San Salvador. It has to do with states' obligation to produce – under internationally accepted criteria – a sufficient quantity of high quality information, and to guarantee free and public access to anyone who needs it.[22]

These crosscutting themes and categories are incorporated into a matrix or a set of tables that includes progress indicators for each right as developed by the Protocol of San Salvador. These categories in turn are complemented by crosscutting human rights norms that apply to all of the rights in the Protocol, and that seek to determine whether the conditions exist in each of the states for people to effectively exercise social rights through the free operation of institutions and deliberative democratic processes. A crosscutting norm can also be considered a 'procedural right' that connects to the fulfillment of a given 'substantive right' and is therefore defined as corresponding to that right.[23]

The development of progress indicators, innovatively, involved the design and implementation of a mechanism that combines obligations, accountability and empirical evidence for eight rights: health, education, social security, work, trade union rights, adequate food, environment and cultural rights. The system of progress indicators also takes into account guarantees for the protection of children, adolescents and elderly, as well as of persons with disabilities, while also incorporating a gender perspective and the recognition of indigenous peoples and ethnic groups in a crosscutting manner.[24]

The way in which the information is provided has also been refined. It has been established that the reports should be prepared through a participatory dialogue with different sectors of civil society (principle of participation), in a complementary way that does not replicate the reports drafted for other human rights protection mechanisms (principle of complementarity). Meanwhile, information about indicators, rights and reports should be broadly and publicly accessible; information about rights will be assumed to be public (principle of publicity) and

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[21] For example, with regard to access to justice, indicators are the duration of each judicial process (process indicator) and the existence of free legal services for the protection of each right (structural indicator).

[22] As an example, in relation to the right to work indicators, states are requested to present indicators that account for the existence of periodic information sources, such as the Permanent Household Survey. The second indicator refers to the periodicity and sample size and coverage. Finally, among the result indicators, states are requested to report on the number of users of public portals that include statistics and open data.

[23] OHCHR 2012 (n 1).

[24] Disaggregation by gender, children, elderly people and LGBTI persons are included in each indicator since it is required that each case be disaggregated by each of these. For example, LGBTI population with social security coverage data.

should be relevant and accurate, avoiding generalizations or confusion with progress indicators or economic development indicators.[25]

V. THE MONITORING BODY OF SOCIAL RIGHTS IN THE INTER-AMERICAN SYSTEM: THE WORKING GROUP OF THE PROTOCOL OF SAN SALVADOR

As mentioned above, the WGPSS became operative in 2010. The Working Group is composed of eight experts: four government experts, two independent experts and one member of the Inter-American Commission of Human Rights.[26] Among its responsibilities, the WGPSS defined the indicators to be included in state parties' reports on the compliance with the Protocol of San Salvador (Article 19); it also provides technical assistance to states, and analyzes and monitors compliance of obligations under the Protocol of San Salvador and General Observations. In this regard, the WGPSS has indicated that the use and dissemination of indicators as a mechanism of enforceability of ESCR presents one of the main paths to achieve this.

More specifically, the system designed by the WGPSS requests 714 indicators. While the number could be considered excessive, the possibility of identifying advances and setbacks in the field of compliance with state obligations requires integral elements that take into account the complexity in the guarantee of rights.

In turn, the WGPSS proposes to organize indicators into *three conceptual categories*:

(i) *Incorporation of the right* in the legal system, and guarantees established by the states;
(ii) *Financial context and budgetary commitment*, referring to the availability of state resources for public social spending, and how it is distributed; and
(iii) *State or institutional capacities*, describing the distributive aspects of resources within the state apparatus (administrative, technical, political and institutional capacities). In other words, it means analyzing under what parameters the state, through its different local and regional branches, deals with a set of social questions. Using state capacity as a category entails reviewing the rules of play within the state apparatus, interagency relations, financial commitments, the division of tasks and the staff needed to carry out those tasks. Putting social rights into effect depends, among other things, on the capacity of institutional bodies (judicial branches, public ministries, administrative and executive agencies and legislative bodies) to provide the necessary goods, services and regulations.

The WGPSS divided the different rights in the Protocol into two groupings. The first includes the rights to health (Article 10), social security (Article 9) and education (Article 13), and indicators for these were established in an initial document, postponing indicators for a second grouping. The latter comprised the right to work and trade union rights (Articles 6–8), the right to food (Article 12), the right to a healthy environment (Article 11) and the right to the benefits of culture (Article 14). The WGPSS also determined that each grouping of rights, and each right itself, should consider gender equality; the specific rights of boys, girls and adolescents; the elderly; persons with disabilities; ethnic and cultural diversity; and the involvement of civil

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[25] See OAS and WGPSS (n 18).

[26] WGPSS: <www.oas.org/en/sare/social-inclusion/protocol-ssv/working-group.asp> (15 October 2019).

society organizations in the formulation of legislative proposals and public policies, which correspond to the other rights established in the Protocol (Articles 15–18). Thus, the WGPSS offers states a gradual but comprehensive process for defining indicators for all of the obligations in the Protocol, and facilitates dialogue and the participation of a range of government and social actors, as well as organizations and the general public.[27]

The information that state parties submit provides a baseline for further measurement of progress. State parties must report every 3 years.[28] As of May 2019, 19 reports had been submitted by the state parties to the Protocol, on the basis of which the progress in social rights could be measured and evaluated.[29] There is thus relevant information which allows for a detailed analysis of the different elements involved in the compliance with the economic, social and cultural rights. Importantly, the WGPSS does not compare countries nor does it establish a ranking among them. Each country is a unit of analysis itself. All this shows the potential strength of these indicators as tools to highlight the current deficits and shortcomings in the realization of ESCR. In the case of the 11 reports available, up to May 2019, of the first group of rights, and the eight reports of the second group of rights, states have inserted a good number of indicators. At the same time, not all states have presented the mandatory reports, and those which have done so have failed to complete all the tables with the required indicators. In this sense, the system of indicators is still under construction. The WGPSS has indicated to states in the General Observations that they are required to produce information and to indicate in what way and in what terms they envisage compliance. Indeed, from the analysis and cross-sectional reading of the indicators, gaps in public policy become clear.[30]

VI. ASSESSMENT, FINDINGS AND CHALLENGES IN THE USE OF INDICATORS

Many lessons can be drawn from the reports presented so far by the state parties, specifically from the reports for the first grouping of rights (right to health, to social security, to education) and the reports available for a second grouping composed of the right to work and trade union rights, the right to adequate nutrition, the right to a healthy environment and the right to the benefits of culture, together with the corresponding final observations of the WGPSS.[31] The large commitment made by states in relation to the duty to report should be pointed out, despite the fact that in many cases they were not able to adequately complete the requested indicators.

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[27] To see the complete list of indicators: OAS and WGPSS (n 18).

[28] Note that the WGPSS also allows civil society organizations and specialized agencies to submit reports in order to contribute information to the mechanism. Such information provided by civil society organizations is a powerful instrument to contrast the official data presented by states.

[29] WGPSS: <www.oas.org/en/sare/social-inclusion/protocol-ssv/working-group.asp> (15 October 2019).

[30] For example, as a structural indicator of protection of the right to health, a state has defined in its reports that it has a universal system, while at the same time informing in the indicator of progress related to coverage that it does not reach 60 per cent of the population. Therefore, it can be concluded that universality is far from being fulfilled.

[31] For a comprehensive list of the nations' reports and WGPSS Final Observations see WGPSS, at <www.oas.org/en/sare/social-inclusion/protocol-ssv/working-group.asp> (15 October 2019).

Although linear relationships cannot be established between indicators, nor rankings among countries that have more adequately complied or those that have been lagging behind in complying with the obligations, the objective of promoting better practices of states reporting on their obligations seems to have been fulfilled. Overall, the following tendencies can be observed.

First, the communicative action and assertion of rights requires empirical evidence of their effective enjoyment and becomes an objective tool to measure compliance.

Second, it has become clear that states have limited information available. In particular, there is a lack of sources of reliable information with data broken down by gender, sexual identity, age, ethnicity, socio-economic level, place of residence and migration, among others; this also extends to breakdowns which require an adaptation of statistical systems, or in other cases the creation of new sources of information.

Third, the required quantity, quality, adequacy, accessibility and availability of state responses leave state bureaucracies with the challenge of how to comply. Also, the implementation of rights is put to the test in terms of showing that they are not purely programmatic.

Fourth, the involvement of citizen controllers/civil society as part of international monitoring where the state is responsible for guaranteeing social participation is measured with specific indicators; thus, in turn, the state reports its actions to the citizens.

Fifth, and finally, the requirement to 'evaluate and leave behind targeted social focused programs' – in line with the universality, interdependence and indivisibility of all rights as well as with the non-discrimination standard – can be better visualized when the state is responsible in a crosscutting manner for all the areas that involve a social right.

Importantly, the reports highlight the centrality of monitoring access to justice in the broad sense that has been defined in the indicators, since it is normally not considered a 'piece of information' generally provided by the public administration.[32] More particularly, state reports to the WGPSS show a lack of information regarding the realization of the crosscutting category of access to justice as compared to other categories covered by the system of progress indicators. This lack of information has not enabled a systematic evaluation of the judicial systems at domestic level, a problem that is common to all state parties. In general, only judgments from high courts of justice are available; however, little is known about the extent to which procedures for receiving complaints are effective, or whether remedies for compensation in case of violations are available. Furthermore, little information is provided regarding the length and cost of judicial procedures, information which is central to analyze access to justice. The mere fact that state parties have not been able to provide information in a national compliance report – even though such information could often be available – is an indication of the deficiency in state capacities and accountability and the lack of any record regarding the justiciability of social rights.[33]

Overall, the importance of reinforcing and improving the forms to measure compliance with social rights is to be pointed out. The preparation of national reports based on progress indica-

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[32] Repeatedly, rights are included in governmental speeches and, to a lesser extent, are used to justify programmes and policies, more often than not in an improper and narrative manner, without including minimum standards. In particular, there is a lack of recognition regarding the need to 'enable' access to justice.

[33] In other cases, the delay in the resolution of lawsuits from one forum to another also demands an explanation which, as of today, is not available. See Pautassi 2018 (n 16).

tors not only involves the ministries of foreign affairs, but also requires the collaborative work among different ministries (interinstitutional instance). Some states are beginning to develop news forms of domestic collaboration. This procedure surpasses the 'mere compliance report' and constitutes a fundamental step towards treating social rights in a comprehensive manner.

Indeed, the WGPSS has emphasized the binding nature of international social obligations as incorporated in the Protocol of San Salvador, making it clear that it is not about 'challenges' or 'goals' of governments but rather about how they should comply with their positive and negative obligations derived from social rights. To advance the realization of social rights in the Inter-American region necessarily requires concerted processes within the countries and forms of regional cooperation. In this sense, the experience initiated by the Protocol of San Salvador's monitoring system will contribute to a better understanding of how to monitor states' compliance with their social rights obligations, based on empirical information. Therefore, more generally, the regular use of indicators will enable the design of social rights-based public policies.

VII. CONCLUSIONS AND OUTLOOK

This chapter analyzed the use of human rights indicators to monitor and measure states' compliance with social rights with special focus on the Inter-American system. It explained how indicators and relevant categories are established, the monitoring system by means of state reports and the work carried out by the WGPSS.

In interpreting the scope of (social) rights, defining the respective standards and measuring compliance through a progress indicator system constitutes one of the most important advances over the past few years in the Inter-American system. The system of indicators under the Protocol of San Salvador provides for a theoretical–methodological tool that allows the evaluation of state conduct. Most importantly, it permits states to evaluate themselves. For this, relevant mechanisms have to be set up also at domestic level. Indeed, the system of reports with indicators is not resolved if the state only presents 'copy and paste' statistics: it requires an interinstitutional evaluation process within the state, between the different branches of government, to comply with the Protocol of San Salvador. Indeed, it is necessary to establish a sophisticated form of cooperation between the ministries at domestic level, for example, between the ministry of health and the ministries of economy, work and education, among others, as well as between the executive branch and the legislative and judicial branches.

This may then have also more far-reaching regional repercussions and benefits. The achievement will further be improved if a common matrix is in place that, far from standardizing, consolidates the national/domestic experiences into a regional programme.

Overall, the system of progress indicators constitutes a robust tool which is highly useful for states as well as for civil society. Of course, one has to know how to use it and the success of this is based on the four pillars that the human rights approach introduced: a wide framework of recognition of rights, the identification of standards, the design of indicators and the empowerment of the people entitled to the rights. Still, an institutional framework that relies on the use of indicators and signs of progress, which will become stronger and more consolidated over time, is an excellent opportunity to build firm relationships between the state and civil society. It also promotes a citizenry that supports a renewed invigoration of the public sphere and who will certainly be more participatory, more informed and more democratic.

17. The role of domestic actors in the implementation and enforcement of social rights

Andreas Th Müller[1]

I. INTRODUCTION

When international lawyers discuss human rights, the focus is often on the substantive side. This can entail a double distortion of perspective, which should, however, be avoided: on the one hand, the question of what is guaranteed in terms of rights should not be uncoupled from the question of whether and how such guarantees are implemented and enforced in favour of their beneficiaries; on the other, even when taking the analysis into the institutional and procedural realm, international lawyers, in a certain *déformation professionnelle*, tend to primarily deal with institutions and procedures on the international plane and to leave aside the domestic plane.

While the present chapter seeks to cure the first distortion (as does the whole section of this *Research Handbook* in which it is embedded), it still suffers from the second. To be more specific: Even though this contribution aims to shed light on the domestic implementation and enforcement of human rights, notably social rights, such effort is doomed from the beginning. This is not only due to space constraints, but also to limitations in terms of knowledge. To perform this task genuinely would require doing justice to the 200+ domestic legal orders existing on the planet, and to the huge diversity of actors, institutions, mechanisms, procedures and practices they shape and by which they are shaped, both in terms of *law in the books* and *law in action*.[2]

This is a comparative effort which goes beyond what can be achieved by the present chapter and its author. What is presented in the following is therefore necessarily a selection of the vast amount of material which the title of this contribution promises to cover, and certainly one that is biased in manifold ways. Taking comfort from the adage which Aquinas ascribed to Aristotle – *sapientis est ordinare*, it is the wise person's mark to order[3] – the following pages seek above all to offer categories that may help to approach and structure the abundance of material that comes into view when discussing the role of domestic actors in the implementation and enforcement of social rights.

To this effect, in a first step, the terms to be used are clarified, and some important distinctions are to be made (section II). This is followed by an examination of what 'domestic actor' means in the context of this chapter and what types of such actors exist, both at the governmen-

[1] The author thanks Mag. Theresa Weiskopf for the research in preparation of this contribution and the support in editing it.

[2] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 ALR 12.

[3] Thomas Aquinas, Sententia Libri Ethicorum, I, 1.1, referring to Aristotle, Metaphysics, I 2 (982a18).

tal and the non-governmental levels (section III). On this basis, the chapter will address and discuss some major venues of implementation and enforcement of social rights at the domestic level (section IV), before concluding (section V).

II. IMPLEMENTATION AND ENFORCEMENT OF HUMAN RIGHTS, IN PARTICULAR SOCIAL RIGHTS, AT THE DOMESTIC LEVEL

a. Implementation and Enforcement

The terms 'implementation' and 'implement' figure frequently in international treaties in general, and treaties guaranteeing social rights in particular, both at the universal and regional levels:[4] examples include the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),[5] the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[6] the 1989 Convention on the Rights of the Child (CRC),[7] the 2006 Convention on the Rights of Persons with Disabilities (CRPD),[8] the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),[9] the 1996 Revised European Social Charter (ESC)[10] and the 2004 Revised Arab Charter on Human Rights.[11]

By comparison, the term 'enforce' is only rarely used in the aforementioned international human rights instruments. For instance, Article 32 CRC (recognizing the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development) states that state parties shall take legislative, administrative, social and educational measures to ensure the implementation of this article and shall therefore, among others, '[p]rovide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article'. Furthermore, pursuant to Article 3 ESC, for the purpose of ensuring the effective exercise of the right to safe and healthy working conditions, the state parties undertake not only to 'issue safety and health regulations', but also to 'provide for the enforcement of such regulations by measures of supervision'.

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[4] It is of interest to note that this is not the case for the African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS 217 (Banjul Charter).

[5] See Arts 14, 18, 22 International Covenant on Economic and Social Rights (ICESCR) (16 December 1966) 993 UNTS 3.

[6] See Arts 7, 14, 17, 22 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (18 December 1979) 1249 UNTS 13.

[7] See Arts 4, 7, 24, 27, 32, 44, 45 Convention on the Right of the Child (CRC) (20 November 1989) 1577 UNTS 3.

[8] See Arts 4, 9, 31, 33, 36, 37, 38, 40 Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006) 2515 UNTS 3.

[9] See Art 6 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol San Salvador) (17 November 1988) OAS Treaty Series No 69 (1988).

[10] See Arts 3, C, I Revised European Social Charter (ESC) (3 May 1996) ETS 16.

[11] See Arts 42, 48 Revised Arab Charter on Human Rights (22 May 2008), reprinted in (2005) 12 International Human Rights Report 893.

In human rights scholarship, the terms 'implementation' and 'enforcement' are extensively used, commonly without clear contours or delimitation, and thus as overlapping or even synonymous concepts.[12] In addition, a series of other terms are often widely used in an interchangeable fashion, such as 'compliance', 'application', 'realization', 'protection', 'monitoring', 'giving effect to' and the like.[13] This diagnosis applies both to human rights research in general and to social rights scholarship more particularly.

Yet, it is submitted here that the terms 'implementation' and 'enforcement' convey different meanings and should therefore be distinguished. Implementation generally refers to transposing a legal regime (in our context, as laid down in an international human rights instrument) into more specific and practical, that is, more application-friendly or application-prone, legal provisions. In the specific context of international law, implementation often denotes the act of introducing or transposing an international treaty into domestic law, according to the respective constitutional requirements. In most cases, implementation is therefore chiefly entrusted to national parliaments. In contrast, enforcement has to do with making sure that the legal provisions in question are actually followed,[14] and therefore typically involves action by the courts and particularly the executive authorities, as it means to actually compel a legal subject into obedience of the law,[15] notwithstanding the fact that this tends to prove especially cumbersome in the context of social rights.[16] In the international law context, one might draw a useful parallel here to the doctrine of jurisdiction of states and its distinction between prescriptive jurisdiction and enforcement jurisdiction.[17]

Thus, while the implementation of international human rights instruments already touches upon state sovereignty and therefore generally results in rather cautiously drafted provisions, the fact that these instruments solely contain ephemeral references to enforcement does not come as a surprise at all. Indeed, the enforcement of legal provisions is still widely seen as a matter of sovereignty, as the *domaine réservé* of states. At the same time, implementation and in particular enforcement are the fields where the treaty guarantees spring to life, as it were. Implementation and enforcement constitute the actual litmus test whether and to what

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[12] See, e.g., Alan Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework' (1985) 35 University of Toronto Law Journal 219, 219: 'provisions for enforcement or implementation at the supranational level', and at 220: 'enforcement by domestic tribunals'; Gisella Gori, 'Domestic Enforcement of the European Social Charter: The Way Forward' in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (2005) 69: 'Domestic enforcement […], that is its legislative and judicial implementation into national legal systems'.

[13] See, e.g., CESCR, 'General Comment No 1 on Reporting by States Parties' (27 July 1981) UN Doc E/1989/22, which refers to the Committee's responsibility 'for monitoring States parties compliance with their obligations and for facilitating the realization of economic, social and cultural rights in accordance with the provisions of the Covenant'; CESCR, 'General Comment No 9 on the Domestic Application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, para 1 regarding the state parties' obligation 'to give effect to the rights recognized therein'.

[14] *Black's Law Dictionary* (2014), 451 defines 'enforce' as 'to give force or effect to' or 'to compel obedience to' and 'enforcement', among others, as '[t]he act or process of compelling compliance with a law'.

[15] *Ibid.*, 451.

[16] See *infra* sections II.b. and II.c.

[17] See notably American Law Institute, *Restatement (Fourth) of the Foreign Relations of the United States § 401* (2018) 139ff; Bruno Simma and Andreas Th Müller, 'Exercise and Limits of Jurisdiction' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 147.

extent a human rights instrument remains a mere 'paper tiger' or effectively changes the life situation of the prospective beneficiaries of these instruments to the better.

In sum, implementation and enforcement encompass the whole cycle of 'giving effect to'[18] the precepts of an international treaty, from incorporating or transposing it into the domestic legal order, on the basis of whatever constitutional arrangement, to specifying its legal effects in the domestic realm, to the case by case, day to day technical application and enforcement in order to bring about a state of affairs compatible with what is required by international law.

b. Domestic versus International Level

Inasmuch as human rights treaties expressly refer to their implementation, they do so primarily as regards their implementation on the international plane,[19] namely by creating international treaty bodies such as the Committee on Economic, Social and Cultural Rights (CESCR) and the European Committee of Social Rights (ECSR) and by establishing monitoring mechanisms such as state reporting and state, individual or collective complaint systems.[20] The same treaties are much more reluctant when it comes to providing for implementation mechanisms on the domestic plane, and this holds all the more true for enforcement, which remains behind the veil of sovereignty, as mentioned previously. Hence, as regards implementation and especially enforcement on the domestic level – which are at the very heart of the present chapter – there is not much guidance from the international human rights treaties themselves.

Human rights law scholarship is well aware that implementation and enforcement at the international level (alone) are deficient, notably with respect to (economic and) social rights.[21] As the realization of social rights typically goes hand in hand with the use of resources, it competes with other public tasks and interests. At the same time, it is at the internal level that the decisions on the allocation and prioritization of resources are to be taken.[22] Thus, 'internalization is essential: it can compensate for the weaknesses of the international regime in bringing about compliance'[23] with international obligations. Indeed, '[a]ccessible and effective national remedies are the primary means of protecting economic and social rights'.[24] Domestic institutions can apply these rights on a regular basis to a wide range of circumstances arising in the particular country.[25] Moreover, domestic remedies are normally quicker and more convenient in terms of accessibility, as well as backed by more effective arrangements for enforcement.[26]

When devising and handling these domestic remedies, states are, however, 'free to decide how they discharge the international obligations in which they have entered',[27] as long as

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[18] CESCR (GC 9) (n 12), para 1.

[19] See, e.g., Art 16ff ICESCR; Art 17ff CEDAW; Art 43ff CRC; see in regard to social rights in particular Allan Rosas and Martin Scheinin, 'Implementation Mechanism and Remedies' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2001) 425ff.

[20] See further contributions in this *Research Handbook*, particularly Chapters 5, 6 and 7.

[21] See Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2016) 88.

[22] See *infra* section II.c.

[23] Olivier De Schutter, *International Human Rights Law*: *Cases, Materials, Commentary* (2019) 810.

[24] Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2001) 55.

[25] *Ibid.*

[26] See Ssenyonjo (n 21), 88.

[27] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2014) 167.

they actually comply with their respective obligations. 'International law does not prescribe a specific method of implementation.'[28] This is especially relevant for our topic since '[i]n the social rights sphere, it is particularly true that the state remains the main actor, its intervention being necessary to ensure that this protection for individuals is in fact effectively enforced'.[29] Consequently, the ICESCR and other international treaties guaranteeing social rights, even more than their civil and political rights counterparts, '[adopt] a broad and flexible approach which enables the particularities of the legal and administrative systems of each state, as well as other relevant considerations, to be taken into account'.[30]

It is therefore in a very general way that Article 2(1) ICESCR refers to the realization or implementation of the rights recognized by the Covenant 'by all appropriate means, including particularly the adoption of legislative measures', with the CESCR adding that 'each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights'.[31] This underdetermination on the part of international law, and states' corresponding wide scope of manoeuvre, do not only apply to the substantive but also, and in particular, to the organizational and procedural level of domestic implementation and enforcement.

The fact that international procedures for implementing human rights, and in particular social rights, are generally seen to be 'only supplementary to effective national remedies'[32] gives rise to a peculiar tension experienced by the international lawyer when it comes to implementing and enforcing social rights. Given the subsidiarity of human rights protection on the international plane, realization and effectuation of social rights are chiefly to be handled at the domestic level, and thus outside the natural habitat of the international lawyer. This makes the question of domestic implementation and enforcement equally momentous and difficult to tackle.

c. Legal versus Political Level

To add just another layer of complication: lawyers are trained to deal with legal provisions, to interpret and apply them to individual cases. When it comes to social rights, however, it is sometimes said that 'it is not the role of the judge to interfere with the procedure states

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[28] *Ibid.*, 165 and 167; Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) vol 1, Article 27 para 2; Manfred Nowak, 'National Human Rights Institutions' in Manfred Nowak *et al* (eds), *All Human Rights for All: Vienna Manual on Human Rights* (2012) 292; Ssenyonjo (n 21), 254.

[29] Gori (n 12), 70.

[30] CESCR (GC 9) (n 13), para 1. Para 2 reminds states, however, that 'this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant' and expressly refers to Article 27 of the Vienna Convention on the Law of Treaties in this regard (para 3).

[31] CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23, para 4; see, in a similar vein, CESCR (GC 9) (n 13), para 5 and Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (8 January 1987) UN Doc E/CN.4/1987/17, para 20. See further Ssenyonjo (n 21), 82.

[32] CESCR (GC 9) (n 12), para 4, also referring to the 'primacy of national remedies'; see also Gerald Staberock, 'Human Rights, Domestic Implementation' in Rüdiger Wolfrum (ed.), MPEPIL (2012) para 1: 'primacy of domestic implication'; Nowak (n 28), 292.

consider appropriate for putting social rights into practice',[33] as this involves general policy decisions on timing and budgetary issues. Differently put, 'the task of allocating resources to the realization of economic, social and cultural rights is one that rightfully rests with the political organs of the state',[34] both because these organs are better placed than courts to take such decisions and because in many political systems they can claim a higher measure of democratic legitimacy than courts.

Today, attempts to radically distinguish economic, social and cultural rights from civil and political rights by referring to their different 'nature', or their belonging to different 'generations' of human rights, are generally rejected.[35] At the substantive level, various mechanisms and techniques have been developed not to content oneself with the distant goal of progressive realization of social rights, but to make them operational, for instance by recognizing minimum core obligations,[36] or by preventing deliberately retrogressive measures.[37] Such strategies are also relevant beyond the substantive level, that is, for the question of implementation and enforcement. Making social rights operational often equals making them applicable by courts, thus generating a shift from the political level (legislature) to the judicial level (courts). Such 'judicialization' and thus 'juridification' of social rights takes place not only when courts apply social rights directly, but also when they place a burden on the executive and legislature to justify the reasonableness of their policy choices and thus 'proceduralize' the protection of social rights.[38] This takes us directly to the question of relevant domestic actors.

III. RELEVANT DOMESTIC ACTORS

There is no authoritative definition of what 'domestic authors' are. The concept can, of course, be explained in a negative manner, that is, by excluding all actors that operate on the international plane, such as international organizations and their organs, international courts and treaty bodies. When focusing on the domestic realm in a positive way, one will probably first think of legislative and judicial institutions, that is, parliaments and courts, as domestic actors,[39] but on second thought one will also include national governments and administrative authorities as well as national human rights institutions (NHRIs).

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[33] Gori (n 12), 85.

[34] Lilian Chenwi and Danwood M Chirwa, 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 53; see also CESCR (GC 9) (n 13), para 10 in this regard.

[35] See, e.g., Martin Scheinin, 'Indirect Protection of Economic, Social and Cultural Rights in International Law' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 73.

[36] See CESCR (GC 3) (n 31), para 10; International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997) para 8 <www.icj.org/wp-content/uploads/1997/01/economic-social-and-cultural-rights-compilation-thematic-report-1997-eng1.pdfl> (29 May 2019); Ssenyonjo (n 21), 105ff; Staberock (n 32), para 13.

[37] See CESCR (GC 3) (n 31), para 9; Ssenyonjo (n 21), 93ff; Chenwi and Chirwa (n 34), 52.

[38] See Liebenberg (n 24), 60; De Schutter (n 23), 823.

[39] See, e.g., CESCR (GC 3) (n 31), para 5; Limburg Principles (n 31), para 18f; Manfred Stelzer, 'Domestic Human Rights Safeguards' in Manfred Nowak *et al* (eds), *All Human Rights For All: Vienna Manual on Human Rights* (2012) 289; Gori (n 12), 70.

Such domestic actors may be classified in different ways, for instance according to whether they are dependent or independent actors – that is, whether they act upon the directives of other actors, notably the political leadership, or under their own responsibility. Whereas administrative authorities generally fall into the first category, courts, but also NHRIs, typically belong to the second. An actor's position within and *vis-à-vis* the governmental apparatus has a major impact on its potential role in the implementation of social rights at the domestic level, as will be analyzed in more detail below.[40]

Furthermore, it may be asked whether a domestic actor is governmental or non-governmental in character. Parliaments, governments, administrative authorities and courts are governmental actors, thus representing the three traditional branches of government, that is, the legislative, executive and judicial powers. NHRIs are sometimes referred to as semigovernmental or hybrid actors: on the one hand, they are established by a governmental act as a public body with an official mandate and special prerogatives; on the other, they operate outside the regular governmental apparatus and do therefore not easily fit into the traditional division of state powers.

This also holds true for non-governmental actors at the domestic level, such as non-governmental organizations and the media, as well as – particularly relevant in the context of social rights – organizations of workers and employers.[41] Inasmuch as they form what is commonly called the 'civil society', their contribution to the realization of social rights is treated in more detail elsewhere.[42] In a similar vein, there is no need for the present chapter to cover the role of corporations.[43] When addressing domestic actors, one might ultimately think of the relevance of individuals. To be sure, individuals are increasingly recognized as actors, also on the international plane.[44] However, since the following section focuses on the analysis of governmental and semi-governmental actors in implementing and enforcing social rights, the contribution of individuals is dealt with only indirectly, that is, by looking at their important role in triggering and activating domestic mechanisms and remedies.

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[40] See *infra* section IV.

[41] Art I(1)(b) ESC refers to 'agreements between employers or employers' organizations and workers' organizations' as a method of implementation of the rights guaranteed in the Charter. See also the tripartite structure of the International Labour Organization (ILO) in this regard; numerous of the conventions adopted under ILO auspices relate to social rights or have at least a social rights dimension, e.g., ILO Convention C029: Forced Labour Convention (Convention Concerning Forced or Compulsory Labour) (14th Conference Session Geneva 28 June 1930); ILO Convention C111: Discrimination (Employment and Occupation) (Convention concerning Discrimination in Respect of Employment and Occupation) (42nd Conference Session Geneva 25 June 1958).

[42] See the contribution by Daniela Ikawa in this *Research Handbook* (Chapter 18); see notably also UNGA Res 53/144 (9 December 1998) 'UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'.

[43] See the contribution by Judith Schönsteiner in this *Research Handbook* (Chapter 21).

[44] See notably Anne Peters, *Beyond Human Rights* (2016) 472ff, on individualized enforcement of international law.

IV. VENUES OF IMPLEMENTING AND ENFORCING SOCIAL RIGHTS AT THE DOMESTIC LEVEL

a. Via the Legislative Power: Parliaments

The major human rights treaties make it clear that the domestic actor primarily called upon to implement social rights is the legislator, that is, national parliaments (in federal states both at the federal and the regional levels). While social rights guarantees will often only fully come to life in decisions in individual cases, this will frequently merely be possible in the wake, and on the basis, of the intervention of the legislator. This is expressly acknowledged by Article 2(1) ICESCR, pursuant to which the duty to achieving progressively the full realization of Covenant rights is to be fulfilled 'by all appropriate means, including particularly the adoption of legislative measures'.[45] Similarly, Article I(1)(a) ESC refers to 'laws or regulations' as the first method of implementation of the rights guaranteed under the Charter. Even more obviously, Article 2 of the San Salvador Protocol – on the model of Article 2 of the American Convention on Human Rights and under the title 'Obligation to enact domestic legislation' – states:

> 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.

Accordingly, a 'sound legislative foundation is critical for the effective implementation and enforcement of economic and social rights within national jurisdictions'.[46] At the same time, since the pertinent treaties only require national parliaments to adopt new laws or amend existing ones inasmuch as this is 'necessary for making' the guaranteed social rights 'a reality', states remain free in the choice of the method of implementation of their international obligations.[47] This notably also includes the decision whether to follow a monist or dualist (or mixed) model of implementation of international law.[48] At the same time, it has been suggested by human rights treaty bodies, particularly also with respect to social rights, that

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[45] See CESCR (GC 3) (n 31), para 3: 'in many instances legislation is highly desirable and in some cases may even be indispensable'; see further Ssenyonjo (n 21), 84ff. Legislation is particularly essential to combat *de jure* discrimination such as that against women, minorities, children and persons with disabilities; see notably CESCR, 'General Comment No 5 on Persons with Disabilities' (9 December 1944) UN Doc E/1995/22, para 16.

[46] Liebenberg (n 24), 79.

[47] See *supra* section II.b. See, however, CESCR (GC 9) (n 13), para 7 which calls for a compelling justification if the means used to give effect to the ICESCR differ significantly from those used in relation to other human rights treaties.

[48] *Ibid.*, para 5: 'The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law.'

> while the [ICESCR] does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. […] [T]he Committee strongly encourages formal adoption or incorporation of the Covenant in national law.[49]

This should not be read as a bias of the Committee in favour of the monist tradition, but rather as encouragement to either make the respective social rights directly part and parcel of the domestic legal system by virtue of the act of ratification (in the monist tradition) or to transform them into the vessel of a national act of legislation (in the dualist tradition), without however changing the wording of the treaty text, so as to avoid problems arising from translating treaty provisions into national law.[50]

The aforementioned freedom of choice also leaves it to states to decide whether to elevate internationally guaranteed social rights to constitutional rank within the domestic legal system.[51] Implementing social rights by *constitutionalizing* them may fulfil a series of purposes, generally benefiting the effectiveness of these rights. Consequently, they may, for instance, be better protected against amendment or abolition in case of a change of majority, serve as a standard of review for ordinary laws, expand the sphere of constitutionally protected rights of citizens, open special venues of constitutional litigation for them, create a special burden of justification for the limitation of these rights by parliaments and governments, and so on. In addition, constitutional entrenchment of social rights also has a symbolic value, making social rights as visible as civil and political rights which are typically constitutionalized, and therefore contributing to awareness raising.

The same holds true for *subjectivation* of social rights. It generally remains up to the national legislator to decide whether and to what extent internationally guaranteed social rights should be made directly enforceable within the domestic legal system, thus entitling individuals to rely on them before domestic administrative authorities and courts.[52]

Depending on their constitutional setup, parliaments can have important tasks in regard to social rights beyond their legislative function in the strict sense, such as in controlling the executive power or appointing members of national ombudsman institutions,[53] but also through the contribution made by parliamentary (sub-)committees especially devoted to human rights issues.[54]

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[49] *Ibid.*, para 8. See also HRCttee, 'General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev1/Add.13, para 13; Staberock (n 32), para 18 derives from this that states that do not directly incorporate or transform the treaty have the burden to show that they are able to ensure the Covenant rights effectively through other means.

[50] See CESCR (GC 9) (n 13), para 8. If laws are to be adopted in languages differing from the authentic versions of the human rights instruments in question (which will commonly be the case), an effort of translation will in any event be unavoidable.

[51] See also CESCR (GC 9) (n 13), para 6; see notably Liebenberg (n 24), 56ff; but also Chenwi and Chirwa (n 34), 51; Ssenyonjo (n 21), 253f; Cécile Fabre, 'Social Rights in European Constitutions' in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (2005) 15ff in this regard.

[52] As regards justiciability of social rights see further *infra* section IV.c.

[53] See *infra* section IV.d.

[54] See, e.g., the broad range of activities of the Joint Committee of Human Rights of the House of Commons and the House of Lords in the United Kingdom.

b. Via the Executive Power: Governments and Administrative Authorities

Whereas the legislature is, as shown before, expressly present in international human rights treaties on social rights, the government and administrative authorities are referred to rather indirectly. To the extent that Article I(1)(a) ESC mentions 'laws *or regulations*' and Article 2 of the San Salvador Protocol envisages the adoption of 'legislative *or other measures*', the executive branch of government also comes into play and is called upon to make its contribution to the effective implementation and enforcement of social rights.

This relates first and foremost to national governments (in federal states both at the federal and the regional levels), on the one hand in their role as law-makers in their own right (in the form of administrative regulations, executive orders, and so on) in order to make operational the precepts of internationally guaranteed social rights, and, on the other hand, in their function as chief actors in terms of agenda setting and policy-making. It has become common for governments to adopt action plans, programmes and the like, thus creating a comprehensive framework for the multi-level and multifaceted domestic efforts in the realization of human rights, including social rights.[55] In addition, governments can have a major role in promoting mainstreaming of social rights, that is, the systematic integration of social rights in all fields of everyday policy-making.[56]

Furthermore, also *decentralized* administrative authorities should not at all be underestimated in their relevance as domestic actors in the implementation and enforcement of social rights. Like the government, they operate on the level of formal decision-making, both by issuing general administrative regulations, but also and in particular by deciding individual cases. After all, most of the binding decisions affecting the life situations of citizens in terms of social rights are issued by administrative authorities, not by courts.[57] Moreover, administrative remedies will often be cheaper, speedier and more accessible, particularly to persons from disadvantaged and vulnerable groups, than formal court proceedings.[58]

Moreover, while the 'power of the purse' is normally formally held by parliament, in effect the lion's share of the decision-making on the allocation and prioritization of resources that is so decisive for the effective implementation of social rights is taken by actors at the governmental and administrative levels. In addition, administrative authorities have also responsibilities going beyond formal decision-making, by disseminating information, running education programmes, funding social rights initiatives, coordinating activities, funding social rights, and so on. Recent human rights instruments tend to be more sensitive to these 'soft' tools of the administration, which can, however, be particularly effective when it comes to promoting the respect of social rights. A prime example in this regard is Article 33(1) CRPD, which requires state parties to designate 'focal points within government for matters relating to the implementation' of the Convention and to give due consideration to the establishment of

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[55] See also De Schutter (n 23), 852.

[56] *Ibid.*, 852ff.

[57] See also CESCR (GC 9) (n 13), para 9 in this regard: 'Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making.'

[58] See Liebenberg (n 24), 80.

a 'coordination mechanism within government to facilitate related action in different sectors and at different levels'.

Governments and administrative authorities are also the main actors in submitting national reports in the state report system, in defending the state party's position in complaint proceedings and in drawing conclusions from, and implementing reforms following, Concluding Observations and General Comments by human rights treaty bodies. While these aspects pertain to the implementation of human rights treaties on the international plane, they testify to the necessary interaction between international and domestic actors for the purpose of fully effectuating international human rights guarantees, a crucial aspect to be taken up subsequently.

c. Via the Judicial Power: Courts

While the ICESCR does not contain a provision such as Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR)[59] guaranteeing every person victim of a Covenant violation the right to an 'effective remedy', including the obligation of states 'to develop the possibilities of judicial remedy', international human rights treaties guaranteeing social rights also envisage the existence of judicial remedies in case of violation of these rights.[60]

Yet, there is a longstanding debate as to whether economic, social and cultural rights can be considered justiciable, that is, directly enforceable by courts.[61] Indeed, social rights have even suffered from a 'presumption of non-justiciability',[62] thus strictly distinguishing them from civil and political rights.[63] Most commonly, the lack of justiciability is justified by the (purportedly) indeterminate character of these rights as well as by the missing competence and legitimacy of courts compared to national parliaments when it comes to activating and implementing social rights, threatening to result in a violation of the separation of powers.[64] From a contemporary perspective, it can, however, be clearly held that 'extreme views of denying the justiciability of economic, social and cultural rights by referring to their different "nature" have been proved wrong'.[65] While it is correct to state that, at least to some extent, 'matters involving the allocation of resources should be left to the political authorities rather than the courts'[66] and while it is equally true that the realization of social rights will often have implications for the allocation of resources, it is also necessary

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[59] International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 (ICCPR). See also Article 13 European Convention for the Protection on Human Rights and Fundamental Freedoms (ECHR), guaranteeing the right to 'an effective remedy before a national authority', and Article 47(1) Charter of Fundamental Rights of the European Union, guaranteeing 'the right to an effective remedy before a tribunal om compliance with the conditions laid down in this Article'.

[60] See CESCR (GC 9) (n 13), para 3.

[61] See in particular the references in De Schutter (n 23), 821.

[62] Gori (n 12), 70.

[63] See for this position, e.g., Tomuschat (n 27), 166, considering economic, social and cultural rights ('second generation rights') not to be directly invocable.

[64] See further De Schutter (n 23), 821ff; Liebenberg (n 24), 58ff; Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2016) 415ff.

[65] Scheinin (n 35), 73.

[66] See the statement referred to in CESCR (GC 9) (n 13), para 10.

> to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent.[67]

Indeed, there is an increasing judicial practice to the contrary, with courts across the continents and different legal systems adjudicating and giving effect to social rights in various ways.[68] The (constitutional and supreme) courts of South Africa, India and Colombia have acquired a particular reputation as progressive actors in this field.[69]

In addition, when discussing the role of courts, one should not only consider the instances of *direct* application of internationally guaranteed rights, but also the *indirect* implementation of such rights. This may refer to different legal techniques. First, it can mean that international human rights are used as 'interpretative standards', on the basis of the 'principle that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations'.[70] Depending on the leeway that the domestic interpretation doctrine accords to courts and their preparedness to make use of such leeway, domestic courts may be able to ensure a degree of harmony between international precepts and domestic reality that does not differ substantially from the scenario of direct application of social rights and can therefore effectively compensate for a lack of direct applicability.

Second, social rights may be implemented indirectly if they attach themselves to provisions and mechanisms created for civil and political rights. Such dynamics have been observed and documented not only for the domestic level,[71] but also for the universal level, that is, in the relationship between the ICESCR and the ICCPR,[72] as well as in the regional protection

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[67] *Ibid.*; see also Chenwi and Chirwa (n 34), 53.

[68] See Staberock (n 32), para 35; see in particular Fons Coomans (ed.), *Justiciability of Economic and Social Rights*: *Experiences from Domestic Systems* (2006) as well as International Commission of Jurists, 'Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability' (Geneva 2008) <www.icj.org/wp-content/uploads/2009/07/Courts-legal-enforcement-ESCR-Human-Rights-Rule-of-Law-series-2009-eng.pdf> (29 May 2019), with many examples.

[69] See Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' 38ff <www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> (29 May 2019); David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 190, 196ff; Liebenberg (n 24), 61ff; De Schutter (n 23), 832ff, 847ff; Ssenyonjo (n 21), 258f, 268ff, 301ff; see in particular the case studies in Danie Brand, 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale' in Fons Coomans (ed.), *Justiciability of Economic and Social Rights*: *Experiences from Domestic Systems* (2006) 207ff; S Muralidhar, 'Judicial Enforcement of Economic and Social Rights: the Indian Scenario' in Fons Coomans (ed.), *Justiciability of Economic and Social Rights*: *Experiences from Domestic Systems* (2006) 237ff; Rodrigo Uprimny Yepes, 'Should Courts Enforce Social Rights? The Experience of the Colombian Constitutional Court' in Fons Coomans (ed.), *Justiciability of Economic and Social Rights*: *Experiences from Domestic Systems* (2006) 355ff.

[70] CESCR (GC 9) (n 13), paras 13, 15.

[71] See Liebenberg (n 24), 71ff.

[72] See Scheinin (n 35), 72ff, particularly using Articles 10 and 26 ICCPR to promote the right to social security (Article 9 ICESCR) as well as to grant prisoners their right to health, food and clothing (Article 11 ICESCR). See notably *Gueye et al v France*, HRCttee, Communication No 196/1985, CCPR/C/35/D/196/1985 (1989); *Mukong v Cameroon*, HRCttee, Communication No 458/1991, CCPR/C/51/D/458/1991 (1994).

systems of Europe,[73] America,[74] and Africa.[75] It is important to note that which civil and political rights are most capable of providing indirect protection to social rights is not a given. While under the ICCPR the main vehicle has been non-discrimination, under the European Convention on Human Rights it has been fair trial.[76] The outcome will depend on multiple factors, including differences in the catalogue of rights, the textual formulation of specific provisions and the articulation of claims by individuals or advocacy groups.[77]

In addition to the horizontal crossfertilization between civil and political as well as economic, social and cultural rights, these dynamics testify to an increasing vertical crossfertilization between international and domestic courts.[78] The paradigm of the 'dialogue of courts' conveys the idea that this crossfertilization is not only unidirectional from the top to the bottom, but also leads to international human rights bodies and courts taking inspiration from domestic judicial reasoning.[79]

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[73] Particularly using Articles 2, 3, 6, 8 and 14 ECHR (as amended by Protocols Nos 11 and 14) to promote the right to health (Article 11 ESC), the right to social security benefits (Articles 12 and 13 ESC), the right of people with disabilities to social integration (Article 15 ESC) as well as the right of children and young people to protection from negligence, violence and exploitation (Article 17 ESC). See notably *Airey v Ireland*, ECtHR, App No 6289/73, Judgment of 9 October 1979; *Gaygusuz v Austria*, ECtHR, App No 39/1995/545/631, Judgment of 23 May 1996; *Botta v Italy*, ECtHR, App No 21439/93, Judgment of 24 February 1998; *Bensaid v United Kingdom*, ECtHR, App No 44599/98, Judgment of 6 February 2001; *Z and others v United Kingdom*, ECtHR, App No 29392/95, 10 May 2001; *Larioshina v Russia*, ECtHR, App No 56869/00, Judgment of 23 April 2002; in this regard, see also Gori (n 12), 80f; Christina Binder and Thomas Schobesberger, 'The European Court of Human Rights and Social Rights – Emerging Trends in Jurisprudence?' (2015) Hungarian Yearbook of International and European Law 51; Christina Binder and Elisabeth Steiner, 'Education Related Rights' in Christina Binder, Jane A Hofbauer, Flávia Piovesan, Anna-Zoe Steiner and Elisabeth Steiner (eds), *Social Rights in the Case Law of Regional Human Rights Monitoring Institutions* (2016) 61ff.

[74] See in particular the recent jurisprudence of the Inter-American Court of Human Rights, extending its preexisting case law (see Flávia Piovesan, 'The Inter-American Court of Human Rights and Social Rights' in Binder *et al* (n 73) 315ff) by using Article 26 ACHR to promote the protection of the right to work and the right to health; see *Lagos del Campo v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 31 August 2017; *Dismissed Employees of Petroperu et al v Peru* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 23 November 2017; *Poblete Vilches et al v Chile* (Merits, Reparations and Costs), IACtHR, Judgment of 8 March 2018; *Cuscul Pivaral et al v Guatemala* (Preliminary Objection, Merits, Reparations and Costs), IACtHR, Judgment of 23 August 2018.

[75] See Sisay A Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect* (2013) 299ff; Jane A Hofbauer, 'The African Commission and African Court on Human and Peoples' Rights and Social Rights' in Binder *et al* (n 73), 441ff.

[76] See the references *supra* notes 72 and 73.

[77] See Scheinin (n 35), 87.

[78] See Staberock (n 32), para 37.

[79] See for the ECHR López Guerra, 'Dialogues between the Strasbourg Court and National Courts' in Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (2017) 401ff; Erik Møse, 'The ECtHR's Use of Decisions of Domestic Courts from States Not Involved in the Case and of Other Council of Europe Bodies' in Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (2017) 410ff. The new Protocol No 16 to the ECHR, although in the field of civil and political rights, is of interest in this regard since it establishes a mechanism allowing highest domestic courts to request the ECtHR to give an advisory opinion on questions of principle relating to the interpretation or application of Convention rights. According to the Protocol's preamble, this new competence 'will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention'.

Hence, for civil and political rights as well as for economic, social and cultural rights, there can be no doubt that '[t]he effectiveness of international covenants on human rights will depend in large measure on the extent to which municipal courts are willing to apply them to domestic disputes'.[80] On the one hand, this requires overcoming cultures of resistance and indifference *vis-à-vis* social rights that still abound at the domestic level.[81] The welcoming attitude that domestic courts, including constitutional courts, in France, Italy and Spain, manifest *vis-à-vis* the ESC prove that international social rights are in principle well digestible for the national court system.[82]

On the other hand, a merely formalistic application of social rights by domestic courts does not suffice either. In fact, effective and meaningful implementation is

> closely linked to a legal system in which all actors in the justice system, including lawyers and prosecutors, are able to carry out their professional duties without undue political interference and are protected from attack, hindrance, harassment, or prosecution for their professional duties.[83]

This also, and particularly, means taking seriously the principle of non-discrimination enshrined in every human rights instrument,[84] not only in a formal but also in a material and comprehensive sense. Thus, special care should be taken to ensure that the judicial system is actually accessible to minorities, and especially vulnerable, disadvantaged and marginalized groups and persons, who may be not familiar with legal remedies and may not have the necessary resources to afford them.[85]

d. Via Semigovernmental Actors: National Human Rights Institutions

Whereas the previously discussed governmental actors operate in virtually all domestic legal systems, NHRIs exist in many but not all states. In addition, the concept of NHRIs is a broad one, referring to a rather heterogeneous group of bodies having in common that they are 'officially established and State-funded national entit[ies] independent from the government, mandated to promote and protect international human rights standards at domestic level'.[86]

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[80] Brudner (n 12), 253.

[81] See in this regard notably the 1988 Bangalore Principles on 'The Domestic Application of International Human Rights Norms', published in Michael Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 Australian Law Journal 531–32, addressing the role of courts with respect to human rights obligations, notably for legal systems in the dualist tradition. See further Michael Kirby, 'The Road from Bangalore: The First Ten Years of the Bangalore Principles on the Domestic Application of International Human Rights Norms' (1998) <www.hcourt.govau/assets/publications/speeches/former-justices/kirbyj/kirbyj_bang11.htm> (29 May 2019).

[82] See, e.g., Juliano Sarmento Barra and Marine Aubrière, 'La charte sociale européenne et son application par les juridictions internes: Regards croisés entre la jurisprudence française et espagnole', 5 Lex Social: Revista jurídica de los Derechos Sociales (2015) 161ff.

[83] Staberock (n 32), para 29.

[84] See, e.g., Article 2(2) ICESCR.

[85] See Staberock (n 32), para 31, referring to the use of public interest litigation or other forms of third party intervention in certain countries (e.g. India) to rectify systemic problems of access to justice; see also *infra* section IV.d.

[86] De Schutter (n 23), 861.

NHRIs are generally entrusted with broad mandates (often not corresponding to the rather limited resources assigned to them).[87] This typically includes several among the following functions: advising governments and parliaments on how to promote, protect and implement human rights; reviewing the compatibility of existing and draft legislation with international human rights obligations; drafting, adopting or commenting on national human rights action plans; identifying national-level benchmarks against which the realization of human rights can be measured; conducting research or impact assessments and providing technical advice on human rights issues; carrying out awareness raising and human rights education and dissemination activities (both within the population at large and among particular groups such as the public service, the judiciary, the private sector, and so on); monitoring compliance; and publishing reports on the legal and factual human rights situation.[88] NHRIs may also have quasi-judicial functions such as examining individual or collective human rights complaints alleging infringement of human right standards, often by means such as fact-finding and mediation.[89] The broad and multifaceted mandates of NHRIs, combined with the higher flexibility they typically enjoy in comparison with courts that have to operate based on the rule of law, may prove particularly conducive to the promotion of social rights.[90] At the same time, it has been observed that NHRIs tend to pay far greater attention to civil and political rights than to economic, social and cultural rights.[91]

NHRIs are typically organized in two major forms:[92] on the one hand, they are often set up as human rights bodies with a rather large membership, often including experts, but also involving civil society organizations ('human rights commissions model'); on the other, they may operate according to the 'ombudsman model'. The traditional concept of the ombudsman is that of an 'independent and easily accessible control of public administration conducted

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[87] See Nowak (n 28), 292.

[88] *Ibid.*, 294 as well as CESCR, 'General Comment No 10 on the Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights' (10 December 1998) UN Doc E/C.12/1998/25, para 3.

[89] See Staberock (n 32), para 41. In addition, NHRIs are sometimes also tasked with initiating preventive measures and carrying out preventive visits to places of detention (at para 40); Nowak (n 28), 294. See in this regard particularly the national prevention mechanisms (NPM) established on the basis of Article 3 of the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (18 December 2002) 2375 UNTS 237 (OPCAT), which can also help to protect fundamental social rights.

[90] See in particular CESCR (GC 10) (n 88), para 3, noting that NHRI 'have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights […] It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.'

[91] See C Raj Kumar, 'National Human Rights Institutions and Economic, Social and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights' (2006) 28 HRQ 755; De Schutter (n 23), 866; Ssenyonjo (n 21), 319; see in particular Liebenberg (n 24), 83 in regard to the South African Human Rights Commission and the realization of rights concerning housing, health care, food, water, social security, education and the environment.

[92] See, e.g., Ssenyonjo (n 21), 311; De Schutter (n 23), 861; as regards the great variety of modes of organization of NHRI see in particular Linda C Reif, 'The Shifting Boundaries of NHRI Definition in the International System' in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (2012) 52ff.

by highly reputable persons with democratic legitimation'.[93] According to the more recent 'human rights model', the ombudsman is assigned with responsibilities specifically serving the implementation of human rights in state practice. In particular, ombudsman institutions are often endowed with the competence to initiate public interest cases or to intervene as a third party in domestic proceedings. Being themselves extrajudicial (since regularly parliamentary) bodies,[94] they may activate and strengthen the courts' role in implementing human rights and, notably, social rights by conducting strategic litigation before domestic courts.[95] This can have a major impact in terms of awareness-raising and mobilization of constituencies in order to bring about domestic legal and policy change.[96] The same holds true for specialized national institutions that exist in some states and are especially devoted to protecting the rights of one particular vulnerable group, such as minorities, indigenous populations, women, children, persons with disabilities or refugees.[97]

A major example of an NHRI in the field of social rights, which is envisaged and shaped by international human rights law itself, is the 'independent mechanism' to promote, protect and monitor the implementation of the CRPD as provided for by Article 33(2) CRPD. Civil society, in particular persons with disabilities and their representatives, shall be involved and participate fully in the monitoring process and therefore act as 'experts in their own cause' (Article 33(3) CRPD), thus reflecting '[t]he motto "nothing about us without us" [that] resonates with the philosophy and history of the disability rights movement, which relies on the principle of meaningful participation'.[98]

In addition, when establishing such a monitoring mechanism, Article 32(2) CRPD requires state parties to take into account the so-called Paris Principles.[99] These principles were adopted in the aftermath of the 1993 Vienna World Conference on Human Rights, which strongly encouraged the establishment of NHRIs.[100] Accordingly, NHRIs shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence. NHRIs must be independent from their government and not be subject to financial control which might affect their independence. Members shall be appointed or elected by an official act which shall establish the specific duration of the mandate and which shall afford all necessary guarantees to ensure the pluralist representation of the social forces of civil society, including NGOs, professional organizations, universities, religious communities, parliament and government departments.

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[93] Gabriele Kucsko-Stadlmayer, 'Ombudsman Institutions' in Manfred Nowak *et al* (eds), *All Human Rights For All: Vienna Manual on Human Rights* (2012) 296.

[94] *Ibid.*, 297.

[95] See also Liebenberg (n 24), 83, emphasizing the cooperative relationship between courts and NHRI in the enforcement of orders relating to economic and social rights.

[96] See Ssenyonjo (n 21), 322.

[97] *Ibid.*, 311.

[98] CRPD Committee, 'General Comment No 7 on the Participation of Persons with Disabilities, Including Children with Disabilities, through their Representative Organizations, in the Implementation and Monitoring of the Convention' (9 November 2018) CRPD/C/GC/7, para 4.

[99] UNGA Res 48/134 (20 December 1993) 'Principles relating to the status of national institutions for the promotion and protection of human rights'; see further Gauthier de Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (2015) 31ff.

[100] See Vienna Declaration and Programme of Action (25 June 1993) UN Doc A/CONF.157/23, para 36.

Article 33 CRPD envisages that the domestic independent monitoring mechanisms liaise with their counterpart on the international level,[101] *in casu* with the CRPD Committee, and contribute to its work, for example by playing a major role in reporting the domestic human rights situation to the Committee.[102] In addition to creating this vertical link between the domestic and international levels, NHRIs, by virtue of their very composition, often also provide a horizontal link between government and the civil society.[103]

Accordingly, the NHRI envisaged by the CRPD is paradigmatic for the international standards regarding independence, pluralism, effectiveness and accountability existing today with respect to NHRIs,[104] as well as for the promotion of active interplay and mutual strengthening of NHRIs and their counterparts on the international plane.

V. CONCLUSION

As has been widely observed, after an intense period of standard-setting, since the 1980s

> a new generation of questions has arisen which focuses more on the effectiveness of [the human rights] framework and, particularly, on its impact at national level. The role of national authorities is vital in this respect.[105]

At the same time, the analysis has shown that there is no uniform regime and no settled practice regarding the implementation and enforcement of social rights on the domestic plane.[106] In fact, we are confronted with a huge variety of actors, processes and strategies in this regard.

It must be clear that in order to effectively 'bring home' social rights a multidimensional approach is of the essence, including legislative, administrative and judicial, but also financial, social and educational, measures.[107] Beyond the legal realm in the strict sense, crucial factors for the effective implementation and enforcement of social rights are the existence of a human rights and law enforcement culture; political will on the part of government and political, economic and cultural elites; the existence of a civil society; the dissemination and integration of social rights into school and university curricula; the integration of social rights into the regulations and institutional culture of police, penitentiaries, health and social services, and so on.[108]

There can be no doubt that the continual interaction on the horizontal level, that is, between the different branches of the domestic government as well as NHRIs, 'in defining and redefining their respective roles and powers in different contexts'[109] is of paramount importance

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[101] See Staberock (n 32), para 3.
[102] See Nowak (n 28), 293.
[103] *Ibid*.
[104] As regards the possibility of international accreditation of NHRI by the Global Alliance of National Human Rights Institutions (GANHRI), formerly the International Coordinating Committee of NHRI (ICC), see <http://ennhri.org/NHRI-Accreditation>.
[105] De Schutter (n 23), 809; see also Staberock (n 32), para 4.
[106] See Ssenyonjo (n 21), 322.
[107] See CESCR (GC 3) (n 31), para 7; CESCR (GC 9) (n 13), para 9; Limburg Principles (n 31), para 17.
[108] See Staberock (n 32), paras 2, 43.
[109] Liebenberg (n 24), 59.

in this regard. *Nota bene*, such interaction does not necessarily always come in the form of positive collaboration, but can also arise from competition and conflict. In a similar vein, implementation also calls for a 'broad and holistic approach' on the vertical level, since '[i]t is the effective interplay between the two levels which best serves the domestic realization'[110] of social rights.

[110] Staberock (n 32), para 48.

18. The role of civil society organizations in the protection of social rights

Daniela Ikawa

I. INTRODUCTION[1]

NGOs and social movements have a key role in the promotion of social rights in at least two ways: by fighting for the protection of social rights as a means of sustaining the struggle for human rights more generally, and by channelling voices of vulnerable groups in the framing of new human rights content.

In other words, human rights NGOs and social movements connect individual local experiences to a global system of norms to create a more effective and universal human rights framework. This local to global connection operates in two spheres: a substantive sphere, where the content of rights reflects the needs of real individuals as opposed to the needs of the allegedly abstract subject of liberalism; and a procedural sphere, where the inclusion of new voices slowly leads to a shift in the balance of power among those responsible for producing norms, as well as to new frameworks of collaboration among stakeholders. Work in both spheres can make human rights, including social rights, truly universal.

As for the substantive sphere, universalism is achieved by taking into consideration the specific violations and obstacles faced by differently situated individuals in exercising their social rights. Let us take, for instance, the social right to health. The content of the right to health for a white, rich, heterosexual, ablebodied man living in a dictatorship will be different from the content of such a right for a black, poor, pregnant woman living in a democratic but economically unequal country. While the former might need assurances that his oppressive government will fulfil its negative obligations and will not bar him from getting to the best private hospital in town, the latter might need assurances that the government will fulfil its positive obligations to establish a reliable system of public health that provides for adequate obstetric services without racial discrimination.[2]

The procedural sphere is closely connected to the substantive sphere. To be universal, human rights, including social rights, need to include the voices of differently situated individuals in their making. Universalism cannot be built from a view from nowhere.[3] The solipsist Kantian alternative of envisioning universal norms by detaching oneself from all experience – by situating oneself in an allegedly disembodied and decontextualized place[4] – has great potential to lead to a partial perception of justice: the perception of dominant groups. Although attempts

[1] Another version of this article was published as Daniela Ikawa, 'Rights for Real People, Networks and a View from Everywhere' in Peter Evans and Cesar Rodriguez-Garavito (eds), *Transnational Advocacy Networks – Twenty Years of Evolving Theory and Practice* (2018) 136.

[2] For an example of the latter interpretation, see the *Alyne da Silva Pimentel Teixeira v Brazil*, CEDAW Committee, Communication No 17/2008, CEDAW/C/49/D/17/2008 (2011).

[3] This is borrowed from Thomas Nagel, *A View from Nowhere* (1986).

[4] Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785).

to achieve higher degrees of impartiality are positive, they need to recognize that impartiality and universality are built collectively,[5] as no one can either fully detach oneself from one's own circumstance,[6] or fully capture the vast array of life experiences while attached to one's single and limited circumstance. A view from everywhere, rather than a view of nowhere, is, therefore, a more humbling and inclusive approach to the construction of universal norms. However, it requires a shift in the balance of power among those responsible for producing these norms, both with regard to the voices being heard and with regard to the forms of collaboration forged among stakeholders.

This chapter focuses on some of the substantive and procedural steps taken by NGOs and social movements, organized in networks and coalitions for the protection of social rights – especially the NGO Coalition for the Adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the International Network for Economic, Social and Cultural Rights (ESCR-Net) – toward the construction of a more effective and universal human rights framework. ESCR-Net has more than 280 members, including grassroots groups, social movements, NGOs, academic centres and advocates, working on ESCR in 75 countries. The experience of ESCR-Net in the field is relevant because it has, for the past 17 years, brought international and local NGOs and social movements together. By doing so, it created a space where international law on social rights can be directly influenced by the work of civil society actors on the ground. The focus on the NGO Coalition is due to its role in the adoption of the Optional Protocol to the ICESCR. The Coalition gathered more than 300 civil society organizations from 70 countries in a global campaign for the ratification of the Optional Protocol to the ICESCR. Similar to ESCR-Net, the Coalition was responsible for a bottom-up approach to the protection of social rights.

This chapter is structured in two main parts. Section II briefly addresses types of collaboration forged by NGOs and social movements in the protection of social rights, and section III focuses on case studies. These case studies highlight how NGOs and social movements have channelled the voices of vulnerable groups in the framing of new content for human rights and how the protection of social rights is relevant in sustaining the struggle for human rights more generally.

II. COLLABORATION AMONG NGOS AND SOCIAL MOVEMENTS IN SOCIAL RIGHTS PROTECTION

NGOs and social movements have adopted different forms of collaboration in the past decades for the protection of social rights. I will highlight in this chapter three forms of collaboration: converging, bilateral and holistic. Converging forms of collaboration can be found, for instance, in the adoption of multilateral human rights treaties, such as the Optional Protocol for the International Covenant on Economic, Social and Cultural Rights. Bilateral forms of

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[5] For a further analysis of a contextualized approach to impartiality, please see Daniela Ikawa, *Acoes Afirmativas em Universidades* (2008).

[6] On this, I follow Moi's interpretation of Beauvoir's conception of the body: the body as and in a situation. The 'body as a situation' refers to our only known possibility of existence: we live only through our bodies, our particular bodies, which have been culturally immersed in meaning. The 'body in a situation' refers to our context. Toril Moi, *What is a Woman?* (1999).

collaboration can be found in short term and long term strategies of rights protection, which match communities' specific needs with particular NGOs that can respond to them. Holistic forms of collaboration involve both converging and bilateral forms in a long term process. The key element of holistic forms of collaboration is not the number of actors, as in bilateral and converging forms of collaboration, but rather the fact that such collaborations vary along time in accordance to what is required for the protection of particular rights. The process of implementation of the ACHPR's ruling on the *Endorois* case is an example of the latter.

III. CASE STUDIES AND CURRENT DEVELOPMENT

This section focuses on three examples of converging forms of collaboration, regarding the adoption of the OP-ICESCR, the *Toussaint* case and advocacy before the Human Rights Committee (HRCttee) for the reinterpretation of the right to life to include social rights. It also addresses three examples of holistic forms of collaboration with the *Sawhoyamaxa* case, the *Endorois* case and the System of Solidarity for the protection of human rights defenders. In the *Endorois* case, the struggle for implementation depended on a continuing dialogue, including bilateral and converging dialogues, between the *Endorois* community and NGOs. Both the *Endorois* case and the *Sawhoyamaxa* case highlight once again the need for stronger focus on social rights as a means of sustaining a broader political struggle for human rights more generally.

a. Converging Forms of Collaboration

i. The adoption of the OP-ICESCR

During most of the twentieth century, one of the main challenges facing the protection of economic, social and cultural rights was the lack of recognition of economic, social and cultural rights as full rights. In the international sphere, that gap was in part filled by the opt-in clause included in the International Convention on the Elimination of All Forms of Racial Discrimination, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol to the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of the Child. Such clauses and protocols enabled the enforcement of social rights recognized by those treaties. It was not until 2008, however, that a treaty was put in place establishing specific protection to economic, social and cultural rights through the use of individual and group-based claims.

More than 300 NGOs on economic, social and cultural rights (ESCR NGOs) saw this gap of enforcement as having not only direct but also symbolic consequences for the protection of economic, social and cultural rights. As a result, they formed the NGO Coalition for the Adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.[7] This coalition not only successfully advocated for a new protocol, which was adopted in 2008, but also discussed and lobbied for a protocol with stronger rules of protection.

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[7] For further information on the NGO Coalition, please check these websites dated from the time of the campaign for the OP-ICESCR: Join the NGO Coalition for the OP-ICESCR, <www.escr-net.org/petitions/2015/join-ngo-coalition-op-icescr> (26 June 2019); and Considerations of the International

I would describe this first steady form of collaboration as converging collaboration, as organizations with diverse backgrounds, from both the Global North – such as the International Federation for Human Rights (FIDH, France), Global Initiative for ESCR (GI-ESCR, United States) and Social Rights Advocacy Center (SRAC, Canada) – and the Global South – such as Centro de Estudios Legales y Sociales (CELS, Argentina) and Socio-Economic Rights Institute of South Africa (SERI) – brought their own contributions to discussions on the Protocol with a single goal in mind: the adoption of a more protective instrument. One of the results of such contributions was the adoption of a standard of review that reflected not the European Court of Human Rights' 'margin of appreciation', which grants a large space for states' discretion in the protection of rights, but rather the 'reasonableness' standard, adopted in a number of national jurisdictions such as South Africa. The standard of reasonableness represents a more structured standard of review, incorporating a focus on the allocation of resources, special protection for disadvantaged groups and the principle of non-discrimination.[8] It includes, therefore, some idea of proportionality, which is the standard of review adopted by the European Social Charter and the Inter-American system of human rights. As explained by Bruce Porter, director of SRAC, who participated closely in the campaign for the adoption of the OP-ICESCR:

> [A] campaign was initiated by the opposing States to weaken the standard of reasonableness review proposed in the Chairperson's first draft. States such as Canada, the UK, Australia, Poland, China, and the United States advocated for the inclusion of a reference to 'a broad margin of appreciation' to be accorded to states in assessing whether obligations under article 2(1) had been met. They also proposed the substitution of a standard of 'unreasonableness' for the standard of 'reasonableness'. These proposals were linked to affirmations that states should be free to decide for themselves the 'appropriate policy measures and allocation of its resources in accordance with domestic priorities'.[9]

A coalition of state delegations and NGOs for the strengthening of the Optional Protocol therefore led to the adoption of the reasonableness standard.[10]

Converging forms of collaboration that include contributions from organizations in the Global North and Global South alike have strengthened the idea of social rights (as well as economic and cultural rights) as legally binding rights from a bottom-up – or, rather, a local toward global – perspective that further legitimizes their protection. Although collective initiatives have been valued in the international human rights movement for decades, the focus on the 'local' (especially the 'local' from the Global South) for the adoption and effective use of universal norms is a more recent, yet extremely relevant, advance. Moreover, the further recognition of social rights as justiciable rights has allowed NGOs initially focused on the protection of economic, social and cultural rights to expand their scope to issues of indivisibility.

NGO Coalition for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in relation to the OP-ICESCR and its Rules of Procedure, <www.escr-net.org/sites/default/files/NGO_Coalition_submission_to_the_CESCR_on_OP-ICESCR_0.pdf> (26 June 2019).

[8] CESCR, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' (10 May 2007) UN Doc E/C.12/2007/1.

[9] Bruce Porter, 'Reasonableness and Article 8(4)' in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 173, 180.

[10] Porter (n 9), 178–80.

The use of converging forms of collaboration for the expansion of the content of rights can be further studied in the redefinition of the right to life to encompass social rights, as explained below.

ii. Indivisibility of rights: the *Toussaint* case and submissions to the HRCttee on the right to life

The connection between civil rights and social rights has been forged by members of ESCR-Net since 2013 within the Canadian context, where social rights are not constitutionally recognized as fundamental rights. The strategy involved litigation support for the case *Nell Toussaint v Canada* before the HRCttee,[11] as well as two advocacy initiatives calling for the reinterpretation of the right to life by the HRCttee. In the *Toussaint* case, NGO members of ESCR-Net's Strategic Litigation Working Group presented a legal opinion in August 2015 to the HRCttee,[12] highlighting the connection between the right to life (and other civil rights) and the right to health of undocumented migrants in Canada. They also stressed the need to recognize positive state obligations with regard to civil rights, and not just economic, social and cultural rights. Nell Toussaint, a citizen of Grenada who had been residing in Canada since 1999, filed her claim before domestic courts while she was still undocumented. She argued that her right to life had been violated due to a lack of access to the public health system in Canada. After domestic courts failed to grant her adequate remedies, she brought her case to the HRCttee in 2013.

In 2018, the HRCttee ruled on the *Toussaint* case, framing the right to life to encompass the right to health:

> The Committee recalls that in its general comment No. 6, it noted that the right to life had been too often narrowly interpreted and that it could not properly be understood in a restrictive manner, and that the protection of the right required that States adopt positive measures. The Committee considers that the right to life concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Furthermore, the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not result in loss of life. In particular, as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life. The Committee affirmed the positive obligation of States to ensure that everyone has access to essential health care necessary to prevent foreseeable risks to life, regardless of migration status.[13]

The *Toussaint* case was not developed only through litigation, though. ESCR-Net members SRAC and GI-ESCR presented a parallel report on Canada to the HRCttee in June 2015, focusing on the issues of indivisibility, positive state obligations and an extended interpretation of the right to life from the perspective of undocumented migrants. Moreover, more than 20 ESCR-Net member organizations and partners sent contributions to a halfday discussion on

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[11] *Nell Toussaint v Canada*, HRCttee, Communication No 2348/2014, CCPR/C/123/D/2348/2014 (7 August 2018).

[12] ESCR-Net Legal Opinion – HRC, *Toussaint v Canada*, <www.escr-net.org/resources/escr-net-legal-opinion-hrc-toussaint-v-canada> (26 June 2019).

[13] *Nell Toussaint v Canada* (n 11), para 11.3. See also ESCR-Net Legal Opinion (n 12).

the right to life organized by the HRCttee that same month, stressing the indivisibility among rights (particularly between the right to life and economic, social and cultural rights) and the need to recognize states' positive obligations under the right to life in order to protect the rights of differently situated individuals. The contributions also highlighted the role of international human rights law in protecting vulnerable groups, including detainees, women and LGBTQI people. They argued that to ensure the protection of vulnerable groups, international human rights bodies such as the HRCttee have the responsibility to interpret rights from the perspective of those groups – that is, to understand and respond to the specific challenges these groups face in exercising their rights.[14]

On 30 October 2018, the HRCttee adopted a new General Comment on the right to life, which encompassed the perspective of those groups and covered the protection of social rights, including social and reproductive health, and the provision of water, food and shelter.[15] Paragraph 26 of General Comment No 36 established that:

> The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include […] the prevalence of life threatening diseases, such as AIDS, tuberculosis or malaria, […] widespread hunger and malnutrition and extreme poverty and homelessness. The measures called for addressing adequate conditions for protecting the right to life include, where necessary, measures designed to ensure access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and other measures designed to promote and facilitate adequate general conditions such as the bolstering of effective emergency health services, emergency response operations (including fire-fighters, ambulances and police forces) and social housing programs.[16]

This collaboration around the right to life was aimed not only at enriching international human rights law by expanding the concepts of the rights to life and personal security, as well as of the principle of non-discrimination, but also at reassessing ESCR NGOs' approach to the indivisibility of rights. The approach on indivisibility was (and still is) used when legally binding norms do not offer protection to ESCR as they do to civil and political rights. This was the case, for instance, in one of the best known cases on social rights litigated in India: *PUCL v Union of India*, which led to the recognition of the right to food as an element of the right to life.[17] It has also been the case in social rights protection, to a great extent, within the inter-American system of human rights. A number of NGOs have, however, stressed the importance of directly adjudicating ESCR as ESCR, in order to apply specific ESCR principles, such as the principle of maximum availability of resources, and promote structural change. As the UN treaty body system more strongly recognized the justiciability of ESCRs with the adoption of the OP-ICESCR, ESCR NGOs felt more at ease with focusing once again on indivisibility in the protection of ESCR, without running as high a risk of losing ground in directly protecting ESCR. In this sense, the focus shifted to local needs and opportunities for change as opposed

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[14] ESCR-Net, UN Body Adopts Progressive Interpretation of the Right to Life (27 November 2018) <www.escr-net.org/news/2018/un-body-adopts-progressive-interpretation-right-life> (26 June 2019).

[15] *Ibid.*, paras 8, 26.

[16] HRCttee, 'General Comment No 36' (30 October 2018) CCPR/C/GC/36.

[17] *PUCL v Union of India*, Supreme Court of India, Writ Petition No 196 of 2001 (30 November 2001).

to normative requirements for the direct protection of economic, social and cultural rights, whenever such protection made an indivisibility-based approach more efficient.

The *Toussaint* case, together with the two advocacy initiatives described above, are examples of multicentered, yet converging, forms of collaboration in the production of universal rules of protection. Such converging forms of collaboration brought together local, regional and international NGOs toward a single goal without losing the distinct voices of each organization. The possibility of diverse participation led to a more plural perspective regarding the content of the right to life. Indeed, the litigation of the *Toussaint* case has illustrated the need to reinterpret the rights to life and to personal security, as well as the principle of non-discrimination in Canada from the perspective of particular individuals whose rights were being threatened.[18]

b. Holistic Forms of Collaboration

Those affected by violations of social rights are usually members of the most vulnerable groups in society. Poverty overlaps with discrimination, aggravating particular situations of vulnerability. In this vein, networks of NGOs and social movements have the role of asking their members what their needs are. Knowledge about the needs of the most vulnerable groups, according to the groups themselves, is the basis for a rights framework that protects all, that protects differently situated individuals and that aims at being truly universal.

This should not be about an identitarian construction of human rights, however. Rather, it should be about considering different life experiences, often linked to multiple and changing identities, in the interpretation of rights.[19] Such a process can be seen in strategic litigation and international advocacy. Below, I explore a couple of examples of the infusion of local experiences into the content of domestic and international human rights law and the use of social rights to sustain political struggles for the protection of rights more broadly: (1) the *Endorois* case in Kenya and (2) the *Sawhoyamaxa* case in Paraguay. I also address the example of the System of Solidarity for the protection of human rights defenders.

i. Political struggle and social rights: the *Endorois* and the *Sawhoyamaxa* cases

The use of holistic forms of collaboration for the expansion of the content of rights and of the processes used in the framing of rights will be further studied here, with a particular focus on the *Endorois* and the *Sawhoyamaxa* cases. In the latter case, the monitoring of social rights, as established by the Inter-American Court of Human Rights (IACtHR), sustained the political

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[18] The *Toussaint* case was mainly led by SRAC's director, Bruce Porter.

[19] Identity politics are usually based on the idea of identity as a fixed, pervasive, unique trait that defines one's personality and one's role in society. The idea of pervasiveness sprang from feminist critical theory in the 1960s in relation to biological determinism and how having particular reproductive organs framed who a person should be and how they should act in society. This idea can be applied to other characteristics, however, such as a person's disability, race and age, creating a very restrictive and simplified view of whom specific individuals are and can be. It is that perspective of individuals and groups that provokes a response – equally restrictive – of social movements. What I am proposing here is to inform international human rights law not from the point of view of individuals as defined by single characteristics of gender, race, disability and so forth but from the point of view of individuals' multiple and changing characteristics – by narratives derived from particular circumstances.

struggle on the right to land, which led to the actual restitution of the land to the Sawhoyamaxa community.

The re-interpretation of human rights can take place both during litigation itself and during the implementation of a decision. The *Endorois* case,[20] aimed at protecting the right to land of a pastoralist community in Kenya, is a good example of the latter, by raising the issue that the right to land is also a women's right, and by highlighting other priorities besides land itself, such as the protection of the right to education.

Before getting to such reinterpretation, however, some background information on the case may be useful. The *Endorois* case was originally litigated by the Endorois Welfare Council and two ESCR-Net member organizations (the Centre for Minority Rights Development and the Minority Rights Group International), leading the ACHRP to adopt in 2009 a relatively (and in this sense paradigmatically) detailed set of recommendations for the government of Kenya that included land restitution for the indigenous Endorois people, compensation for all their losses and the payment of royalties for existing economic activities on their land.

The decision marked the beginning of a new challenge: that of implementation.[21] Recognizing that the subjects of human rights are real people (and not abstract concepts) implies also recognizing the need to provide for real protection and real change. Assisting with the implementation of judicial decisions is a central tool for such change and was identified as such within ESCR-Net's Strategic Litigation Working Group during the network's 2008 general assembly. Having started with more general discussions on the challenges to implementation, the working group began in 2012 to focus on specific cases, as it is at the local sphere that more complex, concrete challenges are faced, hopefully addressed and brought back to international spheres of protection in order to improve the latter's mode of operation.

In the case of the Endorois, specific challenges have included three decades of community mobilization and litigation at domestic and regional spheres. They have also encompassed, among others, the struggle of less powerful voices within the community. ESCR-Net's response to such challenges has been what I term holistic collaboration. Here, organizations from the Global North, such as Minority Rights Group International, and from the Global South, such as Dejusticia in Colombia, the Kenyan Human Rights Council and the Endorois Welfare Council in Kenya, formed in 2012 a core group of ESCR-Net members and partners that could tackle, in a relatively sustainable manner, the changing needs springing from a long and politicized process of implementation. This group gave continuity to the implementation process, while identifying new issues and opportunities, sharing resources in response to a single strategy built collectively, avoiding the duplication of efforts, and bringing new organizations to the table when necessary. The key aspect of holistic forms of collaboration is their continuing dialogue, through which political changes – as well as changing needs and opportunities – are assessed from local and global perspectives. Such forms of collaboration encompass other forms, such as converging and bilateral forms of collaboration in a long term process.

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[20] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (*Endorois*), ACHPR, Communication No 276/03 (25 November 2009).

[21] ESCR-Net, 'Implementing the ACHPR's Ruling on the Endorois Case' (2014) <www.escr-net.org/news/2014/implementing-achprs-ruling-endorois-case> (26 June 2019).

With regard to the inclusion of less powerful voices within the community, a holistic, dialogical and participatory approach that involves community groups beyond the male leadership of the Endorois people has also been adopted. Member organizations in Kenya and in the United Kingdom have conducted surveys to assess how differently situated members within the Endorois community perceive loss and expect reparations. One often stressed concern shown by such surveys among parents and youth relates to a specific social right: the right to education. That is a concern that goes beyond land restitution and the idea of backward-looking reparations. There is, moreover, no full leadership in assessing priorities without access to information.

In this vein, workshops involving community members from different locations and of different genders and ages have been conducted, also by ESCR-Net member organizations, on reparations, restitution and the registration of community members to assess who is and who is not Endorois and who has and who does not have a right to the land. The latter workshop has opened up a new opportunity for the further inclusion of women in the implementation process and has provided for a good example of how broadly impact should be assessed. Impact should not refer only to material results, but also to symbolic results.[22] In this case, women's participation in the implementation process led to a change in perception on women's role, both by men and women in the Endorois community: not only are Endorois women entitled to participate, but they can also add value to the Endorois' struggle for land, by more strongly stating the interests of children in education, by more clearly showing the connection between religion and land and by highlighting the priority given by the community to the protection of the right to health.

The process of implementation and the registration of community members can be used to promote further inclusion because it encompasses the interests of diverse members of the community and because its results stand to have an impact on the community as a whole as opposed to just its leaders. The registration process can define both the beneficiaries of future resource distributions (derived from compensation, royalties and land restitution) and those with authority to monitor and decide on the forms of distribution that will take place. The inclusion of women in this process can therefore have both medium and long term impacts – that is, impacts directly related to the implementation of the 2009 decision and impacts that go beyond such implementation. Endorois male leaders have supported inclusion, to some extent, based on the idea that the same international human rights law that has given them their land back also supports gender equality; that paternalistic views of traditional cultures cannot grasp these cultures' capacity to change; and that there are traditional structures of power, such as the ones that allow for arbitrary evictions and gender oppression, that could and should be challenged. The symbolic, indirect impact regarding inclusion of women may be as relevant as the material impact found in the actual implementation of the decision: it represents an endorsement of individual dignity that allows legal, social and institutional structures to be built and reformed in a way that reflects the idea that individuals should be treated as equals.

The participation of women in this political struggle for implementation has, however, faced challenges related to women's lack of access to social rights, such as education, paid work and property. Such rights could be seen here as basic conditions for that participation. Women in rural areas have raised the challenge of communicating to each other, as they cannot

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[22] Cesar Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socio-economic Rights in Latin America' (2010–11) 89 Texas Law Review 1669, 1679.

afford phone calls or transportation to meet with other members of the community. Without continuing communication, women cannot fully mobilize, and they cannot, therefore, actually influence the framing of rights. Endorois women also raised issues regarding access to information and illiteracy, stressing the need to recognize still another social right to guarantee their participation: the right to education.

Therefore, to guarantee the participation of women in the struggle for land, there is a need to support not only their civil rights, including their right to access information, but also their social rights. Hence, this is an area of work which has to be further developed by human rights' NGOs.

Another example where the protection of social rights was perceived as key to assure sustainability of broader struggles is the case of the Sawhoyamaxa. The Sawhoyamaxa community faced not only violations to their right to land but also, connected to that, violations to social rights, as recognized by the IACtHR in 2006:

> In the instant case, together with the lack of lands, the life of the members of the Sawhoyamaxa Community is characterized by unemployment, illiteracy, morbidity rates caused by evitable illnesses, malnutrition, precarious conditions in their dwelling places and environment, limitations to access and use health services and drinking water, as well as marginalization due to economic, geographic and cultural causes.[23]

In light of such challenges, the IACtHR issued an order in 2007 to monitor its judgment on the case, requiring 'the State to provide immediately the basic goods and services and medical care necessary for the survival of the members of the Sawhoyamaxa Indigenous Community'.[24] The order relied on para 230 of the judgment on the case:

> while the members of the Community remain landless, the State shall immediately, regularly and permanently adopt measures to: (a) supply sufficient drinking water for consumption and personal hygiene to the members of the Community; (b) provide medical check-ups and care to all the members of the Community, especially the children, the elderly and women, together with periodic deparasitation and vaccination campaigns, respecting their practices and customs; (c) deliver food of adequate quantity and quality; (d) set up latrines or other type of sanitation facilities in the settlements of the Community, and (e) provide the school of the 'Santa Elisa' settlement with all necessary material and human resources, and establish a temporary school with all necessary material and human resources for the children of the 'Kilómetro 16' settlement. The education provided must respect the cultural values of the Community and of Paraguay, insofar as possible, and be bilingual: in the Exent language and, at the discretion of the members of the Community, in either Spanish or Guarani.[25]

The case was based on continuing monitoring of Tierraviva, a legal NGO based in Paraguay and also a member of ESCR-Net, in a long term form of bilateral collaboration with the Sawhoyamaxa community. Such monitoring was key to guaranteeing some extent of compliance with the provisional measures and the sustainability of the Sawhoyamaxa struggle for land. The case also benefited from a converging form of collaboration, bringing ESCR-Net members together in advocating for state compliance with the legally binding decision of the IACtHR in the *Sawhoyamaxa* case. Guided by Tierraviva, ESCR-Net member NGOs all

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[23] *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs), IACtHR, Judgment of 29 March 2006, para 168.

[24] *Sawhoyamaxa Indigenous Community v Paraguay* (Monitoring Compliance with Judgment), IACtHR, Order of 2 February 2007), operative para 1.

[25] *Ibid*.

over the world signed letters to Congress members, explaining the lack of compliance with the IACtHR decision. The result was the adoption in 2014 by the Paraguayan Congress of an unprecedented expropriation law on behalf of the Sawhoyamaxa, allowing the community to achieve the title of their own lands. The law was signed by the President in June 2014,[26] and considered constitutional by the Paraguayan Supreme Court in the same year,[27] further stabilizing land tenure for the Sawhoyamaxa.

In view of complex local realities and diverse, changing life experiences, the *Sawhoyamaxa* and *Endorois* cases show that the content of universal human rights should be fed by local narratives. Such narratives can be channeled through litigation and advocacy, building the global not from a topdown perspective but through dialogue – through a view from everywhere, made up of holistic, converging and bilateral forms of collaboration among NGOs and social movements. As Thomas Nagel puts it, there are certain types of knowledge in the world that can better be understood subjectively. Life experiences and narratives – the basis for understanding needs and rights, including social rights – can be located in that category. In this sense, rights litigation and advocacy can be central tools for the drafting of a more inclusive, multicentred and truly universal human rights law.[28]

ii. Solidarity and the need to expand the response to risks: the protection of human rights activists

The attempt to encompass a larger variety of voices – including the voices of the most vulnerable – in the framing of rights has clarified the growing risks faced by affected individuals and communities, as well as by human rights defenders, as they strive to protect social rights. One such risk comes in the form of criminalization. Unfortunately, the criminalization of rights defenders and social movement leaders has become a widespread practice.

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[26] ESCR-Net, Case of *Sawhoyamaxa Indigenous Community v Paraguay*, <www.escr-net.org/caselaw/2013/case-sawhoyamaxa-indigenous-community-v-paraguay> (26 June 2019).

[27] ESCR-Net, 'The Paraguayan justice rules in favor of the Sawhoyamaxa Community' (3 October 2014) <www.escr-net.org/news/2014/paraguayan-justice-rules-favor-sawhoyamaxa-community> (26 June 2019).

[28] Nagel's view of nowhere is an attempt to balance subjective and objective views in order to find universal norms. He understands the need to consider individuals' contexts and the relevance of deliberation. He also underscores that objectivity might not extend to all norms and that even for those norms covered by it, the types and levels of objectivity may vary. Moreover, objectivity might not be final. Such elements of his theory are relevant here: the consideration of context, the consideration of deliberation or dialogue and the notion that objectivity is neither all-encompassing nor definitive (and is open to further discussion). In part, however, Nagel seems to be considering objectivity in spite of subjectivity (Nagel (n 3)), while we consider objectivity (or, in our words, universality) due to the consideration of subjective contexts and narratives. Like Nagel, I believe that deliberation over what each person considers to be universal is quite relevant. Individual narratives might include not only egotistic interests but also issues of broader justice. The difference, however, seems to lie in our focus. While I focus on the construction of universal norms, Nagel focuses on their discovery. Therefore, I use a view from everywhere instead of a view from nowhere to describe universality for the purpose of human rights. Finally, such a construction of universal human rights norms is perceived here as part of an ongoing process that might not have a particular end. At the same time, it is not a completely unstructured process that can lead to any result that will then be legitimized. The process is framed around the preexisting foundations of a human rights framework, which encompasses the ideas of individual dignity, equality of respect and the intrinsic value of each human being.

NGOs have collaborated over time to address such risk and ESCR-Net's System of Solidarity is an example of that. In 2014 and 2015, the System of Solidarity addressed the criminalization of human rights defenders in Egypt, Guatemala, Mexico and Cambodia, where domestic law has been twisted to harass, silence and punish advocates working in defence of economic, social and cultural rights. In Egypt, the director of an ESCR-Net member organization, the Land Center for Human Rights, was charged and sentenced *in absentia* in 2013 with 'contempt of religion, atheism and inciting to sedition and bloodshed' under Article 98 of the Blasphemy Law, after he published the book *Where is Allah?*, which describes the life experiences of farmers in the country. ESCR-Net has been advocating before the Egyptian government for the director's rights to freedom of thought and religion. In Guatemala, three human rights defenders from Huehuetenango were arrested in 2015 for opposing several development projects headed by Spanish, Canadian and Italian corporations. The mining and hydroelectric projects commenced without taking into account indigenous communities' right to free, prior and informed consent. ESCR-Net has advocated before the Guatemalan government for these defenders' right to a fair trial. In Mexico, not only has the federal government refused to implement a court decision (Amparo 631/2012) recognizing the right of the Yaqui tribe to be consulted on the construction of an aqueduct that will have a dire impact on their lives, but it has also allowed the detention of Yaqui community leaders. This System of Solidarity intervention and the related actions of ESCR-Net's Mexican members Centro Mexicano de Derecho Ambiental (Mexican Center for Environmental Law) and Fundar contributed to the release of one of the leaders in March 2015. Finally, in Cambodia, the network advocated before the government to free seven human rights defenders who had been sentenced after peacefully protesting against the eviction of almost 20,000 people living around Boeung Kak Lake. In this case, the activists were released in April 2015.[29]

This collaboration for the protection of human rights defenders against criminalization is extremely important for the sustainability of human rights protection. Here, the work on behalf of human rights defenders is made possible due to the exchange of information among human rights organizations, as well as the relationships of trust built within networks over time; in other words, it is made possible through holistic forms of collaboration. Such relationships of trust improve NGOs' capacity to identify risks and to attest for members' credibility, contributing to the empowerment of human rights activists and social movement leaders.

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[29] For more information on these initiatives and their impact, see ESCR-Net, 'Cambodia: Free Women Human Rights Defenders and Their Supporters' (2014) <www.escr-net.org/node/365714> (26 June 2019); ESCR-Net, 'Egypt: Allow Karam Saber, a Human Rights Defender, to Remain Free' (2014) <www.escr-net.org/node/365522> (26 June 2019); ESCR-Net, 'Mexico: Stop the Independence Aqueduct' (2014) <www.escr-net.org/node/365660> (26 June 2019); ESCR-Net, 'Guatemala: Stop the Criminalization of Leaders of Indigenous Communities in Guatemala' (2015) <www.escr-net.org/node/365827> (26 June 2019); Centro Mexicano de Derecho Ambiental, 'Otorgan amparo a líder yaqui para su liberación' (2015) <www.cemda.org.mx/otorgan-amparo-a-lider-yaqui-para-su-liberacion> (26 June 2019); International Federation for Human Rights, 'Cambodia: Release by Royal Pardon of Ten Women Human Rights Defenders' (2015) <www.fidh.org/en/region/asia/cambodia/the-observatory-cambodia-release-by-royal-pardon-of-ten-women-human> (26 June 2019).

IV. CONCLUSION AND OUTLOOK

Challenges posed to ESCR NGOs in recent decades have not been completely overcome, but procedural and substantive steps taken to address them have revealed opportunities for improving human rights protection, including the protection of social rights. First, the inclusion of new voices in the framing of human rights has expanded the content of rights to respond to the needs of vulnerable groups, such as the expansion of the content of the right to life to encompass social rights by the HRCttee, and the orders issued by the IACtHR to guarantee the sustainability of the Sawhoyamaxa's struggle for land through the protection of social rights.

Second, advances in the perception of economic, social and cultural rights as legally binding rights have allowed ESCR NGOs to approach rights more fully through the principle of invisibility. In other words, they have allowed ESCR NGOs to strengthen their focus on the protection of social rights through a variety of tools, including a redefinition of civil and political rights.

Third, challenges regarding the heightened vulnerability of affected individuals have provoked responses in terms of protection, such as the System of Solidarity. This system has been strengthened over time as relationships of trust and exchange among members increase. Systems of solidarity can be further developed to encompass the protection of social rights, as necessary conditions to sustain the struggle for human rights more broadly.

Fourth, challenges have further clarified the need to reformulate international human rights law so that it reflects a growing number of voices and more effectively protects the rights of all. As the *Endorois* case shows, listening to different voices may clarify that indigenous communities' right to land is closely connected to social rights, such as the rights to education and health.

Finally, challenges have stressed the need to become more attentive to new forms of collaboration that extend over longer periods of time and that combine a diversity of backgrounds and experiences with shared normative and political goals. Such new forms of collaboration should, as mentioned above, include protection of social rights, in order to grant sustainability to grassroots struggles for human rights more broadly.

19. The proceduralization of social rights: access to information, justice and remedies

Yota Negishi

I. INTRODUCTION

This chapter aims to illuminate the procedural guarantees of social rights which complement their substantive elements, which are illustrated in other contributions of this *Research Handbook*. As a background to the *Prozeduralisierung* of international law, the *Zukunftsorientierung* tendency exists: the more public international law undertakes to substantively shape the future, the more the regulatory density of its rules decreases.[1] In other words, the procedural approach to international law emerges as a solution with the potential to fill such normative gaps created by the future-oriented nature of modern public international law, including the realization of social rights.[2] In this sense, this contribution substantiates the observation that while proceduralization is visible in connection with first generation (civil and political) rights,[3] the tendency is even more obviously present with second generation (economic, social and cultural) rights.[4]

In fact, the Committee on Economic, Social and Cultural Rights (CESCR), the guardian of the International Covenant on Economic, Social and Cultural Rights (ICESCR), proclaimed the significance of procedural guarantees quite early on:

> Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter […] which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights.[5]

In the following, a threefold analysis is developed in relation to the procedural protection of social rights: information, justice and remedies.[6] The trinitarian elements are closely inter-

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[1] *Cf.* Jochen Rauber, 'Zukunftsorientierung und Prozeduralisierung im öffentlichen Recht: Parallelen in der Entwicklung von innerstaatlicher und völkerrechtlicher Ordnung' (2018) 143 Archiv des oeffentlichen Rechts 67.

[2] *Ibid*; see also Edouard Dubout, 'La procéduralisation des droits' in Frédéric Sudre (ed.), *Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme* (2014) 264.

[3] Jan Klabbers, *International Law* (2013) 115.

[4] For the categories of generations, see Karel Vašák, 'Pour une Troisième Génération des Droits de l'Homme' in Christophe Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge: en l'honneur de Jean Pictet* (1984) 837.

[5] CESCR, 'General Comment No 7 on the Right to Adequate Housing' (20 May 1997) UN Doc E/1998/22, para 15.

[6] The trinity formula of access to information, justice and remedies is expressed in the universal and comprehensive framework of the UNGA Res A/60/147 (16 December 2005) 'United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (UN Basic Principles and Guidelines):

twined with each other since 'the effective exercise of the right to remedy requires funding access to justice and information about the existence of these remedies'.[7] Put differently, victims face barriers to effective access to remedies for human rights violations given the difficulty of accessing information and evidence to substantiate their judicial actions.[8]

Following this introduction, section II describes how the proceduralizing tendency reflects distributive as well as corrective justice for protecting social rights. In section III, this contribution assesses how the personal scope of access to information/justice/remedies for social rights shifted from a static concept of status (non-discrimination) to a more flexible notion of *situation* (vulnerability). Section IV analyzes the procedural aspects of social rights in terms of the categories of corresponding obligations imposed on states (respect, protect and fulfil). Section V further explains the implementation procedures for social rights protection according to the structural principles of subsidiarity and solidarity. Section VI concludes by mentioning some complex issues in the proceduralization of social rights.

II. FROM FIRST TO SECOND GENERATION: CORRECTIVE AND DISTRIBUTIVE JUSTICE

International human rights law has incorporated the procedural rights of access to information, justice and remedies as first generation rights, namely, civil and political rights. In fact, the right of *access to information* has been gradually recognized, mainly in relation to the freedom of expression.[9] According to the Human Rights Committee (HRCttee), Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) 'requires States parties to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers' and 'protects all forms of expression and the means of their dissemination'.[10] Likewise, the right of *access to justice* is expressly recognized as one of the core principles which the HRCttee included in the list of non-derogable provisions of the ICCPR.[11] Any victim of human rights violations shall have

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11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
(*a*) Equal and effective access to justice;
(*b*) Adequate, effective and prompt reparation for harm suffered;
(*c*) Access to relevant information concerning violations and reparation mechanisms.

7 CESCR, 'General Comment No 22 on the Right to Sexual and Reproductive Health' (2 May 2016) UN Doc E/C.12/GC/22, para 64.

8 CESCR, 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24, para 42.

9 For the relationship between access to information and other rights, see Maeve McDonagh, 'The Right to Information in International Human Rights Law' (2013) 13 Human Rights Law Review 25, 28–44.

10 HRCttee, 'General Comment No 34 on the Freedoms of Opinion and Expression' (12 September 2011) CCPR/C/GC/34, para 18.

11 HRCttee, 'General Comment No 29 on Derogations during a State of Emergency' (31 August 2001) CCPR/C/21/Rev.1/Add.11, para 15; see also Antônio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (2011) chapter 4.

equal access to an effective judicial remedy. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law.[12] In a similar vein, the right of access to remedies has been developed with *caractère hybride* between primary rules (establishing an obligation under treaty) and secondary rules (on state responsibility under customary international law).[13] While the secondary obligation to make full reparation under the *Chorzów* principle (taking the form of restitution, compensation and satisfaction) corresponds to 'remedial justice, to rectify the wrong done an injured party and correct injustice by restoring the *status quo ante*',[14] effective remedies shall include cessation and non-repetition, both of which are 'aspects of the restoration and repair of the legal relationship affected by the breach'.[15]

The procedural formulation of rights has been effectively infused into the realm of second generation rights, that is, economic, social and cultural rights. In line with the HRCttee's view, the CESCR has recognized within the ICESCR framework 'the right to seek, receive and impart information and ideas' in relation to social rights, and that any person or group victim of those violations 'should have access to effective judicial or other appropriate remedies at both national and international levels'.[16] While procedural guarantees of civil and political rights tend to be limited to *individual* and *corrective* consequences by assuming the justness in the *status quo ante*, the procedural realization of social rights particularly needs to be *collective* and *distributive* to rectify the unfairness of preexisting conditions in society.[17] In fact, the following three procedural aspects of social rights reveal collective effects to redistribute resources among different groups of persons.

First, as regards the effective accessibility to information, its multidimensional character serves different democratic objectives, from holding public servants to account, to increasing participation by citizens, to enhancing their dignity through their acquisition of a deeper range of information; it also articulates, with its multirationale character, its *raison d'être* as an instrument of democratic deliberation or as a lever for social rights.[18] In terms of access to information, international law can and should prove useful in creating the conditions that enable the transformation of the debate about global distributive justice by the political

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[12] UN Basic Principles and Guidelines (n 6), para 12.

[13] Hélène Tigroudja, 'La satisfaction et les garanties de non-répétition de l'illicite dans le contentieux interaméricain des droit de l'homme' in Elisabeth L Abdelgawad and Kathia Martin-Chenut (eds), *Réparer les violations graves et massives des droits de l'homme: la Cour interaméricaine, pionnière et modèle?* (2010) 69, 77. As to the distinction between primary and secondary rules, see Working Paper prepared by Roberto Ago, 1973 YILC (Vol II), UN Doc A/CN.4/SER.A/1973/Add.1, 253.

[14] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 AJIL 833, 845–46. See also *Factory at Chorzów (Germany v Poland)*, 1928 PCIJ Series A No 17, p 47 (Judgment of 13 September); ILC, Draft articles on responsibility of states for internationally wrongful acts, 2001 YILC (Vol II, Part 2), UN Doc A/56/10, 91, paras 1–2 of the commentary on Article 31.

[15] ILC Commentary to ARSIWA (n 14), 88, Article 30, para 1.

[16] CESCR, 'General Comment No 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4, paras 12 and 59.

[17] For an excellent analysis on corrective and distributive justice in relation to first generation and second generation rights see Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 46, 58.

[18] Richard Calland, 'The Right of Access to Information: The State of the Art and the Emerging Theory of Change' in Fatima Diallo and Richard Calland (eds), *Access to Information in Africa: Law, Culture and Practice* (2013) 13, 20–23.

empowerment of the weak and the disregarded.[19] In practice, the CESCR emphasizes the right of not only individuals but also organizations to seek, receive and impart information on all social entitlements, which should be ensured by establishing systems under national law in a clear and transparent manner.[20]

Second, in the context of access to justice, states are required to develop procedures to allow individual as well as group victims to present claims for reparation and to receive reparation.[21] Under Article 2 of the Optional Protocol to the ICESCR, unlike that to the ICCPR, there is express provision for communications to be submitted on behalf of groups.[22] This collective mechanism reflects 'the recognition that violations of economic, social, and cultural rights, like other human rights, may have individual but also collective impact'.[23] The same trend could be seen in relation to the European Social Charter, which was revitalized in the 1990s with additional rights and the creation of a collective complaints mechanism.[24] Likewise, as the African Commission on Human and Peoples' Rights (ACHPR) recognized in the landmark *Ogoni* case relating to environmental and social impacts on indigenous peoples, the African Charter on Human and Peoples' Rights system provides for the possibility of *actio popularis* claims to combat for social justice,[25] without a nexus between the applicant and the underlying class required in class actions.[26]

Third, the right to an effective remedy similarly entails individual reparations having corrective effects as well as collective reparations for achieving distributive justice, depending on the injuries caused by internationally wrongful acts of states.[27] The Inter-American Court of Human Rights (IACtHR) has prominently developed 'transformative reparations' redressing social rights violations, including housing programmes, medical and psychological treatments and development programmes in the areas of health, education, production and infrastructure.[28]

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[19] Eyal Benvenisti, 'Ensuring Access to Information: International Law's Contribution to Global Justice' 2017-09 *GlobalTrust Working Paper Series* 1, 3.

[20] CESCR, 'General Comment No 19 on the Right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19, para 11.

[21] UN Basic Principles and Guidelines (n 6), para 13.

[22] Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary* (2014) 25.

[23] Christian Courtis and Julieta Rossi, 'Individual Complaints Procedure' in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 37, 46.

[24] Robin Churchill and Urfan Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15(3) EJIL 417.

[25] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (Ogoniland)*, ACHPR, Communication No 155/96 (27 October 2001), para 49, noting that this case 'is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter'. For differences between class action litigation and *actio popularis* claims see William J Aceves, 'Actio Popularis: The Class Action in International Law' (2003) [Article 9] University of Chicago Legal Forum 353, 358.

[26] Paul Dubinsky, 'Justice for the Collective: The Limits of the Human Rights Class Action' (2004) 104 Michigan Law Review 1152, 1182.

[27] Rordrigo Uprimny Yepes and María P Saffon, 'Reparaciones transformadoras, justicia distributiva y profundización democrática' in Catalina Díaz Gómez, Nelson C Sánchez and Rordrigo Uprimny Yepes (eds), *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusion* (2009) 31.

[28] For example, *Plan de Sánchez Massacre v Guatemala* (Reparations), IACtHR, Judgment of 19 November 2004, para 49(4).

As regards collective complaints involving several interrelated economic, social and cultural rights violations, the ACHPR demands that the state party concerned engage in dialogue with the complainants for the effective implementation of its recommendations.[29] Within the framework of the Optional Protocol of the ICESCR, the CESCR similarly considers remedial measures that provide redress while placing the victims in a transformed situation, in order to guarantee non-repetition.[30] In *I.D.G. v Spain*, the first decision under the Optional Protocol, the Committee emphasized that, in principle, the remedies recommended in the context of individual communications may include guarantees of non-repetition and recalled that the state party had an obligation to prevent similar violations in the future.[31]

In essence, along the procedural turn in first generation rights, we can observe the fact that the substantive aspect of second generation rights (particularly social rights, for the present purpose) is certainly complemented by their procedural guarantees, both of which contribute to distributive justice for rectifying the unjustness of preexisting conditions in society.

III. FROM STATUS TO SITUATION: NON-DISCRIMINATION AND VULNERABILITY

The principle of *non-discrimination* affects the interpretation and application of access to information, justice and remedies in relation to social rights. To perform general obligations, national legislation, strategies, policies and plans in each state party should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights.[32] In line with substantive obligations, the scope of procedural obligations also covers the prohibition of indirect discrimination. For instance, the European Court of Human Rights (ECtHR) concluded in *D.H. v The Czech Republic* that the systematic exclusion of members of a group from the regular schooling system corresponded to indirect discrimination because

> the domestic authorities [do not] appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures.[33]

In parallel to the expansion of its material scope, the principle of discrimination has also enlarged its personal scope. Article 2(2) ICESCR expressly prohibits 'discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social

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[29] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (*Endorois*), ACHPR, Communication No 276/03 (25 November 2009).

[30] Viviana Krsticevic and Brian Griffey, 'Remedial Recommendations' in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 327, at 339–46.

[31] *I.D.G. v Spain*, CESCR, Communication No 2/2014, UN Doc E/C.12/55/D/2/2014 (2015), para 17.

[32] CESCR, 'General Comment No 20 on Non-Discrimination in Economic, Social and Cultural Rights' (2 July 2009) UN Doc E/C.12/GC/20 (2009), para 40.

[33] *D.H. and Others v The Czech Republic*, ECtHR, App No 57325/00, Judgment of 13 November 2007, para 203.

origin, property, birth or other status'. The status list nowadays also includes 'persons with disabilities', for which the Committee on the Rights of Persons with Disabilities (CRPD Committee) also recommends that state parties take necessary procedural measures to ensure the enjoyment of their social rights.[34] In addition to these status grounds, a flexible approach to the ground of 'other status' is necessary in order to capture other forms of differential treatment on access to information, justice and remedies that cannot be reasonably and objectively justified.[35] More precisely, the emphasis should be shifted from a static concept of status to a more flexible notion of *situation* to capture individuals and groups in *vulnerable* circumstances to a greater degree.[36] In practice, as the Committee on the Elimination of Racial Discrimination (CERD Committee) underscores, the procedural protection of social rights extends to persons belonging to the most vulnerable social groups, who are often unaware of their rights, including immigrants, refugees, asylum seekers and stateless persons, Roma/Gypsies, indigenous peoples, displaced populations and persons discriminated against because of their descent.[37]

In parallel to the general clause of non-discrimination, the ICESCR sets forth specific provisions focusing on individuals and groups who have traditionally been considered vulnerable.

First, Article 3 ICESCR requires state parties to ensure the equal rights of men and women. In the 2018 decision in *Trujillo Calero v Ecuador* pertaining to a discriminatory social security system, the CESCR noted that the state had failed to provide adequate and timely information about retirement requirements to the female victim.[38] Furthermore, as a substantive violation of Articles 2(2) and 3 ICESCR, the state was held responsible for discriminating against the victim, who was vulnerable to intersecting forms of gender and age discrimination.[39] To prevent similar systemic violations in the future, the CESCR found that Ecuador must make reparations to

> adopt special legislative and/or administrative measures that are relevant to ensure in fact that men and women enjoy the right to social security, including access to a jubilee pension, on an equal footing, including measures to correct the factors that prevent women who perform unpaid household work from being listed on social security plans.[40]

Second, as expressed by Article 10 ICESCR, special measures of protection and assistance should be taken into account for the benefits of social rights of all children and young persons. In 2017, in the *Ben Djazia and Bellili v Spain* decision concerning the eviction of tenants from private rental accommodation affecting the education of dependent children, the CESCR

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[34] For example, CRPD Committee, 'General Comment No 2 on Accessibility' (22 May 2014) CRPD/C/GC/2 (2014), para 42 (in the context of adequate standard of living and social protection).

[35] CESCR (GC 20) (n 32), paras 27–35.

[36] Romina I Sijniensky, 'From the Non-Discrimination Clause to the Concept of Vulnerability in International Human Rights Law: Advancing on the Need for Special Protection of Certain Groups and Individuals' in Yves Haeck, Brianne M Leyh, Clara Burbano-Herrera and Diana Contreras-Garduño (eds), *The Realization of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (2013) 259.

[37] CERD Committee, 'General Recommendation No 31' (2005) UN Doc A/60/18 [at 98–108], para 5 (e), Preamble.

[38] *Marcia Cecilia Trujillo Calero v Ecuador*, CESCR, Communication 10/2015, UN Doc E/C.12/63/D/10/2015 (2018), para 16.

[39] *Ibid.*, para 19.

[40] *Ibid.*, para 23(e).

emphasized the obligation to provide the family with the widest possible protection under Article 10(1) ICESCR, in relation to the obligation to ensure that vulnerable individuals or groups who are subjected to systemic discrimination have access to a real opportunity for genuine prior consultation with the authorities and to an effective judicial remedy.[41] From the more child-centred perspective, the Committee on the Rights of the Child (CRC Committee), emphasizing the justiciability of social rights, noted that states need to give particular attention to ensuring that effective remedies 'include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance'.[42]

In conclusion, the personal scope of the procedural guarantees of social rights has gradually expanded from the static, status-based notion of non-discrimination to the more dynamic, situation-oriented concept of vulnerability.

IV. FROM SHIELD TO SWORD: NEGATIVE AND POSITIVE OBLIGATIONS

In general, states bear not only the *negative obligation to respect*, to refrain from limiting people's access to information, justice and remedies but also the *positive obligation to protect*, to ensure the enjoyment of rights, and *to fulfil (promote)*, towards the full realization of social rights.[43] In the context of social rights, as a premise of these different types of obligations, a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party.[44] The CESCR has confirmed that state parties must ensure a *core obligation* with 'comparable priority', to provide access to information concerning the main social problems in the community, including methods of preventing and controlling them.[45] The Committee has also indicated that the incorporation in the domestic legal order of international instruments recognizing social rights can significantly enhance the scope and effectiveness of remedial measures, and enables courts to adjudicate violations of those rights, or at least their core obligations, by direct reference to the Covenant.[46]

Procedural measures for protecting social rights are taken as a part of the *obligation to protect*, which has a dual layer.[47] The first layer is the specific, case by case mandate to ensure the enjoyment of social rights by exercising due diligence. When third parties contravene social rights, states must ensure that such violations are investigated and prosecuted, and that the perpetrators are held accountable, while the victims of such violations are provided with

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[41] *Ben Djazia and Bellili v Spain*, CESCR, Communication No 5/2015 (2017), para 17.

[42] CRC Committee, 'General Comment No 5 on General Measures of Implementation' (27 November 2003) CRC/GC/2003/5, paras 24–25.

[43] For those categories of obligations, see Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2018) 97–99.

[44] CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1999) UN Doc E/1991/23, para 10.

[45] CESCR (GC 14) (n 16), para 44.

[46] CESCR (GC 14) (n 16), para 60.

[47] CESCR (GC 14) (n 16), paras 34-37.

remedies.[48] In the famous *Ogoni* decision, the ACHPR interpreted the procedural obligation to protect social rights to include independent scientific monitoring of threatened environments, providing information to those communities exposed to hazardous materials and activities and meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[49] The ECtHR has also identified certain procedural requirements under Article 8 of the European Convention on Human Rights, emphasizing the decision-making process involving appropriate investigations and the importance of public access to information, justice and remedies.[50]

These developments highlight that *human rights impact assessments* (HRIAs) as a transparency and accountability mechanism play an important role to ensure the enjoyment of social rights. The mechanism, which was originally developed in the field of environmental protection,[51] has gradually been adopted in international human rights instruments such as the 2012 Guiding Principles on Extreme Poverty and Human Rights endorsed by the Human Rights Council,[52] and the 2018 Framework Principles on Human Rights and the Environment.[53] As an important judicial development, the IACtHR issued its Advisory Opinion on the *Environment and Human Rights* that made the procedural criteria of social rights protection more sophisticated, in light of the extensive *corpus juris* of international environmental law.[54] In the specific context of financial activities,[55] the 2012 United Nations Guiding Principles on Foreign Debt and Human Rights clarified that to avoid any adverse influence on social rights, it is incumbent upon lenders intending to finance specific activities or projects in borrower states to conduct a credible HRIA as a prerequisite to providing a new loan.[56] The CESCR also notes that the conclusion of trade or investment treaties should be preceded by HRIAs that take into account both the positive and negative human rights impacts of trade and investment treaties particu-

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[48] CESCR (GC 22) (n 7), paras 42 and 64. See also UN Basic Principles and Guidelines (n 6), para 24: 'victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations'.

[49] *SERAC* (n 25), para 53.

[50] *Taşkın and Others v Turkey,* ECtHR, App No 46117/99, Judgment of 10 November 2004, para 119.

[51] In *Pulp Mill*, the International Court of Justice acknowledged that impact assessments had already crystallized as customary obligation in international environmental law (*Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ 14, para 116 (Judgment of 20 April).

[52] HRC, 'Guiding Principles on Extreme Poverty and Human Rights' (18 July 2012) UN Doc A/HRC/21/39, para 92.

[53] HRC, 'Framework Principles on Human Rights and the Environment' (24 January 2018) UN Doc A/HRC/37/59, Principle 7.

[54] *The Environment and Human Rights*, IACtHR, Advisory Opinion OC-23/17 of 15 November 2017, paras 211–41. For the doctrine of '*corpus juris internacional*' in the IACtHR's jurisprudence see para 43 of the Advisory Opinion, and Yota Negishi, 'Relative Authorities: Constitutional Reasonable Resistances against Inter-American Court's Doctrines' (2018) 21 Iuris Dictio 49, 50–51.

[55] The 2003 Tilburg Guiding Principles on World Bank, IMF and Human Rights, which were revised under the project of Beyond Territoriality: Globalisation and Transnational Human Rights Obligations (GLOTHRO) in 2015 (Principle 16). See Annex I in Willem van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualised Way Forward* (2015).

[56] HRC, 'Guiding Principles on Foreign Debt and Human Rights' (18 July 2012) UN Doc A/HRC/RES/20/10, para 23.

larly on the enjoyment of specific Covenant rights relating to health, housing, food, water and social security.[57]

To complement the first layer of the case by case mandate, the second layer of the obligation to protect imposes on state parties to more comprehensively harmonize their domestic legal systems with the standards of international human rights treaties.[58] It follows that states are required not only to provide effective access to individuals but also to control the compatibility of domestic legal systems with international standards relating to accessibility.[59] In practice, international legal instruments relating to access to information have transformed domestic legal procedures by granting public participation and information.[60] The right of access to justice also embraces an integrative dimension of the domestic and international sources of law that serve as the basis for guaranteeing judicial protection.[61] The right of access to remedies, when connected to the primary obligation to harmonize, entails the secondary obligation of reparation to transform domestic legal systems to ensure compliance with international standards.[62]

The *obligation to fulfil (promote)* furthermore requires states to undertake actions that create, maintain and restore the conditions of procedural accessibility. Under the ICESCR framework, the duty to take steps imposes on state parties an obligation to adopt a *national strategy* and *plan of action* to realize social rights, unless the state party can show that it has a comprehensive system in place and that it reviews it regularly to ensure that it is consistent with social rights.[63] Furthermore, *indicators and benchmarks* should be designed by states to monitor the progress of access to them. State parties are obliged to monitor effectively the realization of social rights and should establish the necessary mechanisms or institutions for such a purpose.[64] For this purpose, they may obtain guidance on appropriate indicators from the ongoing work of international organizations (IOs) specialized in social security,[65] food

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[57] CESCR (GC 24) (n 8), para 13.

[58] Riccardo Pisillo-Mazzeschi, 'Responsabilité de l'État pour violation des obligations positives relatives aux droits de l'homme' (2009) 333 RdC 179, 311ff; see also *Exchange of Greek and Turkish Populations*, 1925 PCIJ Series B No 10, p 20 (Advisory Opinion of 21 February).

[59] Yota Negishi, 'The *Pro Homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control' (2017) 28 EJIL 457.

[60] Stephan W Schill, 'Interface Between National and International Energy Law' in Kim Talus (ed.), *Research Handbook on International Energy Law* (2014) 44, 71; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998) 2161 UNTS 447; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (4 March 2018) C.N.195.2018. TREATIES-XXVII.18.

[61] *Liakat Ali Alibux v Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 30 January 2014 (Concurring Opinion of Judge E Ferrer MacGregor Poisot), para 73.

[62] Nollkaemper points out that an essential connection between primary and secondary norms serves 'to coordinate and ensure some degree of convergence between two [international and domestic] legal systems': André Nollkaemper, 'The Power of Secondary Rules to Connect the International and National Legal Order' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011) 45, 61.

[63] CESCR (GC 14) (n 16), para 53; CESCR (GC 19) (n 20), para 68.

[64] CESCR (GC 14) (n 16), para 57; CESCR (GC 19) (n 20), para 74.

[65] CESCR (GC 19) (n 20), para 75 (referring to the International Labour Organization (ILO), World Health Organization (WHO) and International Social Security Association (ISSA)).

and water,[66] and health.[67] During the periodic reporting procedure, the CESCR will engage in a process of scoping with the state party, involving their joint consideration of the indicators and national benchmarks which will provide the targets to be achieved during the next reporting period.[68]

Moreover, in parallel to the discussion on civil and political rights, the applicability of procedural obligations pertaining to social rights beyond the national territorial scope has been problematized.[69] As regards this controversial issue, a group of experts in international law and human rights adopted the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, which include the right to informed participation in decisions which affect social rights and the right to prompt, accessible and effective access to justice and remedy for their violations.[70] The CESCR has also interpreted the extraterritorial obligation to protect in regard to state parties taking steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control.[71] To perform such an extraterritorial obligation to protect, appropriate monitoring and accountability procedures must be put in place, including the imposition of a duty on companies to report on their policies and procedures to ensure respect for human rights, and providing effective means of accountability and redress for abuses of Covenant rights.[72]

In short, the procedural obligations of states to offer accessibility to information, justice and remedies complement each of the three categories of their substantive obligations in the protection of social rights.

V. FROM CO-EXISTENCE TO CO-OPERATION: SUBSIDIARITY AND SOLIDARITY

Access to information, justice and remedies relating to social rights is implemented in accordance with the structural principles of international human rights law: to govern the vertical allocation of powers between states and IOs, the principle of *subsidiarity*

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[66] CESCR, 'General Comment No 15 on the Right to Water' (20 January 2003) UN Doc E/C.12/2002/11, para 53 (referring to the Food and Agriculture Organization of the United Nations (FAO), the United Nations Centre for Human Settlements (Habitat), the ILO, the United Nations Children's Fund (UNICEF), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP)).

[67] CESCR (GC 14) (n 16), para 57 (referring to WHO and UNICEF).

[68] *Ibid.*, para 58.

[69] For a comparison of the extraterritorial application of the ICCPR and the ICESCR, see Ibrahim Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction' (2018) 19 German Law Journal 43, 47–49.

[70] See also Olivier De Schutter *et al*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights Olivier' (2012) 34 HRQ 1084.

[71] CESCR (GC 24) (n 8), para 27.

[72] *Ibid.*, para 33.

> serves human dignity by enabling individuals to gain fulfilment through social interaction within a hierarchy of freely chosen associations, each performing its proper task, and with the larger associations aiding but not superseding the smaller ones;[73]

and to regulate the horizontal cooperation between international actors, the principle of *solidarity*

> reorients international law from a set of rules for preserving the present state of existing international relations, into a regime for fulfilling a certain mission, namely the promotion of international social justice among states.[74]

In the vertical relations between states and IOs, the right of access to remedies for social rights typically reflects subsidiarity, according to which state parties have broad freedoms to choose the best way of granting remedies and complying with international standards. As a counterpart to victims' accessibility to remedies, as stipulated for example in Article 3 of the Optional Protocol to the ICESCR, the rules on the exhaustion of domestic remedies foresee that the applicants exhaust local remedies before having recourse to international instances. This admissibility requirement also stems from remedial subsidiarity, that is, state parties are thereby allowed the opportunity to remedy human rights violations in the first instance within their domestic legal orders without unwarranted international proceedings.[75]

A variety of international mechanisms that are subsidiary to domestic authorities exist to implement these procedural accessibilities.[76] In particular, under Article 8 of the Optional Protocol of the ICESCR, the Committee is authorized to consider the reasonableness of the steps taken by the state party, including both substantive and procedural dimensions, and engage both individual and systemic issues as they may arise in the context of particular complaints.[77] As noted in *I.D.G. v Spain*, it is in the primary place for the courts of state parties to evaluate the facts and the evidence in each particular case, as well as the application of domestic law; in other words, these aspects may only be relevant before the Committee's subsidiary authority when it can be shown that such evaluation or application was clearly arbitrary or amounted to a denial of justice that entailed the violation of a right recognized in the Covenant.[78] Article 9 of the Optional Protocol also empowers the Committee to make 'recommendations' to states in connection with its views by indicating appropriate remedies for

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[73] Gerald L Neuman, 'Subsidiarity' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) 360, 362.

[74] Rüdiger Wolfrum, 'Solidarity' in *ibid.*, 401.

[75] See, e.g., *Velásquez-Rodríguez v Honduras* (Merits), IACtHR, Judgment of 29 July 1988, para 61.

[76] Yota Negishi, 'The Subsidiarity Principle's Role in Allocating Competences between Human Rights Courts and States Parties: The Hybrid Model of Centralized and Diffused Conventionality Control of Domestic Law' in Armin von Bogdandy, Flávia Piovesan and Mariela Morales Antoniazzi (eds), *Ius Constitutionale Commune en América Latina, Volume III* (2016) 125 (points out the negative and positive aspects of subsidiarity: the former decentralizes powers in favour of state parties to the extent that national authorities appropriately behave as the primary guardians of human rights, while the latter centralizes powers for the sake of treaty bodies in proportion to the deficiencies of state parties' ability and willingness to protect human rights).

[77] Bruce Porter, 'Reasonableness and Article 8(4)' in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 173, 174.

[78] *I.D.G. v Spain* (n 31), para 13.1.

the victims of social rights violations. Since international instances aim to provide appropriate redress that domestic remedies fall short of meeting, the remedial powers of treaty bodies are rooted in the subsidiarity principle.[79] Following this system, state parties are required under Article 16 of the Optional Protocol to make widely known and to disseminate the Covenant and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, particularly in accessible formats for persons with disabilities. This clause fosters the dissemination of information particularly relating to social rights of the groups traditionally excluded from access to information on these issues.[80]

In the horizontal transnational contexts, the procedural guarantees of social rights require *international assistance and cooperation*.[81] As a key instrument, Article 2 ICESCR mandates state parties to perform their obligations 'individually and through international assistance and co-operation, especially economic and technical'. In addition to these purely inter-state relations, Article 14 of the Optional Protocol to the ICESCR explicitly sets out a role for IOs: first, the duty of assistance on the part of IOs; second, the duty to consider taking direct, both positive and negative, measures on the part of IOs.[82] When the right to an adequate standard of living is infringed by foreign direct investment supported by IOs, for example, the appropriate international measure falling to them might be to withdraw support from the investment project.[83]

It is remarkable in this context that the Committee expressly invokes Article 28 of the Universal Declaration of Human Rights (UDHR) to draw an interpretation that the obligation of international cooperation under Article 2(1) ICESCR (corresponding to Article 22 UDHR) 'requires States Parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights'.[84] As a method of progressive realization of social rights, a set of guidelines informed by a concept of international cooperation, in tandem with the idea of Article 28 UDHR,[85] based on an accurate assessment of the power disequilibrium at the level of international order, and aimed at creating a balance through certain procedures, could ground the negotiations and the agreements in human rights concerns.[86]

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[79] *Manuel Cepeda Vargas v Colombia* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 26 May 2010 (Concurring Opinion of Judge García-Sayán), para 14; Mark Villiger, 'The Principle of Subsidiarity in the European Convention on Human Rights' in Marcelo Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch* (2007) 623, 631ff.

[80] Krsticevic and Griffey (n 30), 337.

[81] For a comprehensive analysis on this notion see Takhmina Karimova, 'The Nature and Meaning of "International Assistance and Cooperation" under the International Covenant on Economic, Social and Cultural Rights' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014) 163.

[82] Başak Çalı, 'Enforcement' in Malcolm Langford, Bruce Porter, Rebecca Brown and Julieta Rossi (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 359, 378.

[83] *Ibid.*

[84] CESCR (GC 24) (n 8), para 37.

[85] For the future-oriented potential of Article 28 UDHR see Yota Negishi, 'The Forgotten Principle of *Fraternité*: Re-Interpreting the Last Three Articles of the Universal Declaration of Human Rights' in Kasey McCall-Smith, Andrea Birdsall and Elisenda Casanas Adam (eds), *Human Rights in Times of Transition* [forthcoming].

[86] Josh Curtis and Shane Darcy, 'The Right to a Social and International Order for the Realization of Human Rights: Article 28 of the Universal Declaration and International Cooperation' in David Keane

The solidarity-driven notion of international cooperation becomes especially pertinent to access to information on social rights. In fact, both the Convention on the Rights of the Child, with a general provision (Article 4),[87] specific rights (Article 17 on access to information, Article 23 on a decent life and Article 24 on health) and institutional (Article 45) clauses, and the Convention of the Rights of Persons with Disabilities, with a general provision (Article 32),[88] require the exchange of information in terms of international cooperation. In its Advisory Opinion on the Environment and Human Rights, the IACtHR expressed that in addition to the duties to notify, consult and negotiate with regard to projects that can result in the risk of transboundary harm, various international instruments envisage, as part of the duty of cooperation, provisions designed to facilitate, promote or ensure the exchange of information between states on scientific and technological knowledge.[89]

In conclusion, the procedural obligations to guarantee social rights are implemented in various international legal systems, in which different actors exercise and perform different powers and duties for the full realization of those rights.

VI. CONCLUSION

This chapter has grasped the proceduralization of social rights in terms of four aspects: rights (corrective and distributive justice), persons (non-discrimination and vulnerability), obligations (negative and positive) and implementation (subsidiarity and solidarity). Notwithstanding several advancements, the proceduralization of social rights raises several complex issues.[90] First, the prospects and success of a procedural approach will depend on the ability of international judges to cope with the difficult task of spelling out procedural criteria that are clear, transparent and demanding.[91] Second, waiving a substantive analysis of a human right in favour of a more cursory consideration of the purely procedural dimensions risks a standstill in the development of many of the more complex rights.[92] Third, the procedural approach risks discouraging future social litigation, limits the guidance the decisions provide to both policy-makers and judges in future cases and is theoretically disappointing because it fails to identify any substantive political philosophy underlying the social rights.[93] It is

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and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (2012) 9, 27–33.

[87] CRC Committee (GC 5) (n 43), paras 60–64.

[88] CRPD Committee (GC 2) (n 34), para 47.

[89] IACtHR, Advisory Opinion OC-23/17 (n 54), para 206.

[90] Krešimir Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (2017).

[91] Thomas Kleinlein, 'The Procedural Approach in International Human Rights Law and Fundamental Values: Towards a Proceduralization of the Interface of International and Domestic Law?' (2017) 10 European Society of International Law Conference Paper Series 1.

[92] Kasey McCall-Smith, 'Human Rights Treaty Bodies, Proceduralization and the Development of Human Rights *Jus Commune*' (2015) 5 European Society of International Law Conference Paper Series 1.

[93] Brian Ray, *Engaging with Social Rights* (2016) chapter 4; Danie Brand, 'The Proceduralisation of South African Socio-economic Rights Jurisprudence or "What Are Socio-Economic Rights For?"' in Henk Botha, AJ Van der Walt and JC Van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (2004) 33.

therefore necessary for future research to situate procedural guarantees of social rights under international law under political, theoretical and philosophical considerations.

PART IV

CRISIS AND SOCIAL RIGHTS/ CHALLENGES TO SOCIAL RIGHTS

20. Austerity measures and women's social and economic rights: we need to look deeper

Abby Kendrick and Juan Pablo Bohoslavsky

I. INTRODUCTION

A decade on from the financial crisis of 2007–8, millions of people around the world continue to face significant social and economic hardship, both because of the crisis itself and as a result of governments' responses to it. In the immediate aftermath of this crisis, many states put in place fiscal stimulus packages and boosted social protection programmes to protect businesses and jobs and address poverty and inequality. However, in the wake of economic slowdown and increased public deficits there has been a global turn to austerity, structural adjustment and fiscal consolidation.

Today, more than two thirds of countries across the world are contracting their public purses and limiting, rather than expanding, their fiscal space – most of them upon the advice of international financial institutions (IFIs).[1] Austerity-driven unemployment, work precariousness and cuts to public investment in essential social services around the globe have served to increase inequalities in general, and gender inequalities in particular.[2] But while evidence on the ground tells us that structural adjustment and fiscal consolidation policies can have grave adverse impacts on the realization of human rights,[3] most of those policies have not been designed or implemented in a manner that considers the safeguarding of human rights at all,[4] let alone offers sensitivity to their gendered impacts. This puts the enjoyment of human rights of women at significant risk, in particular their enjoyment of the right to an adequate standard of living, the right to work and the right to social security. We are seeing now in the context of the Covid-19 crisis how this risk is dangerously exacerbated and materialized.

We argue in this chapter that various forms of gender discrimination have been created or exacerbated by the prevailing economic system, in particular by austerity, which ultimately results in a diminution of women's social rights. We aim to demonstrate that gender discrimination in the economic sphere is not necessarily attributed to a specific set of policies per se, but is rather symptomatic of deep-seated gender discrimination in the foundations upon which any set of economic policies may be based. This is the focus of section II. Specifically,

[1] Isabel Ortiz, Matthew Cummins, Kalaivani Karunanethy, 'Fiscal Space for Social Protection and the SDGs: Options to Expand Social Investments in 187 Countries', Extension of Social Security Working Paper No 48 (2017). On IFIs' responsibility for complicity with retrogressive economic reforms, including those that exacerbate gender inequalities, see Juan Pablo Bohoslavsky, 'Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights' UN Doc A/74/178 (2019).

[2] ILO, *World Employment and Social Outlook – Trends 2018* (2018).

[3] See Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014).

[4] Juan Pablo Bohoslavsky, 'Development of Guiding Principles for Assessing the Human Rights Impact of Economic Reform Policies' UN Doc A/HRC/37/54 (2018).

we see observed inequalities between men and women as having roots in the fundamentals of mainstream economics, and our goal is to show how assumptions and beliefs about economic behaviour and decision-making in dominant economic thinking deliver a distorted view of potential policy impacts, particularly with respect to the impacts on women's status in the household as both workers and carers. Analyzed through this lens, the degree and the direction of such distortions reflect conscious policy choices, and arguably these choices are motivated not solely by economic considerations but by political considerations also. This approach could not only help us understand the causal channels through which certain economic reforms adversely affect women's social (and economic) rights, but also help us think about how international and national law could more effectively prevent negative impacts occurring.

The right to work and the right to social security are essential for the realization of the right to an adequate standard of living as enshrined in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has explicitly addressed economic policy reforms a number of times, in particular their link to women's enjoyment of social (and economic) rights. It has underlined that

> even in times of fiscal constraints and economic crisis, special efforts must be made to respect women's human rights, sustain and expand social investment and social protection and employ a gender-sensitive approach, giving priority to women in vulnerable situations.

It has called on states to ensure that any response to financial crises incorporates a gender perspective and that sufficient funds are allocated to address or mitigate severe negative impacts of austerity measures on women's life, and, for illustration, on access to health services.[5] More recently, the new UN Guiding Principles on human rights impact assessments of economic reforms warn that

> economic reforms which encourage, among other things, labour market flexibilization, reductions in the coverage of social protection benefits and services, cuts to public sector jobs and the privatization of services tend to have a negative impact on women's enjoyment of human rights. Economic reform should aim to prevent gender discrimination and transform existing inequalities, instead of creating such situations.[6]

We take this legal framework as the foundation upon which to explore what we see in the empirical data post-2008, in the global policy context of austerity and fiscal consolidation. In section III, we take advantage of the enormous amount of empirical information on how economic reforms affect women's social (and economic) rights worldwide,[7] provided during

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[5] CEDAW Committee, 'Concluding Observations on Barbados' (24 July 2017) CEDAW/C/BRB/CO/5-8, paras 35–36.

[6] UN Doc A/HRC/40/57, approved by HRC Resolution A/HRC/40/08 (19 March 2019).

[7] The call for contributions formed part of the Independent Expert on foreign debt and human rights 2018 thematic report to the UN General Assembly, 73rd session. All submissions are available at www

2018 by states, IFIs, trade unions, feminist organizations and scholars in the context of a call for submissions for the preparation of an official report to the United Nations Human Rights Council.[8] We argue that the neglect of a gender lens in the rollout of austerity-specific macroeconomic policy has led to what we call 'triple jeopardy', which sees women suffer at once as workers, service users and carers. This situation has led to the violation of a wide range of women's social (and economic) rights. In the sphere of *production*, where labour is used to create exchange value in markets, the fact that women are more likely to be employed in the public sector, in low-paid and precarious jobs and in the informal economy means cuts in employment opportunities in both the public and private sector have sent many women into unemployment or precarious temporary job positions, increasing their financial insecurity and the gender pay gap. Meanwhile, in the sphere of *reproduction*, where labour creates use value in the home and community, cuts to social services are also likely to intensify the demands of unpaid care work, which is disproportionately carried out by women and girls (notably in poor households), forcing them to fill in the gaps. In addition, loss or changes to household income might also reshape the decision-making power of women, leading to less spending on goods and services, such as health and education, that are likely to generate benefits to women themselves and to children, in particular girls. These economic pressures and changing intra-household dynamics may also contribute to increasing rates of domestic violence.[9] Hence, it is not surprising that emerging evidence suggests that when social (and economic) rights are at stake, women are often more affected than men. Indeed, the burdens of the crisis, including reductions in public sector employment, cuts and caps on public sector wages,[10] phasing out of basic subsidies,[11] and cuts to social welfare services and benefits, as well as reforms to pensions, have been disproportionately shouldered by women, and in particular those who are exposed to multiple and intersecting forms of marginalization due to their class, race, sexual orientation or migrant status, among other dimensions.

The chapter concludes in section IV with consideration of what can and should be done with respect to the making and implementation of economic policy to prevent and address negative impacts on women's social (and economic) rights.

II. ECONOMIC FOUNDATIONS AND STRUCTURAL GENDER DISCRIMINATION IN POLICY-MAKING

There are a number of ways in which feminist scholarship might motivate a framework for understanding the position of women in the economy. For instance, research in feminist economics might provide knowledge through a focus on questions that are attuned to feminist pol-

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.ohchr.org/EN/Issues/Development/IEDebt/Pages/ImpactEconomicReformPoliciesWomen.aspx (29 May 2019). Contributions referred to henceforth are denoted as OHCHR, [contributor].

[8] Juan Pablo Bohoslavsky, 'Impact of Economic Reforms and Austerity Measures on Women's Human Rights' UN Doc A/73/179 (2018).

[9] UN Women, 'The Global Economic Crisis and Gender Equality' (2014) 11.

[10] Trade Union Congress, 'The Impact on Women of Recession and Austerity' (2015) (29 May 2019).

[11] For example, the elimination of subsidies for fuel and heating recommended by the IMF to Ukraine has disproportionally affected women. <https://wilpf.org/wilpf_statements/ukraine-the-impact-of-interventions-by-international-financial-institutions-on-women/> (29 May 2019).

itics: the gender pay gap, the division of labour in the household, the costs of having children, among others. Or it could provide knowledge through reconceptualizing standard economic theory with the use and application of the concept of gender to help reveal gender-organized structures of power that shape the nature of economic enquiry from within and without.[12] For our present purposes, the second characterization of knowledge creation holds the most promise, since what is required for our understanding is not simply an analysis of given issues for the production of knowledge 'for women', but rather an analysis of the *economic approach* to those issues *per se*. To this end, Julie Nelson's 1995 essay in the *Journal of Economic Perspectives* still proves relevant. Her application of feminist scholarship to what she calls the 'four different aspects of economics: model, methods, topics and pedagogy' is a useful point of departure.[13] We will focus on the first three of these aspects, which have more specific implications for economic policy, which impacts women's social rights both directly and indirectly.

a. Economic Models: Making Gendered Assumptions

Economists see the world through models. Put simply, economic models are simplified, often idealized, descriptions of reality that seek to offer testable explanations of economic behaviour and phenomena. These descriptions are often entailed by a set of mathematical equations and the structure of these equations reflects the modeller's judgement as to what is needed to explain their version of reality, that is, their theory of economic behaviour. Models then function as frameworks for formulating hypotheses, which then specify, borrowing from Anna Alexandrova's terminology, 'a situation of type *S* with characteristics $\{C_1 \ldots C_n\}$, such that in this situation a certain feature *F* causes a certain behaviour *B*'. To use this theoretical hypothesis for explanation, the modeller must then identify some set of assumptions (the *C*'s) under which the putative cause (the *F*) generates the putative effect (the *B*). In general, mainstream economics defines these *C*'s such that the agents involved have well defined preference functions and they act independently and rationally to make consistent choices in pursuit of those preferences so that they maximize some objective, subject to some constraints, as defined by the model. It is perhaps worth making explicit here that a formalized analysis (feminist or otherwise) of standard economic models and their neoclassical roots will not be embarked upon presently – this is covered amply elsewhere.[14] Rather, what our central argument rests on is the extent to which the assumptions (the *C*'s) in standard economic models render them unfit as objective and scientific tools for policy purposes from a gender perspective, which

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[12] See, e.g., Crasnow's typology of what makes a social scientific inquiry 'feminist'. Sharon Crasnow, 'Feminist Anthropology and Sociology: Issues for Social Science' in Stephen Turner and Mark Risjord (eds), *Handbook of the Philosophy of Science: Philosophy of Anthropology and Objectivity* (2007) 827.

[13] Julie A Nelson, 'Feminism and Economics' (1995) 9(2) Journal of Economic Perspectives 131.

[14] See, e.g., Marianne A Ferber and Julie A Nelson, 'Introduction: Beyond Economic Man, Ten Years Later' in Marianne A Ferber and Julie A Nelson (eds), *Feminist Economics Today: Beyond Economic Man* (2003) 1; Frances R Woolley, 'The Feminist Challenge to Neoclassical Economics' (1993) 17(4) Cambridge Journal of Economics 485; Marianne A Ferber, 'The Study of Economics: A Feminist Critique' (1995) 85(2) The American Economic Review 357; Barbara R Bergmann, 'Becker's Theory of the Family: Preposterous Conclusions' (1995) 1(1) Feminist Economics 141; Julie A Nelson, *Economics for Humans* (2006).

could have significant implications for the effectiveness of women's social (and economic) rights law protection.

Of course, economic models can and do make useful inferences for some specific policy questions relevant to women. Take the gender pay gap as an example. The stylized facts tell us that on average women persistently earn less than men and are often concentrated in low-paying occupations. Standard economic models can explain these phenomena as the result of women's career and education decisions or women's preferences over labour market 'effort'. The earnings and wage rates we observe are then a mere reflection of an efficient competitive equilibrium.[15] Intuitively, a policy-maker with insight from this basic theoretical idea might then see that expanding women's work opportunities through, say, labour flexibilization would be the most direct solution to closing the gender pay gap and occupational segregation. But several assumptions go into this presumption, including perfect rationality, perfect information, perfectly clearing markets and exogenous policy constraints, all of which seem rather distant from the realities of the socio-economic system. Instead, the reality of the social and economic environment is shaped by culture and history, which in turn rewards and punishes choices according to values that are likewise culturally and historically constructed.[16]

Choices with respect to available options under this scheme are then not taken as given but are induced and are responsive to the various incentives at stake. In environments where one gender structurally subordinates another, it is not a huge leap to suggest that such subordination shapes choices to the detriment of those subordinated, who are most often women. Going back to our simple example, increasing labour market flexibility might create more work opportunities for women, but in a world where societal norms prescribe jobs for women and jobs for men,[17] it could serve to reinforce rather than close the pay and segregation gap if the terms on which those opportunities are offered are not considered.[18] Moreover, in the long run, that women expect segregation and lower wages in the labour market might also direct their decisions regarding how much to invest in market skills versus non-market skills and what types of market skills to accumulate. Through this feedback from labour market inequality to human capital investment, these patterns thus become reinforcing: women accumulate fewer of the higher-return skills and thus receive lower wages. In this sense, policies and their impacts are not exogenous but instead should be seen as endogenously determined by competing pressures and interests *within* the socio-economic system. From a gender-sensitive policy perspective this is costly: the high level of abstraction in economic models might give us useful information about competitive equilibria but it leaves us with little detail on what we should do out of equilibrium, ultimately limiting these models' normative usefulness in dealing with gender issues in a real world where departures from the theorized ideal are multifarious.

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[15] See, e.g., Jacob Mincer, 'Labor Force Participation of Married Women: A Study of Labor Supply' in H Gregg Lewis (ed.), *Aspects of Labor Economics* (1962) 63; Gary S Becker, *A Treatise on the Family* (1981).

[16] Ann E Cudd, 'Rational Choice Theory and the Lessons of Feminism' in Louise Antony and Charlotte Witt (eds), *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (2002) 398.

[17] Where women are much more likely than men to be employed in unskilled or lower paid positions and dominate occupations such as health care, teaching and cleaning.

[18] ActionAid, 'Double Jeopardy. Violence against Women and Economic Inequality' (2016) <www.actionaid.org/sites/files/actionaid/actionaid_double_jeopardy_decent_work_violence_against_women.pdf> (29 May 2019).

b. Economic Methods: Dealing with Gendered Social Realities

From the foregoing, the reader may quite reasonably be persuaded that the problem of using mainstream economic thinking for making economic policy and protecting social (and economic) rights originates at the level of economic models and the assumptions on which they rely. However, others would argue that what matters is not just *what* economists do but *how* they do it.[19] How mainstream economic models are written, how their hypotheses are validated empirically and what qualifies as a 'good proof' of the theory could actually be the biggest culprit; that is the economic method.

Formal mathematical modelling and the deductivist method (in the sense that logical inferences are made from a specific set of *a priori* deductions) have been essential to the science of economics for at least the past 50 years. Central to formalistic economic modelling is the use of mathematical functions as a means to explain social phenomena. Formally, a function is defined such that if X is entailed by a set of x ($x_1 \ldots x_n$) and Y is entailed by a set of y, ($y_1 \ldots y_n$) rules are given by which for each x in X, there is a corresponding y in Y so that $y = f(x)$ where the value y is equal to the function f taken for a particular x. This requires the identification of regularities in the social phenomena under consideration and implies that the functional relationship between these regularities (X and Y) applies in very specific and stable (predictable) ways. The world that we are considering here is made up of agents that have their own independent invariable effect (as a function of initial conditions) whatever the context, and these effects can be distinguished independently of other potentially interfering factors. Assumptions are made with respect to the mathematical form these relationships take so that the model is 'tractable', or in other words, so that it can be *solved*.

However, this is quite implausible in the real world, where more often than not y will not materialize in a given condition of x. This might be for all sorts of reasons: the way an agent relates x and y might depend largely on things other than x, or an agent might act differently each time condition x occurs, to name just two. Clearly, the social world is not made up of independently moving parts that have stable relationships with other moving parts. Consider households as an example. Partners, *qua* partners, are constituted through, not merely linked by, their relation to each other and are at the same time constituted through relations to other ever changing parts and wholes. Relations between partners and other social phenomena are not then isolatable but instead are internally related. Neither are they stable since they are continuously transformed through the actualities on which they depend.

This is also problematic from a gendered policy perspective. For example, a policy-maker might look to economic analysis in thinking about how a cut to working tax credits is likely to affect households' labour supply decisions. Formalized mathematics can help shed light on potential substitution and income effects within households,[20] and give some indication

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[19] See, e.g., the many works of Tony Lawson. In particular, Tony Lawson, 'What is Wrong with Modern Economics, and Why Does it Stay Wrong?' (2017) 80 Journal of Australian Political Economy 26; *ibid.*, 'What is This "School" Called Neoclassical Economics?' (2013) 37(5) Cambridge Journal of Economics 947; *ibid.*, 'Comparing Conceptions of Social Ontology: Emergent Social Entities and/or Institutional Facts?' (2016) 46(4) Journal for the Theory of Social Behaviour 359.

[20] A cut to working tax credit would reduce household income so time spent not working is now less costly. This creates incentives to work less and consume more leisure; this is the *substitution effect*. However, at the same time, there will be incentives to work more in order to maintain the same level of pre-tax cut household income. This is the *income effect*. Whether cuts to tax credits will increase or

as to what happens to *y* (labour supply) under condition *x* (changes to household income). However, by treating agents as individual invariant entities it cannot consider the possibility that those effects could change the nature of the household relationship in and of itself and lead to something quite different from *y*. For instance, a situation where women withdraw their labour altogether, not because of changes to working tax credits necessarily but because of the added and combined changes to household dynamics, which in turn relate to the underlying (often male-biased) social structures, their power and tendencies. While it is true that economic models have developed in various ways in an attempt to integrate some of the 'add-ons' relevant to the real word we describe,[21] in mathematics it might be possible to add one or two of these factors but with many the model becomes at least frustrated and at worst incoherent and non-tractable.

c. Economic Topics: If Women Counted

Feminist economists have long questioned not only the credibility of economic models and the methods used to develop them but also the reach and definition of 'the economy' in mainstream economic thinking, which broadly focuses on the exchange of goods and services in markets. Such a sole focus on the monetized aspects of the economy ignores the value of unpaid care work and its economic contribution, which is clearly important when considering policy likely to affect both the shape and distribution of the two types of economic activity.

As feminist economists have pointed out over many decades, women's unpaid work has greatly contributed to supporting the economic system.[22] Nevertheless, it remains absent from the standard method of measuring an economy's progress, namely GDP and its growth. When reproductive labour is excluded from the national accounting system, neither the value of labour input nor the value of output is counted. Indeed, while evidence shows that women's unpaid care work can contribute from 20 to 60 per cent of GDP, governments and international institutions still do not recognize or value unpaid care and domestic work in the development of economic and social policies.[23] Consequently, the lack of assessment of trends in these variables over space and time fails to reflect fully the total costs and benefits to society in response to enacted economic policies. For instance, policies created to improve the efficiency of, say, health services might hypothetically be good for growth but at the same time transfer work from the public health service, where it is paid, to families and communities, where it is unpaid, thus skewing the cost–benefit calculus.[24]

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decrease labour supply will depend on the magnitude of these competing effects, which will vary across individuals.

[21] For instance, bargaining models have been introduced to theories of the household and marriage markets and the tools and techniques of behavioural economics have begun to permeate standard economic models and methods: see, e.g., the work of Esther Duflo, as well as Ester-Miriam Sent and Irene van Staveren, 'A Feminist Review of Behavioural Economic Research on Gender Differences' (2018) 25 Feminist Economics 1.

[22] Shahra Razavi, 'The Political and Social Economy of Care in a Development Context', Gender and Development Programme Paper No 3 (June 2007) 8–9.

[23] OHCHR (n 7), International Trade Union Confederation.

[24] Diane Elson, 'A Gender-Equitable Macroeconomic Framework for Europe' in Hannah Bargawi, Giovanni Cozzi and Susan Himmelweit (eds), *Economics and Austerity in Europe: Gendered Impacts and Sustainable Alternatives* (2017) 15.

Assessments that account for reproduction and its valuation will lead to different answers about the impact of policy on different individuals in society to those where the focus on the monetized aspects of the economy predominates. Clearly, economic policies based on measures that ascribe greater worth to the productive sphere over the reproductive sphere will disadvantage labour employed in those reproduction units. In many countries women's participation in paid employment has been increasing over time; however, it has not been matched by an increase in men's participation in unpaid reproductive work in the household.[25] Given that women and girls disproportionately carry out this unpaid reproductive work, macroeconomic policy that does not account for it is not gender-neutral. True, this is more an issue of what gets measured in the economic realm than the essence of economics as a science itself, but the absence of counting social provisioning keeps potential impacts on social rights hidden,[26] and can go a long way to explaining why women and men have been affected differently by economic policies aiming to deal with the latest economic crisis.

III. THE IMPACT OF AUSTERITY-DRIVEN POLICIES ON WOMEN'S SOCIAL RIGHTS: 'TRIPLE JEOPARDY'

The previous section argued that, abstract from any particular economic policy that might be implemented by a government (and/or recommended by an IFI), the nature of standard economic theory, its methods and measurement is in various ways gender blind; others would go as far as to say that it is androcentric in the sense of being biased in favour of men's interests.[27] We have argued that there is a need for nuance if we are to understand real policy impacts; however, macroeconomic policy is rudimentarily made *without* consideration of the additional peripheral knowledge that is needed to move from theory to practice. If we accept this argument, it follows that we should expect to see different impacts of economic policy on men and women in the data. It is important to note that up to now, the argument has said nothing about what sign this difference would take: the difference could operate in either a positive or a negative direction. What determines the sign and the strength of the difference will depend on the specific policy chosen. What follows is an assessment of this difference in the global context of austerity, and in particular, how and why this difference is a social (and economic) rights issue.

The empirical analysis adopts a case study approach, which primarily utilizes documentary analysis. States, IFIs, civil society, academia, trade unions and other relevant stakeholders were publicly invited to share information, documents and case studies which analyze the particular ways in which austerity measures, structural adjustment, fiscal consolidation and general economic reform programmes have affected the lives of women of all ages in different regions of the world. Data collected as part of this call constitute the body of evidence upon which the following analysis is based. While it is acknowledged that in documentary analysis bias can be introduced in a number of ways, using numerous and heterogeneous sources that

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[25] *Ibid.*, 16.

[26] The term 'social provisioning' here is borrowed from Marilyn Power, 'Social Provisioning as a Starting Point for Feminist Economics' (2004) 10(3) Feminist Economics 3.

[27] Paula England and Barbara Stanek Kilbourne, 'Feminist Critiques of the Separative Model of Self: Implications for Rational Choice Theory' (1990) 2(2) Rationality and Society 156.

view the question from diverse perspectives limits potential selection bias and retrospective sensemaking effects.

a. The Impact on Women's Right to Work

The economic crisis of 2007–8 had major effects on unemployment for both men and women around the world. However, the timing of these effects has taken on a gendered trend given occupational segregation. Job losses affected industries sensitive to falling output such as the manufacturing and construction sectors, which, depending on the geographical context, are sectors dominated by men (as in construction in industrialized countries) or women (as in manufacturing in some developing countries).[28] In industrialized countries,[29] generally male dominated sectors recovered faster, due, in large part, to the targeting of fiscal stimulus programmes towards industries initially most affected. In a later phase, characterized by widespread austerity, fiscal consolidation and labour market reforms, women's employment outcomes have been more severely affected because women are more concentrated in those sectors most sensitive to cuts, in particular the public sector.[30] This is the case both in the global North,[31] and in the global South.[32]

Notwithstanding the North–South similarities in the public sector space, outside the public sector, economic reforms implemented in the global South following the crisis have affected women's work in distinct ways. In the agricultural sector, for instance, the removal of agricultural subsidies has increased the price of staple foods. Combined with trade liberalization policies and currency devaluation, cheap staple imports and the costs of imported agricultural products such as fertilizer have priced local producers – most often women – out of the market and out of a job.[33]

The 2014 ILO General Survey on Minimum Wage Systems highlighted how minimum wages do not necessarily constitute a living wage, and hence do not ensure adequate livelihoods for workers and their families.[34] Moreover, in some countries, minimum wages have been reduced as part of austerity measures, or have not been adjusted to take into account inflation and the real cost of living, leading to a reduction in their real value over time.[35] Alongside

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[28] UN Women (n 9), 4.

[29] Jill Rubery, 'From "Women and Recession" to "Women and Austerity": A Framework for Analysis' in Maria Karamessini and Jill Rubery (eds), *Women and Austerity: The Economic Crisis and the Future of Gender Equality* (2014) 17, 24.

[30] Maria Karamessini and Jill Rubery, 'Economic Crisis and Austerity: Challenges to Gender Equality' in Maria Karamessini and Jill Rubery (eds), *Women and Austerity: The Economic Crisis and the Future for Gender Equality* (2014) 314, 324–30.

[31] In Europe, women make up 78 per cent of the workforce in the social and health services and 60 per cent of primary and secondary teaching staff. See Oxfam International and European Women's Lobby, 'Women's Poverty and Social Exclusion in the European Union at a Time of Recession – An Invisible Crisis?' (March 2010) 24 <www.oxfam.org.uk/resources/policy/economic_crisis/downloads/rr_gec_an_invisible_crisis_240310.pdf> (29 May 2019).

[32] Ortiz *et al* (n 1).

[33] OHCHR (n 7), CADTM.

[34] ILO, 'General Survey of the Reports on the Minimum Wage Fixing Convention, 1970 (No 131), and the Minimum Wage Fixing Recommendation 1970 (No 135)' (2014).

[35] ITUC, 2017 Global poll (Brussels, 2018) and Labour 20 Argentina, 'The Case for Wage-Led Growth'.

weakening union power, this leaves women with little option but to accept a wage far below the marginal product of their labour.

b. The Impact on Women's Right to Social Security

The breaking down of welfare systems in different parts of the world has impacted women's right to social security in a myriad of ways, whether it be through reductions in unemployment benefits, social benefits, family benefits, maternity benefits or aid to the aged or to dependent persons. The situation is worse for those women who experience multiple and intersecting forms of discrimination due to their socio-economic status, age, race, sexual orientation or migrant status, among other dimensions. For example, single mothers and members of minorities are more likely to be affected by cuts to benefits and tax credits because they are more likely to be living in poverty, with dependent children and in large families, adding to the burdens faced by these marginalized groups.[36]

These effects are more severe when considered alongside other institutional reforms. In Spain, for instance, following European Commission guidelines,[37] access to pensions and social security is increasingly being tied to work-related criteria, hence payments will more likely depend on a worker's entire career.[38] In effect, the more someone works and 'contributes', the more protection and entitlements they will receive. This form of social protection leads to exclusion and erosion of the solidarity-based human rights principle of social protection and marginalizes women from the very beginning, as they have more breaks and interruptions in their work history and are paid less because of gender wage discrimination.

In addition, labour reforms that make it easier for employers to change working hours, as well as the deep cuts that have been made to essential services and subsidies to professional caregivers,[39] make it more likely that women who are not the primary breadwinners will forego paid employment to care for family unpaid. The total impact of cuts on women's right to social security is therefore multiplicative.

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[36] See, e.g., CEDAW Committee, 'Concluding Observations on the United Kingdom of Great Britain and Northern Ireland' (14 March 2019) CEDAW/C/GBR/CO/8: '16. The Committee is concerned about the disproportionately negative impact of austerity measures on women, who constitute the vast majority of single parents and are more likely to be engaged in informal, temporary or precarious employment. It reiterates its previous concern (CEDAW/C/GBR/CO/7, para 20) that austerity measures have resulted in cuts in funding to organizations that provide social services to women, including those that provide services for women only, as well as budget cuts in the public sector, where more women are employed than men. It also notes with concern that reductions in social care services increase the burden on primary caregivers, who are disproportionately women. 17. The Committee recommends that the State party undertake a comprehensive assessment on the impact of austerity measures on the rights of women and adopt measures to mitigate and remedy the negative consequences without delay.'

[37] European Commission, 'Non-Standard Employment and Access to Social Security Benefits' Research Note 8/2015 (Brussels, January 2016).

[38] Núria Pumar Beltrán, 'Mainstreaming Gender in Spanish Labour and Pension Reforms and in European Social Policies' in Beth Goldblatt and Lucie Lamarche (eds), *Women's Rights to Social Security and Social Protection* (2014) 287.

[39] Center for Economic and Social Rights (CESR) *et al*, Joint Submission to the Committee on Economic, Social and Cultural Rights (2012) <www2.ohchr.org/english/bodies/cescr/docs/ngos/JointSubmission19NGOs_Spain_CESCR48.pdf> (29 May 2019).

c. The Impact on Women's Right to Housing, Water and Food

The impacts of austerity measures on women's right to housing are multiple, including evictions, rental price hikes, reduction of social housing and the growth of informal settlements and sublets. In addition, spending cuts can also touch specific programmes such as social housing, or those aiming at preventing and combating violence against women which provide shelters to escape domestic violence. The closing of those shelters may put women more at risk of violence, as well as having implications for homelessness and poverty.

Land policy can negatively affect women in similar ways. This is particularly worrying since lack of security of tenure affecting livelihoods has important implications for the enjoyment of the right to food, especially in terms of access and availability. It also puts them at risk of eviction and dispossession. One of the results of the economic reforms and of rising food and fuel prices has been an increase in largescale land acquisitions. Because women are the majority of the world's small farmers, this makes their situation even more precarious, further depriving them of access to land, or makes their rights over land less secure.[40]

Privatization of and underinvestment in water infrastructures and water services can mean that people must go to public wells to collect water. Privatization of pipeline services may restrict their extension because these services are less profitable. Bearing in mind that in many poor communities fetching water is a task that 'overwhelmingly falls to women and girls',[41] it has important consequences on the time allocated by women to unpaid work. Moreover, this chore leads to many girls exiting school and can lead to increased risk of violence that is often present on the journey to and from fetching water, especially if the journey is to the river or waterhole.

Accessibility, affordability and availability of food are critical aspects for women's enjoyment of their right to food. Households' loss of income triggered by austerity may impact negatively on the quality and quantity of food purchased, as observed in Eastern Europe and Central Asia.[42] A larger proportion of the budget is spent on food by poor households, especially those headed by women. In the face of a loss in household income, child malnutrition could also ensue, and if the gender norm in a particular context is one of strong preference for consumption for sons, then it is likely that girls will be worse affected than boys.

d. The Impact on Women's Right to Health

Cuts to healthcare budgets will affect both men and women. However, negative effects on women are likely to be disproportionate because women are more closely linked to healthcare services, due both to their gender-specific needs and their empirical economic disadvantage as health service users and as health service workers.[43]

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[40] CEDAW Committee, 'General Recommendation No 34 on the Rights of Rural Women' (7 March 2016) CEDAW/C/GC/34, para 62(c).

[41] Catarina de Albuquerque, 'Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation' UN Doc A/HRC/24/44 (2013), para 50.

[42] Jane Lethbridge, *Impact of the Global Economic Crisis and Austerity Measures on Women* (Public Services International Research Unit (PSIRU) 2012) 5.

[43] Kate Donald and Nicholas Lusiani, 'The Gendered Costs of Austerity: Assessing the IMF's Role in Budget Cuts Which Threaten Women's Rights' (Bretton Woods Project, 2017) <www

Many countries have seen cuts to women-specific health services. In the Democratic Republic of the Congo (DRC) the *de facto* privatization of health services has meant that pregnant women must provide evidence that they can pay for maternal care in order to receive it and may be 'held hostage' against the payment of services after giving birth if they cannot afford to pay.[44] This may create disincentives for women to seek appropriate, safe maternal and neonatal care, risking maternal and neonatal death, and impacts women's health and sexual and reproductive rights in fundamental ways.

Again, the total impact of cuts to care services on women's human rights is multidimensional. In Ukraine, for example, as well as cutting 25,000 healthcare jobs, reducing the number of hospital beds, and in some cases forcing hospitals to close,[45] the government has also cancelled fuel subsidies. This will disproportionately affect rural residents (one third of the total population live in rural areas), in particular rural women, since they are already disadvantaged with respect to work, health and physical security when compared with women in urban areas and with men.[46]

e. The Impact on Violence Against Women

Violence faced by women and girls is linked to their economic exploitation in a cyclical, self-reinforcing way. Women have less education and less control over resources, which limits their opportunities, which puts them at risk of exploitation and violence, which in turn makes them more vulnerable to economic exploitation, and so on. Economic reforms that generate disproportionate negative impacts on women and girls can then reinforce this vicious cycle, as well as restrict women's ability to protect themselves from violence and its harmful effects.[47]

Austerity measures and associated spending cuts may imply a 'weakened State's response'[48] to violence, with important implications in terms of access to justice for victims. In Brazil, the Constitutional Amendment No 95 that froze public spending for 20 years has meant that no new women's shelters have been built since 2017, while Brazil now carries one of the highest femicide rates in the world,[49] and has seen a significant recent increase in violence against women.[50]

Moreover, unemployment and poverty 'force many women, including young girls, into prostitution'.[51] This also provides fertile ground for women trafficking, including various

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.brettonwoodsproject.org/wp-content/uploads/2017/09/The-IMF-Gender-Equality-and-Expenditure-Policy-CESR-and-BWP-Sept-2017.pdf> (29 May 2019).

[44] OHCHR (n 7), CADTM.

[45] OHCHR (n 7), Women's International League for Peace and Freedom.

[46] See, e.g., *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No 151/2017, in which case the ERRC stated that Bulgaria had failed to eliminate systemic discriminatory practices targeting Romani women in access to sexual and reproductive healthcare services, and these discriminatory policies and practices undermine the protection of the reproductive health of Romani women in Bulgaria.

[47] ActionAid (n 16).

[48] CEDAW Committee, 'General Recommendation No 35 on Gender-Based Violence Against Women, Updating General Recommendation No 19' (14 July 2017) CEDAW/C/GC/35.

[49] World Bank, 'What Does It Mean to Be a Woman in Brazil? The Answer Will Surprise You' (8 March 2017) <www.worldbank.org/en/news/feature/2017/03/08/ser-mujer-brasil> (29 May 2019).

[50] OHCHR (n 7), Bretton Woods Project.

[51] CEDAW Committee, 'General Recommendation No 19 on Gender-Based Violence Against Women' (1992) UN Doc A/47/38.

forms of sexual exploitation, such as sex tourism, organized marriage or the recruiting of women from developing countries for domestic labour in other countries.

Export-led growth strategies in Cambodia have exposed women to exploitation and violence in and around the workplace. Similar liberalization reforms have increased women's resort to informal employment in India, which has left poorer women economically marginalized and exposed to violence.[52] In addition, some workers cannot exercise their rights to freedom of association and collective bargaining due to the inappropriate use of contractual arrangements, with important right to work implications, including the misuse of self-employment. This also results in potential higher risk of violence and harassment in the workplace, which is especially worrying given the ever growing body of evidence of sexual harassment, violence, forced pregnancy testing, forced abortions and unlawful detention of young women workers in the global supply chains.[53]

IV. CONCLUSION: MAKING GENDER EQUALITY CENTRAL TO ECONOMIC POLICY-MAKING AND SOCIAL RIGHTS PROTECTION

The current economic system is – for the most part – sustained by gender inequality and discrimination, particularly in the labour market. Of the various forms of inequality, addressing women's unpaid care work is crucial, yet neglected in policy design and economic reform. A robust human rights approach to economic issues should endeavour to address the asymmetric power relations that underpin these inequalities, which in turn generate negative impacts on women's social rights.

The recently approved UN Guiding Principles on human rights impact assessments of economic reforms have identified and systematized existing human rights obligations of states and all types of creditors in the context of economic reforms.[54] The principles of non-discrimination, indivisibility and interdependence of all human rights; progressive realization of economic, social and cultural rights; making use of the maximum of available resources; and prohibition of retrogressive measures should guide the design, monitoring and implementation of economic policy reforms.

More specifically, the aforementioned Guiding Principles state (Principle 8) that economic reforms should prevent any kind of direct and indirect form of discrimination based on gender, in law or practice, and should promote substantive and transformative gender equality. This is why a human rights impact assessment can help identify how people confronting cumulative and/or intersecting inequalities may be affected and how to protect them from the discriminatory impact. Human rights impact assessments with respect to the fulfilment of social (and economic) goods and services should always include a comprehensive gender analysis. Our evidence suggests that austerity hits women harder since most women are already confronting a set of structural inequalities in pay gaps, occupational segregation, informality, precarious jobs, unemployment, lack of access to and control over land, credit and other productive

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[52] OHCHR (n 7), Action Aid.

[53] ILO, 'Meeting of Experts on Violence against Women and Men in the World of Work' (Geneva, 2017).

[54] UN Doc A/HRC/40/57 (n 6).

resources, as well as a heavy unpaid work burden. In addition, many women face discriminatory norms, gender stereotypes and various forms of violence. Women are often also underrepresented in politics and decision-making, leaving them with fewer opportunities to participate in decisions that would directly or indirectly affect their living conditions and those of their families and communities. Hence, economic reforms, such as labour market flexibilization, reductions in the coverage of social protection benefits and services, cutbacks to public sector jobs and privatization of services tend to negatively affect women more than men (so-called *triple jeopardy*). Importantly, policies that might improve general social indicators might not do the same for women.

So what might a more gender sensitive policy environment look like?[55] Our findings suggest that investment in the care economy is likely the key. The positive impacts of investing in the care economy are potentially exponential. Not only does this have positive effects on women's income and time, it may also serve to address the more fundamental determinants of occupational segregation by facilitating the shifting of gendered norms. We see an important role for government in subsidizing high quality childcare and providing for adequate child support payments, giving working mothers the resources necessary to compete in the 'male world' on an equal footing with men. It is also possible that during economic crises and recessions, public investment in care creates virtuous cycles, where the investment not only addresses the care deficit in delivering crucial services but also kickstarts a multiplier effect in generating jobs (usually for women), which puts more money in the hands of (usually low income) households, which in turn reduces social spending from reduced unemployment benefits and increases income and consumption tax revenues from the newly employed workforce.

However, all of this also (and crucially) depends on there being a shift in the way in which the fundamentals of economics are treated for policy-making purposes. Human rights impact assessments,[56] with a clear gender focus, can better ensure the realization of women's social rights through addressing structural socio-economic barriers in mainstream economic policy-making. What this implies is that the social, contextual and empirical should be a better starting point for economic policy discussions, as opposed to the individual, the formal and the *a priori*. In the words of Paul Romer,

> [t]he trouble is not so much that macroeconomists say things that are inconsistent with the facts. The real trouble is that other economists do not care that the macroeconomists do not care about the facts. An indifferent tolerance of obvious error is even more corrosive to science than committed advocacy of error.[57]

International human rights law should not pay lip service to gender equality by promoting narrow agendas based on instrumentalist gender economic approaches,[58] but should take due note of how gender inequality is created and exacerbated by economic reform policies so that women's social (and economic) rights can be effectively respected, protected and fulfilled.

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[55] Further recommendations can be found at the report presented to the UNGA, UN Doc A/73/179 (2018).

[56] UN Doc A/HRC/40/57 (n 6).

[57] Paul Romer, 'The Trouble with Macroeconomics' (2016) <https://paulromer.net/wp-content/uploads/2016/09/WP-Trouble.pdf> (29 May 2019).

[58] Gunseli Berik, 'Beyond the Rhetoric of Gender Equality at the World Bank and the IMF' (2017) 38(4) Canadian Journal of Development Studies 564.

21. Corporations and social rights

Judith Schönsteiner[1]

I. INTRODUCTION

The past decades have evidenced growing attention to the role and responsibilities of transnational corporations (TNCs) in the field of human rights. Both litigation and regulation efforts have so far only had limited success in responding to the increasing reach and impact of corporations, however. The nature of corporate activities has particular implications from the viewpoint of social rights. On the one hand, they can have a positive impact by providing employment; contributing to the revenue of a state; facilitating access to specific sectors, such as health care; or developing and implementing essential infrastructure projects. On the other hand, such activities may also result in threats to the enjoyment of social rights. For example, the right to health can be severely affected by industrial activities, and privatized public services may result in costly or discriminatory access to basic services, potentially breaching the right to water, food or an adequate standard of living. Corporations may also benefit from forced labour, child labour or unhealthy working conditions in their supply chains.

However, despite some significant normative developments, international human rights law is still ill-equipped to address these abuses properly, as it cannot effectively address all ramifications of the impact that globalization has on the state's capacity to regulate, oversee and sanction abuses.[2] Social rights protection is hampered *inter alia* by the fact that the prevailing global economic order leaves little room for arguments in favour of state regulation,[3] and there are only a few indications that explicit human rights considerations are incorporated into international economic organizations such as the World Trade Organization (WTO)[4] or the Association of Southeast Asian Nations (ASEAN).[5]

While it seems to be generally accepted that progress on social rights implementation cannot be achieved without the private sector,[6] challenges persist in view of both the lack of

[1] Many thanks to María Gabriela Valenzuela, MA in Human Rights and PhD student at the Friedrich Alexander University Erlangen-Nürnberg, for her excellent research assistance, and to the editors for their very helpful comments.

[2] See, e.g., Wouter Vandenhole, 'Obligations and Responsibility in a Plural and Diverse Duty-Bearer Human Rights Regime' in Wouter Vandenhole (ed.), *Challenging Territoriality in Human Rights Law* (2015) 119.

[3] Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate* (2016).

[4] See, e.g., Holger Hestermeyer, *Human Rights and the WTO* (2007); Adam McBeth, *International Economic Actors and Human Rights* (2010).

[5] See Joo-Young Lee, *A Human Rights Framework for Intellectual Property, Innovation and Access to Medicines* (2015).

[6] See, e.g., UNGA Res 71/221 (7 February 2017) 'Entrepreneurship for Sustainable Development'.

direct human rights obligations of transnational corporations and the frequently transnational operation of business activities, exceeding the sphere of regulation of one state.[7]

As a point of departure, one might note that the current state of international human rights law in relation to corporate actors does not contain any distinct rules regarding social rights (in comparison to other categories of human rights), despite the frequency of according violations and their considerable impact. Rather, there exists a wider framework of general obligations that apply to all categories of human rights. In view of the state-centred approach of international human rights law, these are, however, insufficient to uphold social rights in the context of transnationally operating business enterprises, as will be shown in section II. Section III illustrates that domestic initiatives are also insufficient. In view of the identified protection gap, section IV shifts the focus to direct responsibilities of the private sector. For this, the (non-binding) UN Guiding Principles on Business and Human Rights (UNGPs)[8] are taken as the main reference framework. Section V concludes with a good practice example in the banking sector to show how business and social rights can relate.

II. BUSINESS, SOCIAL RIGHTS AND STATE OBLIGATIONS UNDER INTERNATIONAL LAW

As regards state obligations in relation to business and social rights, especially the obligation to protect (and fulfil) social rights at the horizontal level is engaged. As a rule, a state has the obligation to protect against human (including social) rights violations by all available means. This also includes social rights violations by TNCs. At the universal level, relevant standards are incorporated especially in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on Economic, Social and Cultural Rights (CESCR) has detailed these standards from the perspective of business activities in General Comment No 24.[9] More general, and not exclusively social rights-specific, is the approach of Pillar I of the UNGPs, which likewise refers to a state's duty to protect and reaffirms according state obligations in relation to the regulation of business enterprises.[10]

In determining the obligations of states, two main constellations may be distinguished. The first is obligations of the host state with regard to social rights violations committed by a corporate entity on a state's territory; here, there are relatively clearcut state obligations to protect individuals from harmful conduct stemming from business activities. The 'obligation

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[7] Tilman Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 EJIL 581.

[8] UN Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04.

[9] Note that General Comment No 24 therewith builds on previous work done by the CESCR. The Committee had already previously considered the impact of business activities on the enjoyment of particular covenant rights as regards the right to health, housing, food, water, social security, work, just and favourable conditions of work and the right to form and join trade unions. The issue was also discussed in concluding observations on state reports and in an individual communication (CESCR, 'General Comment No 24' (10 August 2017) UN Doc E/C.12/GC/24, para 2).

[10] UNGP (n 8).

to protect' has been consistently upheld by UN treaty bodies,[11] and detailed by regional human rights organs.[12] To comply with the duty to protect with regard to business activities, states are required to prevent and address human rights abuses by corporate activity.[13] This applies fully to social rights.[14]

As a core matter, the obligation to protect thus encompasses the regulation of private business activities to prevent infringements of social rights.[15] As concretized by the Special Rapporteur (SR) on the right to adequate housing, states are to 'prevent banks and other financial institutions from unreasonably refusing to offer credit to informal settlement residents' and to 'redesign housing markets' with a human rights focus.[16] The SR on the right to food asked for binding regulations 'to more effectively hold corporations liable',[17] *inter alia* in relation to communities where the right to health was severely affected by pesticide drift and states' inaction in the face of a highly concentrated industry.[18]

Similar emphasis can be found at the regional level. Both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have confirmed the obligation to protect against social rights violations through corporate conduct; they did so indirectly – that is, in reliance on civil and political rights – in several cases.[19] The African

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[11] See, e.g., CRC Committee, 'General Comment No 16' (17 April 2013) CRC/C/GC/16.

[12] *The Environment and Human Rights*, IACtHR, Advisory Opinion OC-23/17 of 15 November 2017.

[13] Likewise in cases of privatization, international human rights bodies and tribunals agree – without exception – that under such circumstances states maintain the full international responsibility for guaranteeing the right, without reducing their scope of obligations. See, e.g., CESCR 'General Comment No 19' (23 November 2007) UN Doc E/C.12/GC/19, para 46; see also *Ximenes-Lópes v Brazil* (Merits, Reparations and Costs), IACtHR, Judgment of 4 July 2006; *González Lluy et al v Ecuador* (Preliminary Objections, Merits, Reparation and Costs), IACtHR, Judgment of 1 September 2015. In the same line see HRC, 'Report of the Special Rapporteur on the human rights to safe drinking water and sanitation' (19 July 2017) UN Doc A/HRC/36/45, 20.

[14] CESCR, 'General Comment No 12' (12 May 1999) UN Doc E/C.12/1999/5; CESCR, 'General Comment No 14' (11 August 2000) UN Doc E/C.12/2000/4; CESCR, 'General Comment No 15' (20 January 2003) UN Doc E/C.12/2002/11.

[15] Along these lines, the CESCR detailed in GC 24 (n 9) that '[t]he obligation to protect means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. This requires that States parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities' (para 14).

[16] UNGA, 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' (19 September 2018) UN Doc A/73/310/Rev.1.

[17] UNGA, 'Interim Report of the Special Rapporteur on the right to food' (16 July 2018) UN Doc A/73/164, 77.

[18] HRC, 'Interim Report of the Special Rapporteur on the right to food' (24 January 2017) UN Doc A/HRC/34/48, 22, 51.

[19] See, e.g., *Jugheli and Others v Georgia*, ECtHR, App No 38342/05, Judgment of 13 July 2017, regarding a violation of Article 8 ECHR given a thermal plant's negative impact upon the health and wellbeing of the application; *Dubetska and Others v Ukraine*, ECtHR, App No 30499/03, Judgment of 10 February, concerning the effects of state-owned – later privatized – industrial activities on the homes of the applicants, amounting to a violation of Article 8 ECHR; *López Ostra v Spain*, ECtHR, App No 16798/90, Judgment of 9 December 1994, finding a violation of Article 8 ECHR given the severe environmental pollution stemming from tanneries and having negative effects on their homes. In *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparation), IACtHR, Judgment of 27 June 2012,

Commission on Human and Peoples' Rights (ACHPR) decided similarly (in direct reliance on the social rights provisions of the African Charter on Human and Peoples' Rights).[20] The European Committee on Social Rights dealt with social rights in business contexts mostly regarding labour rights.[21] Overall, all major regional human rights systems have therefore affirmed state obligations to protect against business activities resulting in social rights violations.[22]

Relevant state obligations also comprise access to remedies. Along these lines, General Comment No 24 provides, in relation to the rights incorporated in the ICESCR, that states should establish available, effective and expeditious remedies which are ideally judicial.[23]

The second constellation relates to obligations of the home state of a TNC with regard to transnational conduct resulting in human rights violations. The situation is more complex in this scenario and the home state's obligations are more diffuse. For one, the scenario generally requires a determination of the legality of the extraterritorial regulation of conduct (extraterritorial reach of legislation) and/or the legitimacy of transnationally operating accountability mechanisms (extraterritorial reach of adjudication). Moreover, the ensuing obligations are weaker: as a rule, the extraterritorial obligations of the home state of a TNC are limited. Human (social) rights obligations primarily apply within a state's territory and/or jurisdiction, with the latter – in limited circumstances – resulting in the extraterritorial applicability of these obligations, in situations which are under the effective control of a state.[24]

This being said, some additional basis for extraterritorial state obligations in relation to social rights may be derived from the fact that '[most] obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction'.[25] Additionally, the reference to 'international assistance and cooperation' as a means of fulfilling/complying with,

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relating to oil exploration and extraction activities, the IACtHR noted that it did not need to examine the arguments relating to Article 26 of the Convention separately since it had already found a violation in relation to the rights to communal property, consultation and cultural identity of the Sarayaku People. Similarly, *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 28 November 2007. Note that in view of the IACtHR's increasingly affirmative stance on social rights (see also the contribution by Eduardo Ferrer Mac-Gregor in this *Research Handbook* (Chapter 10)) it seems likely that the Court will more directly rely on Art 26 ACHR also in the context of business enterprises in the future.

[20] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, ACHPR, Communication No 155/96 (27 May 2002) (*inter alia* finding a violation of Article 16 of the African Charter (right to health)).

[21] See, e.g., *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, ECSR, Collective Complaint No 30/2005, Decision of 10 October 2005; *International Commission of Jurists v Portugal*, ECSR, Collective Complaint No 1/1998, Decision of 10 March 1999.

[22] The ASEAN's Inter-Governmental Commission on Human Rights has not gone beyond publishing a study on Corporate Social Responsibility and Human Rights: see ASEAN Inter-Governmental Commission on Human Rights, Thematic Study on CSR and Human Rights in the ASEAN (2014) 21; see also Christine Kaufmann *et al*, *Business and Human Rights in ASEAN – A Baseline Study* (2014) 60.

[23] See CESCR (GC 24) (n 9), para 41: 'It is imperative for the full realisation of the Covenant rights that remedies be available, effective and expeditious.' The access to remedies is indeed crucial for victims of social rights violations. The UNGPs refer to remedies in Pillar III in general – not social rights-specific – terms.

[24] See also the contribution by Ralph Wilde in this *Research Handbook* (Chapter 4).

[25] CESCR (GC 24) (n 9), para 27.

inter alia, social rights may be drawn upon.[26] Another basis may be found in customary international law (mainly developed in international environmental law): that a state must not allow its territory to be used to cause damage to the territory of another state, an obligation which was confirmed by the Human Rights Council as extending to human rights law, for example in the case of extreme poverty.[27] Thus, there are certain considerations that may be relied upon in favour of an extraterritorial application of relevant social rights obligations.

Still, home states of TNCs' obligations to protect or fulfil in the case of extraterritorial constellations lack concreteness as they have not yet been judicially developed or spelled out in a treaty text;[28] they are termed openly under international human rights law. Principle 2 of the UNGPs establishes vaguely: 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'[29] The CESCR uses more affirmative wording when framing the duty to protect against social (as well as economic and cultural) rights violations through the extraterritorial effects of corporate activity. In particular, General Comment No 24 emphasizes that a

> State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event […]. In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries […] or business partners […] respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located.[30]

Nevertheless, overall, the extraterritorial dimension of a state's human/social rights obligations is termed rather weakly.

At the regional level the IACtHR has gone further, and provided additional guidance in relation to environmental impacts. In 2017, the Court adopted an Advisory Opinion on the responsibilities to protect the environment and human rights, especially the right to health, within and beyond a state's territory. It thereby confirmed for the Inter-American system that both the 'authority' and the 'effective control' of a state sufficed to extend the obligations of states to extraterritorial situations, including regarding transboundary and extraterritorial impacts on the environment and human rights.[31] One might argue that this definition is capable of addressing typical challenges of corporate social rights accountability, such as supply chain management and contaminating production processes overseas. Still, whether such extraterritoriality clauses would find acceptance in a business and human rights treaty remains to be seen.

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[26] See Art 2(1) ICESCR; CESCR (GC 24) (n 9), para 27.

[27] See HRC, 'Guiding Principles on Extreme Poverty and Human Rights' (18 October 2012) UN Doc A/HRC/RES/21/11; see also CESCR (GC 24) (n 9), para 27.

[28] Extraterritorial regulation and enforcement are likewise problematic from other perspectives; see *infra* section III for details.

[29] UNGP (n 8), and the corresponding commentary thereto.

[30] CESCR (GC 24) (n 9), para 33. See also the references to extraterritorial dimensions in the context of social rights in the CESCR's General Comments on the right to water (GC 15, paras 31 and 33), right to work (GC 18, para 52), right to social security (GC 19, para 54) and the right to just and favourable conditions of work (GC 23, para 70).

[31] *The Environment and Human Rights* (n 12).

Therefore, the general state consensus on extraterritorial human/social rights obligations of states in relation to corporate activities is weak – even if international human rights organs have indicated that such obligations do exist. Most states would probably agree that '[at] present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'.[32] In the same line, the UNGP insist that '[t]here are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses.'[33]

Also, the access to remedies is more limited in extraterritorial contexts, both *de jure* and *de facto*. The CESCR is cautious and only induces states to facilitate access to justice by stating that states are required to

> remove […] barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid […], enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad, […] [and reducing] *forum non conveniens* considerations [to where access to justice is de facto unavailable in the host country].[34]

Thus, the obligation to provide for an effective remedy regarding business impacts abroad is termed rather vaguely in an extraterritorial context.

III. BUSINESS AND SOCIAL RIGHTS: CHALLENGES AT THE DOMESTIC LEVEL

Effective protection of social rights encounters a number of challenges at the domestic level in the case of transnationally operating business enterprises. As was shown above, *host states* have the primary obligation to protect against violations on the part of corporations. Still, given that domestic legislation is frequently weak or non-applicable,[35] this protection is often deficient. Low social rights/health/labour standards tend to be seen as a comparative advantage in the global economy.[36] Moreover, adequate domestic legislation may lack enforcement and implementation, for example due to weak state structures, lack of impartial court systems or corrupt institutions.[37]

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[32] UNGP (n 8), Commentary to Principle 2.

[33] *Ibid*.

[34] CESCR (GC 24) (n 9), para 44.

[35] For example, certain export processing zones are exempt from domestic legislation: see, e.g., Christina Binder, 'European and US-Perspectives on the Protection of Human and Labour Rights in Export Processing Zones' (2011) 16 Austrian Review of International and European Law 163.

[36] Along those lines see, e.g., Samira Salem and Faina Rozental, 'Labor Standards and Trade: A Review of Recent Empirical Evidence' (United States International Trade Commission, Journal of International Commerce and Economics, August 2012) (15 November 2019).

[37] For the problem of holding corporations accountable within domestic jurisdictions see, e.g., Khulekani Moyo and Sandra Liebenberg, 'The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability' (2015) 37 HRQ 691, 702–03; Margit Ammer, Jane A Hofbauer, Monika Mayrhofer *et al*, 'Human Rights Performance in EU Climate Policy – The Role of European States in Climate Measures, and Access to Justice for Affected Populations' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211844&download=yes> (15 November 2019), 79ff.

Also, the protection by the *home state* at the domestic level is fraught with difficulties. Even if the home state is willing to extend the protection against social rights violations caused by TNCs to extraterritorial scenarios, practical problems may hamper the extraterritorial application and enforcement of a state's social rights standards. These relate to jurisdictional conflicts with foreign states, the application of two sets of laws (host and home state) which may enter into conflict, and the corporate veil which prevents the extraterritorial reach of jurisdiction.[38] Indeed, this partly explains why there is no definite answer as to the reach of a state's regulatory/jurisdictional authority in international law yet. Other norms of international law – such as the principles of state sovereignty and non-interference – may even pose limits to the extraterritorial regulation of conduct.[39]

Given these difficulties, examples of extraterritorial regulation or adjudication at the domestic level are rare. First, there is no clear precedent as regards a home state's reach of jurisdiction to legislate. Only a few acts of legislation prescribe conduct and offer a basis for civil liabilities suits in the case of human rights violations caused by corporate conduct abroad. The general consensus seems to be that, as regards the reach of jurisdiction to legislate by home states, there has to be a reasonable link to the territory or, in fewer cases, to nationality.

Second, there are few domestic instruments that provide for access to justice for victims of corporate human rights violations, and even less for violations of *social* rights in the extraterritorial context. In the US, the Alien Tort Claims Act (ATCA) showed some potential as a possible instrument to achieve access to justice, more particularly as means to achieve compensation for damage done by transnational corporations abroad 'committed in violation of the law of nations'. However, even though not responding to the question whether corporations could indeed violate the 'law of nations', the US Supreme Court's judgment in *Kiobel* raised the bar for future disputes at the federal level, concluding that the presumption against extraterritorial application also applied to the ATCA.[40] This seems to have seriously restricted its potential to grant access to justice of victims of human (including social) rights violations committed by companies abroad. The restrictive approach was recently also confirmed in *Jesner v The Arab Bank*.[41] Nevertheless, some still see a future for extraterritorial access to justice at the state level, inspired by a case against Nestlé brought by child slaves working in the area of the company's cocoa production.[42]

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[38] See for further reference Anil Yilmaz and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?' (2018) 67 ICLQ 389.

[39] See respectively the careful wording used in General Comment No 24 by the CESCR which includes an according saving clause, a reference to the 'limits imposed by international law' when finding that '[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its territory'. CESCR (GC 24) (n 9), para 28.

[40] *Kiobel v Royal Dutch Petroleum*, 569 US 108 (2013). In future a very close connection to the US will therefore have to be demonstrated.

[41] *Jesner v Arab Bank*, PLC, No 16-499, 584 US ___ (2018).

[42] *Doe v Nestlé USA (Nestlé USA)*, 766 F.3d 1013, 1024 (9th Cir. 2014), cert. denied, 136 S.Ct. 798 (2016). See for a discussion of the case Lindsey E Wilkinson, 'Piercing the Chocolate Veil: Ninth Circuit Allows Child Cocoa Slaves to Sue under the Alien Tort Statute in *Doe I v. Nestle USA*' (2018) 63 Villanova Law Review Online 20. In a similar sense on state court jurisdiction see Seth Davis and

Other examples relate to particular fields. In the UK, the 2015 Modern Slavery Act allows for extraterritorial claims by victims of corporate human rights abuses but only provides certain protection against social rights violations, as it limits jurisdiction to forced labour and trafficking of persons. Several other common law jurisdictions have adopted similar statutes. Probably the most progressive domestic legislative measure can currently be found in France. In particular, the French Law of Vigilance allows for proceedings against large French companies where they or their established subsidiaries or suppliers generate 'serious' human rights damage, or damage to workers' health and safety, or the environment abroad, and had no due diligence mechanism in place.[43] This therefore also covers social rights-related claims. Similar legislation is being discussed in Switzerland,[44] as well as in Germany.[45] Still, most of these domestic initiatives are, at best, in the making.

The challenges incurred at the domestic level when aiming at effective regulation of business and human/social rights are also apparent on a policy level, particularly in the National Action Plans (NAPs) on Human Rights and Business which have been adopted by a number of states to implement the UNGPs following the recommendations of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG).[46] These NAPs address the whole range of corporate issues, and thus also social rights violations. They obviously have potential, being adopted in more and more countries.[47] Still, there are shortcomings. Several plans do not address the main protection gaps identified by previously carried out studies and were adopted according to political rather than technical or legal criteria, which might explain their limited impact in reaching regulation necessary for the protection and guarantee of social rights.[48] Only very few plans include measures on access to justice, and even fewer address the possibility of filing claims for extraterritorial damage caused by a country's TNC. In that sense, hardly any NAP reflects adherence to the recommendations of the CESCR's GC 24. So, while NAPs are an important initiative, their quality needs to be improved in order to meet social rights standards.

Thus, while there are certain attempts by home states to counter social rights violations by corporate conduct abroad, initiatives remain limited. Many states are generally unwilling to

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Christopher A Whytock, 'State Remedies for Human Rights' (2018) 98 Boston University Law Review 397.

[43] Art 1, Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (France).

[44] European Coalition for Corporate Justice, <http://corporatejustice.org/news/7046-another-step-towards-the-adoption-of-a-mandatory-hrdd-bill-in-switzerland>.

[45] Stammgesetz zur Regelung menschenrechtlicher und umweltbezogener Sorgfaltspflichten in globalen Wertschöpfungsketten, <www.business-humanrights.org/sites/default/files/documents/SorgfaltGesetzentwurf_0.pdf>.

[46] HRC Res 26/22 (15 July 2014), 4. The UNWG engages in followup on the existence and implementation of NAPs but does not pronounce itself on their quality.

[47] At present, about 20 such plans have been adopted worldwide, mostly in Europe, two in Latin America and three in Asia and several countries report to be developing NAPs National Action Plans on Business and Human Rights: <https://globalnaps.org>.

[48] Paloma Muñoz, 'Buscando la reconciliación: Planes de Acción para lograr la transición' in Humberto Cantú (ed.)*, Derechos Humanos y Empresas. Reflexiones desde América Latina* (2017) 313; Damiano De Felice and Andreas Graf, 'The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights' (2015) 7 Journal of Human Rights Practice 40.

engage in extraterritorial regulation of corporations registered on their territories or to allow for according adjudication. The statecentric nature of (social) rights obligations in classic/traditional human rights law proves problematic.[49] It simply falls short of addressing all dimensions of business and social rights.

When attempting to broaden the approach and to address the protection gaps in view of furthering compliance with social rights, it seems inevitable to turn towards the direct responsibility/accountability of business enterprises under international law.[50] This is obviously not as an alternative but as a complement to the focus on state obligations.

IV. INTERNATIONAL INITIATIVES TO ADDRESS THE PROTECTION GAP: TOWARDS A DIRECT CORPORATE RESPONSIBILITY?

Reference to business obligations in the field of human rights dates far back. Already in the Universal Declaration of Human Rights, mention is made that 'every organ of society shall strive by teaching and education to respect for these rights and freedoms'. The human rights accountability of TNCs is thus an early concept.

More recently, in the mid-2000s, international human rights bodies, especially the CESCR, included references to direct business *responsibilities* in their General Comments. In relation to the right to health, for example, General Comment No 14 of the CESCR established that

> all members of society – individuals […] local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.[51]

General Comment No 12 on the right to food emphasized some years earlier that

> [t]he private business sector – national and transnational – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.[52]

This line of argument was taken up by several Special Procedures.[53] Likewise, the Committee on the Rights of the Child understood that the principle of the best interest of the child 'is also directly applicable to business enterprises that function as private or public social welfare bodies by providing any form of direct services for children'.[54]

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[49] Moyo and Liebenberg (n 37), 726–27.

[50] Jerney Letnar and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (2015).

[51] CESCR (GC 12) (n 14), 20; CESCR (GC 14) (n 14), 42; more careful wording in CESCR (GC 14) (n 16).

[52] CESCR (GC 12) (n 14), 20.

[53] See, e.g., HRC, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' (24 January 2018) UN Doc A/HRC/37/59, 22.

[54] CRC Committee, 'General Comment No 16' (17 April 2013) CRC/C/GC/16, para 16.

Thus, human rights bodies address the responsibilities of corporations, albeit in generally non-binding recommendations and mechanisms. There is no binding business and human rights treaty to protect social rights.[55] Early attempts were considered as too far-reaching and were drafted in a non-inclusive manner, lacking industry support. For example, the 2003 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' which imposed statelike obligations on companies found hardly any support. However, since 2014, an Open-Ended Intergovernmental Working Group on Corporations and Other Business Enterprises with Respect to Human Rights (IGWG) has been working on a legally binding instrument on business and human rights. Cassel and Ramasastry elaborated 'elements' for such a treaty in 2015,[56] and in 2018 the first ('zero') draft of the instrument was discussed. The draft contains no definition of the scope of human rights; rather, it remits to treaties already ratified by state parties – therewith including social rights. The draft likewise proposes an international reporting mechanism, and a claims procedure that would require the ratification of an additional protocol.[57]

Even if adopted, the future, or the impact, of such a treaty is insecure. Political consensus on a treaty text and subsequent ratification by states, especially by home states of powerful corporations in the Global North, is doubtful.[58] As a result, at present, there are no binding obligations for companies under international human rights law.[59] Rather, the main reference framework for corporations' international human rights responsibilities is Pillar II, 'The Corporate Responsibility to Respect Human Rights', of the non-binding UNGPs, according to which business entities are expected to respect human (including social) rights.[60] It has various dimensions which may be important for business and social rights.

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[55] Humberto Cantú, 'Business and Human Rights: From a "Responsibility to Respect" to Legal Obligations and Enforcement' in Jerney Letnar and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (2015) 303; Nicolás Carrillo-Santarelli, 'A Defense of Direct International Human Rights Obligations of (All) Corporations' in Jernej L Černič and Nicolás Carrillo-Santarelli (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (2018) 33; Lee McConnell, 'Assessing the Feasibility of a Business and Human Rights Treaty' (2017) 66 ICLQ 143.

[56] Doug Cassel and Anita Ramasastry, 'White Paper: Options for a Treaty on Business and Human Rights' (2015) 6 Notre Dame Journal of International and Comparative Law 1; see also John Ruggie, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 EJIL 924.

[57] For the current status of the draft see <www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx> (15 November 2019).

[58] Larry Cata Backer, 'Shaping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights' (2017) 42 North Carolina Journal of International Law 417, 477ff.

[59] Note that a unique resolution on corporate criminal responsibility has been adopted by the ACHPR, which states in its Preamble that 'extractive industries have the legal obligation to respect the rights guaranteed in the African Charter', including its social rights provisions. As a consequence, and a form of detailing the appropriate conduct required by the obligation to protect, states are requested to adopt legislation to ensure revenue sharing from operations of extractive industries, consultation of affected communities, including 'active participation' in the drafting of concession contracts, criminal sanctions for corrupt practices, and requirements for independent auditing of all revenues. ACHPR, 'Resolution 367 on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector' (22 May 2017) ACHPR/Res.367 (LX) 2017.

[60] See Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Pillar II, Principle 11: 'Business enterprises should respect human

Principle 12 of the UNGPs reads:

> The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

The Commentary to Principle 12 explicitly mentions key social rights instruments, including the ICESCR, as well as the eight ILO core Conventions.[61]

In terms of standards, Pillar II however remains vague. It refers to the corporate '*responsibility* to respect' rights as a 'global standard of expected conduct'[62] rather than concrete obligations. The UNGPs envisage a dual sort of expected conduct by business enterprises: 'a. [to a]void causing or contributing to adverse human rights impacts through their own activities […]'; and 'b. [to s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[63] This translates into a policy commitment to meet a corporate's responsibility to respect human rights in their own operations as well as to exercise human rights due diligence in their business relations.[64]

The latter in particular (Principle 13(b)) seems complex. Certain guidance as to the expected conduct may be found in Principle 17, which details the expected human rights due diligence of corporations as follows:

> In order to identify, prevent, mitigate and account for their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Principle 17(c) meanwhile establishes that human rights due diligence '[s]hould be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve'.[65] Principle 17(b) acknowledges that the degree of scrutiny and due diligence will vary in complexity depending on various factors ('the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations').

The human rights due diligence of business enterprises also includes a certain responsibility for subsidiaries, with the scope and degree of due diligence however remaining vague. As will be shown below, additional concretization is needed through concerted action of relevant stakeholders, including states, civil society and the relevant business enterprises themselves.

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rights. This means they should avoid infringing on the human rights of others and should address adverse human rights impacts in which they are involved.' See also Pillar III 'Access to remedy' that contains shared responsibilities of both states and corporations regarding access to judicial and non-judicial remedies (UNGP (n 8), and the corresponding commentary).

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*, Principle 13.

64 Among the situations covered are adverse human rights impacts which may be 'directly linked to its operations, products or services by its business relationships' (*ibid*, Principle 17(a)).

65 *Ibid.*, Principle 17.

This notwithstanding, the UNGPs provide relevant guidelines as to how to address, avoid and mitigate the negative human rights impact of business activities.

The UNGPs also refer to the requirement of providing and installing remedies and 'grievance mechanisms' (not only for states but also for business enterprises). Thus, Pillar III of the UNGPs provides that business enterprises 'should establish or participate in effective operational-level grievance mechanisms for individuals and communities who are adversely affected'.[66] Principle 30 establishes similarly that '[i]ndustry, multi-stake-holder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available'. This proves of crucial importance in the context of social rights and business, given the frequency of the violations and their impact.

Consequently, the UNGPs have considerable potential to promote social rights in the context of business activities. Although non-binding, they detail relevant responsibilities of the private sector. This should improve business conduct in relation to social rights, in particular in view of the overall acceptance of the UNGPs due to, *inter alia*, the involvement of TNCs in the drafting process.[67] Indeed, several business sectors have started adapting the UNGPs to their needs, including the mining, oil, gas, banking and diamond sectors, as well as sectors focusing on information and communication technology.[68] As the example below demonstrates, this may considerably further human/social rights understanding in the field of business activities.

V. SOCIAL RIGHTS IN THE BANKING SECTOR: HOW TO IMPLEMENT THE 'RESPONSIBILITY TO RESPECT'?

Among the sectors engaged with the implementation of the UNGPs, the banking sector appears a particularly telling example. This is, on the one hand, in view of the sector's (often underestimated) impact on social rights. Especially in the area of loans, the appropriate exercise of due diligence is needed in order to avoid the financing of projects which negatively impact on social rights.[69] At stake may be not only labour standards but also the rights to health, food

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[66] *Ibid.*, Principle 29.

[67] More generally, the UNGPs were applauded and defended for adopting a practical governance approach for opening channels of participation for business. See, e.g., Larry Cata Backer, 'Shaping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights' (2017) 42 North Carolina Journal of International Law 417; John Ruggie, 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises' in César Rodríguez (ed.), *Business and Human Rights* (2017) 46; as to the criticism concerning the limited NGO and community participation in its elaboration see Tara Melish and Errol Meidinger, 'Protect, Respect, Remedy and Participate: "New Governance" Lessons for the Ruggie Framework' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2012) 303, 328; Juana Kweitel, 'Regulatory Environment on Business and Human Rights: Paths at the International Level and Ideas about the Roles for Civil Society Groups' in César Rodríguez (ed.), *Business and Human Rights* (2017) 160.

[68] See <www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/by-sector> on the steps taken by the different sectors regarding implementation of the UNGPs.

[69] See also Jane A Hofbauer, 'Operationalizing Extraterritorial Obligations in the Context of Climate Project Finance – The Barro Blanco Case' (2017) 8 Journal of Human Rights and the Environment 98.

or an adequate standard of living, such as when a bank provides a loan for an infrastructure project which leads to the widespread displacement of local communities without safeguards for mitigation in place.[70] At the same time, and on the other hand, the banking sector is a good example of how to concretize the UNGPs in view of its more indirect relation to adverse human/social rights impacts. All this contributes to useful insights as to the scope of the 'responsibility to respect' social rights in business relations.

A noteworthy specification is an industry initiative by the Thun Group of Banks, an informal group of bank representatives including UBS, Credit Suisse, Deutsche Bank and Unicredit, which work together with the purpose of 'i) furthering the understanding of the UNGPs in the context of banking; and, ii) considering how they may be applied across the range of different banking activities'.[71] The Thun Group held its first meeting in 2011 and continues its work with the purpose of sharing expertise and supporting the integration of the UNGPs into the policies and practices of banking institutions.[72] Other relevant stakeholders such as the UNWG, NGOs and civil society have also become engaged in this process.[73] They have commented on and criticized relevant papers/products which further contributed to the initiative.

Of particular interest in the area of social rights is the Group's work on UNGP 13(b) and 17,[74] which were examined in view of further concretization and adaptation to the banking sector. After a first paper published in January 2017 had received criticism from civil society and the UNWG, a second paper published in December 2017 explored the meaning and reach of UNGP 13(b) in the corporate and investment context and provided additional guidance around UNGP 17.[75]

For example, to understand what 'directly linked' in UNGP 13(b) may mean in the context of corporate and investment banking relationships, as in the Thun Group's specification, the different degrees of proximity (depending on the type of financial product or service provided) may be drawn upon to clarify the relation a bank has to adverse human rights impacts.[76] Among the factors of relevance in this regard are, according to the Thun Group's December

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[70] Letter to the Thun Group of Banks on 23 February 2017, <www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf> (15 November 2019).

[71] Thun Group of Banks, Paper on the Implications of N Guiding Principles 13b & 17 in a Corporate and Investment Banking Context (December 2017) <www.business-humanrights.org/en/thun-group-of-banks-releases-new-discussion-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banks> (15 November 2019), 5.

[72] *Ibid.*, 5. For example, the first discussion paper was published in 2013 which addressed, from a banking perspective, the corporate responsibility to respect human rights outlined in UNGPs 15-21.

[73] See, e.g., the Letter of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the Thun Group of Banks of 23 February 2017; for the reactions see also <www.business-humanrights.org/en/thun-group-of-banks-releases-new-discussion-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banks> (15 November 2019).

[74] UNGP (n 8).

[75] For further reference on the process see <www.business-humanrights.org/en/thun-group-of-banks-releases-new-discussion-paper-on-implications-of-un-guiding-principles-for-corporate-investment-banks> (15 November 2019). This, however, was said to not have addressed the criticism voiced by Ruggie on the definition of 'contributing to' human rights impact. See Bank Track (27 March 2018) <www.banktrack.org/blog/banks_and_human_rights_the_thun_group_must_step_up> (15 November 2019).

[76] Thun Group of Banks (n 71), 9.

2017 paper, the financial product or service, the sector or operating context, the track record of the client, and so on.[77] This usefully details 'directly linked' for the banking context.

As regards the responsibility to exercise appropriate due diligence 'to identify, prevent, mitigate and account for how they address [business enterprises'] adverse human rights impacts' in accordance with UNGP 17, the proximity of the bank to the human rights impact and the definition of the appropriate unit of analysis for the specific transaction may assist the bank in defining the respective scope of due diligence. Leverage depends on, *inter alia*, the amount of funding, the nature and strength of the relationship with the client and the number of other banks involved.[78]

The above points partially clarify the scope of the UNGPs' responsibility to respect (*inter alia*) social rights in the banking sector. Other points have been addressed in the debate around the efficacy of the Equator Principles,[79] and the analysis of the IFC and MIGA Compliance Ombudsmen.[80] The latest and most noteworthy initiative is the 2019 Due Diligence Guidance published by the OECD, which provides detailing of the responsibility to respect for the banking and securities sector,[81] in a series of sector-specific guidance documents that the OECD has developed on the basis of a combined reading of the OECD Guidelines for Multinational Enterprises and the UNGP due diligence approach. Such voluntary standards, elaborated after consultations with the whole range of stakeholders, therefore seem of crucial importance to identify, prevent, mitigate and account for possible adverse impacts on social rights in a bank's lending policies. Such initiatives show the potential corporations have to further business enterprises' respect for social rights, complementing national and international regulation on transparency, corruption and accountability. At the same time, the input of civil society, NGOs and relevant UN bodies was important to improve the quality of the outcome. Involvement of multiple stakeholders and the overall inclusiveness of the process thus seem of key relevance.

While non-binding international and industry standards are certainly useful to advance in times of weak governmental ability or willingness to protect from corporate human rights abuse, such initiatives can only address part of the problem. In particular, they can hardly resolve the power imbalance between corporations and those who suffer negative impacts. It therefore seems that soft and hard law solutions, coming from different actors and stakeholders, need to be combined.[82]

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[77] *Ibid.*, 13.

[78] *Ibid.*, 15 (see also the examples discussed at pp 18ff. They show that with decreasing proximity the leverage loosens).

[79] See, e.g., BankTrack and Oxfam, Developing Effective Grievance Mechanisms in the Banking Sector (2018), and UNEP, The Equator Principles: Do They Make Banks More Sustainable? (2016).

[80] Samantha Balaton-Chrimes and Kate MacDonald, 'The Compliance Advisor Ombudsman for IFC/MIGA' (Corporate Accountability Research 2016) 6 and 12 <http://corporateaccountabilityresearch.net/njm-report-xvii-cao> (15 November 2019); see also Karen Wendt, *Risk Management Frameworks, Sustainable Financial Innovation and Soft Law Standards* (2015).

[81] OECD, Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises (2019).

[82] See, e.g., Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67(4) ICLQ 961.

VI. CONCLUDING REMARKS

In the case of business and social rights, it is first and foremost up to the state to protect against adverse human/social rights impacts of business activities. Still, especially as regards TNCs, merely relying on the duty to protect is usually insufficient. Host states may fail to protect social rights; home states face several hurdles with regard to extraterritorial regulation and adjudication. To address this protection gap, a focus on the direct responsibility of corporations to respect human/social rights seems required. Pillar II of the UNGPs provides guidance on this issue. Given the vague formulation of the principles, and their non-binding nature, industry initiatives as well as OECD guidance to concretize the duty to respect human/social rights in the business sector seem most important.

Among the major lessons to be learned from their experience are the following. First, considerable concretization may help to assess the scope of responsibility of a business enterprise in a specific case. This may prove particularly useful in the context of social rights, in view of their nature.[83] Second, the input of civil society and NGOs is important, as is that of the international community, especially when minimum regulation on social rights impact of business is debated. It is in the dialogue between business and the other stakeholders that the maximal outcome will be reached.[84] Third and finally, awareness raising and sensibilization at all levels seems crucial to incorporate social rights even further into relevant business initiatives and to foster state-awareness of the need to regulate negative business impact on social rights.

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[83] For example, the question of justiciability, the element of progressive realization, and so on.

[84] See the process in the Thun Group of Banks. Initially, the Thun Group of Banks had declared that they 'in principle' did not fall within the UNGPs as they neither 'caused or contributed to' human rights violations by financing customer activities. Still, it refined and changed its approach in view of the criticism received.

22. The implications of corruption for social rights

Kolawole Olaniyan

I. INTRODUCTION: OVERVIEW OF CORRUPTION AND HUMAN RIGHTS LAW

Corruption is as old as humanity, but international recognition of its corrosive nature is relatively recent. The fight against corruption is now an important aspect of contemporary international law. The past three decades have witnessed steady and even remarkable advances in recognizing corruption as an international problem, with deleterious consequences to democracy, development, the rule of law, government legitimacy and the human rights of the socially and economically vulnerable sectors of the population, often in the poorest regions and countries. An impressive array of international conventions, declarations, guidelines, national laws and institutions exist to combat corruption and to establish a framework for international cooperation and assistance. Intergovernmental organizations are constantly engaged in the fight against corruption, issuing recommendations, directives and codes of conduct or, more significantly, drafting legally binding international conventions. Furthermore, various non-state actors, such as civil society organizations, continue to insist on accountability for the crime of corruption and the need to sensitize people to its destructive effects.

The proliferation of criminal law instruments against corruption shows the importance the international community has consistently attached to them in seeking to end the problem. This is unsurprising, especially given that corruption leads to poor management of resources, which in many ways contributes to impoverishment and marginalization of people and communities, as well as destroying national economies and ultimately facilitating or contributing to violations of human rights, including social rights. No wonder, then, that the primary goal of the global fight against corruption is to promote and ensure transparency and accountability in the management of a state's resources. In turn, transparent and accountable governance would invariably ensure and facilitate respect for social rights and contribute to improving access to essential public services. Herein lie the links and complementarities between corruption and social rights.

However, despite the obvious relationship between corruption and human – *viz*. social – rights, corruption is still treated mostly as a criminal and law enforcement issue both in anti-corruption instruments and in literature. Similarly, while human rights institutions now regularly refer to 'corruption' in their work or make a case for it to be considered a human rights issue,[1] the relationship between corruption and human rights in general, and social rights

[1] For example, in March 2013 the UN Human Rights Council organized a panel discussion on the negative impact of corruption on the enjoyment of human rights (and commissioned a study on the matter). However, UN human rights bodies, including treaty bodies, rarely or systematically address the issue of corruption from a human rights viewpoint. Often, they simply ask states to 'combat corruption', without elaborating how this should be done from a human rights perspective. For example, the Geneva-based Center for Civil and Political Rights, in its recent report by Làzarie Eeckeloo, 'Improving

in particular, remains among the least studied questions in the field of international law.[2] The two concepts are still largely considered distinct and, as such, are treated separately, whether in legislation, treaties or literature. Human rights law does not explicitly prohibit corruption, and human rights institutions and tribunals rarely or systematically apply rigorous human rights analysis to the problem, and human rights defenders and anticorruption activists rarely consistently engage or work together on issues of common interest such as corruption and social rights.[3]

Several questions arise. Can criminal law instruments against corruption provide an adequate remedy and a satisfactory sense of justice for victims of violations of social rights? If criminal law instruments against corruption are considered ineffective and unsatisfactory, is there any role for human rights law to play to address any deficiencies?

This chapter argues that corruption is indeed a violation of human rights, including social rights, showing that there are some benefits in expanding the legal instruments in the fight against corruption beyond the traditional criminal law enforcement approach to include recognizing corruption for what it is: a grave human rights violation. The chapter considers whether there is a universal definition of corruption (section II). It then provides an overview of the legal frameworks against corruption (section III), before turning to examine the nature of social rights and the issue of implications of corruption for social rights (section IV) as well as the potential of these rights in preventing and combating corruption (section V). A short conclusion follows.

II. IS THERE A UNIVERSAL DEFINITION OF CORRUPTION?

The UN Convention against Corruption (UNCAC),[4] which entered into force in late 2005, does not provide a uniform definition of what constitutes corruption under international law. In fact, the convention merely classifies and describes acts of corruption, such as bribery, illicit enrichment and embezzlement, and requires state parties to criminalize those acts within their domestic legal systems. This approach is in part based on political compromise and exigency but also reflects an understanding of corruption as a fluid and constantly evolving concept.[5]

Given its elastic nature, corruption means different things to different professions, disciplines and cultures. Despite its long history and existence,[6] a truly satisfactory definition of

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the Human Rights Dimension of the Fight against Corruption: How do UN Treaty Bodies Address the Issue of Corruption?' (2018) covering UN human rights bodies' work on corruption between 2007 and 2017, accused UN treaty bodies of a 'limited perspective' in linking corruption with human rights. See also UN Universal Human Rights Index: <https://uhri.ohchr.org/>.

2 On the other hand, literature on corruption generally (and its effects on socio-economic and political development) has flourished over the years.

3 The text of this introduction is borrowed from Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (2014) Introduction.

4 UN Convention against Corruption (31 October 2003) 2349 UNTS 41. As of October 2019, it was ratified by 186 state parties, making it the only global instrument against corruption.

5 See, e.g., Matti Joutsen and Adam Graycar, 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention against Corruption' (2012) 18 Global Governance 425.

6 See Genesis 3:1–13. Several aspects of the Bible (King James Version) prohibit corruption. For example, in Exodus 23:8: 'You shall not take a bribe, for a bribe blinds the clear-sighted and subverts the cause of the just.' For a historical overview of corruption, see Henry H Rossbacher and Tracy W

corruption has not yet evolved. Moreover, many treaties and declarations against corruption either do not define the concept (presumably to secure consensus on these instruments) or define it narrowly and differently. The various characterizations of corruption in these instruments are essentially contextual (basically reflecting its multifaceted nature and the multiplicity of its causes, consequences and effects, which depend on the vastly different social, economic, political and historical contexts), and range from isolated acts of bribery based on *quid pro quo* to corrupt acts in legal, judicial, economic and political systems, invariably reflecting a society in decline and decay.[7]

Thus, despite several attempts,[8] as well as the proliferation of anticorruption instruments,[9] there is as yet no universally accepted definition of corruption,[10] in part because, as noted, the word is open to too many interpretations. It has proved difficult over the decades to determine what official misconduct should be designated as crimes. Similarly, corruption is still narrowly considered as an 'ordinary crime' and 'victimless'. However, the crucial relationship between corruption and human rights, including social rights, can be considered from several dimensions, and this relationship is intrinsically linked with definitional issues about corruption.

Corruption involves acts or patterns of behaviour that people generally consider as wrongful abuses of power.[11] In the end, corruption may be any conduct a society may wish to call 'corruption', but this will only be so if backed by legal prohibitions. The requirement of legal prohibitions is a major difference between definitions or characterizations of corruption in legislation and anticorruption treaties. However, corruption from a legal *and* human (social) rights perspective needs to be precise and clear if it is to fully capture the implications of corruption for social rights and to ensure effective remedies for victims. Any ambiguity in the definition of corruption will dilute the gravity and magnitude of corruption and the harms that it causes and negate the accountability of states and perpetrators alike, as well as any global efforts to coordinate the complex legal rules against corruption.

Young, 'The Foreign Corrupt Practices Act: An American Response to Corruption' in Barry Rider (ed.), *Corruption: The Enemy Within* (1997) 273.

[7] For a contemporary account of corruption as decay, see Laura Underkuffler, 'Captured by Evil: The Idea of Corruption in Law' (Duke Law School, Working Papers in Public Law 2005) <www.scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2030&context=faculty_scholarship> (15 October 2019): 'Corruption is one of the most powerful words in the English language. Charges of corruption have condemned men, destroyed the lives of women, and accelerated the decline and fall of governments. Corruption is something that humans instinctively loathe, and that we try to excise from our midst. The word itself conjures something that is powerful, insidious, and destructive of human lives and institutions' (at 1); see generally Susan R Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (1999).

[8] The Inter-American Convention against Corruption, one of few anticorruption treaties to attempt a definition of corruption, states that it includes '[a]ny act or omission in the discharge of his duties by a government official [...] for the purpose of illicitly obtaining benefits for himself or for a third person'. Art 6(1)(c) Inter-American Convention Against Corruption (29 March1996) 35 ILM 724.

[9] There are at least 14 major anticorruption treaties.

[10] Peter J Henning, 'Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law' (2001) 18 Arizona Journal of International and Comparative 801, 807; John G Peters and Susan Welch, 'Political Corruption in America: A Search for Definitions and a Theory' (1978) 72 American Political Science Review 974, 976.

[11] Matthew Stephenson, 'On Different Understandings of "Corruption"' *GAB – The Global Anticorruption Blog* (13 February 2014) <http://globalanticorruptionblog.com/2014/02/13/on-differing-understandings-of-corruption/#more-278> (15 October 2019).

The absence of a universal definition also suggests that inconsistencies may and in fact do arise in the implementation of treaty obligations, and this potentially can exacerbate politicization of the fight against corruption, undermine international cooperation and assistance and diminish the effectiveness of the fight against corruption.[12] While the lack of international consensus on a definition might previously have been excusable given the political and ideological divisions that previously surrounded the narrowed concept of corruption, things have since changed: the world community has condemned corruption (in fact it has done so repeatedly since the mid-1970s, including highlighting that corruption is a threat to progress, democracy, economic development and society as a whole), broadly agreed on core acts that constitute corruption,[13] and, significantly, accepted the responsibility to combat the problem through for example, globally accepted instruments against corruption such as UNCAC.

The fact that a definition of corruption was discussed during the drafting of the convention also suggests the importance the world community has historically attached to it. Although sharp divisions among states (on issues such as national sovereignty) meant that attempts at reaching a definition were unsuccessful,[14] there is nothing stopping the international community from revisiting the issue again, especially because the idea of corruption (and likewise international morality) is an evolving one, and changes over time.[15] If the United Nations has now recognized that corruption infringes the fundamental values of human rights, including social rights, justice and fairness, then it has to take the steps (in the face of changing circumstances) to establish the necessary normative framework to respond accordingly for the sake of the victims. Thus, following the progressive expansion of the notion of corruption, it seems a natural progression to reach a global understanding and consensus on the legal and human rights meaning of corruption. This will no doubt help to remove the question marks that remain over the effectiveness of global and collaborative efforts against corruption.

Adopting a universal definition of corruption that is rooted in human rights norms would further help to overcome this divide and identify areas in which the two movements can collaborate on issues of corruption and human rights (and build on their respective strengths and commonalities) to find effective remedies for victims of corruption. Ultimately, the idea of a universal definition of corruption would serve to better harmonize the laws and legislation on corruption in order to develop a unified and consistent approach to the problem, eliminate differences among national legal systems that have in the past blocked mutual assistance efforts between countries, translate global sentiment against corruption into concrete criminal prohibitions and define misconduct as agreed upon by the international community.

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[12] See generally Emilija Taseva, 'The New European Commission Anti-Corruption Package: Towards a More Efficient Fight against Corruption' (2012) 3 New Journal of European Criminal Law 344.

[13] See, e.g., Alejandro Posadas, 'Combating Corruption under International Law' (2000) 10 Duke Journal of Comparative and International Law 345.

[14] See the *travaux préparatoires* of the negotiations for the elaboration of the UNCAC <www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf>.

[15] Historically this becomes evident just observing the developments following the 1970s US Foreign Corrupt Practices Act (FCPA), codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd-l to 78dd-2, and 78ff(a) (1994)) which was still limited only to prohibition of 'foreign bribery'. Several resolutions adopted by the UN and the OECD Anti-Bribery Convention (17 ILM 1) substantively followed this path. But the international community has now embraced a broader idea of corruption in major treaties such as UNCAC.

In sum, my proposal for a universal definition of corruption is this: corruption is the deliberate, intentional mass stealing of public wealth and resources by senior state officials entrusted with its fair and honest management for the common good and achievement of human rights, whether carried out individually or collectively; but with the support, encouragement or acquiescence of the state, combined with a refusal to genuinely, thoroughly and transparently investigate and/or prosecute the mass stealing and recover stolen assets, which violates the human rights of the economically and socially vulnerable.

III. OVERVIEW OF THE (INTERNATIONAL) LEGAL FRAMEWORK ON CORRUPTION

A series of significant international developments in the 1990s and the early part of this century have dramatically changed the landscape in the global fight against corruption. Today most developed and developing countries have enacted, and increasingly enforce, domestic legislation prohibiting some forms of corruption. Virtually all countries are parties to international and regional anticorruption conventions and human rights treaties.

Prior to the 1990s, the word 'corruption' rarely featured in the lexicon of international relations, despite concerted efforts and initiatives started by the US government in the 1970s to influence the global agenda in this field.[16] Corruption was considered a national crime, so there was little international support for fighting it, or even concern about it. Notably in the West, governments (such as in Germany, where, in the 1990s, bribes were tax deductible as an ordinary and necessary business expense)[17] and international financial institutions (such as the World Bank and the International Monetary Fund, which acknowledged that 'corruption was an endemic, pervasive problem in the implementation of aid programs')[18] resisted attempts to internationalize corruption and its impact.[19] Such reluctance to condemn corruption (in all its forms, in particular bribery) despite its widespread practice in international business transactions, especially between developed and developing countries, seems unjustifiable, but presumably was in part due to geopolitical or economic concerns and in part because it appeared to impinge on the 'sovereignty' or 'cultural sensitivity' of other states.

The international attention to corruption was precipitated initially when the United States enacted its groundbreaking Foreign Corrupt Practices Act (FCPA) in 1977 following the Watergate scandal, which involved money laundering through foreign countries and the use of campaign funds to bribe foreign officials.[20] Nonetheless, the problem of corruption became the subject of international attention in the 1990s, when it became the most important policy issue

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[16] David Hess and Thomas W Dunfee, 'Fighting Corruption: A Principled Approach; The C2 Principles (Combating Corruption)' (2000) 33 Cornell International Law Journal 594, 595.

[17] See AW Cragg, 'Business, Globalization, and the Logic and Ethics of Corruption' (1998) 53 International Journal 643, 646; Hearings on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, S ExEC REP (1998) 105–19, at 12.

[18] See Alexander J Brown, 'What Are We Trying to Measure? Reviewing the Basics of Corruption Definition' in Charles Sampford *et al* (eds), *Measuring Corruption* (2006) 57.

[19] Hess and Dunfee (n 16) 595.

[20] Foreign Corrupt Practices Act, (1985) 22 American Criminal Law Review 510; Mark R Wysocki, 'Foreign Corrupt Practices Act' (1987) 24 American Criminal Law Review 587.

among international economies.[21] Although national legislation, the FCPA inspired, among other activities, an international wave of anticorruption initiatives.

A number of factors – *inter alia* the end of the Cold War, the process of globalization, newly emerging democracies around the world and also the growing universal acceptance of human rights[22] – took corruption out of the purely political or ethical realm by focusing attention on its economic impact nationally, regionally and internationally, as failures of governance in one country reached beyond national boundaries to the capital markets, international institutions, individual consumers and investors halfway around the world.[23]

The United States quickly moved to mount intense pressure on other countries to ensure parity of actions and to discourage foreign competitors from paying bribes (tax deductible or otherwise) to obtain business. This effort, initially unfruitful (because other countries had little incentive to agree a global anticorruption treaty that would presumably level the playing field) and considered 'premature',[24] ultimately succeeded, as it resulted in the adoption in 1997 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[25] As the title suggests, the Convention is limited only to a specific form of corruption: active bribery (that is, to promise, offer or give a bribe) as it relates to business transactions.[26] This Convention requires state parties to criminalize the direct or indirect intentional offer, promise or giving of any undue pecuniary or other advantage to a foreign public official to influence such official in the performance of his or her official duties, and with the aim of obtaining or retaining business or other improper advantage in the conduct of international business.[27] Combating corruption thus became a broader objective of developed nations for economic growth and equitable development. Yet, as noted, only a restricted conception of corruption (in the form of bribery in business transactions) was recognized, and the Convention only applied to 'foreign bribery'.[28]

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[21] Hess and Dunfee (n 16) 595.

[22] Other factors that subsequently increased global attention to corrupt activities also included a wave of scandals and severe economic crises (and the costs and uncertainties associated with foreign bribery); the increasing role of the media and advanced technology (such as internet, mobile phones and so on); the increased work of the International Chamber of Commerce on governance issues; and, no less significant, the establishment of Transparency International in 1993. It has also been stated that corruption became a matter of international concern in order 'to improve social and economic development of developing countries'. See Julio Bacio Terracino, *The International Legal Framework against Corruption: States' Obligations to Prevent and Repress Corruption* (2012) 1.

[23] Terracino (n 22).

[24] See Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, 'The International Legal Framework against Corruption: Achievements and Challenges' (2013) 14 Melbourne Journal of International Law 205, 209.

[25] See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997) 37 ILM 1, OECD Doc DAFFE/IME/MR(97)20.

[26] Although the OECD Convention defines the offence of bribery, it does not contain the meaning of corruption.

[27] FCPA, Art 1.

[28] Notwithstanding these limitations, the United States rather parochially (but admittedly consistent with the requirement of international law) amended the FCPA in 1998 to align it with the OECD Convention by enacting the International Anti-Bribery Act, designed to 'improve the competitiveness of American business and promote foreign commerce' (Andrea Goldbarg, 'The Foreign Corrupt Practices Act and Structural Corruption' (2000) 19 Boston University International Law Journal 276, 279), as well as to promote stronger local governments and to create a more reliable investment climate.

Since the adoption of the OECD Convention, international and regional treaties and standards against corruption have proliferated, and today around 14 of such treaties and countless resolutions, declarations and so on exist on the issue. In 1994, the Organization of American States (OAS) recognized that corruption was undermining progress and preventing its members from establishing competitive markets, equitable development and democratic reform.[29] In 1996, it successfully negotiated and adopted the Inter-American Convention against Corruption (hereafter, OAS Convention). The OAS Convention is a notable achievement both in terms of its rapid adoption and its scope. It requires mutual legal and judicial assistance and more broadly criminalizes transnational bribery and illicit enrichment.[30] Additionally, in 1998, leaders at the Santiago Summit achieved agreement on other elements of a comprehensive attack on corruption. For example, a Plan of Action was adopted which, among others, called for important complementary measures to increase transparency in campaign finance, to enhance the independence of the judiciary, to support a free press and to promote education programmes on integrity and ethics. The OAS for the first time made a clear commitment to ensure economic stability, make progress towards social justice and improve the living conditions of the peoples of the Americas, including economically disadvantaged populations within their countries. The leaders also committed to improve access to education, with fairness, quality, relevancy and effectiveness; to promote the sustainable development of their countries; and to generally improve the quality of life of their people. While the leaders may not have expressly used the word 'victims' in their Action Plan, their focus on 'improving the conditions of economically disadvantaged populations' would seem to suggest some level of understanding of the 'vulnerability' of these categories of people, and of the disproportionate effects of corruption on their human rights and sustainable development and social justice in general.

Other regions have since considered, replicated and even built on the various initiatives in the Americas by progressively expanding the legal framework against corruption to reflect important aspects of victims of corruption. The Council of Europe (CoE) adopted the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption in 1998 and 1999, respectively.[31] These conventions well illustrate the several features that characterize the CoE's approach to fighting corruption. For one, it is multidisciplinary, which underscores corruption as a complex, multisided problem that requires different types of action at different levels. For another, it incorporates a monitoring mechanism, which shows the drafters' and political leaders' intention to ensure that the instruments they adopt are credible. Significantly, the Civil Law Convention on Corruption addresses in some ways aspects of victims of corruption, and the Preamble of the Criminal Law Convention on Corruption emphasizes that

> corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society.[32]

As a further demonstration of its commitment to fight corruption comprehensively, in 1999 the CoE established the Group of States against Corruption (GRECO) to monitor member states'

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[29] Goldbarg (n 28).

[30] *Ibid*.

[31] See CoE Criminal Law Convention on Corruption (27 January 1999) ETS No 173; CoE Civil Law Convention on Corruption (4 November 1999) ETS No 174.

[32] Preamble, CoE Criminal Law Convention (n 31).

compliance with the organization's anticorruption standards. It should be noted that all CoE instruments are linked to the monitoring mechanism provided under the GRECO agreement.[33] This is clearly an important strategy for promoting a human rights perspective of corruption, as many aspects of GRECO's work do touch on human rights, and particularly how corruption undermines judicial independence. No wonder, then, that the preface to GRECO's recent report by its president, Marin Mrčela, states that:

> Corruption erodes human rights protection. The potential damage caused by corruption to Human Rights has been laid bare in a number of areas such as the independence of the judiciary, freedom of expression of journalists and whistle-blowers, freedom of assembly, detention facilities, *social rights*, discrimination, and the trafficking of human beings. These links have been brought to light in the work of Council of Europe monitoring or advisory bodies, including GRECO, and also of the European Court of Human Rights.[34]

As other regions were developing and negotiating instruments to combat corruption, Africa's participation was rather sparse and limited only to its role within the United Nations. Thus, the continent's noticeable initiatives only began at subregional levels in the 2000s with the negotiation and adoption of the 2001 Southern Africa Development Community (SADC) Protocol against Corruption in Blantyre, Malawi,[35] and of the 2001 Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption in Accra, Ghana.[36] A continentalwide initiative occurred two years later, when the African Union (AU) Convention on Preventing and Combating Corruption was adopted in Maputo, Mozambique.[37] Significantly, the AU Convention's preambular paragraphs 3 and 5 place it squarely in the context of the African Charter on Human and Peoples' Rights (African Charter), which guarantees social rights.[38]

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[33] GRECO monitors states' implementation and compliance with the Criminal Law Convention on Corruption. GRECO aims to improve the capacity of its member states to fight corruption through a dynamic and flexible process of mutual evaluation and peer pressure, as well as compliance with their undertakings in this field and, in particular, with the 20 Guiding Principles resolution in the fight against corruption. GRECO is open to equal participation of member states and non-member states of the Council of Europe.

[34] See GRECO, 'Anti-Corruption Trends, Challenges and Good Practices in Europe and the United States of America' (19th General Activity Report (2018)), 6, https://rm.coe.int/19th-general-activity-report-2018-group-of-states-against-corruption-g/1680951d14. However, 14 GRECO member states have not yet ratified the Civil Law Convention of Corruption.

[35] SADC Protocol against Corruption (14 August 2001) (15 October 2019).

[36] ECOWAS Protocol on the Fight against Corruption (21 December 2001) <http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/ecowas_protocol> (15 October 2019).

[37] AU Convention on Preventing and Combating Corruption (11 July 2003) 43 ILM 5.

[38] In terms of the practice of the African Commission on Human and Peoples' Rights (ACHPR), the body charged with overseeing state parties' compliance with the African Charter, Sanji Mmasenono Monageng – former chairperson of the ACHPR and former judge (and vice president) at the International Criminal Court (ICC) – stated on a questionnaire sent out by this author, 'I never used the word "corruption" throughout my time on the commission – perhaps because complainants do not raise issues of corruption'. Modupe Atoki, also a former chairperson of the ACHPR, agrees: 'I don't use the word "corruption" that much in my work as commissioner, although I personally believe that certain corrupt practices like large-scale corruption may violate the human rights under the African Charter. However, the closest we have come is interpreting Article 21 to mean that the resources of the state should be used

Rather surprisingly, while anticorruption initiatives were being embraced across the regions of the world, similar initiatives within the United Nations initially started rather slowly, bogged down by the politics, relations and benefits of international business transactions and other national interests of states. In a 1989 resolution, the UN seems to have recognized the impact of corruption on social rights, noting in part several negative consequences of organized crime, such as corruption, which undermine 'the development process, impairing the quality of life and threatening human rights and fundamental freedoms'.[39]

In 1990 the UN published a manual elaborating national measures against corruption and proposed recommendations on how states could develop national anticorruption programmes.[40] That same year the UN General Assembly adopted recommendations on international cooperation for crime prevention and criminal justice, including specific language calling on all nations to tackle corruption[41] – a recommendation that appeared rather utopian at the time.

More progress was made with the adoption in 1996 of the UN's International Code of Conduct for Public Officials.[42] The Code is relatively brief, at just two pages, but it contains provisions related to conflict of interest, the disclosure of assets, prohibitions on the acceptance of gifts and restrictions on the handling of confidential information and engaging in political activity. The Code provides in Article 2 that public officials 'shall at all times seek to ensure that public resources for which they are responsible are administered in the most effective and efficient manner'. According to the Code,

> [a] public office, as defined by national law, is a position of trust, implying a duty to act in the public interest. Therefore, the ultimate loyalty of public officials shall be to the public interests of their country as expressed through the democratic institutions of government.[43]

While respect for human rights should be the ultimate public interest of any government, the Code does not specifically refer to social rights in its 11 articles. Nonetheless, Resolution 51/59, which annexed the Code, does express concern in its preambular paragraph 1

> at the seriousness of problems posed by corruption, which may endanger the stability and security of societies, undermine the values of democracy and morality and jeopardize social, economic and political development.

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to the exclusive benefit of the citizens. Corruption may very well be implied but the Commission has not ruled that this is the case. It would be interesting for a complainant to bring a case under this rubric and see how the Commission interprets large-scale corruption.' However, a communication alleging that the family of the president of Equatorial Guinea (Obiang family) had diverted the natural resources of Equatorial Guineans to their private benefit and established and maintained a corrupt system within the state and, thus, violated a number of rights guaranteed by the African Charter including the right to health (Art 16), and the right to education (Art 17(1)), was declared – incorrectly, in this author's view – inadmissible for lack of exhaustion of local remedies. *Asociación Pro Derechos Humanos de España (APDHE) v Equatorial Guinea*, ACHPR, Communication No 347/07, Decision on Inadmissibility (2011).

[39] ECOSOC Res 1989/70 (24 May 1989).

[40] 'Manual Prepared by the Secretariat: Practical Measures Against Corruption, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders' UN Doc A/CONF.144/8 (1990), revised by UN Doc A/CONF.144/8/Corr.1 (1990).

[41] UNGA Res 45/107 (14 December 1990).

[42] UNGA Res 51/59 (12 December 1996).

[43] *Ibid.*, Art 1.

Yet, up until this point, many of the early efforts by the UN regarding the relationship between corruption and human rights were sporadic and limited, with attention being given only to bribery in international business transactions.[44] However, this restrictive approach to corruption was jettisoned when the UNCAC was negotiated and adopted in Mexico on 9 December 2003,[45] thus ending a rather long and tedious journey for a comprehensive, globally and legally acceptable criminal instrument against corruption. More significantly, apart from containing important and groundbreaking provisions on asset recovery and international cooperation and assistance, UNCAC also signals the need for increased attention to the human rights aspects of corruption.

Apart from its global reach, the UNCAC expands the scope of the fight against corruption, making it truly global. It also recognizes in its first preambular paragraph that corruption undermines 'the institutions and values of democracy, ethical values and justice and [jeopardizes] sustainable development and the rule of law'. The UNCAC does not however specifically refer to human rights, though this is implicitly covered in the term 'rule of law'.[46]

In sum, corruption – initially treated only as a crime against the state and society, and then expanded into an economic crime and a problem for international business transactions – is now increasingly considered as posing serious socio-economic harms to individuals and communities. Human rights treaty bodies have stated that corruption undermines the allocation of resources 'to promote equal rights to basic services and to assist those at risk of being left behind'.[47] However, criminal law instruments against corruption remain focused on the prosecution and punishment of state officials (and not on the effects corruption has on people), and nearly all of the conventions and standards that have been adopted only describe corruption, but do not define it. So, despite the multiplicity of anticorruption initiatives, at the moment there is no one single comprehensive list of acts that is universally accepted as constituting corruption.

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[44] Other examples of standard-setting at the UN at the time included: the Resolution on International Cooperation against Corruption and Bribery in International Commercial Transactions 1975, and the 1996 Declaration against Corruption and Bribery in International Commercial Transactions. The latter was broader than the one adopted in 1975 because it captured both the active and passive elements of bribery, required states to end tax deductions on bribery payments, encouraged consideration of criminalizing 'illicit enrichment' by government officials and ended the practice of bank secrecy. It is useful to point out that the term illicit enrichment appeared for the first time in the UN's 1996 Inter-American Convention against Corruption.

[45] UN Convention against Corruption (31 October 2003) 2349 UNTS 41. See generally John Sandage, 'Global Corruption and the Universal Approach of the United Nations Convention against Corruption' (2015) 53 Osgoode Hall Law Journal 7; Cecily Rose, Michael Kubiciel and Oliver Landwehr (eds), *The United Nations Convention Against Corruption: A Commentary* (2019).

[46] See, e.g., UNGA, 'Preventing and Combating Corrupt Practices and the Transfer of Proceeds of Corruption, Facilitating Asset Recovery and Returning Such Assets to Legitimate Owners, in Particular to Countries of Origin, in Accordance with the United Nations Convention against Corruption' (5 February 2015) UN Doc A/RES/69/199, which in its preambular paragraph 11 reaffirms 'the importance of respect for human rights, the rule of law at the national and international levels, the proper management of public affairs and democracy in the fight against corruption'.

[47] See Human Rights Treaty Bodies, 'Human Rights Treaty Bodies and Their Role Supporting the 2030 Agenda' <https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=201&menu=3170> (5 October 2019).

IV. OVERVIEW OF THE IMPLICATIONS OF CORRUPTION FOR SOCIAL RIGHTS

The effects of corruption on economic growth and development have long been recognized and documented in the literature, but the idea of corruption as a violation of human rights entered international law discourse only relatively recently.[48] Whereas the effects of corruption on human rights, including social rights, may seem self-evident, this link is rarely seriously explored.[49] However, there is now increasing recognition that corruption has a significant negative impact on human rights in general and social rights in particular, including the rights to an adequate standard of living, affordable housing, food, education, an equitable health system and social security.[50] Social rights are vital to socially and economically disadvantaged individuals and communities, who are the most affected by corruption of all forms.[51] While corruption is not a problem limited to developing countries and regions – it is also a problem for developed countries and regions – its scale, severity and impact are mostly felt in developing regions such as Africa and Latin America, where poor individuals and communities rely mostly on public services like healthcare and education.[52]

Social rights are by far the set of rights most affected by corruption.[53] Corruption not only reduces the capacity of states to respect, protect and fulfil their social rights obligations generally but in particular takes away critical resources, consequently reducing the capacity to fund basic services and undermining the possibility of citizens meeting adequate standards of living and enjoying other social rights. Because it takes away critical resources from states' revenue, corruption thwarts economic development and contributes to widespread poverty, which in turn contributes to a violation of social rights. The Corruption Perception Index (CPI), the annual anticorruption ranking by Transparency International, suggests that countries with a high level of respect for social rights in particular and human rights in general are less likely to experience a high prevalence of corruption.[54] In other words, the countries at the bottom of the index are often those with poor human rights records whereas the countries categorized as

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[48] See generally International Council on Human Rights Policy and Transparency International (prepared by Magdalena Sepúlveda Carmona), *Corruption and Human Rights: Making the Connection* (2009); Olaniyan (n 3).

[49] See Olaniyan (n 3).

[50] *Ibid.*

[51] I use the term 'socially and economically vulnerable' here to refer to any individual or determinate class of persons who, by reason of poverty or disability or socially or economically disadvantaged and vulnerable position, suffer most the immediate effects of violations of social rights caused by corruption.

[52] See, e.g., UNGA, 'Preventing and Combating Corrupt Practices and the Transfer of Proceeds of Corruption' (n 46). The resolution in its preambular paragraph 4 recognizes that 'fighting corruption […] is a priority and that corruption is a serious barrier to effective resource mobilization and allocation and diverts resources away from activities that are vital for poverty eradication and sustainable development.'

[53] Anne Peters, 'Corruption as a Violation of International Human Rights' (2018) 29 EJIL 1251, 1285.

[54] See, e.g., 2018 Corruption Perception Index <www.transparency.org/news/feature/tackling_crisis_of_democracy_promoting_rule_of_law_and_fighting_corruption>. For the human rights situation in 157 countries in 2017, see also Amnesty International Report 2017/18 (2018) <www.amnesty.org/en/latest/research/2018/02/annual-report-201718/>.

the least corrupt in the CPI are often those with a record of respect for human rights, including social rights.[55]

The UN Committee on Economic Social and Cultural Rights (CESCR), unsurprisingly the UN treaty body 'most concerned' with the issue of corruption,[56] has generally condemned systemic and widespread corruption among state parties, stating that corruption has an impact on the enjoyment of social rights, particularly corruption cases related to access to health care, the payment of non-official fees for health care services, access to food and the social security system.[57] In some instances, the CESCR has also expressed concern about the stigmatization of human rights defenders and anticorruption activists (such as in the Democratic Republic of Congo).[58] To address corruption challenges, the Committee has generally called for states to improve and ensure transparency, adopt laws to strengthen the legal framework, ensure the strict application of those laws and raise awareness among judges and the public.[59]

Other recommendations have included those calling for states' resources and budgetary allocations to be increased to strengthen public health care services and social security systems and ensure an adequate standard of living for recipients, and for allegations of corruption to be investigated and prosecuted, root causes of corruption to be addressed, whistle-blowers and victims of corruption to be protected, anticorruption mechanisms to be established or strengthened, workers' salaries to be increased, the UNCAC to be ratified and national action against corruption to be adopted.[60] Significantly, the Committee has recommended a 'charter of patients' in the health care system, as a tool to explain the avenues available for filing a complaint if they witness attempted corruption.[61]

In general, corruption contributes to the failure of states to: pay workers' salaries; provide access to justice to workers and their families whose right to adequate housing may be violated through forced evictions because they are unable to pay bribes to security and law enforcement agencies; provide programmes for emergency shelter in cases of forced evictions; provide socially and economically vulnerable families access to healthcare; provide antiretroviral drugs to prevent transmission of HIV from pregnant women to their unborn children; and provide the elderly appropriate care and retirement benefits or make essential drugs affordable to poor citizens.[62] The foreword to UNCAC in fact makes clear that corruption 'leads to violations of human rights and hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services'.[63]

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[55] CPI (n 54).

[56] Eeckeloo (n 1), 1.

[57] *Ibid.*, 11–13.

[58] *Ibid.* However, most of the Committee's recommendations have been of a general nature.

[59] *Ibid.*

[60] *Ibid.*

[61] *Ibid.* Other UN Treaties that have, in varying degrees, raised concerns about corruption related to issues on social rights or related issues include the Committee on the Elimination of Racial Discrimination, Committee on the Rights of the Child, Committee on the Elimination of Discrimination Against Women, Committee on the Rights of People with Disabilities and Committee on Migrant Workers.

[62] See generally, International Council on Human Rights Policy and Transparency International (n 48).

[63] UNCAC stipulates that 'corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, [and] leads to violations of human rights'.

Therefore, states cannot satisfactorily and successfully respect, protect, promote and fulfil social rights without also addressing issues of corruption that impact directly or indirectly on the effective enjoyment of these rights. Yet, several states regularly express a commitment to prevent and combat corruption. However, as Transparency International's yearly Corruption Perception Index shows, states across the regions of the world fail to follow through on their commitments, sometimes as a result of weak laws and institutions, sometimes due to a lack of sufficient political will to enforce anticorruption laws, or sometimes as a result of both.[64] Similarly, corruption can exacerbate the gap between the poor and the rich.[65] Self-interest, egoism, unwillingness to follow generally accepted norms of morality or the norms of laws and the refusal to implement universal norms can lead to abuse of wealth and power. This may be the result of violations of the social rights of others, usually individuals who are underprivileged and poor.

For example, when a corrupt minister allows the illicit dumping of toxic waste in a place close to a residential area, the rights to life and health of the citizens in the area are violated. Corruption can also violate the right to healthcare and water, for example when a prosecutor fails to enforce regulations on health, water, or similar in exchange for payment of bribes.[66] In addition, weak social rights protection may create opportunities for corruption, as citizens and other interested parties may be unable to bring legal action based on the human rights framework in cases where allegations of corruption are reported in the education sector, for example. As such, it is important for states that are yet to do so to ensure the legal recognition and protection of social rights as human rights to improve the legal tools for preventing and combating corruption. Empowering socially and economically vulnerable individuals and communities to enjoy social rights as legally enforceable human rights would contribute towards making institutions more accountable, ending impunity and improving the quality of government.

Corruption can lead to violations of the right to health in several ways, such as when governments fail or neglect to improve conditions and the quality of service and facilities in public hospitals because of the stealing of critical funding for achieving individual physical and mental wellbeing. Similarly, the lack of performance-based budgeting in several countries is the greatest incentive for corruption in social services. The realization that a government's budget for basic public services – including the right to health – is being diverted into private pockets means a state is unable to use its 'maximum available resources' to fulfil the minimum thresholds of these rights. Diversion of critical spending away from the health sector can also lead to the denial of access to adequate health and can create an incentive for corruption among health professionals and practitioners.

According to the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the obligation to respect, protect and

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[64] See for example, 2018 CPI (n 54).

[65] See HRC Res 35/25 (23 June 2017) 'The negative impact of corruption on the enjoyment of human rights'. See generally Thomas Pogge (ed.), *Freedom from Poverty as a Human Rights: Who Owes What to the Very Poor?* (2007) and Jeffrey Sachs, *The End of Poverty: Economic Possibilities for Our Time* (2005).

[66] See, e.g., International Council on Human Rights Policy and Transparency International (n 48). The report shows the connection between corruption and human rights for the purpose of raising 'awareness among key stakeholders and the public of the links between corruption and human rights, thereby diminishing public tolerance of corruption and strengthening public support for anticorruption measures'.

fulfil the right to health is violated when, because of corruption in the health sector, a state makes no progress to achieve this right.[67] Although the General Comment on the right to health does not specifically discuss corruption,[68] as noted earlier, the UN treaty bodies have to some degree referred to corruption in relation to their mandates.[69]

In sum, the myth that corruption is a victimless crime has prevailed for many years in part because of the narrowed conception of corruption and the perceived legal and practical challenges to addressing it, such as causation, legal standing and evidence gathering. It is often said that corruption is a 'collective crime' (because it affects everyone), and as such it is difficult to identify a clear and direct victim. However, this section of the chapter has attempted to rebut this assumption and demonstrated the strong causal relationship between corruption and the human rights, with particular focus on social rights.

While it is true that certain legal and practical challenges do exist that might obstruct the application of human rights law to corruption, the challenges are not insurmountable and cannot (and should not) stand in the way of establishing a comprehensive and multidisciplinary approach that is victim-focused. Human rights mechanisms, including UN treaty bodies and regional human rights bodies, have to engage more directly on the effects of corruption on social rights within the scopes of their mandates.

To accomplish these important human rights and judicial tasks, it is suggested that both quasi-judicial and judicial bodies should adopt progressive legal concepts and principles, such as the precautionary principle and the public trust doctrine, in their interpretation of the human rights within their mandates. Victims and NGOs should also develop the expertise to submit complaints on the effects of corruption on social rights before these human rights bodies.

V. POTENTIAL OF SOCIAL RIGHTS FOR COMBATING CORRUPTION

a. Potential of Social Rights for Combating Corruption[70]

As noted, corruption is a complex phenomenon and manifests itself in many ways and occurs in a multitude of contexts. As such, there are many human rights that can be violated by corruption but the focus of this section is on social rights. Human rights law has established

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[67] UN Doc E/CN.4/2006/48 (22 December 2005), para 40.

[68] However, the General Comment on the Right to Health (CESCR, 'General Comment No 14' (11 August 2000) UN Doc E/C.12/2000/4) suggests in its para 18 that inappropriate health resource allocation (implicitly referring to systemic corruption) can lead to discrimination that may not be overt.

[69] Eeckeloo (n 1).

[70] See also Final Report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, UN Doc A/HRC/28/73 (5 January 2015). The UN special mechanisms have repeatedly recognized the links between corruption and social rights, including by stating that 'if there is corruption in the education sector, the right to education can be violated. […] If there is corruption in the health sector or the social welfare sector, the right to access to medical service or the right to food can be violated (among others). Moreover, the principle of non-discrimination can be affected if a person has to bribe someone in order to get favourable treatment or access to a public service. It is difficult to find a human right that could not be violated by corruption' (para 17). Similarly, the Report in para 18 states: '[A] wide range of human rights that can be violated by corruption [include] the right to work, the right to food, the right to housing, the right to health,

detailed and longstanding principles regarding state obligations. Though implicitly, the obligations imposed on states would include establishing the legal and institutional mechanisms to allow individuals and communities to challenge acts of official and private sector corruption whenever and wherever they occur, and, equally important, to take steps to prevent and combat corruption as well as ensure access to justice and effective remedies for victims.[71] A human rights approach to corruption would improve the ability of states and other public authorities to discharge their human rights obligations in an effective and efficient manner at every level.[72] However, the often maintained general lack of recognition of social rights as legally enforceable human rights in many legal systems means that victims of corruption are less likely to have access to judicial/legal remedies to challenge such violations and enjoy the right to an effective remedy.[73] This could also create new possibilities and opportunities for action at different levels – national, regional and international – where mechanisms, at both regional and international levels, already exist to monitor states' compliance with human rights obligations and to hold them to account, thus creating disincentives for corruption.

Recognition of social rights as legally enforceable human rights can provide standards against which the public can hold the government accountable in relation to corruption. As one of a few notable examples, the ECOWAS Court of Justice, in the case filed by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) (a Nigerian-based human rights and anticorruption NGO), ordered the government of Nigeria to replenish a shortage of funds in its education sector due to corruption so that it could fulfil its obligation relating to the right to education under the African Charter (Article 17).[74] SERAP had sued the Federal Republic of Nigeria and the Universal Basic Education Commission (UBEC), alleging that Nigeria had violated its obligations under the African Charter.[75] SERAP argued that corruption and theft by highranking officials within the ranks of the UBEC had left the education sector woefully underfinanced and, therefore, unable to provide free, basic and compulsory education to all Nigerian children. The organization also alleged that the Nigerian government was complicit by its failure to satisfactorily investigate these allegations of corruption. Further, it argued that Nigeria had, in effect, denied its citizens the right to freely dispose of their wealth and natural resources, which are the bases for realizing the right to education and other human rights.[76]

SERAP's suit before the ECOWAS Court was based on the report of the Independent Corrupt Practices and other Related Offences Commission (ICPC), published in 2007, which was written following a petition it had received from SERAP.[77] The report detailed the mismanagement of funds allocated for basic education in ten states of the Federation of Nigeria.[78] According to SERAP, more than five million Nigerian children lacked access to primary

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the right to education, and the right to public services; the right to development; [and] the principle of non-discrimination.'

71 *Ibid.*, paras 24–41.

72 *Ibid.*

73 *Ibid.*, para 30.

74 *SERAP v Nigeria*, ECOWAS Court of Justice, ECW/CCJ/APP/0808, Judgment of 27 October 2009. This author helped to draft the legal arguments that aided the court to come to its conclusion.

75 African Charter on Human and Peoples' Rights (27 June 1981) 1520 UNTS 217.

76 *SERAP v Nigeria* (n 74).

77 *Ibid.*

78 *Ibid*.

education as a direct consequence of the corruption and theft. The organization thus sought before the court: a declaration that every Nigerian child be entitled to free and compulsory education pursuant to Nigeria's own domestic legislation and the African Charter; an order compelling the government to replenish the stolen funds to the education sector; and an order asking Nigeria to prosecute those responsible for the theft or corruption and to monitor the recovery of stolen funds. Before deciding the merits of the case, the court first had to hear several preliminary objections that challenged the court's jurisdiction, the justiciability of the right to education and SERAP's legal standing as an NGO to bring cases before the court. These challenges were totally dismissed.[79]

In its final judgment, the court held that the ICPC report provided only prima facie evidence of incidents of corruption. Although the court accepted the report's contents as true, it felt it could not rule on it since it was not a criminal court, and that the innocence or guilt of those indicted in the report had not yet been established. Nonetheless, the court ordered the government to make adequate provisions for the compulsory and free education of every child forthwith. Significantly, the court asked the government to ensure that the right to education not be undermined by corruption. The court also held that the UBEC was responsible for making sure that the funds were to be properly disbursed for basic education and used for this purpose. It stated further that while steps are to be taken to recover the funds and/or prosecute the suspects, the Nigerian government should, in the meantime, provide the funds necessary to cover the shortfall in order to avoid denying any of its people the right to education.[80]

While the judgment has been widely lauded as a victory for education advocates throughout Nigeria, as well as the African and international communities,[81] it also represents a noteworthy development for better realization of related social rights in the subregion in particular and the continent as a whole. By requiring the government of Nigeria to invest additional resources in its education sector, the court effectively recognized the harsh consequences of corruption and general neglect, forcing the government to root out detrimental conduct within its ranks or risk compensating from other parts of its budget. The court's decision makes clear that corruption and mismanagement of education funds did not excuse Nigeria from reaching a baseline standard in accordance with its obligations.

Apart from raising questions about states' use of resources to implement and achieve human rights, corruption represents a deliberate retrogressive measure, inconsistent with social rights obligations.[82]

The argument for a rights-based approach to corruption has mostly been rooted in the foundational instruments of human rights law.[83] A point that I have made elsewhere is that examining the corruption problem from a human rights viewpoint and applying human rights law to combat corruption is a logical and natural thing to do,[84] because corruption in many cases leads or contributes to human rights violations. Overall, a better understanding of the relationship between corruption and social rights will not only improve governments' human

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[79] *Ibid.*

[80] *Ibid.*

[81] See, e.g., Olaniyan (n 3), 255–58.

[82] See *ibid.*, 255–62.

[83] See *ibid.*, Introduction; see also International Council on Human Rights Policy and Transparency International (n 48).

[84] See generally Olaniyan (n 3).

rights records but also their ability to prevent and combat corruption. By integrating states' obligations to respect, protect, promote and fulfil social rights to address corruption, a new obligation to combat corruption and promote respect for social rights, including the right to an adequate standard of living, social security, access to quality education and so on, emerges. This 'enhanced obligation' recognizes not only that corruption does have a negative impact on social rights, but also that combating corruption is necessary for states to be able to respect these rights.

b. Current Challenges and Developments and Looking Ahead

The main challenge seems twofold: first, the general lack of justiciability of social rights as legally enforceable human rights in many jurisdictions; second, the lack of legal redress for victims of violations of social rights. Despite the increasing attention paid to corruption as a human rights issue by scholars and commentators, many states still largely view corruption as purely an economic-cum-criminal law enforcement issue.[85] Although it is generally acknowledged that preventing and combating corruption requires a comprehensive and multi-layered approach to be successful and sustainable,[86] this approach is rarely adopted in practice.

Civil society and NGOs can and should play an important role in the efforts to improve the understanding of social rights as human rights, put pressure on states to make social rights justiciable within domestic legal systems and establish legal frameworks that would support victims of social rights violations caused by corruption. The progress in the global fight against corruption is rather slow and piecemeal. The same may be true about the global efforts to combat human rights violations and abuses, but if the anticorruption movement and the human rights movement can collaborate on advocacy and litigation initiatives on the effects of corruption on social rights, the prospects of success are bright.

States should begin to actualize the vision of a human rights approach to corruption as a complementary strategy to the criminal law enforcement approach if they are to fulfil their human rights and anticorruption obligations and commitments. Since corruption undermines the effective enjoyment of social rights, recovery of proceeds of corruption would clearly contribute to improving access to those rights.[87] Besides, linking corruption with human rights violations would be good for developing regions like Africa to make headway on asset recovery, as it would provide both a moral and a legal impetus in tracing money looted from many countries by their own leaders. In turn, it would reduce the moral and legal burdens on Western states to provide development aid and debt relief to poor countries. Increased international

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[85] See generally UNGA, 'Preventing and Combating Corrupt Practices and the Transfer of Proceeds of Corruption' (n 46); International Council on Human Rights Policy and Transparency International (n 48); Olaniyan (n 3); and Final Report of the Human Rights Council Advisory Committee (n 70).

[86] See, e.g., Olaniyan (n 3).

[87] See Simeon A Igbinedion, 'Human Rights as a Basis for Recovering the Proceeds of Grand Corruption' (2018) 26 African Journal of International and Comparative Law 483. In fact, the UNGA's Agenda 2030 for sustainable development specifically commits member states to substantially reduce corruption and bribery in all their forms, promote the rule of law nationally and internationally, strengthen the recovery and return of stolen assets and develop effective, accountable and transparent institutions at all levels by 2030. This shows the links between corruption and recovery of proceeds of corruption. UNGA Res A/70/1 (25 September 2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development', Goal 16 (16.4, 16.5, and 16.6).

cooperation in the field of asset recovery would contribute to addressing some law enforcement challenges in developing regions, thereby improving transparency, accountability and human rights protections in many countries.

It has been stated that:

> [the practice of linking corruption and human rights] should be reinforced in the direction of mutual mainstreaming. Human rights mainstreaming of anti-corruption efforts would mean that the realization of human rights would be one of the anti-corruption goals from the outset.[88]

However, human rights and anticorruption defenders and activists, as well as leading international NGOs such as Amnesty International, Human Rights Watch and Transparency International, do not seem to be providing the much needed leadership to push for this to happen, with the rare exception of a report by International Council on Human Rights Policy and Transparency International.[89] These international NGOs need to pay more attention to issues of corruption and human rights, including by regularly drawing public attention to the impacts of corruption on human rights and advocating for the justiciability of social rights as human rights through various means, including public interest litigation and government engagement. NGOs and activists should also push for expansion of the legal doctrines of *locus standi* and procedural rights for individuals, communities and NGOs in countries where these are lacking, to improve the access of victims of corruption to justice and effective remedies.

Finally, another way of reasoning refers to human suffering. As Asbjørn Eide and Allan Rosas have rightly pointed out:

> The efforts to bring torture, arbitrary detention and capital punishment to an end are laudable and have our support. But to be somewhat provocative, what permanent achievement is there in saving people from torture, only to find that they are killed by famine or disease that could have been prevented, had the will and the appropriate control there?[90]

Corruption in some shape or form exists globally, but its effects are most devastating in developing regions and countries. While the effects of corruption will inevitably vary from country to country and in individual cases, corruption unquestionably affects the social rights of individuals – whether directly or indirectly – and ultimately has negative impacts on socio-economic-cum-political institutions, and society in general. However, addressing the impacts of corruption on social rights, and improving the enjoyment of the rights by everyone, requires the political will to protect the rule of law, and to develop legal and institutional frameworks to empower citizens to challenge the violations of their social rights caused by corruption. It is also important for states to establish and maintain a truly independent judiciary and anticorruption agencies that are free from political or other interference, as well as to improve social rights protection, as weak protection inevitably creates opportunities for corruption.

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[88] Peters (n 53), 1283.

[89] See International Council on Human Rights Policy and Transparency International (n 48).

[90] Asbjørn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in Asbjørn Eide, Allan Rosas and Catarina Crause (eds), *Economic, Social and Cultural Rights – A Textbook* (2001) 7.

VI. CONCLUSION AND OUTLOOK: BENEFITS OF A SOCIAL RIGHTS APPROACH TO CORRUPTION

States should move to integrate their human rights approaches and anticorruption approaches and show a better understanding of the implications of corruption for social rights within their respective national legal systems.[91] This would improve both the implementation of human rights and anticorruption laws. However, despite the increasing commitment, and some degree of political will of the international community to fight corruption and end violations of human rights, corruption remains, with deleterious effects on human rights, including social rights. Also, many of the international and regional treaties and mechanisms on corruption lack enforcement powers. Understanding the implications of corruption for social rights is fundamental to developing approaches to prevent and combat corrupt practices that affect the effective enjoyment of these rights, and to improve the justiciability of social rights within domestic legal systems.

Corruption may never be completely eradicated. But the argument of this chapter is that the more states can respect, protect, promote and fulfil all human rights, including social rights, the more resilient they will become in confronting, preventing and combating corruption, especially corrupt practices that have negative impacts on social rights and vice versa. States need to establish an adequate and comprehensive legal framework to specifically address the effects of corruption on social rights and to afford victims access to justice and the right to an effective remedy.

As noted, human rights law neither explicitly refers to corruption nor prohibits it. It is true that a dynamic and evolutionary interpretation rule is a proper part of judicial or interpretative duties, obviously has its benefits and is strongly encouraged. However, the extent to which the considerable potential of human rights is enhanced and realized for tackling corruption will be determined not by ascribing to it 'a thousand and one interpretations' but by the development of a new instrument in the form of a protocol to existing human rights treaties, preferably the International Covenant on Economic, Social and Cultural Rights (mainly because of the comprehensive coverage of economic, social and cultural rights issues and its near universal reach and acceptance), which would explicitly recognize corruption as a violation of the rights contained in these treaties.

Since corruption clearly disproportionately affects the poor and marginalized sectors, any human rights reform to achieve effective prevention and combating of corruption must necessarily be firmly conceptualized in a manner which responds to the vulnerability of the most marginalized and disadvantaged sectors of the population and 'decentralizes' and expands the notion of *locus standi* as well as the authority of states to fight corruption in order to include victims of corruption as 'interested parties'. There is also the need for judicial activism to encourage legal development through social litigation and advocacy that seeks to ensure effective remedies for victims of corruption nationally, regionally and internationally.[92]

Even so, corruption can only be effectively and satisfactorily combated through a combination of approaches and strategies in the short, medium and long term, but, given the serious harms that corruption has already caused (and continues to cause), it is clear that complemen-

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[91] See C Raj Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (2011).

[92] See generally Olaniyan (n 3).

tary legal, policy and other initiatives to address the problem and its effects on human rights should not be postponed or put aside indefinitely. In sum, the application of human rights law to address corruption would succeed if this strategy is combined with the criminal and law enforcement approach and other similar strategies to the problem.

Ultimately, the interests of the socially and economically vulnerable sectors of the population can best be addressed as a central part of a reform agenda that includes anticorruption reforms and legal recognition of social rights as human rights. Those who care about these rights must take the bull by its horns, by consciously pursuing the goal of increasing social access to public goods and services as legal entitlements.

As one commentator has put it, 'with regard to corruption, the purely criminal law approach has so far not worked all too well, and this suggests trying out complementary strategies'.[93] It took some 60 years to abolish the highly profitable transatlantic slave trade. It is to be hoped that the global efforts to combat corruption and address its negative impacts on social rights through a complementary framework of human rights and anticorruption laws will be triumphant in less time.

[93] Peters (n 53), 1283.

23. Social rights adjudication and the future of the welfare state

Elise Dermine

I. INTRODUCTION

Activation reforms in the welfare state have been the main concrete answer articulated by industrialized countries over the past two decades to combat longterm unemployment. These reforms cover a wide range of measures, including vocational training and paid internships, as well as the intensification of work-related obligations such as actively looking for work or even mandatory participation in work programmes. They can also take the form of a reduction in the amount of social benefits or in their duration.

This chapter examines how the international bodies responsible for the adjudication of social rights frame the development of national activation measures. Empirical findings will then support and feed theoretical insights into current and broader debates on the role that can be played by international human rights bodies in reshaping national welfare states. Rejecting the legitimacy, as well as the effectiveness, of a defensive approach to human rights – that ties states to past political choices – we will suggest instead a practical theory of adjudication that tends to reconnect human rights and politics, in order to ensure a democratic and rights-based transformation of national welfare states.

After this brief introduction, the chapter is divided into four main sections. Section II deals with the transformations of the welfare state and the activation turn. Section III summarizes the international human rights case law that is related to this activation turn. In section IV we examine how the case law review can inform scholarly discussion on the legitimacy and effectiveness of social rights adjudication. Section V summarizes the main conclusions of the chapter.

II. THE WELFARE STATE CRISIS AND THE ACTIVATION TURN

Since the end of the 1970s the welfare state model has been under pressure in industrialized countries. Unemployment benefits and social assistance systems suffer from a crisis of social support. They are accused of keeping the unemployed out of the labour market. Transformations in the social and economic context (the globalization of economies, the transition from an industrial economy towards a service economy, technological change and digitalization, the entry of women into the labour market and population ageing) have created new risks such as largescale longterm unemployment and the acceleration of skills depletion.[1]

[1] Pierre Rosanvallon, *The New Social Question: Rethinking the Welfare State* (2000, originally published in French in 1995); Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (1998); Anton Hemerijck, *Changing Welfare States* (2013) 51; Olivier De Schutter, 'Activation Policies

The 'activation turn' of the welfare state stands as the main attempt by industrialized countries to respond to its crisis of legitimacy and effectiveness.[2] Since the early 1990s Western welfare states have entered a spiral of activation reforms aiming at promoting the return to employment of social benefits recipients.[3] These reforms rely on a broad consensus that social security systems cannot limit themselves to ensuring the financial autonomy of the unemployed outside the labour market: they must play the active role of a springboard into employment.[4] At the international level the activation turn has been promoted and pushed by international institutions such as the OECD through its 1994 Jobs Report and its subsequent jobs strategy.[5] The European employment strategy has also supported and reinforced the activation trend through the open method of coordination, now largely integrated into the instruments of EU economic governance, and countless policy reports from the European Commission and expert committees (policy diffusion).[6] Activation measures are now commonplace in unemployment benefit schemes and social assistance systems, as well as in programmes dealing with work disability.[7]

Beyond this general trend, the socio-political literature has highlighted the heterogeneity of activation measures and policies implemented by governments. In the field of comparative social policy, authors have proposed various typologies of activation policies since the end of the 1990s.[8] Two major models are generally identified. One comprises the disciplining approaches of activation – which incite the unemployed to go back to work by strengthening the work-related obligations in social benefits systems, by reducing either the amount or the

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for the Unemployed: Redefining a Human Rights Response' in Elise Dermine and Daniel Dumont (eds), *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* (2014) 259; Olivier De Schutter, 'Welfare State Reform and Social Rights' (2015) 33 Netherlands Quarterly of Human Rights 123, 133.

2 Richard L Siegel, *Employment and Human Rights: The International Dimension* (1994) 189.

3 For comparative overviews see, e.g., Jean-Claude Barbier and Wolfgang Ludwig-Mayerhofer, 'The Many Worlds of Activation' (2004) 6 European Societies 423; Amparo Serrano Pascual and Lars Magnusson (eds), *Reshaping Welfare States and Activation Regimes in Europe* (2007); Werner Eichhorst, Otto Kaufmann and Regina Konle-Seidl (eds), *Bringing the Jobless Into Work? Experiences with Activation Schemes in Europe and the US* (2008).

4 Duncan Gallie and Serge Paugam (eds), *Welfare Regimes and the Experience of Unemployment in Europe* (2000); Pascale Vielle, Isabelle Cassiers and Philippe Pochet (eds), *L'Etat social actif, vers un changement de paradigme?* (2005); Elise Dermine and Daniel Dumont, 'Activation Policies for the Unemployed – The Right to Work and the Duty to Work: Which Interactions?' in Elise Dermine and Daniel Dumont (eds), *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* (2014) 17.

5 OECD, *Jobs Strategy, Pushing Ahead with the Strategy* (1994) 6; (2000) 137–64; (2003) 183–257; (2005) 193–233; (2007) 229–72; (2013) 139–214.

6 Diamond Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (2005).

7 Dermine and Dumont (n 4), 17.

8 See Matti Heikkilä, 'In Summary' in Matti Heikkilä (ed.) *Linking Welfare and Work* (1999) 87; Ivar Lodemel and Heather Trickey (eds), *An Offer You Can't Refuse: Workfare in International Perspective* (2000); Amparo Serrano Pascual, 'Activating Regimes in Europe: A Clustering Exercise' in Amparo Serrano Pascual and Lars Magnusson (eds), *Reshaping Welfare States and Activation Regimes in Europe* (2007); Jean-Claude Barbier and Matthias Knuth, 'Of Similarities and Divergences: Why There is No Continental Ideal-Type of Activation Reforms' (2010) CES Working Papers; Patrizia Aurich, 'Activating the Unemployed: Divisions and Directions in Europe' (2011) 13(3) European Journal of Social Security 294.

duration of benefits or by the introduction of tax credits. The other comprises more emancipatory variants – which advocate developing the employability of the unemployed through the implementation of various active labour market policies, such as training measures or first work experiences. The two models rely on different explanations of the causes of unemployment. Disciplining approaches emphasize welfare dependency: they consider that unemployment is voluntary and results from a rational calculation by the unemployed. Enabling approaches, for their part, are based on the conviction that unemployment results from a problem with matching labour market needs with the qualifications of the unemployed: the unemployed are not hired because the value of their skills (productivity) would be lower than the wages in the economy. Therefore, disciplining approaches proceed from a *recommodification* logic while enabling approaches are driven by a *human capital* logic.[9]

Since the early 2000s, social scientists have studied the question of the convergence of national activation policies and the eventual impact of the European employment strategy in the diffusion of a common model.[10] The latest studies before the 2008 crisis showed an increasing hybridization of activation models. It was argued that this was the result of a learning process based on the experiences of other countries and empirical evaluation of these experiences.[11]

The 2008 economic crisis and the subsequent significant increase in the unemployment rate across Europe changed the situation. In a first period, states improved unemployment protection and invested in active labour market policies (enabling approach to activation) with a view to cushioning the impact of the crisis. Very quickly, however, in a context of budgetary constraint, some states undertook reforms that reduced the amount or the duration of social benefits, as well as reforms that strengthened the conditions for eligibility or conditions for granting social benefits (disciplining approach to activation). When it appeared politically difficult to reduce the level or duration of social benefits, considered as *social acquis*, they also opted for reinforcement of work-related obligations and their control, intending to push social benefits recipients out of the social security system. This focus on the disciplining approach to activation was even more important in countries under memoranda of understanding that

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[9] Elise Dermine, 'The Right to Work: A Justification for Welfare to Work?' in Anja Eleveld, Thomas Kampen and Josien Arts, *Welfare to Work in Contemporary European Welfare States. Legal, Sociological and Philosophical Perspectives on Justice and Domination* (2020).

[10] Jean-Claude Barbier, 'The European Employment Strategy, a Channel for Activating Social Protection?' in Jonathan Zeitlin, Philippe Pochet and Lars Magnusson (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (2004) 417; Jean-Claude Barbier, 'Research on "Open Methods of Coordination" and National Social Policies: What Sociological Theories and Methods?' in Thomas Bredgaard and Flemming Larsen (eds), *Employment Policy from Different Angles* (2005) 47; Daniel Dumont, 'Les traductions de l' "activation". La douce européanisation des systèmes nationaux de protection sociale' (2009) 63 Revue interdisciplinaire d'études juridiques 60.

[11] Werner Eichhorst and Regina Konle-Seidl, 'Contingent Convergence: A Comparative Analysis of Activation Policies' (2008) IZA Discussion Paper No 3905; Björn Hvinden and Håkan Johansson (eds), *Citizenship in Nordic Welfare States – Dynamics of Choice, Duties and Participation in a Changing Europe* (2007); Irene Dingeldey, 'Between Workfare and Enablement – The Different Paths to Transformation of the Welfare State: A Comparative Analysis of Activating Labour Market Policies' (2007) 46 European Journal of Political Research 823.

were constrained by the Troika to adopt severe austerity measures as a condition for financial assistance.[12]

III. SOCIAL RIGHTS ADJUDICATION AND ACTIVATION REFORMS

This section examines how international bodies frame the development of national activation measures through the process of adjudicating social rights. The focus is on two social rights: the right to social security, protected under Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 12 of the European Social Charter (ESC), and the right to work (Article 6 ICESCR and Article 1 ESC). This last right includes the right to freely chosen work. Therefore, it not only engages states to take positive actions in order to reach as high an employment rate as possible (obligation to fulfil), but also imposes on them negative obligations to respect and to protect the individual's free choice of employment. According to the case law, the prohibition of forced labour enshrined in international covenants dedicated to civil and political rights (Article 8(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 4(2) and (3) of the European Convention on Human Rights (ECHR)) is thus also part of the right to work proclaimed in international instruments dedicated to social rights.

Activation measures have captured the attention of international bodies in the course of their regular reporting procedures. Up to now, these bodies have set only one minimum standard under the right to social security and the right to work: states must in all cases protect the possibility of unemployment benefits recipients to refuse offers of employment that are not suitable (section III.a). They thus adopt a rather deferential approach to the choices undertaken by governments when activating social benefits recipients. However, we highlight that, through the questions put to states, international bodies are gradually structuring a general proportionality requirement when states adopt coercive activation measures (section III.b). They are also giving increasing importance to the procedural requirements surrounding the adoption and implementation of activation measures in states (section III.c).

a. The Minimal Norm of Suitable Employment

International bodies have identified a single minimum standard that maps the development of activation measures: unemployment benefits recipients must retain the right to refuse employment that is not suitable. More precisely, they must retain the possibility of refusing an offer of employment that does not match their qualifications or professional experience during an initial reasonable period without running the risk of losing their entitlement to unemployment

[12] Christophe Degryse, Maria Jepsen and Philippe Pochet, 'The Euro Crisis and its Impact on National and European Social Policies' (2013) European Trade Union Institute Working Paper No 5; Jason Heyes, 'Flexicurity in Crisis: European Labour Market Policies in a Time of Austerity' (2013) 19 European Journal of Industrial Relations 71; Thomas Hastings and Jason Heyes, 'Farewell to Flexicurity? Austerity and Labour Policies in the European Union' (2018) 39 Economic and Industrial Democracy 458; Elke Heins and Caroline De la Porte (eds), *The Sovereign Debt Crisis, the EU and Welfare State Reform* (2016).

benefits. This minimal core obligation relies on international standards for unemployment benefits which define the risk of unemployment as the loss of earnings due to the impossibility of obtaining suitable employment (Article 20 of ILO Convention No 102 concerning social security, Article 10 of Convention No 168 on the promotion of employment and protection against unemployment and Article 20 of the European Code of Social Security). In these texts the protection of the social and professional status of the unemployed constitutes the heart of the concept of suitable employment.[13]

This minimum core obligation was first endorsed by international human rights bodies under the right to social security. The European Committee of Social Rights (ECSR), the monitoring body of the ESC, stated that the criteria which determine the adequacy of unemployment benefits relate not only to the amount and duration of benefits but also to the securing of a reasonable initial period during which an unemployed person may refuse a job not matching his previous skills without losing his unemployment benefits.[14] Concerning restrictive developments in social security systems that may be admitted under certain conditions in accordance with Article 12(3) ESC, the ECSR specified that states cannot derogate from this minimal core obligation regardless of the labour market situation, and whatever the justifications put forward by the state. It has therefore made findings of non-compliance with states that have broadened the concept of suitable employment or removed any reference to that concept in their legislation.[15] On its side, the Committee on Economic, Social and Cultural Rights (CESCR), the monitoring body of the ICESCR, also considers that state parties must endeavour to provide benefits to cover loss or lack of earnings due to inability to obtain or maintain suitable employment.[16] In its reporting procedure it has therefore repeatedly expressed concerns about Germany, which provided, in the framework of its 2005 reform merging unemployment assistance and social assistance, that the unemployed must accept any 'acceptable employment', which may be interpreted in practice as meaning almost any job.[17]

This minimum standard was rapidly taken over under the right to freely chosen work. During the reporting procedure the ECSR learnt that some governments were taking activation measures to support employment and reduce spending on unemployment benefits. It found that the use of such measures 'was becoming increasingly frequent' and 'could have a significant effect on the right to earn one's living in an occupation freely entered upon' protected under Article 1(2) ESC.[18] In 2002 it therefore 'developed its case law' and decided to systemically examine the issue of the loss of unemployment benefits for refusal to take up employment in

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[13] Elise Dermine, 'Suitable Employment and Job of Quality' in Pascale Vielle and Silvia Borelli (eds), *Quality of Employment in Europe, Legal and Normative Perspectives* (2012) 157–80.

[14] ECSR, 'Conclusions 2006 – Germany – Article 12-1' (30 October 2006) Doc No XVIII-1/def/DEU/12/1/EN; ECSR, 'Conclusions 2009 – Malta – Article 12-1' (2 January 2009) Doc No 2009/def/MLT/12/1/EN.

[15] ECSR, 'Conclusions 2000 – Norway – Article 12-3' (31 March 2000) Doc No XV-1/def/NOR/12/3/EN; ECSR, 'Conclusions 2003 – Norway – Article 12-3' (30 May 2003) Doc No XV-1/def/NOR/12/3/EN; ECSR, 'Conclusions 2006 – Denmark – Article 12-3' (30 October 2006) Doc No XVIII-1/def/DNK/12/3/EN.

[16] CESCR, 'General Comment No 19' (4 February 2008) UN Doc E/C.12/GC/19, para 16.

[17] CESCR, 'Concluding Observations on Germany' (12 October 2018) UN Doc E/C.12/DEU/6, paras 46–47; CESCR, 'Concluding Observations on Germany' (12 July 2011) UN Doc E/C.12/DEU/5, para 17.

[18] ECSR, 'Conclusions 2004 – Sweden – Article 1-2' (31 May 2004) Doc No 2004/def/SWE/1/2/EN; ECSR, 'Conclusions XVII-2 – Latvia – Article 1-2' (30 June 2006) Doc No XVII-2/def/LVA/1/2/EN.

the context of its control of the application of that provision.[19] According to the Committee, even if it is legitimate to make the granting of unemployment benefits conditional on real availability for work, the right to an occupation freely entered upon implies that 'for an initial reasonable period, jobseekers may refuse offers that do not match their qualifications and experience, without running the risk of losing their entitlement to unemployment benefits'.[20] In a 2008 statement of interpretation the ECSR specified the respective scopes of application of Article 12(1) and (3) and Article 1(2). It gave a reminder that, in principle, the conditions for receiving unemployment benefits, including the obligation to take up employment, need to be evaluated under Article 12 ESC. Under certain circumstances, however, the loss of benefits following the refusal of an employment offer 'could amount, indirectly, to a restriction on the freedom to work and as such the situation would be assessed under Article 1(2)'.[21] Since 2002 the Committee has concluded on several occasions that governments have violated the right to freely chosen work by removing the initial period of protecting the professional status of the unemployed, with a view to activating them.[22]

Finally, the issue was even addressed under the prohibition of forced labour. In its 2007 global survey, entitled *Eradication of Forced Labor*, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) expressed the same finding as the ECSR: in the context of growing unemployment, including longterm unemployment, industrialized countries were tending to widen the spectrum of jobs that had to be accepted by unemployed persons, on pain of having their benefits suspended, reduced or cut. According to this finding, availability for work was of course a classic condition for receiving unemployment benefits. However, this could conflict with the conventions on forced labour (Convention Nos 29 and 105) if it were to be used as a sanction, or if the unemployed were requested to accept jobs that were not suitable, within the meaning of the ILO Social Security Convention No 102.[23]

The right to refuse a job that is not suitable is thus an invariable minimum standard that is recognized in different legal orders (United Nations and Council of Europe) and under several social rights. Despite this, states pinned by international bodies have not backtracked on their reforms. We refer for instance to Germany, Denmark, Norway and the United Kingdom. Other states are also following in their tracks and have undertaken reforms that reduce the period or level of protection of the professional status of the unemployed.[24] The actions of international monitoring bodies thus appear ineffective.

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[19] ECSR, 'Conclusions XVI-1 – Statement of Interpretation – Article 1-2' (2002); ECSR, 'Conclusions 2002 – Statement of Interpretation – Article 1-2 of the revised ESC' (2002).

[20] ECSR, 'Conclusions 2004 – Cyprus – Article 1-2' (31 May 2004) Doc No 2004/def/CYP/1/2/EN; ECSR, 'Conclusions 2003 – Denmark – Article 1-2' (30 May 2003) Doc No XVI-1/def/DNK/1/2/EN; ECSR, 'Conclusions 2003 – Germany – Article 1-2' (30 May 2003) Doc No XVI-1/def/DEU/1/2/EN; ECSR, 'Conclusions 2005 – Germany – Article 1-2' (28 February 2005) Doc No XVII-1/def/DEU/1/2/EN.

[21] ECSR, 'Conclusions XIX-1 – Statement of Interpretation – Article 1-2' (2008); ESCR, 'Conclusions 2008 – Statement of Interpretation – Article 1-2 of the revised ESC' (2008).

[22] ECSR (2004 CYP) (n 20); ECSR (2003 DNK) (n 20); ECSR (2003 DEU) (n 20); ECSR (2005 DEU) (n 20).

[23] ILO, CEACR, *Eradication of Forced Labor, General Survey* (2007) 73, para 131.

[24] For example, Belgium, Canada, Slovenia or Sweden. See comparative tables of the social protection systems in the EU on www.missoc.org.

State reports show that they do not respect the minimal standard because it seems unsatisfying and outdated to them. When unemployment was frictional or cyclical, but ultimately of short duration, the minimum standard of suitable employment was enough to secure the right to freely chosen work: the unemployed were guaranteed compensation during the few months they needed to find a job that corresponded to their professional and social status. Since unemployment has transformed into a massive and longterm risk, and given the rapid evolution of jobs and skills demanded on the labour market in a postindustrial economy, this minimal standard has become unsatisfying. It does not consider the issue of helping the unemployed to find employment. According to states, abandoning the principle of professional status protection during a fixed period may allow for broadening the spectrum of jobs offered to the unemployed when their skills are obsolete or when their professional experience is low, in order to avoid their episode of unemployment turning into a situation of longterm exclusion.[25] The minimum standard of suitable employment does not make it possible to distinguish between activation reforms that are purely part of a logic of *recommodification* and those that are based on a *human capital* development approach and accompany, for example, the broadening of the notion of suitable employment with a right to retraining for the unemployed concerned (on these two approaches of activation, see section II).

b. The Emergence of a General Requirement for Proportionality

Besides this minimal core approach to human rights, we observe the emergence of a proportionality requirement to assess the compliance of coercive activation reforms under both obligations to fulfil the right to social security and obligations to respect the right to freely chosen work (which includes the prohibition of forced labour). While the minimum standard of suitable employment only relates to one type of activation measures – those that broaden the range of jobs that need to be accepted on the labour market by unemployment benefits recipients – the proportionality requirement makes it possible to monitor all kinds of coercive activation reforms, including mandatory work programmes, the reinforcement of obligations to actively look for a job or the reduction of the amount or duration of benefits. Moreover, it makes it possible to have regard to the state objective of combating longterm unemployment.

The right to social security implies an obligation of progressive realization (obligation to fulfil) from which arises a principle of non-retrogression. Reforms that seek to activate individuals by reducing the generosity of social benefits are therefore looked upon with suspicion by human rights bodies.[26] Still, modulations may be admitted if they are reasonably justified. According to both the ICESCR and the ECSR national governments must then prove that a measure pursues a legitimate objective and that it is relevant and necessary to achieve it.[27] In its conclusions concerning Article 12(3) ESC the ECSR has therefore considered the objectives pursued by member states through the introduction of activation measures. It has noted that governments tend to use unemployment benefits as an active means of combating unem-

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[25] On the states' justifications of the reforms see, e.g., ECSR, 'Conclusions 2000 – Norway – Article 12-1' (31 March 2000) Doc No XV-1/def/NOR/12/1/EN; ECSR, 'Conclusions 2006 – Germany – Article 12-1' (30 October 2006) Doc No XVIII-1/def/DEU/12/1/EN.

[26] De Schutter 2014 (n 1), 264.

[27] CESCR (GC 19) (n 16), para 42; ECSR, 'Conclusions XIII-4 – Statement of Interpretation – Article 12-3' (1996).

ployment and reintegrating the unemployed into working life. According to the Committee, this aim is not incompatible with the right to social security if the means chosen by the state for achieving such an aim are appropriate and proportionate.[28]

The proportionality requirement is also explicitly stated in the general case law of international bodies concerning the right to freely chosen work and the prohibition of forced labour (implying both obligations to respect). The right to freely chosen work proclaimed in Article 1(2) ESC is a relative right on which states may impose restrictions in compliance with the conditions laid down in Article 31 ESC (corresponding to Article G of the revised ESC). This article includes a proportionality requirement: in addition to having to be 'prescribed by law', restrictions must, in accordance with Article 31, 'be necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals'. As to the prohibition of forced labour, this is not an absolute right either, unlike the prohibition of slavery and servitude. The prohibition is immediately followed, in both the ILO Convention on Forced Labour (Article 2(2)) and in the covenants on civil and political rights (Article 4(3) ECHR and Article 8(3)b ICCPR), by the enunciation of a list of particular forms of work that escape the prohibition of forced labour. The forms of work listed in these instruments relate to very similar forms of work that have in common that they are imposed on individuals by states in the name of a general interest objective. Examples include compulsory military service, work in detention or normal civic obligations. ILO bodies and the European Court of Human Rights (ECtHR) have both derived a general requirement of proportionality from this particular list of work types when the work is imposed by a state under general interest considerations.[29] According to the case law a certain level of coercion is thus admitted if the mandatory work is the fact of the state (and not a private actor) and if the obligation to work appears relevant, proportionate and necessary to achieve general interest objectives.

In contrast to their general case law on the right to freely chosen work and the prohibition of forced labour, human rights bodies do not make any explicit reference to the proportionality requirement when confronted with activation measures. However, when trying to find coherence between the general and the specific case law, we observed that the criteria for assessing the activation measures identified by the ECSR, and the questions it poses to states regarding the implementation of such programmes, actually embody the criterion of proportionality.

In its conclusions on the application of Article 1(2) ESC the ECSR started, at the beginning of the 1990s, to examine various activation measures under the section dedicated to the prohibition of forced labour. It asked numerous questions to the states in order to get a better

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[28] ECSR, 'Conclusions 1996 – Denmark – Article 12-3' (30 September 1996) Doc No XIII-4/def/DNK/12/3/EN; ECSR, 'Conclusions 2000 – Germany – Article 12-3' (30 October 2006) Doc No XVIII-1/def/DEU/12/3/EN; ESCR (2000 NOR) (n 15); ECSR, 'Conclusions 2001 – Germany – Article 12-3' (30 November 2001) Doc No XV-1/def/DEU/12/3/EN.

[29] ILO, Report of the committee set up to examine the representation alleging non-observance by Chile of the Forced Labour Convention, 1930 (No 29), submitted under Article 24 of the ILO Constitution by the Colegio de Abogados de Chile A.G. (11 November 2008), para 32; ECHR, *Van der Mussele v Belgium*, ECtHR, App No 8919/80, Judgment of 23 November 1983. For an extensive analysis of this case law, see Elise Dermine, 'Activation Policies for the Unemployed and the International Human Rights Case Law on the Prohibition of Forced Labour' in Elise Dermine and Daniel Dumont (eds), *Activation Policies for the Unemployed, the Right to Work and the Duty to Work* (2014) 103; also published in (2013) 1 European Journal of Human Rights 746.

understanding of measures, their goals and their effects. These questions concerned the aims pursued by activation measures, the existence of the possibility for unemployed persons to justify a refusal to take up employment or training and the reasons that could be invoked, the considerations taken into account when assigning a person to socially useful work or to training (professional conditions, qualifications, distance, personal preferences), the number and duration of sanctions, the possibility of appealing to an independent body, the possibility of receiving minimal social assistance for the duration of the sanction, the impact of measures on returning to work, and so on.[30] These questions reflect the ECSR's desire to ensure a balance between restrictions on the free choice of employment imposed on social benefits recipients and the general interest objective pursued by an activation measure (the proportionality idea). Following the states' replies, the ECSR either communicated new questions or adopted conclusions on compliance. Up to now, it has never adopted negative conclusions. However, through this list of questions one can anticipate the different points that the ECSR might consider problematic with regard to Article 1(2) ESC by applying the proportionality requirement contained in Article G.[31]

c. The Procedural Requirements

Finally, international bodies tend to develop procedural requirements for the adoption and implementation of activation measures that restrict the enjoyment of social rights. Three types of procedural requirements are identified. Before the implementation of an activation reform, the persons that will be affected by it, that is, recipients of unemployment benefits and social assistance, must be consulted (1) and an analysis of existing alternatives must be carried out (2). After the implementation of a reform, governments must proceed to an impact analysis of the measure (3).

These requirements are formulated very clearly in the ICESCR general observations on both the right to social security and the right to work. When retrogressive measures are taken in national social security systems it is foreseen that the Committee will 'look carefully', *inter alia*, at whether 'alternatives were comprehensively examined', 'there was genuine participation of affected groups in examining the proposed measures and alternatives' and 'whether there was an independent review of the measures at the national level'.[32] Regarding employment policy development, the Committee stresses the importance of involving social partners and, more broadly, various concerned civil society groups.[33] It also asks states to set up procedures for evaluating their employment policies.[34]

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[30] See, e.g., ECSR, 'Conclusions 1992 – Germany – Article 1-2' (30 November 1992) Doc No XII-2/def/DEU/1/2/EN; ESCR, 'Conclusions 1995 – Norway – Article 1-2' (30 November 1995) Doc No XIII-3/def/NOR/1/2/EN; ESCR, 'Conclusions 1996 – Luxembourg – Article 1-2' (30 April 1996) Doc No XIII-3/def/LUX/1/2/FR; ESCR, 'Conclusions 1998 – Belgium, Germany, Italy, Norway, United Kingdom – Article 1-2' (1998); ESCR, 'Conclusions 2000 – Italy, Norway, United Kingdom – Article 1-2' (2000).

[31] For an extensive analysis of this case law, see Dermine (n 29), 161–66.

[32] CESCR (GC 19) (n 16), para 42.

[33] CESCR, 'General Comment No 18' (6 February 2006) UN Doc E/C.12/GC/186, paras 38, 39 and 42.

[34] *Ibid.*, paras 36, 41, 45–47.

The ECSR is also showing increasing interest in processes within states in order to ensure the democratic development of restrictive measures and evaluation of their effectiveness. In 1993, it stated for the first time that Article 1(1) ESC (right to work) contained a requirement to consult social partners when drawing up and implementing employment policy.[35] Since then it has repeatedly confirmed that consultation with employers' and workers' organizations is 'of great importance' or 'necessary' in the development and implementation of a policy aimed at achieving stable and high levels of employment.[36] Since 2002, it has also requested that states provide information on the results of active labour market measures.[37] In 2012 it reminded that 'employment measures must be targeted, relevant and regularly monitored' and asked states to indicate in this respect 'whether monitoring of the employment policies is implemented and how their effectiveness is evaluated'.[38]

Recently, the formalization of procedural requirements took a leap forward when the ECSR had to pronounce on various collective complaints concerning austerity measures imposed on the Greek state by the Troika in exchange for financial assistance. The Committee first enounced procedural requirements under Article 12(3) ESC, which concerns restrictive measures to the right to social security,[39] and then reiterated them under Article 31 which, as a reminder, deals more generally with restrictions on rights enshrined in the ESC.[40] First, it considered that governments willing to adopt restrictive measures must conduct a thorough balancing analysis of the effects of the envisaged measures, notably of their possible impact on the most vulnerable groups in the labour market. They must also carry out a genuine consultation with those most affected by the measures. Finally, it also checked if there had been any real examination or consideration of possible alternative and less restrictive measures.[41] Failure to comply with these requirements led the Committee to note the disproportionate nature of the restrictive measure and to conclude that the right to social security and other social rights had been violated in conjunction with Article 31. The Committee was thus developing the procedural aspect of the principle of proportionality whereas so far it had essentially adopted a substantial approach to this principle. It has also recently developed the requirement of legality contained in Article 31, stating that the restrictive measures must have been approved 'by a democratic legislature'.[42]

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35 ECSR, 'Conclusions 1993 – United Kingdom – Article 1-1' (31 December 1993) Doc No XIII-1/def/GBR/1/1/EN.

36 ECSR, 'Conclusions 1998 – Turkey – Article 1-1' (30 March 1998) Doc No XIV-1/def/TUR/1/1/EN; ECSR, 'Conclusions 2002 – Romania – Article 1-1' (31 March 2002) Doc No 2002/def/ROU/1/1/EN.

37 ECSR, 'Conclusions 2002 – Statement of Interpretation – Article 1-1 of the revised ESC' (2002); ECSR, 'Conclusions XVI-1 – Statement of Interpretation – Article 1-1' (2002).

38 ECSR 'Conclusions 2012 – on the application of Austria, Albania, Armenia, Belgium, Croatia, Italy, Slovenia – Article 1-1 of the revised ESC' (2012).

39 *IKA-ETAM v Greece*, ECSR, Collective Complaint No 76/2012, Decision of 7 December 2012, paras 79–80 (and the four other decisions pronounced on the same day).

40 *GSEE v Greece*, ECSR, Collective Complaint No 111/2014, Decision of 23 March 2017.

41 *Ibid.*, para 90.

42 *Ibid.*, para 83.

IV. INFORMING DEBATES ON THE ROLE OF INTERNATIONAL ADJUDICATING BODIES TOWARDS WELFARE STATES' REFORMS

In this last main section we review the current scholarly debates on the role that international bodies can play in the transformations of national welfare states. This brings us to examining recent literature in political and human rights theory on the issues of legitimacy and the effectiveness of the work of international human rights bodies in adjudicating social rights. We show how the empirical findings resulting from the case law review conducted in the previous section can support and feed theoretical insights on those current issues. First, the defensive approach to social rights raises questions in terms of the legitimacy of the action of international bodies and ultimately undermines the effectiveness of their action (section IV.a). A transformative approach to social rights can be implemented through an experimentalist process for the adjudication of social rights. This makes it possible to update the content of social rights on the basis of the experience of the concerned parties. It establishes a positive spiral between the legitimacy and effectiveness of the action of international bodies (section IV.b). The literature raises some concerns about the experimentalist approach to the adjudication of social rights, and more generally about participatory approaches to determining the content of rights, regarding the protection of the weakest. Empirical analysis is rather reassuring: international case law pays increased attention to this issue and progressively develops procedural safeguards to ensure the protection of the weakest (section IV.c).

a. The Defensive Approach to Social Rights and the Negative Spiral between Legitimacy and Effectiveness: An Example

Some authors have recently highlighted that, in the context of the crisis of the welfare state, the use of social rights is essentially based on a logic of defending the *acquis* of the post-war social model. Attempts by governments to reexamine past choices, once they have been cast into legal rights, are viewed with suspicion by international bodies.[43] Olivier De Schutter described this approach to social rights as defensive or conservative. He criticized it because it carries the risk of protecting the 'insiders', who already hold recognized entitlements, at the expense of the 'outsiders', who occupy a more vulnerable position in the legal system.

The adoption of a defensive approach to social rights by international bodies can be linked with the democratic legitimacy concern they face in the exercising of their mission of adjudicating social rights. First theorized and documented at the national level concerning the adjudication of constitutional rights, the legitimacy concern is receiving increasing attention in the literature on international human rights law,[44] which seeks to characterize and to identify

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[43] De Schutter 2015 (n 1), 151; see also Alana Klein, 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights' (2007) 39 Columbia Human Rights Law Review 353, 361; Hemerijck (n 1), 24.

[44] Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies – Law and Legitimacy* (2012); Andreas Føllesdal, Johan Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (2013); Samantha Besson, 'Legal Philosophical Issues of International Adjudication – Getting Over the Amour Impossible Between International Law and Adjudication' in Cesare Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 420; Andreas Føllesdal, 'Subsidiarity and

this concern's particularities as it relates to the adjudication of human rights at the international level.[45] We focus on the legitimacy concern before explaining its linkage with the defensive approach.

In order to complete their mission, international bodies must determine the concrete requirements that flow from abstract and indeterminate rights in a specific situation. In doing this they risk being accused of having exceeded their mission of applying human rights and of usurping the sovereignty of states (judicial usurpation). For that reason, they may prefer to opt for an attitude of self-restraint but then fail in their mission of monitoring the application of rights (judicial abdication). Concerns about democratic legitimacy are exacerbated when adjudication concerns social rights,[46] all the more if the norm to be applied is old and the social context has changed. The legitimacy concern results from the artificial sequencing of the phases of law-making and application, which implies that international bodies must apply to concrete cases a law elaborated once and for all by states.[47]

Traditionally, specialists in the theory of adjudication seek to 'domesticate the arbitrary'[48] and identify the circumstances in which an international body may or may not intervene without exceeding its functions of applying the pacts developed by states. Overall, it can be concluded that the more important the concerns related to democratic legitimacy are, the more they must adopt a deferential approach (large margin of appreciation recognized to states). In the field of social rights international bodies thus often adopt self-restrained positions and validate the political choices made by governments. For instance, we have seen that international bodies develop a generally deferential approach to the activation policies pursued by states and validate the measures in their heterogeneity, failing to frame the transformations of the welfare state under human rights (judicial abdication).

Legal doctrine has shown that international bodies allow themselves greater control when governments have already adopted legislative or regulatory measures to realize the social right they must control. They can then rely on an act adopted by a representative body and feel justified (or legitimized) in sanctioning a subsequent and obvious setback in the legislation.[49] Here is the link between legitimacy concerns and the defensive approach to social rights: it is legitimacy concerns that lead international bodies to adopt a defensive approach to social rights and encourage the legislative *status quo*.

International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights – Or Neither' (2016) 79 Law & Contemporary Problems 147; Gerald L Neuman, 'Human Rights, Treaties, and International Legitimacy' in Silja Voeneky and Gerald L Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (2018) 51.

[45] It is for example articulated, on a theoretical level, around distinct principles: national judges must ensure that they respect the principle of the separation of powers while international bodies must ensure that they do not undermine the principle of national sovereignty of states.

[46] While the principle of the justiciability of social rights is no longer debated, it remains that they do raise more important concerns of democratic legitimacy because their realization implies important economic and social policy choices (Klein (n 43), 361).

[47] Michaël Dorf and Charles Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2) Columbia Law Review 267, 390; Michaël Dorf, 'Legal Indeterminacy and Institutional Design' (2003) 78(3) New York University Law Review 954; Mike Wilkinson, 'The Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism' (2010/2) Wisconsin Law Review 673, 682.

[48] In the words of Dorf, 'Legal Indeterminacy and Institutional Design' (n 47), 878.

[49] Klein (n 43), 361 and 374.

This situation is critical since the effective realization of rights depends on adapting laws to changes in the socio-economic environment. The defensive approach is tying states to past political choices about the realization of rights that may no longer be appropriate, which in fact ultimately raises questions of democratic legitimacy (judicial usurpation). International case law on activation measures is an excellent illustration. We have seen that international bodies impose one single common and invariable minimum standard: the right of recipients of unemployment benefits to refuse jobs that are not suitable (see section III.a). They feel authorized to set this minimum standard because it is enshrined in international labour standards and is included in the unemployment benefits legislation of many states. Through the institution of this minimum standard, international bodies are developing a defensive approach to the post-war social model. This standard is illegitimate in the eyes of states trying to reform this model in crisis in order to face new challenges such as longterm unemployment and an accelerated risk of skills depletion. For this reason, they depart from this norm and the gap between the law in the texts and the law in practice is growing. A negative spiral between legitimacy and effectiveness is thus observed.

This empirical observation allows us to highlight a particularity of the issue of democratic legitimacy at the supranational level. At the national level it is often said that judges are caught in a dilemma between legitimacy and effectiveness. By opting for tight control of the political power's action the judiciary is certainly exposed to a loss of democratic legitimacy, but it effectively fulfils its mission of applying human rights, since the political power will have to comply with its decision. This is different at the international level. The international bodies responsible for monitoring the implementation of international covenants on social rights are not judicial bodies. Their decisions are not binding. They must therefore pay attention to ensuring that their decisions appear democratically legitimate so that they are taken into account by states and contribute effectively to the realization of social rights. The situation is similar for international judicial bodies, whose decisions are certainly binding but are not enforceable. In these circumstances the compliance of national situations with international decisions depends in practice, as is the case for quasijurisdictional bodies, on the respect that states have for them and for their decisions. In other words, lack of legitimacy in international human rights bodies' actions risks leading to their ineffectiveness.

b. The Transformative Approach to Human Rights, Democratic Experimentalism and the Positive Spiral Between Legitimacy and Effectiveness: Promising Premises

After declining the defensive approach to human rights, Olivier De Schutter pleads for its replacement with a 'transformative' approach: one

> that accepts the constraints that States face and acknowledges the need for reform, but broadens the political imagination of governments in order to ensure that their responses to the predicament they are facing will be guided by human rights.[50]

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[50] De Schutter 2015 (n 1), 151. For a transformative approach to social rights at the constitutional level inspired by the South African case, see also Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights 146; Sandra Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights' (2006) 17 Stellenbosch Law Review 5.

In other words, this approach means mobilizing social rights as a tool for recomposing social policies in a changed environment where new institutional arrangements are struggling to emerge. This proposal is in line with approaches in human rights theory that see democracy as the principle of justification of human rights and the appropriate context for interpreting them. According to this conception human rights are considered as the place for the institutionalization and stimulation of democratic debates and exchanges on the legitimate norms of social organization.[51]

The question arises as to the role of international monitoring bodies in the implementation of this transformative vision of human rights. How can they initiate and frame a dynamic of transformation of national welfare states guided by human rights without usurping the national sovereignty? How can they ensure the relaunching of the democratic debate on the content of rights and frame a democratic transformation of social policies under the auspices of human rights?

Several scholars specializing in theories of democratic deliberation and judicial review have recently proposed moving away from the artificial sequencing between law-making and its application which is at the root of the concerns about democratic legitimacy faced by judicial and quasi-judicial bodies. From this perspective they have imagined more dialogical and accountable roles for these bodies that could reconnect human rights and politics and initiate a positive spiral between legitimacy and effectiveness.[52]

Experimentalist approaches to the adjudication of human rights are among these proposals. Democratic experimentalism is a general model of institutionalized democratic deliberation elaborated by Michaël Dorf and Charles Sabel.[53] Applied to the adjudication of rights, it urges the courts to draw on the practical experience of parties in order to gradually determine and re-determine the content of rights in a continuous process. This procedural approach to determining the content of rights has been developed at the constitutional level but can be transposed to the practice of international human rights law.[54] The procedural model can be summarized in five steps. First, in the face of an abstract and indeterminate human right, the body responsible for monitoring its application first determines a minimum rule, the

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[51] Claude Lefort, 'Droits de l'homme et politique' (1981) *L'invention démocratique* 43.

[52] The literature also speaks of 'weak-form', 'experimental' or 'catalytic' forms of adjudication. See Rosalind Dixon, 'Creating Dialogue about Socio-economic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited' (2007) 5(3) International Journal of Constitutional Law 391; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008); Katherine J Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 International Journal of Constitutional Law 385; Oliver Gerstenberg, 'Negative/Positive Constitutionalism, "Fair Balance," and the Problem of Justiciability' (2012) 10(4) International Journal of Constitutional Law 904; Frank I Michelman, 'Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocating Perturbations in Liberal and Democratic Constitutional Visions' in Helena Alvia García, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice* (2015) 275.

[53] Dorf and Sabel (n 47).

[54] See, e.g., Olivier De Schutter and Violeta Moreno Lax (eds), *Human Rights in the Web of Governance: Towards a Learning-based Fundamental Rights Policy for the European Union* (2010); Olivier De Schutter, 'The Democratic Experimentalist Approach to Governance: Protecting Social Rights in the European Union' in Olivier De Schutter and Jacques Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (2010) 115; Oliver Gerstenberg, 'The Justiciability of Socio-Economic Rights, European Solidarity, and the Role of the Court of Justice of the EU' (2014) Yearbook of European Law 245.

observance of which guarantees a conclusion of conformity with the human right instrument (specification of a 'safe harbour'). Second, at the same time the body must recognize the possibility for the states – and even encourage them – to deviate from this guideline if they can justify that their alternative approach is at least as effective as the minimum rule at protecting the human right; they are called upon to articulate 'prophylactic rules', that is, 'prescribing presumptive rules to be applied until experience provides a better alternative'.[55] Third, states must organize procedures for evaluating their alternative experiences. Fourth, the body must then evaluate the effectiveness of the experiment against the minimum standard and other experiments conducted by other states. Based on evaluations of the results of the experiments carried out by states, it may adapt the minimum standard. Fifth, the new minimum standard is in turn prophylactic, that is, the states may continue to experiment in order to seek to better realize the right.

The experimentalist approach is particularly relevant in the face of the emergence of a new problem or risk that is itself not yet well defined and whose solutions have not yet been identified.[56] It allows the actors concerned to move away from traditional and familiar categories to experiment; successful experiences are likely to be replicated through social learning. Democratic experimentalism thus opens the way to the reinvention of the social.

Procedural mechanisms make it possible to democratize the judicial determination of rights.[57] By relying on the knowledge and experience of the parties the international bodies should be able, with full legitimacy and capacity, to gradually raise the standard of norms that flow from human rights. The experimental approach, which places great emphasis on contextualization, also allows for a certain flexibility of solutions according to local circumstances, to ensure greater effectiveness of the law and gradually close the gap between law in the books and law in action. A positive spiral between the legitimacy and effectiveness of human rights is created.[58]

In the international case law on activation measures an example of experimentalist practice can be identified. In the course of its reporting procedure (regular monitoring mechanism) we have seen that the ECSR has engaged, under Article 1(2) ESC, in a practice of questioning states about the coercive activation measures they were developing (see section III.b). Through dialogue with states it is gradually acquiring a better knowledge of the phenomenon of activation, its diversity and its challenges. Over successive reporting cycles it has progressively developed a standard list of questions. These are all indicators that would make it possible to frame the different types of coercive activation measures adopted by states while considering the new challenges they face. It must now be seen whether, through the proportionality test, the Committee will replace or supplement the minimum standard of suitable employment and gradually increase the protection of social rights and update the prophylactic rules so that they effectively protect the unemployed in a constantly changing environment. Indeed, while in a first period, the experimentalist approach only implies that international bodies dictate an agenda of questions to states (catalysts of transformation), in a second phase it implies that they identify best practice standards for the realization of rights and tighten the control of

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[55] Dorf and Sabel (n 47), 457.

[56] *Ibid.*, 314f.

[57] *Ibid.*, 446.

[58] *Ibid.*, 388–419; Dorf, 'Legal Indeterminacy and Institutional Design' (n 47), 954–68; Klein (n 43), 395–97.

what is 'reasonable' or not (guardian of human rights). They must therefore act as arbitrators, without, however 'claim(ing) a door-closing last word'.[59]

It should be noted that the ECSR has already done so once in the past. In 1984, in response to the emergence of mass and longterm unemployment in Europe, the globalization of economies and the resulting restructuring of economic and social policies, the Committee decided to stop assessing the conformity of national situations with Article 1(1) and embarked on a practice of questioning to ascertain the employment situations in various countries and the policies pursued with a view to achieving full employment.[60] During successive control cycles it gradually structured a list of questions before finally, in a third step, restarting the evaluations under Article 1(1) in 2002 on the basis of an indicator-based method it had developed in view of the list of questions.[61]

The experimentalist approach to determining the content of rights may seem complicated to implement in the context of a specific control procedure when the international body has to decide once on the case submitted to it, without the ability for it to be brought back. On the other hand, it seems particularly relevant when there is a regular mechanism for monitoring respect for fundamental rights, in addition to specific control procedures. The reporting procedure allows for regular exchanges with state parties on the best way to realize social rights and to keep informed of the evolving national practices. It makes it possible to follow, compare and monitor the reforms and experiments undertaken by states. Based on the experiences of states and the knowledge acquired, bodies can review minimum standards in a continuous process in order to keep pace with changing realities and improve the effectiveness of the protection of social rights. A regular monitoring mechanism can then feed into the development of case law in specific procedures such as the collective complaints procedure at the ESC's level and the individual communications mechanism at the ICESCR's level.

c. Democratic Experimentalism at the Expense of the Outsiders? Counter-evidence

Several authors have raised the risk that participatory approaches to determining the content of rights, including the experimentalist approach, may work at the expense of the most vulnerable.[62] They have two concerns. On the one hand, they fear that this procedural approach to human rights may in practice disadvantage those parties least equipped to participate in democratic debate, that is, least organized or most politically weak, or, in other words, the 'outsiders'. This is a classic risk raised in the context of deliberative conceptions of democracy. The second criticism concerns the normative weakness of this procedural approach to

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[59] Michelman (n 52).

[60] ECSR, 'Conclusions 1986 – General Introduction – Article 1-1' (IX-2); ECSR, 'Conclusions 1984 – General Introduction – Article 1-1' (VIII).

[61] ECSR (2002 SoI, Article 1-1 revESC) (n 37); ECSR (2002 SoI, Article 1-1 ESC) (n 37).

[62] Sandra Liebenberg and Katherine G Young, 'Adjudicating Social and Economic Rights – Can Democratic Experimentalism Help?' in Helena Alvia García, Karl Klare and Lucy A Williams (eds), *Social and Economic Rights in Theory and Practice* (2015) 247; see also Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons From South African Eviction Law' (2014) 32 Nordic Journal of Human Rights 329; Roberto Gargarella, 'Why Do We Care About Dialogue?' in Katherina G Young (ed.), *The Future of Economic and Social Rights* (2019) 212.

rights compared to more substantial traditional approaches in which judges play an equalizing role and protect the interests of minorities and the weakest. This second criticism appears less important at the supranational level since in any case the decisions of quasi-judicial bodies are not binding and those of judicial bodies cannot be subject to forced execution. Therefore, governments, as representatives of the majority, are not obliged to enforce strong decisions protecting the rights of minorities or weaker parties. From a pragmatic point of view, we have also seen that concerns of legitimacy lead them to adopt a defensive approach to human rights that focuses on the protection of insiders' existing rights. In that sense, the minimal norm of suitable employment does not offer any protection to increasingly wider categories of unemployed persons that either experience unemployment for long periods or else do not even qualify for unemployment benefits, and instead rely on social assistance schemes.

In addition, the empirical analysis of the development of experimentalist practices by international bodies is reassuring on these two concerns (see section III.c).

On the first, we have seen that international bodies are increasingly attentive to the fact that an informed democratic debate has taken place about the adoption of a programme, involving all the parties affected by the measure. We have seen that the ECSR has in recent years strongly developed the procedural aspect of proportionality when analyzing the conformity of restrictive measures with the rights enshrined in the Charter. International bodies are concerned that those involved are consulted and can make their voices and concerns heard (connection of social rights with political rights). On this point, they take into account deliberative inequalities, in particular through the progressive development of procedural requirements for representation.

As for the issue of substantial protection of the rights and interests of the most vulnerable people, we have seen that international bodies require governments willing to adopt restrictive measures to assess their impact on the most vulnerable groups in the labour market. In doing so, international bodies do not adopt a substantive social rights approach but provide a procedural framework to ensure that national reforms are adopted, implemented and reviewed through a democratic, informed and reasoned discussion that gives voice to and takes into account the interests of the outsiders (external structuring of an internal regulation process).

The experimentalist approach to human rights and the external (supranational) structuring of an internal (national) regulation process are particularly promising for international adjudication. Indeed, beyond universal minimum standards, the realization of social rights must be able to vary across countries and adapt to the local context.[63] In a democratic conception of rights, the main function of international bodies is therefore to ensure a democratic framework for debates on the best way to realize social rights and to guarantee the 'right to have human rights' domestically for all individuals, including the most vulnerable.[64]

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[63] On the differences of application of human rights in various local contexts, see Mattias Kumm, 'Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality. New Frontiers, New Challenges* (2017) 51, 70–73.

[64] See Samantha Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (2011) 4 Ethics and Global Politics 19.

V. CONCLUSIONS

Olivier De Schutter recently argued for the replacement of a defensive approach to social rights, which tends to essentialize the post-war social model, with a transformative approach to social rights aimed at broadening governments' political imagination on social policies to respond to current social, economic and also ecological challenges and to combat new inequalities. This chapter proposed to give substance to this conception of social rights by promoting an experimentalist approach to the adjudication of social rights that tends to reconnect social rights and politics, in order to ensure a democratic and rights-based transformation of national welfare states. To this end, it drew on the most recent literature on the legitimacy and effectiveness of social rights adjudication. This theoretical perspective was enriched through the systematic analysis of international social rights case law on activation policies that represents a specific, albeit important, part of the recent reforms of national welfare states.

This empirical examination has shown that the experimentalist approach to the adjudication of social rights is particularly relevant at the international level for at least three reasons. First, strong forms of review do not work at the international level because the decisions of international bodies, unlike the decisions of national courts, are either not binding (for the non-judicial bodies) or not enforceable (for judicial bodies). States' compliance with the decisions of international bodies is therefore closely linked to the respect they have for their decisions. Second, the procedures for regular monitoring of the application of social rights set up at the international level are particularly well suited to the development of an experimentalist approach to social rights adjudication, which involves regularly monitoring, comparing and evaluating the experiences of states with a view to achieving social rights as effectively as possible. In addition, interesting crossfertilizations may intervene between the regular report procedure and specific control procedures. Finally, while promoting learning-based processes stemming from the successful experiences of other states, the experimentalist approach offers the possibility to adapt solutions to best meet national context and needs. This latitude is, however, regulated: the experimentalist approach ensures that the transformations of national welfare states will be the subject both of an informed democratic debate involving the weakest and of a human rights-based assessment.

24. Social rights in armed conflict situations

Amrei Müller

I. INTRODUCTION

Armed conflicts regularly undermine people's abilities to enjoy their social rights, often grossly so, and in various direct and indirect ways. First, there are the direct consequences for human life and health: individuals, both military personnel and civilians, are killed or wounded in armed hostilities.[1] Second, the number of persons suffering from the direct effects of violence is consistently surpassed, often by far,[2] by the number of individuals killed or affected by the indirect, frequently long-term and even intergenerational,[3] health consequences of armed conflicts. Among them are disabling injuries; highly increased exposure to epidemic diseases and, to a lesser extent, to endemic diseases; raising maternal and child morbidity and mortality rates; and adverse effects on mental health.[4] All these effects are augmented by a general breakdown of public health systems and the exodus of qualified health personnel.[5] They are also linked to conflict-related interferences with social rights other than the rights to life and health: the destruction and damage of housing and infrastructure, such as roads, bridges, electricity generating facilities, power lines and switching stations, water treatment plants, hospitals and other medical facilities, schools and universities, factories and so on,[6] and the environmental damage caused by conflicts.[7] Rising malnutrition rates and even starvation

[1] Regrettably, the number of battle deaths increased sixfold from 2011 to early 2017. See Sebastian von Einsiedel *et al*, 'Civil War Trends and the Changing Nature of Armed Conflict' *UNU-CPR Occasional Paper 10* (March 2017).

[2] Keith Krause, 'From Armed Conflict to Political Violence: Mapping and Explaining Conflict Trends' (2016) 145(4) MIT Press Journal 113.

[3] Delan Devakumar *et al*, 'The Intergenerational Effects of War on the Health of Children' (2014) 75(12) BMC Medicine 1.

[4] See the numerous contributions documenting these health consequences in Barry Levy and Victor Sidel (eds), *War and Public Health* (2008); Fouad Fouad *et al*, 'Health Workers and the Weaponisation of Health Care in Syria: A Preliminary Inquiry for The Lancet–American University of Beirut Commission on Syria' (2017) 390 The Lancet 2516.

[5] Fouad (n 4), 2520; see also CESCR, 'Concluding Observations – Democratic Republic of the Congo' (16 December 2009) UN Doc E/C.12/COD/CO/4, para 35; and ECSR, 'Conclusions 2017 – Ukraine – Article 11-1' (8 December 2017) Doc No 2017/def/UKR/11/1/EN, observing that armed conflict and political instability brought essential reforms of the Ukrainian health system to a halt.

[6] E.g. Scott Gates *et al*, 'Development Consequences of Armed Conflict' (2012) 40(9) World Development 1713; and concerning Syria, see World Bank Group, *The Toll of War: The Economic and Social Consequences of the Conflict in Syria* (2017).

[7] Arthur Westing, 'The Impact of War on the Environment' in Barry Levy and Victor Sidel (eds), *War and Public Health* (2008) 69; Victor Sidel, Barry Levy and Jonathan Slutzman, 'Prevention of War and its Environmental Consequences' in Tarek Kassim and Damia Barcelo (eds), *Environmental Consequences of War and Aftermath, The Handbook of Environmental Chemistry* (2009) 22; Adam Roberts, 'Environmental Destruction in the 1991 Gulf War' (1992) 23(291) International Review of the Red Cross 538.

are equally common in times of conflict,[8] as is the displacement of people that aggravates all these negative effects of conflicts on people's abilities to enjoy their human rights to health, food, water, housing, education and social security. The diversion of public funds from health, education and social security in favour of defence and security spending is another trait of armed conflicts compounding these effects.[9]

Regrettably, in current times in which forced displacement has reached an unprecedented scale,[10] and in which the number of civil wars has nearly tripled in the past decade,[11] the scope of these effects is only to increase. These bleak realities make it all the more important to forcefully reiterate that international law contains rules, among them social rights, that shall prevent, or at least mitigate, these effects during conflicts and in their aftermath. This chapter gives an overview of how social rights set out directly in international and regional human rights treaties – and, though more indirectly and in a different way, in international humanitarian law (IHL) – are protected in times of armed conflict. This includes an examination of how the *lex specialis* maxim can assist in structuring the parallel application of IHL and social rights to armed conflicts. The *lex specialis* maxim can help both to solve conflicts between these two bodies of law and to maximize the complementary protection that they offer in many areas concerning the protection of the human interests that underlie social rights.

The chapter adopts the following structure. First, it introduces the two bodies of international law – human rights law and IHL – that protect social rights in times of armed conflict and in post-conflict situations, and elaborates on their relationship, which can be structured with the help of the *lex specialis* maxim (section II). It then shows, by way of a few examples, how social rights and IHL can contribute to safeguarding life-saving conditions of conflict-affected populations in ongoing armed conflicts (section III), before discussing in section IV how social rights and general human rights principles can contribute to peacebuilding and reconstruction processes. Section V ends with some concluding remarks about the multifaceted role that social rights can play in armed conflict and postconflict situations.

II. THE APPLICABILITY OF SOCIAL RIGHTS TO ARMED CONFLICT SITUATIONS AND THEIR RELATIONSHIP TO IHL

Two bodies of international law – human rights law and IHL – bind state and, to some extent, non-state parties to armed conflicts and oblige them in various ways to secure the human interests that underlie the social rights of persons under their influence or control. While the parallel application of IHL and human rights law in armed conflicts is no longer questioned

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[8] UN Special Rapporteur on the Right to Food, 'The Right to Food in Conflict Situations' (21 July 2017) UN Doc A/72/188; Klaus von Grebmer *et al*, *2015 Global Hunger Index: Armed Conflict and the Challenge of Hunger* (2015).

[9] Paul Collier *et al*, *Breaking the Conflict Trap: Civil War and Development Policy* (2003) 17; Victor Sidel and Barry Levy, 'The Health Consequences of the Diversion of Resources to War and Preparation for War' (2009) 4(3) Social Medicine 133.

[10] UNHCR counted 68.5 million forcibly displaced persons in 2017 (compared to 42.7 million in 2007). UNHCR, *Global Trends: Forced Displacement in 2017* (2018) <www.unhcr.org/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017.html> (3 June 2019).

[11] von Einsiedel (n 1), 2.

today,[12] the primary source – IHL and/or human rights law – and the scope of obligations of the parties to protect the human interests underlying social rights vary depending on the situation as well as on the (state or non-state) character of the parties. This is due to the differing scope of application of IHL, on the one hand, and human rights law, on the other; the distinct underlying rationale of these two bodies of law; and their relationship to each other, which shall be briefly introduced in the following.

a. Human Rights Law and Social Rights

International and regional human rights treaties that include social rights, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the (revised) European Social Charter, the African Charter for Human and Peoples' Rights and the Additional Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights, traditionally bind states that have ratified these treaties. Concrete human rights obligations of states arise, however, only towards those individual rights-holders that have a jurisdictional link with these states,[13] with jurisdiction being defined as the exercise of 'effective, overall and normative control or power of a state over a person'.[14] Effective control implies that state power is actually exercised;[15] overall,[16] or 'total',[17] control implies that power is exercised over many issues and policy areas, 'not one time only and over a single matter only';[18] and normative control implies that control is exercised 'in a normative fashion so as to give reasons for action, and not as mere coercion',[19] that is, as (political and legal) public authority with a claim to (democratic) legitimacy.[20] Normally, states exercise 'spatial' jurisdiction over the persons on their own official territories, and thus also during armed conflicts

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[12] For an overview of states', UN treaty bodies' and the ICJ's approach, see Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (2011) chapter 1; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012) 83; Orna Ben-Naftali, 'Introduction: International Humanitarian Law and International Human Rights Law – Pas de Deux' in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 3–12.

[13] Art 1 ECHR; Art 2(1) ICCPR; concerning the ICESCR, see CESCR, 'General Comment No 15 on the Right to Water' (20 January 2003) UN Doc E/C.12/2002/11, para 53; CESCR, 'General Comment No 19 on the Right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19, para 75; Art 2 OP-ICESCR.

[14] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) Leiden Journal of International Law 857.

[15] *Ibid.*, 872, including references to relevant ECtHR judgments, e.g., *Loizidou v Turkey*, ECtHR, App No 15318/89, Judgment of 23 March 1995, para 62. See also *Al-Skeini and Others v UK*, ECtHR, App No 55721/07, Judgment of 7 July 2011, paras 133–39; and HRCttee, 'General Comment No 31 on General Obligations' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 10.

[16] *Loizidou* (n 15), paras 58 and 62.

[17] *Al-Saadoon and Mufdhi v United Kingdom*, ECtHR, App No 61498/08, Decision of 30 June 2009, para 88.

[18] Besson (n 14), 872. See also ECtHR, *Banković and Others v Belgium and Others*, ECtHR, App No 52207/99, Decision of 12 December 2001, para 75; *Medvedyev and Others v France,* ECtHR, App No 3394/03, Judgment of 29 March 2010, para 67, rejecting a 'cause and effect' notion of jurisdiction.

[19] Besson (n 14), 872–73.

[20] This comes through, e.g., in the ECtHR's frequent references to 'authority' (e.g. *Al-Skeini* (n 15), para 137; *Öcalan v Turkey*, ECtHR, App No 46221/99, Judgment of 12 May 2005, para 91) or 'public powers normally exercised by [a sovereign] government' (*Al-Skeini* (n 15), para 135; *Banković* (n 18),

that take place on their own territories.[21] In exceptional circumstances, states may also exercise 'spatial' or 'personal' jurisdiction over people outside their own territories, where 'spatial' extraterritorial jurisdiction implies exercise of jurisdiction in a general form over all people on the (foreign) territory,[22] and 'personal' extraterritorial jurisdiction a more direct, personal form of effective, overall and normative control over a person outside the state's official territory.[23] International armed conflicts, in particular military occupations,[24] are among the situations in which states can exercise 'spatial' or 'personal' extraterritorial jurisdiction, and thus obtain human rights obligations towards individuals coming under this jurisdiction.

Moreover, in international armed conflict where states do *not* exercise extraterritorial jurisdiction as effective, overall and normative control, but do nonetheless impact and influence individuals located in other states, they must arguably take their broader 'responsibilities for human rights'[25] into account, flowing *inter alia* from Article 2(1) ICESCR. 'Responsibilities for human rights' under this provision are responsibilities to engage in international cooperation and assistance. They call on states (and non-state actors[26]) both to avoid undermining other states' abilities to secure the human rights of people under these other states' jurisdiction and to support and build other states' (institutional) capacities to protect these rights.[27] The degree

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para 71). The normative component of jurisdiction is grounded in the intricate relationship between human rights, equality and democracy, as pointed out convincingly by Besson (n 14), 864–66.

[21] There is a (rebuttable) presumption that states exercise 'spatial' jurisdiction over their own territories, see, e.g., *Assanidze v Georgia*, ECtHR, App No 71503/01, Judgment of 8 April 2004, para 139; *Al-Skeini* (n 15), para 131; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136, 179, para 109 (Advisory Opinion of 9 July); HRCttee (GC 31) (n 15), para 10.

[22] *Al-Skeini* (n 15), paras 138–39.

[23] *Ibid.*, paras 133–37. Further elaborated on by Besson (n 14), 874–76. See also Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011) 118–22 and 173ff.

[24] E.g. *Loizidou* (n 15), paras 62–64 and *Al-Saadoon and Mufdhi* (n 17), paras 87–89; *Wall* (n 21), para 112 and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 ICJ 168, 213–15, paras 107–13 (Judgment of 19 December); CESCR, 'Concluding Observations – Israel' (16 December 2011) UN Doc E/C.12/ISR/CO/3, para 8; HRCttee, 'Concluding Observations – Israel' (21 November 2014) CCPR/C/IDR/CO/4, para 5 and 'Concluding Observations – Iraq', contained in UN Doc A/46/40 (1991) para 652.

[25] The notion of 'responsibilities for human rights' is developed by Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)evolution' (2015) 32(1) Social Philosophy and Policy 244; see also Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted September 2011 (which, however, do not explicitly distinguish between extraterritorial human rights *obligations* based on the exercise of jurisdiction on the one hand and 'responsibilities for human rights' on the other). Similarly, CESCR, 'General Comment No 24 on State Obligations in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24, paras 25–37.

[26] As implied, e.g., in CESCR, 'General Comment No 14 on the Right to the Highest Attainable Standard of Physical and Mental Health' (11 August 2000) UN Doc E/C.12/2000/4, para 42: 'While only States are parties to the Covenant and thus ultimately accountable for compliance with it, *all members of society – individuals, including health professionals, families, local communities,* […] *non-governmental organizations, civil society organizations* […] – have *responsibilities* regarding the realization of the right to health' [emphasis added]. Note that non-state actors as responsibility-bearers do not necessarily act extraterritorially, but have responsibilities to not undermine and support a state's efforts to implement its human rights obligations from within.

[27] See, e.g., among many sources: Art 32 of the UN Convention on the Rights of Persons with Disabilities (CRPD); Art 18(2) of the 1998 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human

of normativity of 'responsibilities for human rights' remains low due to the fact that their scope and content, their relationship to human rights obligations of states of jurisdiction and the grounds based on which they should be allocated to different potential state and non-state responsibility bearers are unclear.[28] Therefore, the following focuses primarily on states' human rights obligations that arise out of their relationships of jurisdiction with individuals.

Once jurisdiction is established, the exact scope of states' more negative and more positive human rights obligations, including those flowing from social rights, depends on many factors. For the context of armed conflicts with which this chapter is concerned, the scope of states' social rights obligations is first of all determined by the level of control (beyond the level of control required to establish jurisdiction[29]) that a state has over a certain situation, including institutional and democratic control. For example, obligations of states exercising extraterritorial jurisdiction during an international armed conflict or military occupation will regularly be more limited in scope than obligations of states that exercise jurisdiction over their own territory.[30] Depending on what type of extraterritorial jurisdiction a state exercises, it must, for instance, primarily secure access to health care, adequate food and water for individuals whom it has detained and who therefore come under its 'personal' extraterritorial jurisdiction.[31] Meanwhile, when a state exercises 'spatial' extraterritorial jurisdiction, the scope of social rights obligations might include more far-reaching (systemic) obligations, such as obligations to take all necessary measures to keep health,[32] education and social security systems running in occupied territories under control, including the relevant institutions.[33] On their own territories, states' social rights obligations will regularly be even broader given that it is presumed

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Rights and Fundamental Freedoms, UNGA Res A/53/144 (9 December 1998); and the elaborations of the CESCR (GC 24) (n 25), paras 25–37 (however, as mentioned, the CESCR does not draw a clear distinction between extraterritorial obligations arising from the exercise of extraterritorial jurisdiction and (extraterritorial) 'responsibilities for human rights' of states that do not depend on jurisdiction).

[28] As outlined by Besson (n 25); see also David Miller, *National Responsibility and Global Justice* (2007).

[29] Since jurisdiction is a threshold concept (see, e.g., *Al-Skeini* (n 15), para 123), a 'gradual approach' to jurisdiction itself as suggested by some (see, e.g., Claire Breen, 'The Edges of Extraterritorial Jurisdiction: The Integration of Economic, Social and Cultural Rights into Peace Support Operations' (2012) 6 Journal of International Peacekeeping 47, 76–77, with further references) is rejected here.

[30] This can also be inferred from regional and international courts' regular observations that human rights obligations are 'essentially territorial'. E.g., *Wall* (n 21), para 112; *Ilaşcu and Others v Moldova and Russia*, ECtHR, App No 48787/99, Judgment of 8 July 2004, para 312. See also Breen (n 29), 66–67; and Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9(4) Human Rights Law Review 521, 547.

[31] As made clear by *Al-Skeini* (n 15), para 137. See also *Öcalan* (n 20), para 91; *Al-Saadoon and Mufdhi* (n 17), paras 86–89; and *Hassan v United Kingdom*, ECtHR, App No 29750/09, Judgment of 16 September 2014, paras 76 and 80.

[32] This arguably excludes most legislative measures, however, as they would encroach too much upon the rights of the displaced sovereign government. This is recognized, e.g., in CESCR (GC 24) (n 25), para 26.

[33] See, e.g., *Wall* (n 21), paras 112 and 130, 134–37; CESCR (Israel) (n 24), para 8; and CESCR, 'Concluding Observations – Morocco' (20 October 2015) UN Doc E/C.12/MAR/CO/4, paras 5–6. That the scope of extraterritorial obligations or 'responsibilities for human rights' (the CESCR does not draw this distinction carefully) can vary depending on influence and control of a state is also recognized by CESCR (GC 24) (n 25), paras 25–28.

that they control, fund and shape the (representative) institutions and domestic legislation through which social rights and other human rights are protected in the first place.[34]

An ongoing armed conflict on its own territory will not release a state from its obligations to rely on these (democratic) institutions to determine the concrete scope of social rights obligations in line with domestic circumstances and availability of resources in national legislation, and to adopt other suitable measures for their implementation.[35] This flows from general obligations under the ICESCR to 'progressively realise'[36] social rights by all appropriate means, and to limit them only in line with Article 4 ICESCR, that is, only as far as is necessary and proportionate in a 'democratic society' to promote 'general welfare', and only as far as is 'determined by [national] law' and is 'compatible with the nature of [economic, social and cultural] rights'.[37] The latter points to a further focus of the material scope of social rights obligations that is relevant for all states as human rights duty-bearers, no matter whether they act on their own territory or extraterritorially: the obligation to prioritize the implementation of minimum core obligations corresponding to the minimum core contents of each social right that are,[38] at least to some extent, set out in the UN Committee on Economic, Social and Cultural Rights' (CESCR) General Comments.[39] This is also reinforced by the fact that social rights cannot be derogated from in times of armed conflict, based on the absence of a derogation clause in the ICESCR and other treaties containing social rights.[40] This absence is primarily substantiated by the inherent absence of the necessity to derogate from social rights to achieve the aim for which derogations are regularly permitted: to protect or restore public order and the (democratic) institutions that are vital for ensuring such order and to indeed protect human rights.[41]

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[34] See also John Cerone, 'Human Dignity in the Line of Fire: The Application of Human Rights Law during Armed Conflict, Occupation and Peace Operations' (2006) 39 Vanderbilt Journal of Transnational Law 1447, 1495.

[35] Among many, see, e.g., CESCR, 'Concluding Observations – Colombia' (10 June 2010) UN Doc E/C.12/COL/CO/5, paras 7 and 15; HRCttee, 'Concluding Observations – Iraq' (3 December 2015) CCPR/C/IRQ/C/5, paras 19, 20 and 46 and *Sargsyan v Azerbaijan*, ECtHR, App No 40167/06, Judgment of 6 June 2015, paras 137–48; even in cases where the presumption of territorial jurisdiction has been rebutted because a state is 'prevented from exercising its authority over the whole of its territory by a constraining de facto situation' (including involvement in an armed conflict), this state retains certain obligations under the ECHR, among them to take administrative, judicial, political and diplomatic measures 'needed to re-establish control over the territory in question, as an expression of its jurisdiction' (*Ilaşçu* (n 30), paras 333, 339 and 346).

[36] Art 2(1) ICESCR.

[37] For more details on the interpretation of Art 4 ICESCR, see Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) Human Rights Law Review 557, 569–91.

[38] *Ibid.*, 579–83 and 588–89.

[39] CESCR (GC 19) (n 13), paras 59–61; CESCR (GC 15) (n 13), paras 6 and 37–38; CESCR (GC 14) (n 26), paras 19, 43–45, 47–48 and 60; CESCR, 'General Comment No 13 on the Right to Education' (8 December 1999) UN Doc E/C.12/1999/10, para 57; and CESCR, 'General Comment No 12 on the Right to Adequate Food' (12 May 1999) UN Doc E/C.12/1999/5, paras 6, 8 and 33.

[40] For a discussion, see Müller (n 37), 591–99; see also Gilles Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (2014) 69–107.

[41] This protective aim of derogations is pointed out by the HRCttee in 'General Comment No 29 on Derogations during a State of Emergency' (31 August 2001) CCPR/C/21/Rev.1/Add.11, para 1.

Open questions remain about whether and, if so, to what extent non-state armed groups, which are involved in almost all contemporary armed conflicts, are bound by human rights law. Despite a growing body of literature arguing that non-state armed groups are so bound,[42] many uncertainties remain. This is so in particular against the background of the absence of treaty or customary human rights law endorsed by states that binds these groups, as well as the rather ambiguous approach taken by the UN Security Council,[43] and by the UN Human Rights Council,[44] on these questions. Trends point in a direction which would indicate that very strong non-state armed groups controlling territories and setting up functioning administrations could potentially be considered human rights duty-bearers.[45] But even concerning these entities, questions can be raised as to whether these armed groups exercise jurisdiction similar to states which triggers their human rights obligations, and whether it is desirable to recognize non-state armed groups as human rights duty-bearers. After all, any exercise of human rights jurisdiction is bound to (democratically) legitimize the authority (via 'normative' control) exerted by non-state armed groups. Becoming human rights duty-bearers through the exercise of jurisdiction will inevitably endow non-state armed groups with certain 'privileges', among them to adopt (domestic) law, to conduct (fair) trials and to (non-arbitrarily) detain individuals.[46] This, in turn, threatens state legitimacy – including democratic legitimacy – at least in the longer term, and possibly even state borders. Alternatives to put further IHL obligations on non-state armed groups could be explored, for instance the expansion and adaption of the law of occupation – including in light of human rights law[47] – to bind groups that control territories and that set up functioning administrations.[48] Unlike human rights law, the law of occupation

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[42] See, e.g., Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (2016); Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (2017); Tilman Rodenhäuser, *Organizing Rebellion. Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (2018); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) chapter 6. For a rejection, see Lisbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (2002).

[43] Jessica Burniske, Naz Modirzadeh and Dustin Lewis, 'Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the UN Security Council and UN General Assembly' (Harvard Law School Program on International Law and Armed Conflict, June 2017) 26–27.

[44] Geneva Academy, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council' (Academy In-Brief No 7, December 2016) 32.

[45] E.g., Report of the International Commission on Libya established by UN Human Rights Council resolution S-15/1, UN Doc A/HRC/17/44, 1 June 2011, para 72; Joint Report by four UN Special Rapporteurs on Their Mission to Lebanon and Israel (22 December 2014) UN Doc A/HRC/2/7, para 19; OHCHR, Human Rights Violations Emanating from Israeli Military Attacks and Incursions in the OPT, Particularly the Recent Ones in Occupied Gaza Strip – Report of the High Commissioner for Human Rights on the Implementation of Human Rights Council Resolution 7/1 (6 June 2008) UN Doc A/HRC/8/17, para 9.

[46] For a detailed discussion of the implications of such endowment see Frédéric Mégret, 'Detention by Non-State Armed Groups in Non-International Armed Conflict: International Humanitarian Law, International Human Rights Law and the Question of Right Authority' in Ezequiel Heffes *et al* (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (2020) 169–94.

[47] The law of occupation applying to international armed conflicts is frequently interpreted and applied in light of human rights law, see, e.g., Marco Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupiers' (2005) 16 EJIL 661.

[48] So far, the prevailing consensus is that the law of occupation does not apply to situations of non-international armed conflict, see, e.g., Rules 21, 129A and 130 ICRC Study on Customary IHL; Yoram Dinstein, *The International Law of Belligerent Occupation* (2009) 34–35; and Hans-Peter

does not envisage administrations with a representative character, but with an autocratic and technocratic character ('commissarial dictatorships'[49]). Occupying powers are obliged to maintain 'public order and civil life',[50] but at the same time, their law-making powers will be limited.[51] Such an adapted law of occupation could apply in addition to the numerous obligations non-state armed groups already have under treaty and customary IHL covering scenarios where they are involved in hostilities in which they control or do not control territory.

b. International Humanitarian Law

IHL applies in situations of international and non-international armed conflicts. It binds all state *and* non-state parties to an armed conflict,[52] the latter in situations where they display a sufficient level of organization and where the hostilities which they are engaged in have reached a certain level of intensity.[53]

Unlike human rights law, IHL does not set out individual human rights of persons that come under the jurisdiction of states, and that have to be specified and contextualized in (domestic) laws and policies, ideally adopted through participative (even democratic) processes. Rather, IHL takes a more top-down approach and establishes (often detailed) obligations on state and non-state parties to an armed conflict that aim to *mitigate* the effects of armed hostilities on individuals, domestic institutions and infrastructure. By doing this, IHL indirectly and to a certain extent protects the human interests that underlie the social rights in regional and international human rights treaties, among them the interests not to be killed arbitrarily and to access food, health care, housing and education, as well as the institutional framework and infrastructure that is required to protect these interests. IHL mitigates the effects of hostilities by limiting permissible means and methods of warfare and by protecting persons who are not, or are no longer, directly participating in hostilities. Restrictions to means and methods of warfare come mainly in the form of the principle of distinction between military and civilian objects;[54] as well as between combatants,[55] or persons taking direct part in hostilities,[56] and civilians;[57] the principle of proportionality;[58] precautions in attack;[59] the prohibition against causing superfluous injury and unnecessary suffering;[60] and the banning of numerous types of

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Grasser, 'Protection of the Civilian Population' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2008) 237, 272. For a different view, see Eyal Benvenisti, *The International Law of Occupation* (2012) 61; and Sivakumaran (n 12), 529.

49 Nehal Bhuta, 'The Antimonies of Transformative Occupation' (2005) 16 EJIL 721, 723.

50 Art 43 Hague Regulations IV.

51 Art 43 Hague Regulations IV; Art 64 GCI; Adam Roberts, 'Transformative Military Occupations: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 586–89; Bhuta (n 49), 726; Benvenisti (n 48), 89–102.

52 Arts 2 common to GCI-IV.

53 Sivakumaran (n 12), 164–76.

54 Arts 48, 52(1) and (2) API; Rules 1, 7, 8 and 9 ICRC Study.

55 Arts 4A(1), (2), (3) and (6) GCIII; Art 43 API; Rule 3 ICRC Study.

56 Art 52(3) API; Article 13(3) APII; Rule 6 ICRC Study.

57 Arts 48, 50 and 51(2) API; Art 13(2) APII; Rules 1 and 5 ICRC Study.

58 Arts 51(5)(b) and 57(2)(a)(iii) API; Rule 14 ICRC Study.

59 Art 57(1) API; Rule 15 ICRC Study.

60 Art 35(2) API; Rule 70 ICRC Study.

weapons.[61] Special protection is also afforded to medical units,[62] and to transports.[63] Among persons protected from attacks are civilian and military medical personnel,[64] as well as religious personnel,[65] in addition to persons *hors de combat*, such as those who have surrendered or have been detained (including prisoners of war) and the wounded, sick and shipwrecked.[66]

While these rules mitigate damage caused by armed conflicts, including damage that undermine people's abilities to enjoy their social rights, they also show that IHL is built on the premise that the resort to violence – within the limits set by IHL – is permitted to achieve certain aims: those involving the weakening of the *military* potential of the enemy.[67] This premise indicates that IHL does *not* aim to and thus cannot protect everyone who is affected by an armed conflict. It does allow the use of force (including lethal force) against combatants and persons directly participating in hostilities as well as the destruction of military objects. Moreover, as reflected in the notion of 'collateral damage' woven into the principle of proportionality, it even accepts that civilians and persons *hors de combat* can be killed or suffer otherwise, and that civilian objects can be destroyed or damaged. This means that some interferences with social rights (and of course the right to life and other human rights) that would amount to violations of these rights under human rights law will be legal under IHL.

IHL is codified primarily in the four Geneva Conventions of 1949 (GCI-IV) and the two Additional Protocols to these Conventions of 1977 (API and APII). GCI-IV and API apply to international armed conflicts, while Article 3 common to GCI-IV and the whole of APII regulate non-international armed conflicts. Treaty rules are complemented by customary rules of IHL, applicable to both international and non-international armed conflicts.[68]

c. Relationship between Human Rights Law and International Humanitarian Law

The foregoing sections show that both social rights in human rights law and, albeit to a lesser extent, IHL protect individuals' interests underlying various social rights in times of armed conflict. Questions can be asked about the relationship between these two bodies of law, in particular when applying them in parallel leads to conflicting results. Though no agreement on the exact function of the *lex specialis* maxim exists in legal literature and jurisprudence,[69]

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[61] Among prohibited weapons are poison, exploding and expanding bullets, chemical and biological weapons, blinding laser weapons and antipersonnel mines; see Rules 72–74, 77–78, 81–83 and 86 ICRC Study.

[62] Art 19 GCI; Art 18 GCIV; Art 8(e) API; Art 11(1) APII; and Rule 28 ICRC Study.

[63] Art 8(f)–(g) API; Art 11(1) APII; and Rule 29 ICRC Study.

[64] Arts 24-26 GCI; Art 36 GCII; Art 20 GCIV; Art 15 API; Article 9(1) APII; Rule 25 ICRC Study.

[65] Art 24 GCI; Art 36 GCII; Art 15 API; Art 9 APII; Rule 27 ICRC Study.

[66] Art 41(1) API; Art 4 APII; Rule 47 ICRC Study.

[67] This is most clearly expressed in the preamble of the 1868 Declaration of St Petersburg, declaring that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'.

[68] Customary rules can be found in the ICRC's database: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

[69] Among others, see the analyses by Marko Milanovic, 'A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law' (2009) 14(3) Journal of Conflict and Security Law 459, 473–76; Nancie Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40(2) Israel Law Review 355; Hans Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian

in some situations the maxim can help to structure the parallel application of IHL and human rights law. Two functions of the *lex specialis* maxim set out in the International Law Commission's (ILC) Study on Fragmentation of International Law are relevant in this context.[70] In its first function, it is applicable to conflicts of norms, where it promotes the setting aside of the more general rule to an extent that it is inconsistent with the more special rule. The second function comes into play when two rules are consistent with each other, but when one rule is more detailed or tailored to the particular situation to which they both apply.[71] In this case, any tension between the rules is solved through interpretation, and the more specific rule is an application of the general rule.[72] In practice, it is often difficult to determine whether one rule is more special than another, whether there is indeed a direct conflict between two rules, and thus whether the special rule sets aside the general rule or applies in addition to the general rule.[73] The ILC Study also highlights that even in cases where the more special law indeed sets aside a more general rule, the general rule remains in the background and 'provide[s] interpretative direction'[74] to the special rule. This is supported by the principle of systemic integration in treaty interpretation set out in the Article 31(3)(c) of the Vienna Convention on the Law of Treaties. Moreover, the exact function of the *lex specialis* maxim depends on the character of the two rules that apply in parallel, the specific situation to which they are applied and any additional rules of treaty interpretation that might be considered when interpreting and applying the two norms.[75] This shows that the application of the *lex specialis* rule is not a schematic exercise that, for instance, allows for always giving preference to IHL over human rights law in times of armed conflict. As will be shown in the following, both (relative) functions of the *lex specialis* maxim can feature in the parallel application of social rights and IHL when it comes to the protection of life-saving conditions for conflict-affected populations. Of course, due to the limited – if existent – applicability of human rights law to non-state armed

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Law' (2004) 86 International Review of the Red Cross 789; Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (2011) 34–94; and Cordula Droege, 'The Interplay between International Humanitarian Law and Human Rights Law in Situations of Armed Conflict' (2007) 40(2) Israel Law Review 310.

[70] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) UN Doc A/CN.4/L.682, paras 56–58.

[71] See also Marco Sassòli and Laura Olsen, 'The Relationship between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killings and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 International Review of the Red Cross 599, elaborating on this function of the *lex specialis* maxim, including by discussing concrete examples.

[72] Both functions are arguably set out in ICJ jurisprudence, see *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, 240, para 25 (Advisory Opinion of 8 July); *Wall* (n 21), para 106.

[73] ILC Study on Fragmentation (n 70), paras 91–92; and Sivakumaran (n 12), 89–92. It can be speculated as to whether this is the reason why the ICJ refrained from referring to the *lex specialis* maxim in its most recent judgment involving the parallel application of IHL and human rights law, see *Armed Activities on the Territory of the Congo (DRC v Uganda)* (n 24), para 216. The ECtHR does also not rely on the *lex specialis* maxim explicitly in its jurisprudence concerning situations of armed conflict to which IHL arguably applies, see, e.g., *Isayeva, Yusupova and Bazayeva v Russia*, ECtHR, App Nos 57947/00 57948/00 57949/00, Judgment of 24 February 2005; and *Abdulkhanov and Others v Russia*, ECtHR, App No 22782/06, Judgment of 3 October 2013.

[74] ILC Study on Fragmentation (n 70), paras 102–03.

[75] *Ibid.*, paras 36, 106–07, 112 and 119–20.

groups, the *lex specialis* maxim is primarily relevant when it comes to structuring the parallel application of states' obligations under IHL and human rights law.

III. SOCIAL RIGHTS AND IHL PROTECTING LIFE-SAVING CONDITIONS IN CONFLICT SITUATIONS

The application of IHL, with its inbuilt acceptance of the fact that parties to a conflict can resort to violence to achieve their (strictly military) aims within the limits set by IHL, will frequently result in interferences with affected people's abilities to enjoy their social rights, to an extent that might not be justifiable when relying solely on the limitation clauses found in human rights treaties. At the same time, the parallel application of social rights set out in these treaties, among them the rights to food, water, health, housing, education and social security, will in numerous ways complement, reinforce and even expand the IHL protection of life-saving conditions for people affected by armed conflicts. This is so in particular when we are concerned with states' obligations. Two examples will be given: the first shows how the parallel application of social rights can contribute to limiting the destruction of civilian infrastructure and objects that are essential for individuals to enjoy their social rights – a destruction that is, to some extent, authorized by IHL. The second relates to the protection of health care and will indicate how specific rules of IHL on the protection of the wounded and sick and of medical personnel, facilities and transports are well complemented by states' obligations under the right to health, leading to a comprehensive protection of the conflict-affected population's access to health services.

a. Limiting Destruction of Civilian Infrastructure Essential for the Enjoyment of Social Rights in Active Hostilities

As mentioned, IHL permits the resort to violence against military objects, defined as

> those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[76]

The parallel application of social rights might not prevent attacks on military objects that reasonably fall under this definition and that also might interfere with people's abilities to enjoy their social rights. The application of the *lex specialis* maxim would allow giving (relative) preference to IHL rules in the specific situation of active hostilities in an armed conflict. However, as suggested above, the obligations flowing from socio-economic rights are still relevant even in situations of active combat where the *lex specialis* maxim has the function to resolve conflicts of norms. Socio-economic rights obligations should therefore influence the interpretation and application of the IHL definition of military objects in the process of making military target decisions. For instance, it can be argued that far-reaching interpretations of the phrases 'purpose or use' and 'effective contribution to military action' should be strongly rejected when account is taken of the parallel application of social rights, even in situations of

[76] Art 52(2) API; Rule 8 ICRC Study.

active combat.[77] Relying on broad interpretations, the destruction of a wide range of economic or so-called revenue generating objects based on equating the phrase 'effective contribution to military action' in Article 52(2) API with an effective contribution to the 'opposing forces' war-fighting or war-sustaining capability'[78] has been justified by some states and academics.[79] Applying this interpretation interferes significantly with people's rights to food, water, health, housing, education and work.[80] Even if IHL obligations will be given preference in situations of active combat over obligations flowing from social rights concerning the attacks on military objects, such far-reaching 'derogations' from obligations under socio-economic rights can hardly be justified. This is so in particular when it is recalled that even if the more general rules – in this context social rights – fade into the background as *lex generalis*, they shall still guide the interpretation of the *lex specialis*, in this case the definition of a military objective under IHL.[81]

Similarly, the parallel application of social rights should have an influence on the interpretation and application of the IHL principle of proportionality when military target decisions are made. Under the principle of proportionality, attacks on military objectives are prohibited which 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'.[82] For instance, by applying social rights in parallel, reasonably foreseeable interferences with social rights from attacks on certain military objectives – even if their effects materialize only in the mid- or long-term – should be factored into IHL proportionality analyses. This is particularly relevant when so-called dual-use objects are identified as military objectives.[83] Attacks on certain dual-use objects, among them roads, bridges, industrial complexes and energy generating facilities, often have the immense medium and long term effects that undermine the ability of individuals to enjoy their rights to health, adequate food, water, housing and education as described in the introduction. The

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[77] As indicated in section II.c above, this approach is supported by Art 31(3)(c) VCLT.

[78] US Department of Defense, *US Law of War Manual*, June 2015, paras 5.7.6.2, 5.7.8, 5.7.8.5 and 5.17.2.3, <http://archive.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf> (3 June 2019).

[79] See, e.g., Ryan Goodman, 'The Obama Administration and Targeting "War-Sustaining" Objects in Non-international Armed Conflict' (2016) 110(4) AJIL 663; and Hays Parks, 'Asymmetries and the Identification of Legitimate Military Objectives' in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges* (2007) 65, 81 and 101.

[80] See, e.g., HRC, 'Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48; and OHCHR, 'Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: Detailed Findings' (23 February 2016) UN Doc A/HRC/31/CRP.3, 51–53.

[81] See above, section II.c. Most IHL scholars also reject such far-reaching interpretations of 'military objects', see, e.g., Agnieszka Jachec-Neale, *The Concept of Military Objectives in International Law and Targeting Practice* (2014) 105 and 254; Stefan Oeter, 'Methods and Means of Warfare' in Dieter Fleck (ed.), *Handbook of International Humanitarian Law* (2013) 115, 169–70; Sivakumaran (n 12), 344–45; and Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable on Cyber Warfare* (2013) 110–11 (para 16).

[82] Arts 51(5)(b) and 57(2)(a)(iii) API; and Rule 14 ICRC Study.

[83] For more on the notion of dual-use objects, see, e.g., Alexandra Boivin, 'The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare' (UCHL Centre of International Humanitarian Law Research Paper No 2, 2006) 21; and Henry Shue and David Wippman, 'Limiting Attacks on Dual Use Facilities Performing Indispensable Civilian Functions' (2002) 35 Cornell International Law Journal 559.

various components of minimum core obligations flowing from different social rights can be relied on to make these medium- and long-term socio-economic effects – often called 'reverberating effects'[84] – of an attack on dual-use objects more foreseeable and thus enables their integration into the proportionality analysis.[85] This becomes increasingly important at a time when many conflicts take place in urban settings, where prevention and mitigation of the conflicts' devastating effects on the urban infrastructure that supports civilian life is urgently needed.[86]

There are numerous other areas where social rights-based analysis can influence the interpretation and application of IHL rules concerning means and methods of warfare, which cannot be discussed in detail here. Among them is the IHL prohibition of starvation of civilians as a method of warfare.[87] This prohibition, together with the protection of 'objects indispensable to the survival of the civilian population' in Article 54(2) API and Article 14 APII, contributes to ensuring civilian access to food and water, at the very least to the extent that their *survival* is secured.[88] These prohibitions are complemented by, for example, state obligations under the rights to food and water that go further than the survival-focused IHL obligations. These obligations require states of jurisdiction to ensure that individuals not only have access to the amount of food and water that is needed for them to survive, but also have sustainable physical and economic access to adequate and nutritious food,[89] and sufficient and safe drinking water.[90] Demands for adherence to these minimum requirements have reached a level of exceptional urgency against the background of their widespread violations in currently ongoing armed conflicts.[91] Resolution 2417(2018) of the UN Security Council on conflict-induced food insecurity and famine is a welcome first step in this context,[92] though it falls short of condemning and sanctioning starvation of civilians that has not been deployed *intentionally* as a means and method of warfare.[93] The Resolution thus ignores the role of the human right to food in light of which relevant IHL provisions should be interpreted,[94] including the more positive obligations flowing from this right.

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[84] See, e.g., Isabel Robinson and Ellen Nohle, 'Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas' (2016) 98(1) International Review of the Red Cross 107.

[85] For more details see Amrei Müller, *The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law* (2013) chapter 6.

[86] See the various contributions to (2016) 98(1) International Review of the Red Cross on 'War in Cities'.

[87] Art 54(1) API; Art 14 APII; Rule 53 ICRC Study.

[88] This is clear from the reference to 'survival' in these rules, as well as in Art 18(2) APII; see also Müller (n 85), 240–42.

[89] CESCR (GC 12) (n 39), paras 8–13.

[90] CESCR (GC 15) (n 13), paras 37(a) and (c).

[91] See, e.g., 'Half the population of Yemen at risk of famine: UN emergency relief chief' (*UN News*, 23 October 2018) <https://news.un.org/en/story/2018/10/1023962> (3 June 2019); and 'South Sudan: A year after averting famine, "food insecurity outlook has never been so dire," UN warns' (*UN News*, 26 February 2018) <https://news.un.org/en/story/2018/02/1003552>.

[92] UNSC Res S/RES/2417 (24 May 2018).

[93] For a discussion see Ruwanthika Gunaratne, 'Advocating for a Separate Designation Criteria for Starvation' (*Just Security*, 6 June 2018).

[94] While the resolution contains the occasional general references to 'international human rights law', it does not refer concretely to the parties' obligations and responsibilities flowing from the right to food or other social rights.

b. Protecting Access to Health Services

The following shows how health-related IHL rules and the right to health complement each other well when it comes to the protection of access to health care in both international and non-international armed conflicts – a protection that alleviates the direct and indirect health consequences of these conflicts.

First, the personal scope of health protection is to be mentioned. Since the adoption of API in 1977,[95] IHL rules on the protection of the wounded, sick and shipwrecked cover all military and *civilian* persons who, 'because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility'.[96] This does not prevent the possibility that the health (and life) of combatants and persons directly participating in hostilities is lawfully interfered with by active hostilities due to the application of the *lex specialis* maxim that gives relative preference to IHL in times of conflict. However, the parallel application of the right to health covering 'everyone'[97] will reinforce the equal IHL protection of both military personnel and civilians once they are 'wounded, sick or shipwrecked'.

Second, the medical care that is to be made accessible to the wounded and sick under IHL is well complemented by the care to be made accessible under the minimum core right to health, as well as non-core aspects of the right to health. IHL requires that the wounded and sick 'receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition'.[98] Commentaries to these provisions mostly indicate that those injured in hostilities should be provided with first aid and emergency medical treatment.[99] IHL thereby primarily obliges parties to the conflict to provide care that addresses the direct health consequences of armed conflicts, reflecting its traditional focus of protecting medical services attached to state armed forces whose primary task is to care for those who have been wounded in battles.[100] The broad IHL definitions of the 'wounded and sick' and of medical 'units', 'transports' and 'personnel'[101] that include persons suffering from indirect health consequences, as well as the medical units, transports and personnel caring for them, furthermore indicate that the scope of medical care may also include care that addresses the more indirect health consequences of conflicts. Among them are increasing rates of epidemic and endemic diseases, rising numbers of maternal and neonatal deaths, increasing prevalence of mental illness and complications from chronic diseases.[102]

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[95] Before the adoption of API, the IHL protection offered to civilian wounded and sick in international armed conflicts was more limited to that offered to the military wounded and sick (compare Arts 14–22 GCIV with detailed rules on the protection of wounded, sick and shipwrecked members of armed forces in GCI and GCII).

[96] Art 8(a) API.

[97] Art 12(1) ICESCR.

[98] Art 10(2) API; Art 7(2) APII.

[99] See, e.g., Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) para 4655.

[100] See also for more details Amrei Müller, 'States' Obligations to Mitigate the Direct and Indirect Health Consequences of Non-International Armed Conflicts: Complementarity of IHL and the Right to Health' (2013) 95 International Review of the Red Cross 129, 143–44.

[101] Medical 'personnel', 'units' and 'transports' are defined in Art 8(c), (e) and (g) API respectively.

[102] Müller (n 100), 150–51.

These obligations are complemented by the more explicit obligations that flow from the right to health. As indicated above, in times of conflict states shall prioritize the implementation of the minimum core right to health, which can neither be limited nor derogated from. In the CESCR's interpretation, under the minimum core right to health, states are to concentrate on building a basic health system that ensures access to 'essential primary health care'.[103] In regard to the care and health services that should be prioritized within a state's jurisdiction as a matter of obligation, the CESCR expressly notes that these shall include:

- 'immunisation against major infectious diseases occurring in the community';
- 'measures to prevent, treat and control epidemic and endemic diseases';
- 'reproductive, maternal (pre-natal as well as post-natal) and child healthcare';
- 'education and access to information concerning the main health problems in the community, including methods of preventing and controlling them';[104]
- 'essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs'.[105]

Moreover, in its definition of the minimum core right to health, the Committee emphasizes the importance of protecting the so-called underlying determinants of health, that is, ensuring access

- 'to a minimum essential food which is nutritionally adequate and safe'

as well as

- 'to basic shelter . . . and sanitation, and an adequate supply of safe and potable water'.[106]

This focus is particularly helpful for providing care that is needed to avert some of the most dreadful *indirect* health consequences of armed conflicts mentioned in the introduction to this chapter. It reveals that the parallel application of the minimum core right to health calls on states involved in armed conflicts to not unduly prioritize emergency care, surgery and trauma care at the expense of keeping health facilities running that focus on the provision of primary, community-focused health care services in line with the minimum core of the right to health.

A third aspect to mention is the protection of health *systems*, which are essential to secure people's health rights in times of peace, and even more so in times of armed conflict. Taken together, extensive definitions of 'medical personnel', 'medical units' and 'medical transports' in IHL detail many of the key features of a well-developed and accessible health system that is required to address the diverse health needs of conflict-affected populations.[107] They can be seen as specifications of some of the core elements of a health system that states have to set up under their overarching obligation to 'fulfil' the right to health.[108]

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[103] CESCR, 'General Comment No 3 on the Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23, para 10; and CESCR (GC 14) (n 26), para 43.

[104] CESCR (GC 14) (n 26), paras 44(a)–(d).

[105] *Ibid.*, para 43(d).

[106] *Ibid.*, paras 43(b) and (c).

[107] Medical 'personnel', 'units' and 'transports' are defined in Art 8(c), (e) and (g) API respectively.

[108] See, e.g., HRC, 'Report of the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt' (31 January 2008) UN Doc A/HRC/7/11.

States' explicit planning and law-making obligations under the right to health can further complement these health system-related obligations.[109] This is in particular so in non-international armed conflicts, when states act on their own official territory over which their (human rights) jurisdiction is presumed. For example, decisions on the prioritization of health interventions and adaptations of existing health planning, policies and legislation can be made in light of changing circumstances on the ground that affect *inter alia* the availability of resources to fund health care – decisions to be made ideally through participatory (democratic) processes.[110] Such prioritization or adaptation should, depending on the situation, focus on community-based public health and primary care as encouraged by the minimum core right to health, as indicated above. Moreover, planning obligations flowing from social rights can guide coordination of the delivery of medical and humanitarian assistance by domestic and international humanitarian organizations, and its integration into the procedures of an existing health system.[111]

There are similar complementarities between relevant IHL obligations and obligations under the rights to food, water, education and housing protecting the institutional aspects of national food, water and sanitation, education and housing systems, and guiding the adaptation of policies and programmes in these areas in times of armed conflict,[112] including the integration of humanitarian assistance provided by external actors.[113]

IV. SOCIAL RIGHTS, POST-CONFLICT RECONSTRUCTION AND PEACE-BUILDING

State obligations to 'fulfil' social rights that relate to the building of accessible institutions providing services on an equal basis to everyone who finds themselves under the jurisdiction of a particular state, as mentioned in the foregoing section, are also one component of states' social rights obligations that can contribute to the building of peaceful post-conflict societies. This and other aspects of these obligations, and their potential role in peacebuilding and post-conflict reconstruction, will be briefly examined in the following.

UN treaty monitoring bodies have reiterated their 'firm conviction' that the implementation of the ICESCR 'can play a vital role in procuring lasting peace'.[114] Though implementing and bringing them to full fruition remains an immense challenge,[115] the linkages and synergies of human rights, peacebuilding and development have been recognized in numerous policy

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[109] Art 2(1) ICESCR. Planning obligations flow even from the minimum core right to health, CESCR (GC 14) (n 26), para 43(f).

[110] CESCR (GC 14) (n 26), para 54.

[111] Under Art 2(1) ICESCR, states are required to ask for assistance, in particular if they are unable to secure minimum core rights; see, e.g., CESCR (GC 14) (n 26), paras 45 and 38–40; CESCR (GC 3) (n 103), para 10.

[112] CESCR (GC 11) (n 39), paras 16 and 21–28; CESCR (GC 15) (n 13), paras 17–18, 26, 28 and 37(f); CESCR (GC 13) (n 39), paras 25, 50, 52 and 56.

[113] For details, see Müller (n 85), 257–66.

[114] CESCR, 'Concluding Observations – Israel' (21 August 2001) UN Doc E/C.12/1/Add.69, para 15; and CESCR, 'Concluding Observations – Colombia' (19 October 2017) UN Doc E/C.12/COL/CO/6, paras 7–8.

[115] For a recent overview, see the contributions to the special issue 'Breaking the Silos: Linking Human Rights and Peacebuilding' in (2017) 9(3) Journal of Human Rights Practice 333–468.

documents since the 1990s.[116] They have been clearly restated *inter alia* in the 2030 Agenda for Sustainable Development,[117] as well as in the reviews of the UN peace operations and peacebuilding architecture in 2015, conducted by the UN General Assembly and the Security Council. These reviews called for a stronger integration of human rights into all components of UN peace operations,[118] and, more generally, for renewed efforts to effectively link the peace and security, development and human rights pillars of UN operations.[119] Social rights and broader human rights principles can be particularly relevant in reconstruction and peacebuilding processes when it comes to ensuring that these processes address the root causes of armed conflicts. They can also ensure that they include all relevant local actors, prioritize the building of institutions that provide basic services on the basis of equality and establish accountability mechanisms that allow for sustained local human rights monitoring and provide redress for violations. All these elements promise to make peacebuilding efforts more sustainable.

It has long been emphasized that among the root causes of armed conflicts are severe socio-economic inequalities as well as the systematic exclusion of certain groups from political decision-making.[120] Social rights and human rights law more generally focus on addressing inequality, discrimination and structural violence, as well as on the protection of vulnerable groups. These foci would, for instance, allow for the identification of long-term goals to guide the peacebuilding processes that address country-specific inequalities, and call for the adoption of corresponding domestic laws.[121]

Relatedly, social rights emphasize equal participation of everyone under the jurisdiction of a particular state in political processes that concretize the scope of social rights in domestic law, develop policies for their implementation and set priorities in line with local circum-

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[116] See, e.g., Report of the Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping' (17 June 1992) UN Doc A/47/277 – S/24111, para 81; and UN General Assembly and UN Security Council, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations (25 January 1995) UN Doc A/50/60-S/1995/1, paras 47–48. For a discussion, Meera Sabaratnam, 'The Liberal Peace? An Intellectual History of International Conflict Management, 1990-2010' in Susanna Campbell, David Chandler and Meera Sabaratnam (eds), *A Liberal Peace? The Problems and Practices of Peacebuilding* (2011) 13, 14.

[117] UNGA Res A/70/1 (21 October 2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development', in particular Goal 16: 'Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.'

[118] UNGA and UNSC, Uniting our Strengths for Peace: Politics, Partnership and People, Report of the High-Level Independent Panel on Peace Operations (15 June 2015) UN Doc A/70/95-S/2015/446, paras 77, 81(a) and (d)(iii), 157 and 160(d), 232 and 263–67.

[119] UNGA and UNSC, The Challenge of Sustaining Peace: Report of the Advisory Group of Experts for the Review of the United Nations Peacebuilding Architecture (30 June 2015) UN Doc A/69/968-S/2015/490, paras 36–40 and 61–67.

[120] Oskar Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?' (2007) 29(3) HRQ 674, 683; and Kjersti Skarstad and Havard Strand, 'Do Human Rights Violations Increase the Risk of Civil War?' (2016) 19(2) International Area Studies Review 107, 111–14.

[121] Amanda Cahill-Ripley, 'Reclaiming the Peacebuilding Agenda: Economic and Social Rights as a Legal Framework for Building Positive Peace: A Human Security Plus Approach to Peacebuilding' (2016) 16 Human Rights Law Review 223, 235; and Michelle Parlevliet, 'Rethinking Conflict Transformation from a Human Rights Perspective' in Veronique Dudouet and Beatrix Schmelzle (eds), *Human Rights and Conflict Transformation: The Challenges of Just Peace* (2010) 15, 20–21.

stances and available resources.[122] This can be conducive to making peacebuilding efforts more legitimate in the eyes of everyone affected, and thus more sustainable.[123] This can further be reinforced by the implementation of political rights that enable the establishment of democratically controlled institutions. However, in fragmented post-conflict societies, context-specific adaptations to majoritarian processes may have to be made to ensure that sufficient weight is given to the voices of minorities or hitherto marginalized groups in all political processes.[124] Overall, participatory processes through democratic or democratizing institutions encouraged by human rights law allow for peaceful political engagement to address grievances and to resolve disagreements and conflicts in a non-violent fashion, a feature that is particularly important in divided post-conflict societies.

Similarly, social rights in particular bring the importance of institution-building and short- and long-term policy planning in the areas of health, education, water and sanitation, food and social security to the foreground. Building accessible, affordable and effective institutions and distribution systems in these areas guided by core and non-core social rights obligations that allow people to access services that meet their needs – at first basic services, and gradually more far-reaching ones – will help to address discriminatory practices and contribute to increasing the legitimacy and stability of state institutions.[125] General Comments of the CESCR as well as reports of UN special procedures mandate-holders have specified many of the systemic measures that states should take to plan and institutionalize the provision of services that allow individuals to enjoy their socio-economic rights, which can also be integrated in broader peacebuilding strategies.[126] A focus on social rights will also help to challenge the still prevalent liberal models that push for 'market-driven reforms [in post-conflict countries] which may not take adequate account of the […] need for large-scale public spending'[127] to build legitimate institutions in post-conflict settings.[128]

Last but not least, a social rights focus in peacebuilding would ensure the establishment of accountability mechanisms as part of peacebuilding efforts. States are required to set up

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[122] Sigrun Skogly, 'The Requirement of Using the "Maximum of Available Resources" for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 Human Rights Law Review 393, 400.

[123] Cahill-Ripley (n 121), 234, 242.

[124] For example, by relying on consociational forms of democracy rather than competitive forms of democracy. See, e.g., Sid Noel (ed.), *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (2005); Marc Weller and Stefan Wolff, 'Self-Determination and Autonomy' in Marc Weller and Stefan Wolff (eds), *Autonomy, Self-Determination and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (2005) 1; Stefan Wolff, 'Complex Autonomy Arrangements in Western Europe: A Comparative Analysis of Regional Consociationalism in Brussels, Northern Ireland and South Tyrol' in *ibid*, 117–56.

[125] These obligations can also be reinforced by IHL peacetime obligations under Arts 1 common to GCI-IV and Art 1(1) API, requiring state parties to 'respect and ensure respect' for IHL 'in all circumstances'.

[126] See, e.g., UN Special Rapporteur on the Right to Health, Right to Health in Conflict Situations (9 August 2013) UN Doc A/68/297, paras 32–36; UN Special Rapporteur on the Right to Education, Right to Education in Emergency Situations (20 May 2008) UN Doc A/HRC/8/10, paras 35, 59 and 114–17; UN Special Rapporteur on the Right to Food, The Right to Food in Conflict Situations (21 July 2017) UN Doc A/72/188, paras 92–93.

[127] International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements* (2006) 101.

[128] Cahill-Ripley (n 121), 239–41.

effective domestic remedies to address violations of social rights and other human rights.[129] They can come in the form of an independent judiciary that can review individual complaints about alleged violations of social rights, and/or that of non-judicial monitoring and complaints mechanisms, such as national human rights institutions.[130] In a post-conflict context, such mechanisms are particularly important as coping mechanisms to raise grievances and seek redress in order to prevent relapsing into violence,[131] and to build public trust in reformed post-conflict governmental institutions.[132]

V. CONCLUDING REMARKS

To conclude, it can be noted that there are numerous ways in which social rights and IHL contribute to the protection of fundamental human interests, such as access to health care, food, housing, education and social security, during armed conflicts and in their aftermath. Health-related and other examples discussed above revealed how social rights and IHL place significant limits on the means and methods of warfare to which parties to an armed conflict can resort. This mitigates the destructive effects of armed conflicts and thus contributes to the protection of life-saving conditions in these situations. However, the analysis also showed that giving (relative) priority to IHL rules over socio-economic rights in most situations of active combat, facilitated by the *lex specialis* maxim, can permit measures undermining social and other human rights which, outside armed conflicts, would constitute violations of these rights. Renewed efforts are required to recall the continuing applicability of social rights in times of armed conflicts and to push for better implementation of relevant IHL and human rights obligations to reverse the current trend of increasing deaths in armed conflicts, both battle and non-battle-related,[133] as well as the other direct and indirect socio-economic consequences of armed conflicts that have reached record highs in 2018.[134]

The chapter also pointed out how social rights can contribute to sustainable peacebuilding efforts. Among other things, this can occur by ensuring that the root causes of conflicts are addressed as part of these efforts. Social rights analysis also promotes sufficient investments in building accessible and effective democratic or democratizing institutions that allow both for participatory and inclusive political decision-making processes and for the provision of basic services to populations living in post-conflict countries. It moreover pushes for the establishment of accountability mechanisms that will secure lasting human rights monitoring and provide redress for violations in post-conflict societies. Calls in recent UN documents to amplify efforts to operationalize and implement these (social) rights-based components

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[129] E.g., Art 2(3)(b) ICCPR; Art 13 ECHR; and Art 2(1) ICESCR as interpreted by the CESCR in 'General Comment No 9 on the Domestic Application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, paras 3, 9.

[130] Micheal O'Flaherty, 'Future Protection of Human Rights in Post-Conflict Societies: The Role of the United Nations' (2003) 3 Human Rights Law Review 53, 55; Cahill-Ripley (n 121), 242–43.

[131] See, e.g., Christine Bell, 'Human Rights, Peace Agreements, and Conflict Resolution: Negotiating Justice in Northern Ireland' in Julie Mertus and Jeffrey Helsing (eds), *Human Rights and Conflict: Exploring the Links Between Rights, Law and Peacebuilding* (2006) 345, 352.

[132] Cahill-Ripley (n 121), 245; O'Flaherty (n 130).

[133] See (n 1).

[134] See (nn 1–10).

of peacebuilding highlight the untapped potential of social rights, which should be utilized as effectively and as quickly as possible to secure sustainable peace in conflict-affected countries.[135]

[135] See (nn 118, 119).

PART V

SOCIAL RIGHTS IN PERSPECTIVE: INTERLINKAGES WITH OTHER INTERNATIONAL REGIMES

25. International investment law and social rights: interactions and encounters

Eric De Brabandere[1]

I. INTRODUCTION: OVERVIEW OF CORRUPTION AND HUMAN RIGHTS LAW

The interaction between international investment law and human rights is without doubt one of the most contentious issues surrounding the contemporary regulation of foreign investment. They seem indeed, at first glance, to be relatively separate fields of international law. International investment law and arbitration and human rights share several common features, however, and are in fact more closely connected to each other than one would imagine. There is undeniably a certain proximity between the protection granted to foreign investors under international investment treaties (and customary law), and the protection existing under human rights treaties. The provisions on the protection of the right to property in the latter, and the rules regulating direct and indirect expropriation in the former, are a clear example of this. This is probably why certain decisions of arbitral tribunals established based on an international investment agreement have not shied away from relying on the case law of international human rights courts in giving content to certain investment law norms, and this also explains why recent years have seen parallel proceedings initiated by aggrieved investors before both international arbitral tribunals and human rights courts.[2]

Over the past decades, it has become evident that international investment law interacts in various ways with human rights, beyond the mere common roots of both sets of norms. While foreign investment can be generally beneficial to the respect for and the progressive realization of social rights, the interlinkage between social rights and foreign investment has more often than not been discussed in the context of the conflicts that may arise between a state's obligation to ensure respect of social rights and the rights of the nationals of the host state to those entitlements on the one hand, and the foreign investment and the protection offered to

[1] I would like to thank Ms Anika Natus and Mr Neil Nucup for research and editorial assistance in writing this chapter. This chapter partly draws on and elaborates further on research previously published as Eric De Brabandere, 'Human Rights and International Investment Law' in Markus Krajewski and Rainer Hoffmann (eds), *Research Handbook on Foreign Direct Investment* (2019) 619.

[2] By way of example, the European Court of Human Rights (ECtHR) and three investment tribunals rendered their respective decisions in cases relating to the same factual circumstances and arising from a claim brought by (shareholders of) the liquidated Russian company OAO Neftyanaya Kompaniya Yukos against Russia. These are the following: *Case of OAO Neftyanaya Kompaniya Yukos v Russia,* ECtHR, App No 14902/04, Decision of 29 January 2009 (admissibility of application); *OAO Neftyanaya Kompaniya Yukos v Russia*, ECtHR, App No 14902/04, Judgment of 20 September 2011 (merits); *OAO Neftyanaya Kompaniya Yukos v Russia,* App No 14902/04, Judgment of 31 July 2014 (just satisfaction); *Hulley Enterprises Ltd. v The Russian Federation*, PCA Case No AA 226, UNCITRAL; *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No AA 227, UNCITRAL; *Veteran Petroleum Ltd. v The Russian Federation*, PCA Case No AA 228, UNCITRAL.

foreign investors through – mainly – bilateral investment treaties (BITs) concluded between the host state and the home state of the foreign investor on the other. Such interactions or conflicts may occur in relation to any human rights obligations of the host state, but the specific nature of foreign investment implies that it is more likely that foreign investment will have an impact on economic and social rights rather than on civil and political rights. Undeniably it is more difficult to imagine situations where rights such as the right to free and fair elections are negatively impacted by or enter into conflict with foreign investment protection – but it cannot be excluded, of course, that the protection of foreign investment may enter into conflict with other civil and political rights, such as the freedom of association.

Because of that, and in line with this *Research Handbook*'s general focus, this chapter will be centred on social rights. In its narrow sense, 'social rights' envisages the essentials of an adequate standard of living, including access to food, clothing, housing and the necessary conditions of care.[3] This definition conforms to the working definition employed in this *Research Handbook*, which defines 'social rights' and the 'social rights dimension' as relating to those rights/elements which are linked to the core of social rights protection, that is, the right to an adequate standard of living (rooted in the protection of basic human needs).[4] In the broad sense, however, the enjoyment of social rights also implicates other economic rights such as the right to work and the right to just and favourable labour conditions,[5] since those rights serve the purpose of ensuring an adequate standard of living, among others.[6] While the focus of this *Research Handbook* chiefly lies on the former, I will not, in the context of this chapter, employ a broad or narrow view of the term 'social rights'. Because of the specific focus on international investment law and arbitration, I will focus instead on those social rights which have been impacted by foreign investment. Yet, to the extent that much of what will be discussed and analysed here relates also largely to human rights in general, reference will also be made to human rights more generally and generically.

If one looks at how interactions between social rights and foreign investment and the international protection thereof can occur, it is important to point out that there is in fact no automatic conflict between the two sets of norms. In principle both sets of norms can coexist without any normative friction, in the sense that the host state will usually be in a situation in which it can respect both its obligations under human rights law and under investment treaties. But the lack of automatic conflict between these two sets of norms does not imply that there cannot be, *in casu*, a conflict between the host state's human rights obligations and those in relation to investment treaties. Rather than focusing only on conflicts or disputes in a strict sense, that is, the situation of a normative conflict between the two in the sense that the simultaneous application of both norms would be materially impossible, I will here concentrate more broadly on interactions between social rights and international investment law.

Before engaging the discussion on the social rights obligations of foreign investors, and the interaction between social rights and investment law from the substantive applicable law perspective, I will first address the general linkage between social rights and foreign investment,

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[3] Asbjørn Eide, 'Economic and Social Rights' in Janusz Symonides (ed.), *Human Rights: Concepts and Standards* (2000) 109, 119.

[4] See the editors' introduction to this *Research Handbook.*

[5] Eide (n 3).

[6] See the editors' introduction to this *Research Handbook.*

in which I will touch upon both the positive and negative impacts of foreign investment on social rights (section II).

In relation to interactions between social rights and foreign investment and the international protection thereof, a link must be made with the jurisdiction of arbitral tribunals established based on an investment treaty. Since the direct access of foreign investors to investment treaty arbitration is only accepted because it is part of the protection offered to the investor for claims arising out of the investment, the competence of the arbitral tribunal is at the same time in principle *limited* to these types of disputes. This question is fundamental and impacts the subsequent issues addressed in the context of this chapter, notably the question of applicable law. I will thus first address the limited scope of the jurisdiction of investment tribunals (section III), before turning to the specific circumstances under which social rights obligations and investment protection obligations interact and collide.

As far as the specific interactions are concerned, a first encounter relates to the fact that investors operating in a foreign state may themselves be bound by certain human rights obligations existing mainly under the domestic law of the host state in which the activity takes place, but also, sometimes, under the legislation of their home state based on a certain form of extra-territoriality[7] (section IV.a).[8] While such questions fall under the general issue of how foreign corporations can be held accountable for human rights violations,[9] there is a recent tendency in investment agreements to add so-called legality requirements which imply an obligation for foreign investors to conform to and respect the domestic laws of the host state when investing in that state (section IV.b). Also, the inclusion of clauses containing investor obligations in the area of human rights in investment treaties may, under certain conditions, result in an 'internationalization' of the human rights obligations of the foreign investor (section IV.c). From a procedural perspective, states can initiate counterclaims in relation to a foreign investor's violation of its social rights obligations either under domestic law or under any obligations the investor may have under the investment treaty. This possibility forms the procedural counterpart of the substantive obligations foreign investors have or may have (section IV.d).

Second, social rights may come into play as a matter of applicable law in treaty-based investment arbitrations; in such case, social rights strictly speaking are not discussed in the context of the investor's obligation to respect social rights, but rather on the general premise that human rights as part of international law can be applicable to investment disputes between foreign investors and host states. Investment tribunals can then take into account international law relating to social rights. This can be the case in the context of the interpretation of substantive investment protection standards such as fair and equitable treatment and the norms relating to expropriation (section V.a). In practice, social rights, and more specifically the right to water, have been invoked by states as a defence to responsibility, in the sense that the host state's social rights obligations have been invoked in order to justify, remedy or preclude the wrongfulness of a breach of investment protection agreements (section V.b).

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[7] See the contribution by Ralph Wilde in this *Research Handbook* (Chapter 4).

[8] See Eric De Brabandere and Maryse Hazelzet, 'Corporate Responsibility and Human Rights – Navigating Between International, Domestic and Self-Regulation' in Yannick Radi (ed.), *Research Handbook on Human Rights and International Investment Law* (2018) 221.

[9] See the contribution by Judith Schönsteiner in this *Research Handbook* (Chapter 21).

II. LINKAGE BETWEEN FOREIGN INVESTMENT AND SOCIAL RIGHTS

a. Interconditionality Relations Between Foreign Investment and Economic and Social Development

The link between international investment law and human rights has been often viewed as one of interconditionality in that respect for human rights – both civil and political rights and economic, social and cultural rights – is paramount in order to attract foreign investment. At the same time, foreign investment often is considered a catalyst for economic and social development through positive spillover effects of foreign investment which 'help to improve human rights conditions on a broader scale in the host community'.[10] The general idea is that respect for the rule of law and human rights attracts foreign investment, which in turn generates economic growth and thus contributes to social development.

As regards respect for human rights being a stimulus for foreign investment, the World Bank for instance has noted that 'an institutional environment that respects rights is an important ingredient of the rule of law and a foundation for good jobs for development'.[11] The World Bank further considered that the role of states should be to create a 'policy environment that is conducive to growth. Macroeconomic stability, an enabling business environment, human capital accumulation, and the rule of law are among the fundamentals.'[12]

More generally, the link between human rights, the rule of law and economic growth has also been recognized by the UN General Assembly.[13] The UN Secretary-General likewise has explained – in 'rule of law' language reminiscent of the respect for social rights – that

> the provision and implementation of stable and predictable legal frameworks for businesses and labour stimulate employment by promoting entrepreneurship and the growth of small and medium-sized enterprises, and attracting public and private investment, including foreign direct investment. The link between economic development and the rule of law has long been established.[14]

In this connection, I should also underscore that the increased international attention given to corporations' responsibility for human rights – corporate social responsibility (CSR) – very often through 'soft law' instruments has strengthened the need for foreign corporations investing in states to make sure that the human rights in respect of that corporation's activities are respected in that state.[15] Although not necessarily relying on legally enforceable norms, this reality provides an additional reason for states, if they seek to attract foreign investors and achieve sustainable economic and social growth, to ensure respect for human rights. It is thus

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[10] David S Bettwy, 'The Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for An Analytical Framework' (2012) 11 Richmond Journal of Global Law and Business 239, 250.

[11] World Bank, *World Development Report 2013: Jobs* (2012) 25.

[12] *Ibid.*, 22.

[13] See, e.g., UNGA Res A/67/97 (14 January 2013), Preamble, para 5.

[14] UNGA, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels – Report of the Secretary-General' (16 March 2012) UN Doc A/66/749, para 26.

[15] See Eric De Brabandere, 'Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System' in Jean d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011) 268.

not surprising that it is in the context of the international discussion on CSR that economic development and respect for the rule of law have been considered to be important in guaranteeing respect for human rights generally.[16]

When looking at the other side of the interconditionality, that is, the influence of foreign investment on the respect for human rights generally, and social rights in particular, foreign investment is commonly considered to contribute to the social and economic development of the host state. The underlying idea here is in conformity with the broad premise that foreign investment generates economic growth and social development.[17] An investment agreement, being mostly aimed at enhancing 'the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions',[18] is intended to have a positive influence on the human rights situation in the host state. The idea that foreign investment contributes to economic and social development is indeed inherent in the current conception and definition of foreign investment. One need only refer to the often used definition of 'investment' under Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[19] set by the tribunal in *Salini v Morocco*;[20] the contribution of the investment to the economic development of the host state is, here,[21] considered as one of the main defining characteristics of 'investment'.[22] Whether one agrees with this from a *legal* perspective or not,[23] the main point here is that there is a general agreement that foreign investment is intended to positively impact the social and economic situation in the host state.[24]

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[16] HRComm, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (22 February 2006) UN Doc E/CN.4/2006/97, para 21.

[17] See Jorge Bermejo Carbonell and Richard A Werner, 'Does Foreign Direct Investment Generate Economic Growth? A New Empirical Approach Applied to Spain' (2018) 94 Economic Geography 425.

[18] Comprehensive Economic and Trade Agreement (European Union–Canada) (provisionally entered into force 21 September 2017), Preamble.

[19] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) 575 UNTS 159.

[20] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001).

[21] It has been argued that the contribution of the investment to the economic development of the host state should include 'development of human potential, political and social development and the protection of the local and global environment' (Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2009) 134). See for the claim that economic development should be replaced by a mere contribution to the economy of the host states: *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009), para 85.

[22] *Ibid.*, para 52: 'The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction … In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.'

[23] See Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 Chicago Journal of International Law 287, at 302 in support of *Salini*, and Julian Davis Mortenson, 'The Meaning of "Investment": ICSID's *Travaux* and the Domain of International Investment Law' (2010) 51 Harvard Journal of International Law 257, at 297 espousing a broader definition of investment.

[24] See Godfrey Yeung, *Foreign Investment and Socio-Economic Development: The Case of Dongguan* (2001) ch IV.

If we look at certain more specific social rights, one can also see that, in principle, foreign investment can be beneficial to achieving the 'progressive realization'[25] of social rights. Under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the enjoyment of an adequate standard of living has been considered to include the right to adequate food, encompassing not only '[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture', but also '[t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights'.[26] Research conducted by the German Society for International Cooperation (on behalf of the German Federal Ministry for Economic Cooperation and Development) in 2009 discussed the potentially positive economic impact of foreign investment in land.[27] Positive economic impact may flow more specifically from increased productivity on agricultural land through the use of more advanced and efficient technologies,[28] or via improvement of marginal land through melioration measures.[29] The Food and Agriculture Organization of the UN (FAO) also acknowledged that foreign investment in the agricultural sector has potential benefits, such as technology transfer and more food supplies both for the region and for export.[30]

The right to water may also be positively influenced by foreign investment, although it is also the most frequently invoked social right when considering the (potentially) negative effects of foreign investment (as I will discuss in the next section). The right to water as such is not mentioned in the ICESCR but is generally considered to be part of the right to an adequate standard of living and the right to health under Articles 11(1) and 12(1) ICESCR respectively.[31] In relation to the right to safe drinking water and sanitation, it has been argued that the privatization of and foreign investment in the water distribution sector has generally had positive effects and spillovers on service coverage and quality of the water.[32]

Finally, one could also point to the right to work, and the right to 'just and favourable conditions of work' as guaranteed under Articles 6 and 7 ICESCR. Here also, it has been argued that foreign investment may have a positive direct effect because of the spillover effects to the host state in terms of human capital and knowledge transfer.[33] Further, foreign investment may

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[25] International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3, Art 2(1). For a general discussion of the obligations of states under the ICESCR, see Manisuli Ssenyonjo, 'Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law' (2011) 15 International Journal of Human Rights 969.

[26] CESCR, 'General Comment No 12' (12 May 1999) UN Doc E/C.12/1999/5, para 8.

[27] Matthias Görgen *et al*, *Foreign Direct Investment (FDI) in Land in Developing Countries* (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)) (2009) 21 https://europa.eu/capacity4dev/file/6621/download?token=SkHtGdus (28 May 2019).

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid.*, citing FAO, 'From Land Grab to Win-Win: Seizing the Opportunities of International Investments in Agriculture' (June 2009) 4 Policy Brief.

[31] See for a discussion, Laurence Boisson de Chazournes, *Fresh Water in International Law* (2013) 158ff.

[32] Marianne Fay and Mary O Morrison, *Infrastructure in Latin America and the Caribbean: Recent Developments and Key Challenges* (2007) 42.

[33] See for a discussion Simeon Djankov and Bernard Hoekman, 'Foreign Investment and Productivity Growth in Czech Enterprises' (2000) 14 World Bank Economic Review 49, 55–56; Jože P Damijan *et al*, 'Technology Transfer through FDI in Top-10 Transition Countries: How Important are Direct Effects, Horizontal and Vertical Spillovers' (2003) 17 Institute of Economic Research Working Paper 8;

result in so-called market access spillover, which may benefit local firms that establish relationships with foreign investors,[34] and in turn result in an expansion of operations for domestic investors and thus reduced unemployment.[35]

However, this impact is not only positive – in the sense that foreign investment is conducive to the respect by the state of social rights and in fact can contribute to the state meeting its international social rights obligations – but may also be negative, since foreign investment may result in a difficulty in ensuring respect for (certain) social rights on the domestic level.[36]

b. Encounters and Conflicts between Social Rights and Foreign Investment

One cannot overlook the fact that in certain situations – and most importantly in the case of a financial and economic crisis – the same activity can instead result in a negative effect on the social and economic situation within the state, as several cases involving Argentina have shown.[37] More generally, as pointed out by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, investments in the extractive industries and other industries such as apparel and footwear have coincided with violations of labour rights and other social rights, with the extractive industries sector accounting for two thirds of the total reported violations.[38]

While foreign investment can be generally beneficial to respect for and the progressive realization of social rights, the interlinkage between social rights and foreign investment has more often than not been discussed in the context of the conflicts that may arise between a state's obligation to ensure respect of social rights and the rights of the nationals of the host state to those entitlements on the one hand, and the foreign investment and the protection offered to foreign investors through – mainly – BITs concluded between the host state and the home state of the foreign investor, on the other hand.

When looking at social rights, the vast majority of the instances in which social rights and foreign investment have been in conflict relate to the rights to water and health. Based on the human rights to water and health, certain states have suspended or terminated concessions and lease contracts, leading to claims brought by the investor for the alleged breach of the investment contracts and applicable investment treaties. I will analyse these in more detail in section V of this chapter. It remains, however, that, next to formal investment disputes,

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Magnus Blomström and Ari Kokko, 'Multinational Corporations and Spillovers' (1998) 12(3) Journal of Economic Surveys 247; Dierk Herzer and Peter Nunnenkamp, 'FDI and Income Inequality: Evidence from Europe' (2011) 1675 Kiel Institute for the World Economy Working Paper 1675.

[34] Bettwy (n 10), 245–51.

[35] Blomström and Kokko (n 33), 254–55.

[36] On the 'desirable' and 'undesirable' socio-economic effects of foreign investment generally, see Yeung (n 24), 141–206. See for an overview of the practice of including conditionality clauses, notably in relation to labour rights, in investment treaties Bonnie Penfold, 'Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities' (International Labour Office) (Working Paper No 95), 3–9 <www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_101040.pdf> (28 May 2019).

[37] See notably *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010); and more recently, *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016).

[38] HRComm Interim Report (n 16), para 25.

concerns have also been raised as to the negative impact of foreign investment on social rights. In relation to foreign investment in the agricultural sector, for instance, the FAO has noted the risk of displacing indigenous peoples and decreasing standards of living, which may undermine economic, social and cultural rights.[39] In relation to the right to adequate housing, covered by Article 11 of the ICESCR, the 2011 report of the UN Human Settlements Programme (UN-Habitat) mentions that foreign investment-related forced evictions can occur in the case of largescale development projects 'often planned or conducted under the pretext of serving the "public good," such as those linked to development and infrastructure projects'.[40] Indigenous peoples in particular can be affected by largescale development projects.[41]

In the specific context of international investment law and arbitration, by which I mean the context of disputes between foreign investors and host states brought before international arbitral tribunals, the most egregious violations of social rights usually are not the subject of arbitration proceedings based on investment treaties. The main reason for this is that investment treaties are habitually drafted in such a way as to allow only claims by investors against the host state for violation by the latter of the obligations towards foreign investors contained in such treaties. This means that in practice, and unless the treaty contains either obligations of investors and/or a possibility for the host state to initiate counterclaims against the investor (as I will show later in sections IV.c and IV.d), the host state will not be able to initiate a claim against the investor independently of a claim initiated by the investor against the host state, or absent the existence of an investment dispute. Egregious violations of social rights can of course be conducted in the host state itself. The second, and related, reason is that while violations by foreign investors of social rights have been invoked on several occasions in investment arbitrations (as will be discussed below), the submission of a claim against a host state for breaches of an applicable investment treaty by a foreign investor involved in serious or widespread human rights abuses would quickly backfire legally. An investor initiating an investment claim against a host state, while being itself responsible for serious or widespread human rights abuses, would as a consequence be simultaneously subjecting itself to a possible counterclaim by the state for such abuses. Finally, investment treaties, because of their usually narrowly circumscribed arbitration rules and jurisdictional clauses, may not provide for the best forum to adjudicate disputes against foreign investors for human rights violations.

III. THE JURISDICTION OF INTERNATIONAL INVESTMENT TRIBUNALS

The consent of states, expressed through the signing of bilateral and multilateral investment treaties, is usually given for claims directly related to investments, and therefore cannot be extended to any types of conflict between the investor and the home state. The scope of jurisdiction indeed is defined and limited by the agreement of the state parties to the treaty granting jurisdiction, or, in the event of consent otherwise expressed, by that instrument. A tribunal thus has no competence in matters which fall outside the responsibility given to the tribunal by

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[39] FAO, 'World Summit on Food Security' (2009) <www.fao.org/wsfs/world-summit/en> (28 May 2019).

[40] UN-Habitat, *Forced Evictions: Global Crisis, Global Solutions* (2011) 46.

[41] *Ibid*.

the parties. In this respect, I should also point out that Article 25 ICSID Convention limits the jurisdiction of the Center 'to any legal dispute arising directly out of an investment'.

An investment tribunal which has jurisdiction over a certain dispute cannot extend this jurisdiction to other categories or types of disputes between the parties. Investment agreements contain provisions delimiting the scope of the application of the treaty and thus the jurisdiction of tribunals established under that treaty. If the jurisdiction of the tribunals is limited to 'investment disputes',[42] the *scope* of the tribunal's jurisdiction does not extend to other types of disputes.[43]

In *Rompetrol v Romania*,[44] the Tribunal reiterated that its sole function was to decide a legal dispute arising directly out of an investment, in application of Article 25 ICSID Convention.[45] The Tribunal explained that any complaint that claimants or related parties may have in relation to possible breaches of the European Convention on Human Rights should be submitted to the dispute settlement system established under that Convention. The Tribunal nonetheless clearly established – as will be addressed in section V – that general rules of international law, including those related to human rights, may be relied upon in defining, notably, the content of what constitutes fair and equitable treatment under the investment treaty, hinting at an application of the principle of 'systemic integration' in the context of treaty interpretation under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), but not explicitly referring to it.[46]

The decision of the Tribunal in *Urbaser v Argentina* is highly relevant in this context.[47] The discussion in *Urbaser* has to be seen in light of the counterclaim brought by Argentina,[48] whereby it in essence claimed that the foreign investor, acting as a shareholder of the Argentinian company AGBA SA holding a concession of water distribution and sewage in Buenos Aires, had breached its investment obligations under the concession contract. The alleged breach related to the failure of the foreign investor to make the necessary investments, making it impossible to guarantee the human right to water of the population of the area of the concession. The Tribunal accepted jurisdiction over the counterclaim mainly based on a broadly formulated investor–state arbitration clause, which according to the Tribunal allowed Argentina to present any claim against the foreign investor if such claim is 'in con-

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[42] See, e.g., Article XII(1) of the BLEU-Colombia BIT which provides that 'any *investment dispute* between an investor of one Contracting Party and the other Contracting Party, shall be notified in writing by the investor to the other Contracting Party' [emphasis added]. Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and the Republic of Colombia, on the other hand, on the reciprocal promotion and protection of investments (signed 4 February 2019).

[43] See *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL (1994) 95 ILR 184, 188 and 203. See also for a similar finding, but in relation to *amicus curiae* proceedings, *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, and *Border Timbers Limited, Border Timbers International (Private) Limited and Hangani Development Co (Private) Limited v Republic of Zimbabwe*, ICSID Case No ARB/10/25, Procedural Order No 2 (26 June 2012), para 60.

[44] *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award (6 May 2013).

[45] *Ibid.*, para 170.

[46] *Ibid.*, para 172.

[47] *Urbaser* (n 37).

[48] *Ibid.*, paras 1156–66 for the summary of the counterclaims.

nection with an investment'.[49] According to the Tribunal in *Urbaser*, when investment treaties contain dispute settlement clauses which cover 'all disputes relating to investments' without any limitation to disputes limited to the rights contained in the treaty, a human rights-based counterclaim by the state thus can be accepted by an arbitral tribunal.[50] It is for this reason that the Tribunal in *Urbaser* allowed Argentina to present a human rights counterclaim against the foreign investor because such claim is 'in connection with an investment'.[51]

IV. SOCIAL RIGHTS OBLIGATIONS OF FOREIGN INVESTORS

Since the beginning of the twenty-first century, numerous avenues for increasing the accountability of corporations have been explored in the legal literature and several international instruments have been adopted in an effort to regulate the conduct of non-state actors, in particular the conduct of transnational corporations in the human rights sphere.[52] But in the specific context of international investment law and arbitration, the question of whether foreign investors can be held accountable for violations of social rights cannot be answered only in respect of the obligations, under international and domestic law, of those foreign investors. There are certain recent trends in investment agreements which also – directly or indirectly – regulate foreign investor obligations in the area of human rights. This can be through the inclusion of investor obligations in the area of human rights in investment treaties, sometimes coupled with the procedural possibility for states to initiate counterclaims in relation to violations by the foreign investor of its social rights obligations. But it can also be indirect through the inclusion of 'legality requirements' whereby investments made or executed by foreign investors in breach of the domestic laws of the host state are denied protection under the treaty.

a. Obligation of Foreign Investors and Host States to (Ensure) Respect (for) Human Rights

Traditionally, human rights obligations are addressed to states and have been intended principally to regulate the relations between individuals and the state. The state not only bears a duty to respect the human rights of the individuals on its territory, but also has a duty to ensure that private actors, including foreign investors, do not violate those rights.[53] As is widely acknowledged, the rights guaranteed under the ICESCR impose three types of state obligation, namely

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[49] *Ibid.*, paras 1143–55. For a decision also accepting – in principle – the possibility of jurisdiction over counterclaims, see *Saluka Investments BV v The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004), paras 37ff. In the end, the tribunal denied jurisdiction over the counterclaim since it was brought by Respondent based on an investment contract which had its own arbitration clause (*ibid.*, paras 52–56).

[50] See Patrick Dumberry and Gabrielle Dumas-Aubin, 'When and How Allegations of Human Rights Violations Can be Raised in Investor-State Arbitration' (2012) 13 Journal of World Investment and Trade 349, 360–65.

[51] *Urbaser* (n 37), paras 1143–44.

[52] See De Brabandere and Hazelzet (n 8), 221. This section draws partly on research conducted in that context.

[53] See Christian Tomuschat, *Human Rights: Between Idealism and Realism* (2003) 309. For an extensive analysis of the horizontal application of human rights, see John H Knox, 'Horizontal Human Rights Law' (2008) 102 AJIL 1.

the obligations to fulfil, respect and protect.[54] The obligation to fulfil implies that the state must provide or at least facilitate the enjoyment of the right and needs to take the necessary steps for the realization of those rights.[55] The obligation to respect is more passive, and requires the state to refrain from taking action which would impede the enjoyment of the rights.[56] Finally, the obligation to protect implies an obligation for the state to ensure that individuals or enterprises (including foreign investors) do not negatively impact the rights of individuals.[57]

Human rights thus have, strictly speaking, no direct horizontal effect under international law, in the sense of being applicable, as a matter of *international law*, to relations between individuals and/or corporations. Several committees of human rights conventions have nonetheless recognized the 'responsibility' of corporations in the field of human rights, but such recognitions have often been couched in terms of the responsibility of the state to ensure respect for human rights, or otherwise the responsibility of the corporation is directly targeted, albeit in non-binding terms.[58]

b. 'Legality Requirements' and Human Rights

At present, many international investment treaties contain so-called legality requirements or in accordance with the law provisions, that is, provisions which require that the foreign investor complies with the laws of the host state. A typical example can be found in Article 1 of the 2006 French Model BIT, which contains in its definition of investment the following sentence:

> It is understood that those investments are investments which have already been made or may be made subsequent to the entering into force of this Agreement, in accordance with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made.[59]

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[54] See, among others, CESCR (GC 12) (n 26), para 15; CESCR 'General Comment No 14' (11 August 2000) UN Doc E/C.12/2000/4, para 33; CESCR 'General Comment No 15' (20 January 2003) UN Doc E/C.12/2002/11, para 20; CESCR 'General Comment No 18' (6 February 2006) UN Doc E/C.12/GC/18, para 22; CESCR 'General Comment No 23' (26 April 2016) UN Doc E/C.12/GC/23, para 58.

[55] CESCR (GC 12) (n 26), para 15; CESCR (GC 14) (n 54), para 33; CESCR (GC 15) (n 54), para 25; CESCR (GC 18) (n 54), para 22; CESCR (GC 23) (n 54), para 60.

[56] CESCR (GC 12) (n 26), para 15; CESCR (GC 14) (n 54), para 33; CESCR (GC 15) (n 54), para 21; CESCR (GC 18) (n 54), para 22; CESCR (GC 23) (n 54), para 58.

[57] CESCR (GC 12) (n 26), para 15; CESCR (GC 14) (n 54), para 33; CESCR (GC 15) (n 54), para 23; CESCR (GC 18) (n 54), para 22; CESCR (GC 23) (n 54), para 59; see in more detail on this also the contribution by Judith Schönsteiner in this *Research Handbook* (Chapter 21).

[58] In the context of social rights, see CESCR 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (12 July 2011) UN Doc E/C.12/2011/1, para 5 and CESCR 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24, paras 11–37.

[59] Art 1 Draft Agreement between the Government of the Republic of France and the Government of the Republic of […] on the Reciprocal Promotion and Protection of Investments, www.italaw.com/documents/ModelTreatyFrance2006.pdf (29 May 2019).

Certain investment treaties contain a separate clause to this effect. The Uzbekistan-Kazakhstan BIT,[60] for instance, contains the following in Article 12, entitled 'Application of the Agreement':

> This Agreement shall apply to investments within the territory of one Contracting Party's State, made in compliance with its legislation by investors from the other Contracting Party's State, regardless of whether they were made before or after the entry into force of this Agreement.

When such clause is added to an investment agreement, the essentially domestic law obligations of the foreign investor are somehow 'internationalized' in the sense that the non-fulfilment of the obligations in respect of human rights under domestic law may – depending on the precise formulation of the treaty – impact the admissibility of claims based on the treaty, or the existence, for the purposes of the treaty, of a covered investment and the jurisdiction of the tribunal. The general idea behind such clauses is to bar the application of the treaty to investments made in breach of the host state's legislation,[61] and as a consequence bar an arbitral tribunal from establishing jurisdiction to hear a claim based on an 'illegal' investment[62] – including the applicable human rights obligations.

As some authors have argued, 'legality requirement' clauses can indeed function

> as an entry point for human rights argumentation for the host state's defence so that investments made in violation of applicable international human rights law fall outside the ISDS jurisdiction.[63]

Based on existing case law, it is safe to conclude that when human rights have been integrated in the host state's domestic law, and human rights obligations thus form part of the domestic law of the host state, a breach of such human rights obligations – as a matter of domestic law – by a foreign investor can result in a denial of the application of the BIT to the investment. This is the case if the treaty contains an explicit legality requirement clause, but in light of certain

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[60] Agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments (2 June 1997) 2408 UNTS 65.

[61] See for a discussion Jarrod Hepburn, 'In Accordance with *Which* Host State Laws? Restoring the "Defence" of Investor Illegality in Investment Arbitration' (2014) 5 Journal of International Dispute Settlement 531.

[62] See, e.g., *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007); see also *Inceysa Vallisoletana, SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006), para 230, in which the Tribunal's jurisdiction was predetermined by the requirement of an investment made in accordance with Salvadoran law. It applied the principle of 'good faith' as part of the national laws of the host state. The Tribunal, applying the principle of good faith as part of Salvadorian law, explained that: 'El Salvador gave its consent to the jurisdiction of the [Center], presupposing good faith behavior on the part of future investors […] By falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa's complaint, since its investment cannot benefit from the protection of the BIT' (paras 238–39).

[63] Vivian Kube and Ernst-Ulrich Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) European University Institute Working Paper No LAW 2016/02, at 20.

case law, it can be assumed that some tribunals will accept that the protection afforded under the BIT will also not be applied absent such an explicit requirement.[64]

While there is support in several decisions that only non-trivial violations of the host state's legislation will trigger the application of the clause,[65] there is still much discussion about which types of domestic legislation can trigger the application of the legality requirement. This was discussed in detail by the recent decision in *Kim and Others v Uzbekistan*.[66] The Tribunal, while noting that the treaty language in the case at hand, and in many other investment treaties, does not seem to impose any limits on the type of legislation capable of triggering the application of the legality requirement, found that a principled approach was necessary, based on the objective of the treaty and using the principle of proportionality. The Tribunal thus concluded that the legality requirement is triggered only by 'non-compliance with a law that results in a compromise of a correspondingly significant interest of the Host State',[67] taking into account both the standing of the law or obligation in question and the violation of that law or obligation by the investor. However, from subsequent case law on the question of which types of domestic legislation can trigger the application of the legality requirement, it can readily be asserted that human rights violations would be covered, either because they can be considered as part of the 'fundamental laws' of the host state or because non-compliance with a human rights law will likely result in a 'compromise of a correspondingly significant interest of the Host State'.

One last question remains to be answered – whether a legality requirement operates at the level of the establishment of the investment only, or whether it extends throughout the life of the investment. There is no consensus on this, whether in practice or in scholarship.[68] What can nonetheless be said is that the formulation of the legality requirement in the applicable investment treaty is fundamental and will influence the interpretation of such a provision by an arbitral tribunal. The Tribunal in *Hamester v Ghana* distinguished between both types of legality requirements and concluded that based on the specific language of the applicable BIT, which applied to investments *made* consistent with the host state's legislation, the requirement is limited to the establishment phase only.[69] The Tribunal further noted that the illegality of the investor's conduct during the life of the investment may be relevant to the merits stage of a dispute, but it does not affect the jurisdiction of the tribunal.[70] In relation to social rights spe-

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[64] Tribunals have over the past years read such a requirement into investment treaties even in the absence of such clause. See, e.g., *Plama Consortium Limited v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction (8 February 2005); *Phoenix Action* (n 21), para 107; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award (18 June 2010), para 124. See for a discussion Dumberry and Dumas-Aubin (n 50), 349–72.

[65] See, e.g., *Tokios Tokelės v Ukraine,* ICSID Case No ARB/02/18*,* Decision on Jurisdiction (29 April 2004), para 86; *LESI Spa et Astaldi SpA v People's Democratic Republic of Algeria*, ICSID Case No ARB/05/3, Decision on Jurisdiction (12 July 2006), para 83(iii); *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17, Award (6 February 2008), para 104.

[66] *Vladislav Kim and Others v Republic of Uzbekistan*, ICSID Case No ARB/13/6, Decision on Jurisdiction (8 March 2017).

[67] *Ibid.*, para 398.

[68] See for a discussion Kube and Petersmann (n 63), 21.

[69] *Hamester* (n 64), para 127. For other examples in which the requirement was limited to the establishment of the investment, see *Saba Fakes v Turkey*, ICSID Case No ARB/07/20, Award (14 July 2010), para 119; *Metal-Tech Ltd v Republic of Uzbekistan*, ICSID Case No ARB/10/3, Award (4 October 2013), paras 185ff; *Vladislav Kim* (n 66), 377.

[70] *Hamester* (n 64), para 127.

cifically, this case law implies that only investments made in violation of social rights would be denied protection under the treaty, while violations of social rights during the performance of the investment would not result in a denial of protection but would rather be a relevant factor in determining the existence of a breach of the investment treaty.

c. Clauses Containing Investor Obligations in Investment Treaties

Although human rights obligations of foreign investors are only rarely included in investment treaties themselves, there are several recent examples of investment treaties containing clauses which refer to the obligations of foreign investors in the area of human rights. Yet the idea of incorporating in an investment treaty references to human rights obligations of foreign investors, or more broadly CSR, is not new. A notable attempt to do so was the Multilateral Agreement on Investment proposed by the Organisation for Economic Cooperation and Development.[71]

Several investment treaties (or model investment treaties) have for many years included rather programmatic provisions relating to human rights generally. The 2014 Canadian Model BIT,[72] for instance, imposes positive obligations on the contracting states not to waive or relax domestic health, safety or environmental measures for foreign investors.[73] A similar provision can be found, *inter alia*, in the European Union-Caribbean Community Forum Economic Partnership Agreement.[74] Moreover, the 2014 Canadian Model BIT contains a provision requiring states to 'encourage' investors operating in their territory to voluntarily comply with CSR standards, including human rights.[75] Such clauses have no real obligatory effect in

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[71] Multilateral Agreement on Investment – Draft Consolidated Text (*OECD*) <www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> (29 May 2019) Art X, at 95–96.

[72] Agreement between Canada and […] for the Promotion and Protection of Investments (2014) <www.italaw.com/sites/default/files/files/italaw8236.pdf> (29 May 2019).

[73] Article 15 of the 2014 Canadian Model BIT entitled 'Health, Safety and Environmental Measures' reads: 'The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding the encouragement.'

[74] Article 73 entitled 'Maintenance of standards' reads: 'The EC Party and the Signatory CARIFORUM States shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.'

[75] Article 16 entitled 'Corporate Social Responsibility' reads: 'Each Contracting Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.' A similar provision is included in Art 7 of the Netherlands 2018 Draft Model BIT, <www.bilaterals.org/IMG/pdf/modeltekst.pdf> (29 May 2019). See also Art 810 of the Canada–Peru Free Trade Agreement (2009), <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/background-contexte.aspx?lang=eng> (29 May 2019).

practice, at least from the perspective of the foreign investor, and it would be difficult to found any claim or counterclaim on such provisions.

A more recent, and for the purposes of this chapter more interesting, type of clause contains clear references to *obligations* of foreign investors. The following examples, which remain relatively limited in number compared to the bulk of existing investment treaties,[76] show a gradual inclusion of provisions relating to the human rights obligations of foreign investors, and occasionally also target more specifically social rights and labour rights.

The 2012 Model BIT of the Southern African Development Community (SADC),[77] which however has not yet been used in practice, contains a provision which establishes the duty for investors 'to respect human rights in the workplace and in the community and state in which they are located'.[78] The Model BIT further provides that

> investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist or be complicit in the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

A more specific provision in relation to labour standards is also included,[79] as is a provision prohibiting investors to operate their investment 'in a manner inconsistent with international environmental, labor, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher'.[80]

These provisions were taken over and further specified in the recently negotiated Draft Pan-African Investment Code (PAIC).[81] The draft has not been adopted so far, nor has it been used in practice. The draft text contains not less than six provisions dealing with investor obligations. Besides provisions dealing with corporate governance obligation of investors, socio-political obligations, bribery and the use of natural resources,[82] two provisions deal with human rights obligations of foreign investors in particular. Article 22 of the PAIC, entitled 'Corporate social responsibility', provides among others for an obligation for foreign investors to 'abide by the laws, regulations, administrative guidelines and policies of the host State'. Article 24 in turn deals with 'Business ethics and human rights' and sets several principles that 'should govern compliance by investors with business ethics and human rights'. These principles are:

(a) Support and respect the protection of internationally recognized human rights;
(b) Ensure that they are not complicit in human rights abuses;
(c) Eliminate all forms of forced and compulsory labor, including the effective abolition of child labor;

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[76] For some other examples, see Makane M Mbengue and Stefanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 Journal of World Investment and Trade 414, 435.

[77] SADC, *SADC Model Bilateral Investment Treaty Template with Commentary* (2012).

[78] *Ibid.*, Art 15.1.

[79] *Ibid.*, Art 15.2.

[80] *Ibid.*, Art 15.3.

[81] UN Economic Commission for Africa and African Union 'Draft Pan-African Investment Code' (26 March 2016) UN Doc E/ECA/COE/35/18, African Union Doc AU/STC/FMEPI/EXP/18(II). For a full discussion of the draft, see in general Mbengue and Schacherer (n 76).

[82] *Ibid.*, Arts 19–21, 23.

(d) Eliminate discrimination in respect of employment and occupation; and
(e) Ensure equitable sharing of wealth incurred from investments.

India recently adopted a similar approach in its 2016 Model BIT.[83] The model treaty has not yet been used in practice either, but it contains several articles that detail the obligations of foreign investors. Article 12 of the treaty contains a general obligation for foreign investors to respect the domestic laws of the host state. It then non-exhaustively lists more specific legislation, such as labour laws and legislation relating to human rights.[84]

These clauses, while not yet inserted in subsequently negotiated investment treaties or in treaties that have entered into force, do deserve a couple of observations. Several discussed examples mainly operate as confirmation of the obligations of foreign investors to comply with domestic law, including human rights law, which as such is a non-controversial proposition. Foreign investors indeed are under such an obligation since the operation of an investment in the territory of states implies that the investment and the investor fall under the jurisdiction of that state. Yet, some provisions go further than this. As can be observed from Article 24 PAIC, there are several references to the obligation for foreign investors to respect – generally – *international* human rights law. However, that specific provision, on the face of it, is not couched in mandatory terms, but rather sets the principles that investors 'support and respect the protection of internationally recognized human rights' as a norm that *should* 'govern compliance by investors with business ethics and human rights'.

The inclusion of clauses referring to the obligations of foreign investors under domestic law, however, is not an entirely neutral confirmation of already existing obligations. To a certain extent they operate as a sort of investor-directed or 'reversed' umbrella clause, which typically is included to confirm the *host state*'s respect for the obligations it has entered into with foreign investors, notably on the domestic level. The domestic obligations of foreign investors are then 'internationalized' in the sense that they are brought under the umbrella of the treaty, thus triggering the possibility to not only apply these norms in case of treaty-based claims but also to initiate counterclaims on that basis.

d. Host State Counterclaims

The main reason to include provisions on obligations of foreign investors in the area of human rights is to facilitate the presentation of counterclaims by the host state. This is also why the majority of the treaties discussed above contain specific clauses on counterclaims next to provisions on obligations of foreign investors. The Common Market for Eastern and Southern Africa (COMESA) Agreement,[85] for instance, provides that

> a Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defense, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to

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[83] Model Text for the Indian Bilateral Investment Treaty, <www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> (29 May 2019).

[84] *Ibid*, Art 12.1(i) and (v).

[85] Treaty Establishing the Common Market for Eastern and Southern Africa (5 November 1993) 2314 UNTS 265.

> comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.[86]

A similar provision is found in the SADC Model BIT.[87] The PAIC is much more detailed in this respect. While providing for an optional arbitration, subject to the *ad hoc* consent of the parties to the dispute, the PAIC provides not only for the plain right for states to initiate counterclaims based on breaches of the PAIC, but also that:

> Where an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.[88]

Not only are the legal bases of potential counterclaims initiated by states broad, but there is also an express provision to the effect that any established dispute settlement body has the obligation to appraise the relevance of breaches of the PAIC by the investor and to determine any effect the breach has on the merits of the claim or the damages awarded. The Indian Model BIT contains similar language.[89]

In light of the *Urbaser* case, one might wonder whether such clauses are necessary. So far, the *Urbaser* case is the first case, and indeed among the only cases, in which a decision was rendered discussing in detail a human rights counterclaim by a state. While there will certainly be other tribunals which will follow this decision, it cannot be excluded that some tribunals will in fact depart from the decision of the *Urbaser* tribunal to accept a counterclaim as a matter of admissibility, jurisdiction or merits based on the specific formulation of an applicable treaty. Express treaty language in the examples mentioned thus clarifies the situation. This needs to be coupled with the explicit requirement of compliance with the domestic legislation, which has the advantage of incorporating the domestic law obligations of foreign investors in the treaty, and thus renders such obligations part of the law to be applied by a tribunal faced with a treaty claim. In contrast to *Urbaser*, where the tribunal had to appraise the obligations of the foreign investor only in relation to a 'contractual' counterclaim by Argentina and based on the broadly worded dispute settlement clause in the treaty, express clauses relating to counterclaims have the benefit of making clear both that a tribunal has the competence to hear a counterclaim and that the domestic obligations of the investor form part of the law to be applied by the tribunal in assessing the merits of the counterclaim.

I should reiterate here that a broadly formulated dispute settlement clause simply has the effect of opening up the possibility, as a matter of jurisdiction, for an arbitral tribunal to hear a human rights counterclaim; it does not, however, allow a transformation of the investment dispute into a human rights one.

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[86] *Ibid.*, Art 28.9.
[87] SADC Model BIT (n 77), Arts 19, 29.19.
[88] PAIC (n 81), Art 43.
[89] Indian Model BIT (n 83), Art 14.11.

V. SUBSTANTIVE INTERACTIONS AND CONFLICTS BETWEEN FOREIGN INVESTMENT PROTECTION AND SOCIAL RIGHTS

In general, when deciding on an investment dispute, there is no reason for the tribunal to exclude *ipso facto* human rights considerations *as a matter of applicable law*. Article 42 ICSID Convention provides that, in the absence of an agreement to the contrary, 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. Moreover, the majority of the investment treaties provide for the application of international law to the dispute.[90]

Here also, I should emphasize that, first, the wording of the dispute settlement clauses is fundamental. Limits to the applicable law can be included in the treaty. Second, considering the specific and limited jurisdiction of investment tribunals, human rights law will in effect only be taken into consideration in the event of an *investment dispute*. Finally, in the event of a submission of an investment dispute by the foreign investors, the precise delimitation of the dispute by the parties to the arbitration is fundamental and will also influence the precise mandate of the tribunal and the law applicable to the subject matter before the tribunal.

Based on the above, we can roughly detect three main ways in which human rights law can be considered to be relevant as a matter of applicable law. First, in the case of conflict between the human rights obligations of the host state and the latter's investment obligations, tribunals can be confronted with the question – often invoked by respondents – whether human rights obligations 'trump' investment protection obligations contained in investment treaties. Second, a host state can argue that compliance with its own international human rights obligations results in a circumstance precluding the wrongfulness of the breach of the investment treaty. Finally, in a case of conflict between the human rights obligations of the host state and the latter's investment obligations, the applicable rules of the VCLT may be used to take into consideration the human rights obligations of the state,[91] in particular through the principle of systemic integration as embodied in Article 31(3)(c) VCLT, in order to interpret investment protection standards which seeks to avoid any conflict between the two sets of norms.

a. Conflict Between States' Obligations Under Social Rights and Under Investment Protection Treaties

It is generally acknowledged that states need to take into account their various international legal obligations, including those related to human rights, when signing up to posterior treaties.[92] When states thus negotiate, sign and ratify an investment treaty, they are under an obligation to take into consideration their human rights obligations contained in international treaties. As said before, there is however no *a priori* incompatibility of human rights obligations and investment protection obligations, although a state can be confronted with a clear conflict of obligations in a particular situation. As a consequence, when signing and ratifying

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[90] See, e.g., Art 30, 2012 United States Model BIT <www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (29 May 2019).

[91] Energy Charter Treaty (17 December 1994) 2080 UNTS 95.

[92] See Jan B Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands International Law Review 208, 227.

investment treaties, states do not necessarily omit to take into account their human rights obligations.

A recurrent type of dispute before international investment tribunals relates to one of the reasons behind foreign corporations' involvement with states, namely the privatization of public services such as water supply, sewage systems and waste management.[93] Many states have in the past decades privatized public services, and have granted concessions and lease contracts to foreign investors in these areas. Conflicts may then arise, *in concreto*, between a state's obligations in respect of economic and social rights and its obligations towards the foreign investor. Since human rights are obligations of the host state, the state is under an obligation to ensure respect for the human rights on its territory, including protection from the acts of foreign investors. Regulations and laws adopted by host states in the exercise of their public authority in order to ensure respect for these human rights can at times enter into conflict with certain provisions of investment treaties or investment contracts which states have negotiated and signed with foreign investors.

When confronted with conflicting obligations under both human rights and investment protection treaties, some guidance, in theory, could be found in the rules of treaty interpretation and principles applicable in cases of treaty conflicts. However, the *lex posterior derogat legi priori* and the *lex specialis derogat legis generali* principles will not offer a solution to conflicts between human rights and investment treaties or norms. Notably, it is not self-evident that both human rights obligations and obligations under investment treaties can be considered as relating to the 'same subject matter', as required to apply both principles.[94] That the conflict between two types of obligation – human rights and investment – cannot be solved through the application of general principles of international law, including those of treaty interpretation, has not been argued by arbitral tribunals in much detail. Several tribunals have nonetheless touched upon the issue, and have generally confirmed that the existence of obligations for states under international human rights law does not absolve the state from respecting its obligations under international investment treaties.

In *Azurix v Argentina*,[95] Argentina raised a conflict between the BIT and human rights treaties that protect consumers' rights.[96] One of the experts intervening for Argentina, Dr Solomoni, opined that

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[93] See generally Pierre Thielbörger, 'The Human Right to Water Versus Investor Rights: Double-Dilemma or Pseudo-Conflict?' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009) 487; Stephen C McCaffrey, 'The Human Right to Water' in Edith Brown Weiss, Laurence Boisson de Chazournes and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (2005) 93; Boisson de Chazournes (n 31).

[94] The application of the principles presupposes a conflict between two norms which deal with the same subject matter, and whose scope of application overlaps. See on this and on the application to the conflict between human rights and humanitarian law, Jean d'Aspremont, 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under the Guise of Conflict of Norms-Resolution' in Malgosia Fitzmaurice and Panos Merkouris, *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (2013) 3.

[95] *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006).

[96] *Ibid.*, para 254.

> a conflict between a BIT and human rights treaties must be resolved in favor of human rights because the consumers' public interest must prevail over the private interest of service provider.[97]

The Tribunal avoided the conflict by noting that 'the matter has not been fully argued and the tribunal fails to understand the incompatibility in the specifics of the instant case'.[98]

In *Suez v Argentina*,[99] the argument raised by Argentina – and raised again in several subsequent cases[100] – was essentially that in the event of an economic crisis which compromises the basic human rights of the citizens, including the human right to water of the inhabitants of the country,[101] an investment treaty could not prevail over emergency measures taken by the government to remedy the effects of the crisis and thus to preserve the basic human rights of its nationals. In respect of the claim that Argentina's human rights obligations trump its investment treaty obligations specifically, the Tribunal argued that it cannot

> find a basis for such a conclusion either in the BITs or international law. Argentina is subject to both international obligations, *i.e*. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations.[102]

In *SAUR v Argentina*,[103] the investor had invested in a domestic company, Obras Sanitarias de Mendoza SA (OSM), which held a water distribution and sewage concession in Mendoza, Argentina. During the 2002 economic and financial crisis, the government issued a national emergency decree which basically froze water prices charged to consumers. Argentina argued, among others, that OSM failed to provide the necessary quality of water and sewerage services to its nationals, and thus that the Argentine authorities had been under an obligation to take measures to ensure their citizens' rights to water and sanitation. The Tribunal agreed as a matter of principle that human rights law was a source of law that the Tribunal could apply, by virtue of being 'general principles of law'.[104] The Tribunal did however posit, again as a matter of principle, that a state's powers are not 'absolute' and its obligations in respect of the right to water are compatible with the rights of foreign investors to receive the protection they have been given under investment treaties.[105]

The cases discussed above confirm that while conflicts may arise, *in concreto*, between a state's obligations in respect of (economic and) social rights and its obligations towards the foreign investor, such a conflict cannot in fact be solved through the application of general principles of international law. The existence of obligations for states under international human rights law does not in principle absolve a state from respecting its investment obligations; both can indeed, according to tribunals, coexist. A related question, inextricably

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[97] *Ibid*.
[98] *Ibid.*, para 261.
[99] *Suez* (n 37).
[100] See, e.g., *CMS v Argentina*, ICSID Case No ARB/01/8, Award (12 May 2005), para 114.
[101] *Suez* (n 37), para 252.
[102] *Ibid.*, para 262.
[103] *SAUR International SA v Republic of Argentina*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability (6 June 2012).
[104] *Ibid.*, para 330.
[105] *Ibid.*, para 331.

linked to the one discussed here, is whether a state's social rights obligations can function as a circumstance precluding the wrongfulness of the breach of the state's investment protection provisions.

b. States' Social Rights Obligations as a Circumstance Precluding Wrongfulness

The question here is whether the human rights obligations of the state can be invoked as a defence to justify the breach of an international investment agreement. In essence, the state can assert that the protection of human rights can function as a form of 'necessity', which precludes the wrongfulness of the breach of the investment treaty, either as matter of treaty law ('non-precluded measures clauses') or through the application of the general rules on circumstances precluding wrongfulness under the Articles on State Responsibility.[106]

In *Suez v Argentina*,[107] one of the arguments raised by Argentina was that the impossibility to guarantee the right to water of its nationals constituted a state of necessity. The Tribunal however refused to accept the necessity claim, considering that the strict conditions set by the article on state responsibility were not met.[108] It acknowledged that Argentina was in a state of necessity, but since it had contributed to the development of that state of necessity it was barred from claiming necessity as a defence under the conditions set by the Articles on State Responsibility.[109]

In *Sempra v Argentina*,[110] the Tribunal was relatively open to human rights considerations raised as defences to responsibility, and recognized the potential conflict between human rights obligations and investment obligations. Argentina claimed that its responsibility was excluded 'by the rules of international law governing the state of necessity, whether customary or contained in the Treaty'.[111] The argument principally was that institutional survival and the preservation of the constitutional order, including respect of the provisions of the American Convention on Human Rights, justified the infringements of the rights of the investor.[112] The Tribunal recognized that the question 'raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners'.[113] However, when assessing whether the constitutional order and the survival of the state were imperilled by the crisis, and whether therefore it could constitute 'necessity' under customary international law, the Tribunal held that:

> the constitutional order was not on the verge of collapse, as evidenced by, among many examples, the orderly constitutional transition that carried the country through five different Presidencies in

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[106] UNGA Res A/56/83 (12 December 2001) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

[107] *Suez* (n 37).

[108] *Ibid.*, para 258.

[109] *Ibid.*, paras 257, 265.

[110] *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award (28 September 2007). That decision was however entirely annulled on the ground of manifest excess of powers, mainly for failing to apply Art. XI of the BIT which contained a treaty-based 'necessity' exception. See *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award (29 June 2010).

[111] *Sempra*, Award (n 110), para 98.

[112] *Ibid.*, para 331.

[113] *Ibid.*, para 332.

> a few days' time, followed by elections and the reestablishment of public order. Even if emergency legislation became necessary in this context, legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation.[114]

Here again, the Tribunal analysed the human rights defences raised by Argentina by reference to the conditions under which 'necessity' can be invoked in general customary international law. A similar reasoning was used by the Tribunal in *Biwater Gauff*.[115] Tanzania claimed that the investor 'had created a real threat to public health and welfare', and that '[w]ater and sanitation services are vitally important, and the Republic has more than a right to protect such services in case of a crisis: it has a moral and perhaps even a legal obligation to do so'.[116] The Tribunal considered however that 'there was no necessity or impending public purpose to justify the Government's intervention in the way that took place.[117]

In *LG&E v Argentina*,[118] the Tribunal concluded that the measures adopted by Argentina were 'necessary to maintain public order and protect its essential security interests'. [119] Although the Tribunal never explicitly referred to human rights, it noted that Argentina responded to the crisis by adopting measures to 'ensure the population's access to basic health care goods and services'.[120] A similar reasoning was given by the Tribunal in *Continental v Argentina.*[121] The Tribunal noted that the measures taken by Argentina to protect constitutional guarantees and fundamental liberties were justified, and that the state had a significant margin of appreciation in deciding the types of measures to take.[122] The Tribunal in this case also did not explicitly refer to the human rights obligations of Argentina.

In the more recent case of *Urbaser*, the Tribunal accepted a situation of necessity, although it did not explicitly refer to the human rights situation. It nonetheless considered that, in light of the need to test whether other means were available to Argentina in order to meet the requirement of a state of necessity, it was necessary to take 'into account the needs of Argentina and its population nation-wide'.[123]

Tribunals clearly have responded differently to such claims, but they have not excluded as a matter of principle that human rights could be invoked to exclude the wrongfulness of a breach of an investment treaty and that host states which are bound by human rights norms and obligations under international investment agreements can be faced with a conflict of obligations. However, there does not seem to be much willingness on the side of arbitral tribunals to extensively engage in the discussion on whether and under which circumstances a state's human rights obligations can successfully be used as a circumstance precluding the wrongful breach of an investment treaty.

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[114] *Ibid*.

[115] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008).

[116] *Ibid.*, paras 434, 436.

[117] *Ibid.*, para 515.

[118] *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006).

[119] *Ibid.*, para 226.

[120] *Ibid.*, para 234.

[121] *Continental Casualty Company v The Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008).

[122] *Ibid.*, paras 180ff.

[123] *Urbaser* (n 37), para 716.

c. Use of Social Rights Obligations in the Interpretation of Investment Protection Standards

Article 31(3)(c) VCLT, which requires taking into account in treaty interpretation 'any relevant rule of international law applicable in the relations between the parties' – the so-called systemic integration of treaties – is an interesting provision when it comes to the interpretation of investment protection standards in light of the host state's international human rights obligations. It will however be of little avail in solving genuine conflicts between treaty obligations since Article 31(3)(c) is a principle for the interpretation of treaties,[124] but it will in effect try to reconcile both sets of norms instead of looking at human rights and investment protection norms as opposites. To that extent, Article 31(3)(c) may in certain situations provide the necessary framework for integrating human rights in the interpretation of certain BIT provisions.[125] This can be the case notably in interpreting provisions such as fair and equitable treatment and the rules relating to indirect expropriations.[126]

I will not here engage in an extensive discussion of the application of Article 31(3)(c) VCLT in investment arbitration.[127] I will point only to the recent decision in *Philip Morris v Uruguay*,[128] which related to the question whether the imposition of plain package tobacco legislation constituted a breach of an investment treaty. Uruguay had argued that it had a margin of appreciation in respect of the acts or measures it could take to protect public health. The Tribunal agreed with the Respondent 'that the "margin of appreciation" is not limited to the context of the ECHR but "applies equally to claims arising under BITs," at least in contexts such as public health'.[129] It further held that

> changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest and do not modify the regulatory framework relied upon by the investor at the time of its investment 'outside of the acceptable margin of change.[130]

It is noteworthy that the Tribunal had earlier pointed out that

> Article 5(1) of the BIT must be interpreted in accordance with Article 31(3)(c) of the VCLT requiring that treaty provisions be interpreted in the light of '[a]ny relevant rules of international law applicable to the relations between the parties,' a reference 'which includes … customary international law'[131]

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[124] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 ICLQ 573, 584.

[125] See extensively on this *ibid.*, 584–86.

[126] See, e.g., *Urbaser* (n 37), para 1200.

[127] See generally, Daniel Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (2015).

[128] *Philip Morris Brand Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

[129] *Ibid.*, para 399.

[130] *Ibid.*, para 423.

[131] *Ibid.*, para 290.

and that 'protecting public health has since long been recognized as an essential manifestation of the State's police power'.[132]

Finally, I should here also briefly point to the recent trend of including specific carveouts in investment protection treaties, by which certain measures are excluded from the ambit of such treaty provisions as 'fair and equitable treatment' and 'expropriation'. An example of this is the 2004 Canadian Model BIT, which, in an annex to the treaty, confirms that

> [e]xcept in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[133]

Similar provisions can be found in the 2007 Columbian Model BIT,[134] which excludes measures adopted 'for public purposes or social interests' from potentially constituting an indirect expropriation 'except in rare circumstances'.[135] Rather than relying on Article 31(3)(c) VCLT to integrate human rights in the interpretation of certain BIT provisions, such as fair and equitable treatment and the prohibition of expropriation, clauses such as the ones found in the 2004 Canadian Model BIT or 2007 Columbian Model BIT in effect obtain the same result, but have the advantage of explicitness and clarity.

VI. CONCLUSION

The interaction between social rights – and human rights more generally – and international investment law has been shown to be complex. The globalization of the world economy has resulted in an expansion of corporate activity in foreign states, which have privatized many areas of the public sector and of public activity and transferred the management of such activities to foreign investors, which have been offered protection via different standards of treatment in order to facilitate such investments.

I initially explained that one can view the interaction between social rights and foreign investment as one of interconditionality. In that perspective, respect for human rights generally, and social rights particularly, is paramount in order to attract foreign investment. Conversely, foreign investment can also be seen as a catalyst for economic and social development through positive spillover effects of foreign investment. Social rights and foreign investment thus are interconditional and dependent on each other.

This interconditionality should of course not obfuscate the fact that foreign investment can negatively impact the respect for or the progressive realization of social rights. General concerns have been raised as to the potential negative effects of foreign investment on certain social rights such as the right to housing and the right to water, in the specific context of

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[132] *Ibid.*, para 291.

[133] 2004 Canadian Model BIT, <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (29 May 2019) Annex B.13(1), para c.

[134] 2007 Columbian Model BIT, <www.italaw.com/documents/inv_model_bit_colombia.pdf> (29 May 2019).

[135] *Ibid.*, Art 6(2)(c).

disputes relating to foreign investment – in which the social rights obligations can be more in direct opposition to investment protection standards. The issue has however most often been the result of a clash between the obligations foreign investors may have and those that host states have under domestic and international human rights law, and the investment treaties which provide for certain protection to foreign investors when investing abroad.

I first argued that, because of the limited jurisdiction of investment tribunals which derive their jurisdiction from an applicable international investment treaty, human rights disputes *per se* cannot be brought before investment tribunals. Arbitral tribunals established under a treaty generally have a competence limited to investment disputes. This again, however, as explained, does not imply that human rights considerations cannot be brought before investment tribunals.

The interactions which have been discussed and analysed in this chapter focus first on the responsibility and obligations of foreign investors operating in a foreign state, who may themselves be bound by certain human rights obligations. Such obligations exist mainly under the domestic law of the host state in which the activity takes place, but also, sometimes, under the legislation of their home state based on a certain form of extraterritoriality. I have also argued that recent times have witnessed the increased inclusion and the consolidation of the so-called legality requirements, which imply an obligation for foreign investors to conform to and respect the domestic laws of the host state – including the applicable human rights obligations – and of clauses containing investor obligations in the area of human rights in investment treaties. The procedural counterpart of the substantive obligations which foreign investors have or may have is also a recent development in this respect.

Second, social rights may come into play, and interact with investment law. In relation to foreign investment in the agricultural sector, for instance, the risk of displacing indigenous peoples and decreasing standards of living may undermine economic, social and cultural rights. In relation to the right to adequate housing, foreign investment-related forced evictions can occur in the case of largescale development projects. Indigenous peoples can also be affected by largescale development projects. I have also explained that more often than not, case law relates to the right to water, in light of the several cases Argentina notably was facing in relation to drinking water concessions that had been awarded to foreign investors and which had subsequently been terminated. Then, arguments have been raised as to which set of norms – social rights or investment law – should take precedence over the other. I have argued that, as a matter of principle, such conflicts that may arise *in concreto* cannot be solved through the application of rules and principles in international law. I have also shown that tribunals have in fact confirmed the principled coexistence of both sets of norms, as well as the idea that the obligation to ensure respect for social rights does not trump investment protection obligations. On the related question whether the host state can invoke its human rights obligations as a defence to responsibility, I have noted that Argentina in particular has regularly argued that the need to ensure the access to water of its population resulted in the need to breach its investment obligations, and hence that its responsibility was excluded. As shown, tribunals have responded differently to such claims, but several tribunals have readily acknowledged – as a matter of principle – that human rights can be invoked to exclude the wrongfulness of a breach of an investment treaty.

Finally, I have explained that the interaction, from a substantive law perspective, in investment disputes can also take place in the context of the interpretation of substantive investment protection standards. Article 31(3)(c) VCLT requires tribunals to interpret investment treaties

taking into account other rules of international law, including those relating to human rights. What this can mean in practice again has not yet been fully tested in arbitration practice, although several tribunals have referred to the rule.

The analysis of case law shows that the investment tribunals which have been confronted with interactions between social rights and international investment law have overall – with some notable exceptions, such as *Urbaser v Argentina* – been relatively reluctant to engage in detail in human rights discussions, and have not been keen on articulating general principles relating to the interactions between social rights and international investment law. At the same time, recent treaty practice shows that investment treaties are undergoing a transformation from the original purpose of promoting and protecting foreign investment to broader regulatory instruments governing the protection of foreign investment and the general activities of foreign investors in host states including with respect to social rights. It will be important to see whether this evolution will be sustained in the years to come. This is not completely unsurprising, since concerns relating to corporate social responsibility and the obligations of corporations in the area of human rights, and the interaction between social rights and investment law more broadly, have triggered international attention for many years.

26. Financial institutions and social rights: from the Washington Consensus to the Lagarde Concord?

Matthias Goldmann

I. INTRODUCTION

This chapter studies the social rights obligations of both public and private financial institutions in doctrine and in practice. It argues that financial institutions, after a long period of denying and neglecting their social rights obligations, have in practice moved a long way towards recognizing synergies between social rights, economic development and financial investment. While adjudication has little potential to improve respect for social rights with public financial institutions, it is crucial that social rights become a fully integrated part of their agendas, as in the example of the World Bank. Changing the behaviour of private financial institutions, by contrast, ultimately requires binding legal obligations.

At the outset, some conceptual clarifications are in order. As social rights, I understand the core of human rights law that guarantees an adequate standard of living.[1] Historically, these rights ensure an important background condition for democratic societies. While the bourgeois constitutions adopted in many European and American states since the late eighteenth century suggested that status equality would suffice for a functioning, stable and at times at least rudimentarily democratic government, the history of the social question in the nineteenth century taught otherwise. Along with other factors, the tensions emanating from the social question culminated in the First World War.[2] As a consequence, the international legal framework and domestic constitutions created after the First World War, and even more so after the Second World War, reflect in many respects the conviction that effective participation in a democratic society requires freedom from basic wants, such as food, shelter and healthcare.[3] Social rights therefore overlap with economic rights in multiple ways, going at times beyond them (such as the right to health), while specific economic freedoms would not count as social rights (such as the right to exercise a profession). Similar considerations apply to the relation between social and cultural rights. In the following, the term 'social rights' only refers to the respective international legal guarantees as part of international human rights law.[4]

Moreover, this chapter draws a distinction between public and private financial institutions. The study of public financial institutions is confined to the International Monetary Fund (IMF) and the World Bank, as these two institutions, known as the international financial institutions

[1] See the editors' introduction to this *Research Handbook.*

[2] Insightful, although controversial, is the account of Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944), chapters 1 and 2.

[3] Paradigmatic examples include the 1917 Mexican Constitution, the 1919 Weimar Constitution or the 1948 Italian constitution.

[4] The term social rights thus roughly corresponds to the rights guaranteed by Articles 9–14 ICESCR.

(IFIs), are the institutional backbone of the public side of the present financial order. Certainly, the activities of other public financial institutions, such as central banks, government sponsored investment banks or sovereign wealth funds, may also affect social rights in problematic ways. However, from an international law perspective, any violations of social rights resulting from central bank measures primarily engage the international legal responsibility of the state in question.

The term 'private financial institutions' as used here comprises all corporations governed by the rules of private law and engaged in financial intermediation, that is, in the provision of liquidity. This comprises banks, investment funds, and other corporate vehicles. Broadly speaking, they are usually not the direct addressees of social rights obligations. However, there is nowadays a broad consensus that the realization of social rights and policies requires the cooperation of the business world. Government regulation alone seems insufficient, slow and oftentimes unavailable to hedge the negative social effects of financial intermediation and of business activities in general. For this reason, corporate social responsibility (CSR) is today widely accepted as a necessary corollary of domestic and international social rights guarantees.[5] As this chapter is about the international legal aspects of social rights, the emphasis will be on multinational financial corporations, since international social rights guarantees bear particular relevance for their activities rather than for purely domestic situations.

IFIs and globally operating private financial institutions have had significant impacts on social rights since coming into existence. The IFIs define the global framework for monetary and fiscal policy and public investments. Even though mediated by domestic policy, the impact of the IFI's policies on, for example, employment, education, health, or the environment has been far-reaching. Their loan conditionalities have forced states to cut back spending for social rights. This impact increased particularly under the aegis of the so-called Washington Consensus,[6] a set of policies dominating the IFIs since the 1980s, favouring market-based solutions and discouraging government spending and government intervention in the economy – thereby pushing countries through a treacherous path of austerity.[7] The World Bank also has funded projects with a considerable impact upon social rights. For example, investments in infrastructure often require land acquisition and the involuntary resettlement of people.[8] Private finance may likewise become a determinative factor for social rights enjoyment. Loan pressing,[9] and capital flight are only the tip of the iceberg of the effects which private finance may exert on the economy of host countries. Recently, both public and private financial insti-

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[5] This has not always been the case. Of historical interest is a comparison of the positions of Howard Rothmann Bowen, *Social Responsibilities of the Businessman* (1953) on the one hand, and of Milton Friedman, 'The Social Responsibility of Business is to Increase Its Profits' in Walther Zimmerli, Markus Holzinger and Klaus Richter (eds), *Corporate Ethics and Corporate Governance* (2007) 173 (text first appeared in 1970) on the other.

[6] John Williamson, 'Democracy and the "Washington Consensus"' (1993) 21 World Development 1329.

[7] Illustrative for austerity policies is the enumeration in Magdalena Sepúlveda Carmona, 'Alternatives to Austerity: A Human Rights Framework for Economic Recovery' in Aoife Nolan (ed.), *Economic and Social Rights After the Global Financial Crisis* (2014) 23, 30ff. See also Abby Kendrick and Juan Pablo Bohoslavsky, in this *Research Handbook.*

[8] For an overview, see WBG, Resettlement Fact Sheet, <http://pubdocs.worldbank.org/en/628991425483120559/resettlement-fact-sheet.pdf> (5 November 2019).

[9] *Cf.* Stephany Griffith-Jones, 'The Growth of Multinational Banking, the Euro-Currency Market and Their Effects on Developing Countries' (1980) 16 Journal of Development Studies 204.

tutions have teamed up to produce synergies known as 'blended finance'. This consists in the use of public and philanthropic financial capital to create attractive conditions and generate the trusts necessary to mobilize private investments for improving social rights enjoyment.[10] While this turn to the private in development finance increases the funding available for development, it needs to take into account profitability rather than only need.[11]

In stark contrast with the impact of financial institutions on social rights, social rights discourse took a while to emerge. This might seem astonishing given that social rights have been enshrined in many constitutions around the world for more than one hundred years, and that the 1948 Universal Declaration of Human Rights put them on a par with civil and political rights. One reason is that neither public nor private financial institutions felt bound by international human rights obligations.

This chapter first debunks the latter claim and discusses the basic legal obligations of financial institutions with regard to social rights (section II). Moving beyond doctrinal analysis, the subsequent part discusses how financial institutions have confronted social rights in practice. While *discourse* about social rights at the level of the World Bank and IMF still consists to varying degrees in denying their obligatory character, on *substance* both institutions have moved significantly towards paying greater heed to them. The achievements of the private sector pale by comparison, as the results of initiatives such as the Equator Principles are underwhelming, and even the adoption of a binding treaty might yield modest results (section III). As this scrutiny of practice reveals, there are inherent limitations to social rights in relation to financial institutions. Judicial review of IFIs and CSR in practice faces structural limitations and may only filter the most egregious cases. It is therefore necessary to make social rights discourse an integrated part of decision-making in the frame of the IFIs, while including it in the calculation of regulatory capital for private financial institutions (section IV). The Conclusion to this chapter speculates as to how the new 'Lagarde Concord', which arguably replaced the former Washington Consensus, will confront future challenges, including the possible transition to a post-growth society (section V).

II. THE LEGAL FRAMEWORK

a. International Financial Institutions

i. Basis of the IFI's Social Rights Obligations

While the international human rights community leaves no doubt about the human rights obligations of the IFIs, the IMF has ever since its foundation adopted a remarkably functionalist approach to the interpretation of its mandate. Accordingly, it sees its mission in the implementation of economic development, not in making social policy, and has cultivated a self-understanding of political neutrality.[12] In line with this position, it declined to partic-

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[10] *Cf.* United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, Annex to UNGA Res 69/313 (27 July 2015), para 48.

[11] Javier Pereira, 'Blended Finance: What It Is, How It Works and How It Is Used' (2017) <http://hdl.handle.net/10546/620186> (5 November 2019). On the private turn, see Elisa Van Waeyenberge, 'The Private Turn in Development Finance' (2016) FESSUD: Working Paper Series, No 140.

[12] Joseph Gold, 'Conditionality' (1979) IMF Pamphlet Series, No 31 (1979).

ipate in the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[13] This position remains dominant in the IMF.[14] The World Bank has followed a similar path, constantly stressing the significance of human rights for its members, but exempting itself to varying degrees.[15]

There are various avenues through which to establish, alone or in combination with each other, the obligation of the IFIs to respect human rights, including core social rights.[16] A first avenue follows from the Articles of Agreement of the IMF and the World Bank.[17] While the Articles of Agreement of both organizations do not explicitly mention human rights, the story does not end there. The Articles of Agreement of the International Development Association (IDA) and of the International Bank for Reconstruction and Development (IBRD) both list economic development and balanced growth among the objectives of the respective institutions. Today, the conviction is widespread that, despite some challenges, there is a positive correlation between the promotion of development and human rights.[18] Fostering human rights and the rule of law, but also social rights such as education and health care, can be an important factor in economic growth, and vice versa. Hence, Danilo Türk argued that '[t]he link between human rights and development has become inseparable'.[19] In 1993, the Vienna Declaration and Programme of Action stipulated that '[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing'.[20] By way of a purposive interpretation in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), and as a matter of systemic coherence required by Article 31(3)(c) VCLT, one should therefore interpret the Articles of Agreement as demanding respect for social rights by the World Bank.

The IMF Articles of Agreement charge the Fund in Article I(ii) with the task of contributing 'to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members'. Although the Articles of Agreement avoid the language of human rights, they command policies which effectively contribute to their promotion. In fact, the promotion of growth requires economic and social development, hence respect for social rights in accordance with the foregoing reasoning. Further, Article

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[13] ECOSOC, 'Co-Operation between the Commission on Human Rights and the Specialised Agencies and other Organs of the United Nations in the Consideration of Economic, Social and Cultural Rights' (28 March 1951) UN Doc E/CN.4/534, Annex.

[14] For a paradigmatic example, see Francois Gianvitti, 'Economic, Social and Cultural Human Rights and the International Monetary Fund' (7 May 2001) UN Doc E/C.12/2001/WP.5, para 56.

[15] *Cf.* James Wolfensohn, 'Some Reflections on Human Rights and Development' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (2004) 19, 21.

[16] This subsection draws on Matthias Goldmann, 'Human Rights and Sovereign Debt Workouts' in Juan Pablo Bohoslavsky and Jernej L Cernic (eds), *Making Sovereign Financing and Human Rights Work* (2014) 79.

[17] Koen De Feyter, 'The International Financial Institutions and Human Rights Law and Practice' (2004) 6 Human Rights Review 56, 58ff.

[18] Many of these challenges are addressed in Philip Alston and Mary Robinson (eds), *Human Rights and Development. Towards Mutual Reinforcement* (2005).

[19] ECOSOC, 'Realization of Economic, Social and Cultural Rights, Second progress report prepared by Mr Danilo Türk' (18 July 1991) UN Doc E/CN.4/Sub.2/1991/17, para 53.

[20] UN World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (25 June 1993) UN Doc A/CONF.157/23, Ch. I, para 8.

I(v) obliges the Fund to avert situations which constitute a risk for 'national and international prosperity'. In the context of the creation of the IMF between Franklin Delano Roosevelt's 1941 articulation of 'Four Freedoms', including the freedom from want, and the adoption of the 1948 Universal Declaration of Human Rights with its list of social rights, it seems adequate to understand 'prosperity' as a concept that comprises the equal enjoyment of social rights by all parts of the population, in line with its context and purpose.

A second line of argument as to why the IFIs are bound by human rights emphasizes their character as a specialized agencies of the United Nations. The Preamble of the UN Charter refers to fundamental human rights, social progress and the promotion of the economic and social advancement of all peoples. Article 55 UN Charter charges the UN with promoting 'social progress and development', solutions to 'economic, social, health and related problems' and 'universal respect for, and observance of, human rights and fundamental freedoms' without discrimination. To achieve these ends, Article 59 UN Charter envisages the creation of specialized agencies committed to achieving the purposes of the United Nations. The IMF and the institutions of the World Bank Group became such specialized agencies, even though some of them predate the United Nations. Hence, it seems apposite to understand their mandates in the context (Article 31(1) VCLT) of these purposes set forth in the UN Charter.[21]

Similar to the previously discussed line of argument, a third view argues that the IFIs are subordinated to the United Nations and the human rights provisions of its charter by virtue of Article 103 UN Charter.[22] However, this provision only applies to the UN member states. It does not bind other international organizations or subject them to the human rights provisions of the Charter. At most, one could follow from the particular position of the United Nations a duty to interpret the Articles of Agreement of the IFIs in coherence with the Charter provisions on human rights by virtue of Article 31(3)(c) VCLT.

According to a fourth line of argument, the human rights obligations of the IFIs derive from those of their member states.[23] The difficulty with such 'mortgage theories', which charge international obligations with the human rights obligations of their member states, is that they fail to account for the separate legal personality of international organizations. The rights and duties of an international organization remain in principle unaffected by the – rather heterogeneous – human rights obligations of its members. Should the organization violate human rights, member states might incur responsibility.[24] Accordingly, the Committee for Economic,

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[21] For many, see Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (2001) 99ff. A different view is advocated by the longtime IMF General Counsel, Francois Gianvitti. He interprets Art 24 ICESCR as an impediment to the application of the Covenant to the IMF (see Gianvitti (n 14), para 12). However, Art 24 stipulates that '[n]othing 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'. Remarkably, the relative clause at the end of this quote is omitted in Gianvitti's text. Only this makes his interpretation tenable. By contrast, the relative clause clarifies that Art 24 addresses only the internal repartition of competencies among the various organs of both the United Nations and the specialized agencies.

[22] Skogly (n 21), 101; apparently in this sense also Daniel D Bradlow, 'The World Bank, the IMF, and Human Rights' (1996) 6 Transnational Law and Contemporary Problems 47, 63.

[23] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2009) 117–18.

[24] *Cf. Matthews v The United Kingdom*, ECtHR, App No 24833/94, Judgment of 18 February 1999. The Articles on State Responsibility deliberately left the issue open in accordance with their Art 57. Nevertheless, the commentaries to the 2011 Draft Articles on the Responsibility of International

Social and Cultural Rights (CESCR) stressed the duty of member states of the IFIs to ensure that the IFIs' lending policies do not encroach upon the right to health – a reasoning that should apply equally to other social rights.[25]

The fifth and final line of argument emphasizes the duty of the IFIs to respect customary human rights. Although custom is created by state practice, international organizations as subjects of international law are generally considered to be bound by customary international law.[26]

Whichever avenue one chooses, an additional problem relates to the applicable human rights instruments. Should one consider the IFIs bound by human rights law by virtue of their mandate, one could consider them bound by human rights to the extent that they bear relevance for the discharge of their mandate for economic and social development. This is a fairly broad, but also undefined, standard. Basing their obligations on their character as UN specialized agencies has the advantage of committing them to the human rights law developed within the framework of the United Nations. The scope of customary social rights obligations is smaller and more controversial, though.[27] Only a core set of social rights can be deemed to have customary status, among them possibly the rights enumerated in the Universal Declaration of Human Rights,[28] but certainly not all of the guarantees contained in the ICESCR, as the latter has not been universally ratified or respected. General Comment No 8 of the CESCR therefore stipulates that international organizations are bound by at least a core of ESC rights.[29]

ii. Scope of Social Rights Obligations

Establishing the basis of the IFI's social rights obligations raises a question about their scope. A first difficulty arises from the fact that the IFIs and their staff often do not act directly, but are mediated by their member states or contractors and subcontractors. In this respect, the Draft Articles on the Responsibility of International Organizations (DARIO) stipulate in their Article 4 that 'conduct' needs to be 'attributable' to an international organization to give rise to its responsibility under international law. Both of these terms are of interest here. On the one hand, 'conduct' is a conceivably broad notion. It therefore includes binding legal acts such

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Organizations (DARIO) assume that such responsibility may arise by virtue of Art 5 of the Articles on State Responsibility, which attributes responsibility for the conduct of entities exercising elements of governmental authority. See ILC, Report of the International Law Commission on the work of its sixty-third session (2011) UN Doc A/66/10, commentary on Art 1, para 8. Further, Art 61 DARIO stipulates that states incur responsibility if trying to hide behind the 'corporate veil' of an international organization to commit a violation of international law.

[25] CESCR, 'General Comment No 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12./2000/4, para 39.

[26] Chittharanjan F Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005) 20–21; Skogly (n 21), 63, 84. Arguing for a solution on a case by case basis: Matthias Hartwig, 'International Organizations or Institutions, Responsibility and Liability' in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2011) para 18.

[27] Sigrun Skogly, 'The Human Rights Obligations of the World Bank and the IMF' in Willem van Genugten, Paul Hunt and Susan Mathews (eds), *World Bank, IMF and Human Rights* (2003) 51.

[28] *Cf.* Michael Lucas, 'The International Monetary Fund's Conditionality and the International Covenant on Economic, Social and Cultural Rights: An Attempt to Define the Relation' (1992) 25 Revue belge de droit international 104; arguing that only the core of ESC rights has the status of customary rules: Markus Krajewski, 'Human Rights and Austerity Programmes' in Thomas Cottier, Rosa M Lastra and Christian Tietje (eds), *The Rule of Law in Monetary Affairs: World Trade Forum* (2014) 490.

[29] CESCR, 'General Comment No 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/C.12/1997/8, para 7.

as decisions approving loans or projects, and non-binding acts in relation to conditionalities, such as the negotiation, approval and implementation of memoranda of understanding. On the other hand, conduct needs to be 'attributed' to an international organization. This criterion is of crucial significance in situations in which a member state retains some discretion to implement programmes funded by the IFIs. For this case, Articles 14 to 17 of DARIO stipulate the conditions under which the IFIs incur responsibility. They range from aiding and abetting via control and coercion to situations in which the international organization seeks to circumvent responsibility by allowing a state to act in contravention to the organization's international legal obligations. It seems plausible that conditions imposed on states by the IFIs – which leave states effectively with the choice which and whose social rights they want to violate, not with the choice whether to violate social rights at all – are to be considered as coercive in light of the financial power of the IFIs.

A second difficulty concerns the content of the IFI's social rights obligations. As Article 4 of DARIO provides, international organizations only incur responsibility if they breach an international legal obligation incumbent on them. This leads to a question about the scope of the IFI's human rights obligations in respect of the familiar triad of obligations to respect, protect and fulfil. It seems evident that the obligation to respect applies to the IFIs without further qualification. This entails the obligation that the programmes of the IFIs do not violate social rights (or leave states no choice but to violate them).[30] More difficult to discern is the scope of the duty to protect. As international organizations do not exercise territorial control, their duty to protect could in principle be all encompassing. In this situation, it seems adequate to restrict the IFI's social rights obligations in light of the context and circumstances of the particular case.[31] Factors crucial for the scope of the IFI's duty to protect might include the proximity of the social right in question to the mandate of the IFI in question, the type of programme, the level of IFI involvement or the degree of state discretion.[32] Article 48 DARIO provides rules to disentangle overlapping responsibilities of the IFIs and their member states. The duty to fulfil social rights, by contrast, overlaps to a considerable extent with the general mandate of the IFIs. It is therefore their duty to work towards social rights fulfilment in the discharge of their mandate, without prejudice to the social rights obligations of states towards their citizens.

iii. Retrogressive measures

Retrogressive measures implemented by states under the watch of IFIs became a particular subject of concern during the European sovereign debt crisis. General Comment No 3 of the CESCR provides:

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[30] Willem van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualised Way Forward* (2015) 30ff. Discussing this question under the title of the duty to protect: Fons Coomans, 'Application of the International Covenant on Economic, Social, and Cultural Rights in the Framework of International Organizations' (2007) 11 Max Planck Yearbook of United Nations Law 359, 381.

[31] Martin Scheinin, 'Just Another Word? Jurisdiction in the Roadmaps of State Responsibility and Human Rights' in Malcolm Langford *et al* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013) 212.

[32] Sigrun Skogly, 'Causality and Extraterritorial Human Rights Obligations' in Malcolm Langford *et al* (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013) 233, 239.

> Any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

The 2011 Guiding Principles on foreign debt and human rights adopted by the Human Rights Council approach this issue in even stricter terms, providing that '[s]tates have an obligation to avoid retrogressive measures'.[33] But a contextualized reading of these passages reveals that the Guiding Principles, seeking to strike a balance between creditors' legitimate interests and the human rights of the population of the defaulting state, provide that states should make best efforts to avoid retrogressive measures.[34] This is in line with voices from the literature which claim that states have to provide reasons for their justification.[35]

Which normative framework governs the justification of retrogressive measures? As for the ICESCR, two provisions bear specific relevance. According to Article 2(1) ICESCR, states only need to deploy the 'maximum of [their] available resources'. Article 4 ICESCR permits limitations to the rights of the Covenant 'determined by law only in so far as they are compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society'. The former addresses periods of scarce resources, while the latter provision concerns general economic policy changes that might have a negative impact on ESC rights. In sovereign debt crises, both issues are of relevance. States are confronted with an acute shortage of resources; at the same time they need to change course in order to avoid repetition. Both articles should therefore be applied cumulatively.[36] This appears all the more apposite as their normative content pulls in the same direction. Their various provisions appear to amount to one comprehensive proportionality analysis.[37] In this line, the letter by the CESCR chairperson to the States Parties of 2012 specifies that adjustment should be temporary, proportionate, non-discriminatory, and respect the minimum core obligations as defined for each right under the Covenant.[38] Principle 10 of the Guiding Principles on Human Rights Impact Assessments of Economic Reforms lists a set of criteria for testing the proportionality, broadly understood,

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[33] HRC, 'Guiding Principles on Foreign Debt and Human Rights, annexed to the Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights' (10 April 2011) UN Doc A/HRC/20/23, paras 19–20.

[34] *Cf.* Cephas Lumina, 'Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights' (10 April 2011) UN Doc A/HRC/20/23, Introduction, 10.

[35] Sabine Michalowski, 'Sovereign Debt and Social Rights – Legal Reflections on a Difficult Relationship' (2008) 8 Human Rights Law Review 35, 52; Krajewski (n 28).

[36] See also Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' in Manisuli Ssenyonjo (ed.), *Economic, Social and Cultural Rights* (2011) 113, 140–41; see, however, Aoife Nolan, 'Putting ECR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges' in Aoife Nolan, Rory O'Connell and Colin Harvey (eds), *Human Rights and Public Finance* (2013) 41, 49.

[37] Endorsing proportionality as a way of concretizing social rights in crises: Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 International Journal of Constitutional Law 660.

[38] Letter from the Chairperson of the CESCR to all States Parties to the ICESCR (16 May 2012) CESCR/48th/SP/MAB/SW, <www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf> (5 November 2019).

of retrogressive measures.[39] In line with these requirements, courts have made extensive use of proportionality analysis, examining austerity policies both procedurally (for example, whether the decision was taken after appropriate deliberation and on the basis of accurate assumptions, or whether alternatives were considered) and substantively (for example, whether they lead to unjustified discrimination or violate the minimum core obligations).[40]

b. Private Companies

i. Basis of private financial institutions' social rights obligations

Regarding the human rights obligations of private financial institutions, there are situations in which they assume a quasi-public role and exercise competencies delegated by, or operate in close coordination with, states and international organizations. One example would be the European Financial Stability Facility, a private corporation set up to organize publicly guaranteed emergency loans to Greece in 2010. Another example would be the Institute of International Finance acting as an 'honest broker' in the 2012 Greek debt restructuring, in close coordination with the European Union, the IMF and other stakeholders. In such cases, one might consider private financial institutions as exercising public authority.[41] The delegating (or cooperating) authorities need to ensure that private financial institutions respect the full range of human rights obligations applicable to the delegating (or cooperating) authority.

Usually, however, private financial institutions do not exercise such delegated functions or cooperate with public authorities in such an intense fashion. In this case, the point of departure for the determination of private financial institutions' social rights needs to be the principle that existing social rights instruments are in the first place addressed to states, not to private actors. Nevertheless, there are at least three different approaches to substantiate that private financial institutions and private companies more generally need to respect human rights. The first approach points to the function assigned to companies in society by the legal order. While that function has varied greatly across time and space,[42] in industrial and postindustrial society, company law often features elements revealing the function of entrepreneurship to contribute to aggregate welfare. The welfare-enhancing function of the enterprise entails inherent restrictions on the activities of corporations.[43] The notion of CSR summarizes them. The legal orders of liberal democracies reflect this idea in many ways. For example, they usually allow varying degrees of government interference in the right to property or the freedom of occupation of

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[39] HRC, 'Guiding Principles on Human Rights Impact Assessments of Economic Reforms, Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights' (19 December 2018) UN Doc A/HRC/40/57.

[40] An illustrative example in this respect is the case *Mamatas and Others v Greece*, ECtHR, App No 63066/14 *et al*, Judgment of 21 July 2016 (even though it decides a creditor claim).

[41] Armin von Bogdandy and Matthias Goldmann, 'Sovereign Debt Restructurings as Exercises of Public Authority: Towards a Decentralized Sovereign Insolvency Law' in Carlos Espósito, Juan Pablo Bohoslavsky and Yuefen Li (eds), *Responsible Sovereign Lending and Borrowing: The Search for Common Principles* (2013) 39.

[42] Instructive: David S Landes, Joel Mokyr and William J Baumol (eds), *The Invention of Enterprise: Entrepreneurship from Ancient Mesopotamia to Modern Times* (2012).

[43] From the heydays of the neoliberal epoch: John E Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1995). See also Rothmann Bowen (n 5) and Friedman (n 5). For a contemporary assessment, see Judith Schönsteiner, in this *Research Handbook.*

the entrepreneur if the public interest so requires. Another example is insolvency law, particularly to the extent that it provides for mechanisms to safeguard the survival of a company. Hence, the OECD Guidelines for Multinational Enterprises understand private companies as agents for the realization of sustainable development.[44] The function of the financial sector as an intermediary comes with extensive public guarantees, both implicit and explicit, ranging from deposit insurance schemes to access to 'lending of last resort' by central banks. Such privileges justify not only incisive regulatory intervention in private financial institutions' conduct of their business, but also the alignment of private financial institutions with human rights as paramount public interests. According to this position, the human rights obligations of private financial institutions are indirect, violating the spirit, if not the letter, of their own legal framework.

The second approach, arguably the most widely shared one, makes reference to the familiar tripartite structure of human rights obligations, which distinguishes duties to respect, to protect and to fulfil. Accordingly, states have a duty to protect people against assaults on the effective enjoyment of their social rights caused by the acts of third parties.[45] This obligation compels them to control the activities of private companies and ensure they do not hamper the social rights of those affected by them. Otherwise, states are under an obligation to restrain and regulate the respective activities. The precise legal nature of this obligation is difficult to gauge, though. One might call this a 'soft' obligation given that human rights often cannot be invoked against private companies before courts and are often regulated in non-binding instruments of international organizations, or in codes of conduct emanating from industry associations. Nevertheless, that should not gloss over the fact that these obligations occur in the shadow of a state's binding obligations to protect the enjoyment of social rights.

According to a third approach, the obligation of private companies to respect human rights derives from the universal character of core human rights.[46] The horizontal application of human rights – rare, but not unknown from domestic and European law[47] – finds theoretical support in the very idea of human rights as the expression of the minimum of mutual respect which individuals owe each other in a society.[48] Nevertheless, as states are the direct addressees of international human rights obligations, the obligations of private companies are – again – often qualified as bearing a soft legal character. The UN-sponsored 2011 Ruggie Principles, whose triad of duties to protect, to respect and to remedy endorses both the second and the

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[44] 2011 OECD Guidelines for Multinational Enterprises, II. (General Policies), recommendation A.1.

[45] Ssenyonjo (n 23), 31ff.

[46] August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed.), *Non-State Actors and Human Rights* (2005) 71, 72; Adam McBeth, *International Economic Actors and Human Rights* (2010) 59–60.

[47] E.g. Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 European Law Review 479; *Lüth*, German Federal Constitutional Court, Judgment of 15 January 1958, BverfGE 7, 198; Aoife Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12 International Journal of Constitutional Law 61.

[48] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Repr. edn, 2008), Ch 3, I. (on the common origin of human rights and democracy); John Rawls, *A Theory of Justice* (1972) 52ff.

third approaches,[49] call human rights a 'standard' which private corporations need to observe independent of states' obligations.[50]

Whichever approach one chooses, it would be misleading to qualify respect for human rights by private corporations as a wholly voluntary matter. The conclusion of a binding international treaty, a project currently under negotiation, might change this result.[51] The most recent draft stresses states' obligations to enact legislation ensuring respect for human rights and recognizes companies' obligations only in the preamble.[52] This corresponds to the second approach mentioned above. It also indicates that the treaty is unlikely to change the present situation fundamentally – unless courts take an unprecedented step and hold governments rigorously responsible for failures to implement the treaty.

ii. Scope of social rights obligations

Having established that private financial institutions need to respect human rights in principle, including social rights, questions about the scope of their obligations arise. The vast field of guidelines for CSR, including at the apex the UN-sponsored 2011 Ruggie Principles and the regularly updated OECD Guidelines for Multinational Enterprises, intend to provide guidance in this respect.

However, these non-binding guidelines often remain rather general. In fact, the Ruggie Principles owe their adoption to their refocusing as a framework rather than a set of rules.[53] They rarely address the financial sector directly. One such case is Principle 9, stating in a rather general fashion that states should comply with their human rights obligations with respect to investment treaties.[54] Besides, they hold that private companies need to respect the 'International Bill of Human Rights', namely the 1948 Universal Declaration of Human Rights, the two Covenants and the ILO Declaration on Fundamental Principles and Rights at Work (*cf.* Principle 12). Their responsibility extends over human rights impacts that stand in direct relation to the operations, products or services of an enterprise. This includes all aspects of financing. To address such impacts, financial institutions need to carry out human rights due diligence commensurate to the activity (Principle 17), consult with stakeholders (Principle 18) and prevent and mitigate adverse human rights impacts depending on their influence (Principle 19). The Ruggie Principles also include the duty of states to ensure that those affected by human rights violations have access to a remedy (Principle 25). Beyond these general duties, all of which are of a rather procedural character, the precise human rights obligations which private financial institutions need to respect when funding private or public investments at home or abroad have not been spelled out more clearly.

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[49] *Cf.* John Ruggie, 'Protect, Pespect and Remedy: A Framework for Business and Human Rights' (2008) 3 Innovations: Technology, Governance, Globalization 189.

[50] HRC, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31, para 11.

[51] www.business-humanrights.org/en/binding-treaty.

[52] *Cf.* Art 4, paras 9–15; Art 5, Art 6, OEIGWG Chairmanship Revised Draft (16 July 2019) <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> (5 November 2019).

[53] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights – Foundations and Implementation* (2012) 1, 9–11.

[54] See the contribution by Eric De Brabandere in this *Research Handbook* (Chapter 25).

Even specific codifications of CSR addressing the financial sector hardly add the requisite precision. One example is the Equator Principles, a voluntary framework established by the financial industry in 2003 in collaboration with the International Finance Corporation (IFC), intended to guide private financial institutions' environmental and social risk management.[55] According to Principle 3 of the Equator Principles, environmental and social assessments should cover labour and health standards. However, the list of 'potential environmental and social issues to be addressed in the Environmental and Social Assessment Documentation' only refers to the core labour standards of the International Labour Organization. In non-designated countries, that is, in countries without their own robust standards, the Equator Principles oblige financial institutions to apply the IFC Performance Standards, which include 'Labor and Working Conditions'. The explanatory Guidance Notes provided by the IFC to explain what this standard means are, however, not obligatory. The Principles for Responsible Investment (PRI), a recent, industry-sponsored and UN-supported addition to the chorus of CSR-related soft law, comprise six generally phrased principles that refer to social rights in the broadest way possible.[56] Nevertheless, the organization behind the PRI issues reports that break down these obligations for specific sectors in more detail. For example, the report on infrastructure investments specifies selection criteria for fund managers, for the classification of conflicts regarding economic or social rights (in CSR parlance, economic and social governance or ESG) and for the inclusion of ESG issues in prospectuses.[57]

This overview demonstrates not only the need for further concretization of private financial actors' social rights obligations, but also the difficulty of doing so at a general level. Social rights require sector-specific concretizations. The binding treaty project currently under negotiation will not add much specificity, but will shift the burden to states, which will need to implement and thereby concretize the social rights obligations of private financial institutions.

iii. Extraterritorial obligations

As the preceding sections suggest, invoking the duties of private financial institutions with regard to their international business activities presupposes that states have extraterritorial social rights obligations, particularly if one follows the second approach mapped out above. This issue, which has been controversial for a long time, now seems increasingly settled.[58] While the ICESCR does not define the scope of its member states' obligations, the ICESCR preamble invokes the universal character of the human rights obligations guaranteed by the instrument.[59] Article 2(1) ICESCR obliges states to use international cooperation to progressively achieve the full realization of ESC rights, a point stressed in the CESCR's General

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[55] For an overview see Isabel Feichtner and Manuel Wörsdörfer, '10 Years Equator Principles: A Transdisciplinary Inquiry: Introduction' (2014) 5 Transnational Legal Theory 409.

[56] www.unpri.org.

[57] PRI, Primer on Responsible Investment in Infrastructure (2018) <www.unpri.org/infrastructure/primer-on-responsible-investment-in-infrastructure-/2700.article> (5 November 2019).

[58] The ICJ recognized the possibility of the extraterritorial application of the ICESCR in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ 136, 180 (Advisory Opinion of 9 July); see in more detail the contribution by Ralph Wilde in this *Research Handbook* (Chapter 4).

[59] Olivier De Schutter, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 HRQ 1084, 1127.

Comment No 3.[60] Hence, realization of ESC rights is not, and has never been, guided by an idea of strict territoriality. By now, several General Comments have indicated that the CESCR assumes the guarantees of the ICESCR to have an extraterritorial dimension.[61] Notably, the General Comment on the Right to Water stipulates that states have a duty to prevent their citizens and companies from infringing the right to water abroad.[62] The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights corroborate this view.[63]

The rationale behind this development is compelling. Globalization increased the need for strengthening the extraterritorial and international dimension of social rights protection. The removal of regulatory and actual borders made it easier for foreign actors to exercise their influence abroad. It exposed policy in the host state to the influence of powerful multinational companies. While states in theory retain the right to regulate, competition for investments and jobs might impede social rights implementation. In this situation, the extraterritorial dimension of the home states' social rights obligations might provide an effective means for ensuring that multinational private financial institutions do not infringe the social rights of those affected by their operations, nor fund third parties which will predictably infringe those rights.[64]

III. FINANCIAL INSTITUTIONS AND SOCIAL RIGHTS IN PRACTICE

a. The Changing Position of the IFIs on Social Rights

While from a doctrinal perspective the IFIs have been under an obligation to respect social rights since these rights' emergence, in practice they only recently began to assess their policies in terms of social rights and integrate them into their normative framework. Multiple factors contributed to this lag in social rights discourse. For some decades, the problems deriving from the activities of the IFIs found different conceptual receptacles. In the post-war era, much of the discussion revolved around the establishment of the welfare state. The IFIs contributed to these efforts by providing stable financial conditions, including fixed exchange rates, capital controls and development aid where the market would not lend at affordable rates. Compared

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[60] CESCR, 'General Comment No 3' (14 December 1990) UN Doc E/1991/23, paras 13–14; *cf.* Fons Coomans, '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' (2011) 11 Human Rights Law Review 1, 8.

[61] See CESCR (GC 8) (n 29), para 7; CESCR, 'General Comment No 13 on the Right to Education' (8 December 1999) UN Doc E/C.12/1999/10, paras 39, 56; CESCR, 'General Comment No 15 on the Right to Water' (20 January 2003) UN Doc E/C.12/2002/11, para 33; CESCR, 'General Comment No 17 on the Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author' (12 January 2006) UN Doc E/C.12/GC/17, para 56.

[62] CESCR (GC 15) (n 61), para 33. By contrast, CESCR General Comment No 18 on the right to work remains nebulous.

[63] Maastricht Principles (n 59), paras 19–20.

[64] *Cf.* Radhika Balakrishnan and James Heintz, 'Extraterritorial Obligations, Financial Globalisation and Macroeconomic Governance' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014) 146, 151.

to today, social rights were a task for policy, not for courts and individual plaintiffs.[65] This does not mean that there were no controversies – but they were articulated in terms of policy, not rights. For example, Raúl Prebisch advocated a heterodox economic approach, arguing that trade restrictions and proactive industrial policy would spread prosperity across all echelons of society, which enjoyed high popularity and influence in Latin America.[66] In fact, third world scholars had an ambiguous relationship with human rights. While they cherished self-determination as a human right, some of them were, and still are, sceptical about human rights' potential to be turned into an instrument of interference in their internal affairs and to revive colonial patterns.[67]

The role of social rights in the field of international finance shifted with the arrival of financial globalization in the 1970s. To enable global financial markets and greater policy convergence, globalization dismantled the regulatory protection shields of many states. In a related shift, the policies of the IFIs took a decisive turn in the early 1980s with the establishment of the abovementioned Washington Consensus,[68] imposing severe austerity measures on countries in need of IFI funds.[69] This involved a considerable shift in conditionalities, or the terms agreed upon by the IFIs and a country seeking access to their financial resources. While they previously contained relatively general macroeconomic benchmarks, leaving the country with a wide margin in choosing the means for stabilizing its balance of payments, in the new era the IFIs needed to ensure the countries affected would regain market confidence in the long run. This shift required recipient countries of IFI funding to implement substantial economic policy reforms.[70]

The consequences of these policies for social rights were severe. Among others, UNICEF soon reported rising malnutrition rates of children in affected countries.[71] Nevertheless, policy-makers in the affected countries often prioritized other measures, including calls for more generous debt restructuring, over invoking social rights. Indeed, invoking *social* rights against the IFIs and private actors might not have been the most obvious choice in the context of the Cold War, which still stood in the way of human rights becoming the universally recognized standard they became after 1990,[72] and of financial globalization, which followed

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[65] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (2018) 41ff.

[66] Raul Prebisch, 'The Economic Development of Latin America and its Principal Problems' (1962) 7 Economic Bulletin for Latin America 1.

[67] E.g. Makau Wa Mutua, 'The Ideology of Human Rights' (1995) 36 Virginia Journal of International Law 589. A good illustration is the selective use of human rights language in the Final Communiqué of the Asian-African conference of Bandung (24 April 1955) <http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf> (5 November 2019), which restricts human rights to self-determination and colonial domination. For a nuanced analysis see Joseph R Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40 HRQ 735, 749.

[68] Williamson (n 6) and accompanying text.

[69] *Cf.* Mark Blyth, *Austerity: The History of a Dangerous Idea* (2013) 161.

[70] Patricio Meller, 'IMF and World Bank Roles in the Latin American Foreign Debt Problem' in Patricio Meller (ed.), *The Latin American Development Debate: Neostructuralism, Neomonetarism, and Adjustment Processes* (1991) 169. Comprehensively on the history of conditionalities: James M Boughton, *Silent Revolution – The International Monetary Fund 1979–1989* (2001) 557ff.

[71] Richard Jolly, 'Adjustment with a Human Face: A UNICEF Record and Perspective on the 1980s' (1991) 19 World Development 1807.

[72] On the rising significance of human rights discourse for dissident movements and civil society since the 1970s, see Samuel Moyn, *The Last Utopia* (2010) 120ff.

a logic of advancing development through economic growth. It was only towards the 1990s that voices both in civil society and in academia increasingly began to articulate their critique of the IFIs and of financial markets in terms of human rights.[73]

The IMF consistently rejected any obligation with regard to human or social rights.[74] Taken together with the power differential between the crisis-struck developing world and the advanced economies, this prevented the development of any international standard, guideline, general comment or other instrument defining how social rights apply to the IFIs or to other actors in periods of financial distress. The Great Financial Crisis therefore found the social rights community largely unprepared, and it took a while to frame the Eurozone sovereign debt crisis in terms of social rights,[75] and to adopt international guidelines.[76]

In practice, however, the IMF and the World Bank have not managed to avoid the issue of social rights. Both the IMF and the World Bank have taken steps to give greater significance to issues relevant for social rights enjoyment, even if such policies go by another name. The World Bank took the lead in this respect and has softened its stance considerably since the end of the Cold War. The 1991 World Development Report ushered in the World Bank's turn to good governance. This term suggests that development not only depends on funding, but also requires strong, representative domestic institutions and respect for the rule of law to succeed.[77] Part of this idea of good institutional governance is respect for human rights.[78] Moreover, in response to human rights-based criticism, the World Bank set up its Inspection Panel in 1994 to scrutinize projects for compliance with World Bank operational policies.[79] The Bank even explicitly recognized that its policies contribute to the realization of human rights, including social rights, by providing access to, among others, health, education, food or water.[80] According to the so-called Shihata formula, the mandate of the World Bank allows the promotion of human rights as long as they do not conflict with economic considerations.[81] In line with this formula, the World Bank emphasized the role of development and economic growth for the realization of human rights in an influential report marking the 50th anniversary of the Universal Declaration of Human Rights.[82] Around this time, then General Counsel Roberto Daniño attempted to go one step further. He not only developed a matrix

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[73] Daniel D Bradlow, 'Debt, Development, and Human Rights: Lessons from South Africa' (1990) 12 Michigan Journal of International Law 647. For a detailed account of the developments, see Matthias Goldmann, 'Contesting Austerity: Genealogies of Human Rights Discourse', (2020) Max Planck Institute for Comparative Public Law & International Law Research Paper No 2020-09.

[74] E.g. Gianvitti (n 14).

[75] For many see Margot E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21 European Law Journal 521.

[76] See above (nn 33, 38 and 39).

[77] Thomas G Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges' (2000) 21 Third World Quarterly 795, 801.

[78] Daniel Kaufmann, 'Human Rights and Governance: The Empirical Challenge' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 351; K Sarwar Lateef, 'Evolution of the World Bank's Thinking on Governance' (2016) World Development Report Background Paper 3; Weiss (n 78), 801.

[79] Jonathan A Fox, 'The World Bank Inspection Panel: Lessons from the First Five Years' (2000) 6 Global Governance 279.

[80] Van Genugten (n 30), 4 (with many quotes).

[81] Ibrahim FI Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, vol 2 (1991) 70ff; sceptical on this Coomans (n 60) 37.

[82] World Bank, *Development and Human Rights: The Role of the World Bank* (1998).

that shows how various World Bank policies implement human rights,[83] but also argued that the World Bank should support an active human rights agenda.[84] Nevertheless, official World Bank policies never endorsed this position. In a 2006 report, Daniño's successor as General Counsel, Ana Palacio, recognized that the discharge of the Bank's mandate contributes to the realization of human rights; that the Bank 'can and sometimes should take human rights into consideration as part of its decision-making process'; and that 'human rights as *legal principles* […] may inform a broad range of activities, and […] may enrich the quality and rationale of development interventions', adding that the Bank should support member states in fulfilling their actionable obligations towards their citizens.[85] While this statement leaves some space for interpretation, it falls short of the ambition to actively pursue a comprehensive human rights agenda at the Bank.

It is also important to recognize that overall, the World Bank's shift towards good governance and human rights followed a neoliberal script. Public institutions should provide a sound institutional framework and let the market do the rest, refraining from direct interference in the economy and discontinuing, for example, pursuit of a proactive industrial policy.[86] Paradigmatic of this attitude is the World Bank Doing Business Report series launched in 2003, which promoted the hiring and firing of workers in violation of international labour standards as laudable, business-friendly practice.[87] Another example is the poverty reduction strategy adopted by the World Bank and the IMF in the 1990s, when human rights-based criticism of the IFIs in civil society became louder and louder and the debt crisis of developing countries entered its second decade. This strategy became part of the Heavily Indebted Poor Countries Initiative (HIPC Initiative), a programme aiming at significant debt relief of the poorest countries.[88] While this development demonstrated concern for the plight of the people in programme countries, the sequencing of poverty reduction strategies developed under the initiative put economic integration and growth first and expected poverty alleviation to result

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[83] Roberto Dañino, 'The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (2005) 509, 510.

[84] Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (2013) 75.

[85] Ana Palacio, 'The Way Forward: Human Rights and the World Bank' in *Human Rights and Development, Development Outreach* (2006) 36.

[86] Robert H Wade, 'Agenda Change in Western Development Organizations: From Hard Production to Soft, Timeless, Placeless Policy' (2015) 20 The Lahore Journal of Economics 1.

[87] Peter Bakvis, 'The World Bank's Doing Business Report: A Last Fling for the Washington Consensus?' (2009) 15 Transfer: European Review of Labour and Research 419.

[88] Development Committee (Joint Ministerial Committee of the Boards of Governors of the Bank and the Fund on the Transfer of Real Resources to Developing Countries), 'Building Poverty Reduction Strategies in Developing Countries', DC-99/29 of 22 September 1999.

from the former.[89] Again, the market was expected to fix social rights.[90] Moreover, as the World Bank Inspection Panel may only review compliance with the World Bank's operational policies and procedures, respect for social rights depends on the quality of the Bank's operational policies and procedures. While many of the operational policies are in compliance with social rights, they are not systematically integrated into the World Bank's decision-making process and organizational culture.[91]

Compared to the World Bank, the IMF has been more reluctant to recognize the role of human rights in the discharge of its mandate, employing a strategy of repeated semantic shifts that allowed it to avoid the issue. Once structural adjustment programmes began to reflect the Washington Consensus and impose tight fiscal policy and economic liberalization upon programme countries, UNICEF, alarmed by rising malnutrition rates, engaged with the IMF in a conversation about human needs.[92] The IMF, however, quickly turned this conversation into one about human capital.[93] Later on in the 1990s, the IMF advocated the implementation of social safety nets in response to expected major social disruptions as a consequence of IMF-supported adjustment programmes. The function of social safety nets, however, was limited to cushioning the effects of adjustment by, for example, phasing out specific benefits (such as fuel subsidies) instead of cutting them abruptly.[94] Social expenditure under this approach should be targeted. States were expected to spend resources where they were needed most and where spending was most efficient.[95] This implied, for example, that states had to discontinue subsidies for food and fuel, even though they were vital for many poor people, because such subsidies are never targeted.[96] While some hailed the targeted approach and the turn to poverty for showing greater sensitivity to the actual human plight,[97] one might see in them a truncated version of social rights at work, one that puts the emphasis on curing absolute, abject poverty and gives up more ambitious, more egalitarian ideas of social rights that

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[89] David Craig and Doug Porter, 'Poverty Reduction Strategy Papers: A New Convergence' (2003) 31 World Development 53; Mark S Ellis, 'The World Bank. Fighting Poverty – Ideology versus Accountability' in Krista Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System: Duties to the World's Poor* (2013) 291, 295; arguing that, from a postcolonial perspective, the Poverty Reduction and Growth Facilities diffuse power disparities: Celine Tan, 'The Poverty of Amnesia: PRSPs in the Legacy of Structural Adjustment' in Diane Stone and Christopher Wright (eds), *The World Bank and Governance: A Decade of Reform and Reaction* (2007) 147, 151.

[90] *Cf.* Sanae Fujita, 'The Challenges of Mainstreaming Human Rights in the World Bank' (2011) 15 The International Journal of Human Rights 374.

[91] Galit A Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank' (2017) 103 AJIL 647, 648.

[92] Jolly (n 71) and accompanying text.

[93] Remarks of de Larosière before the Economic and Social Council of the UN (4 July 1986), quoted in Jolly (n 71), 1816; see Goldmann (n 73).

[94] IMF, 'Review of Social Issues and Policies in IMF-Supported Programs. Prepared by the Fiscal Affairs and Policy Development and Review Departments' (27 August 1999) 10–12.

[95] *Ibid.*, 13ff. The targeted approach also applied to education and health care.

[96] IMF Independent Evaluation Office, 'The IMF and Social Protection', 2017 Evaluation Report, 11.

[97] Krista Nadakavukaren Schefer, 'Poverty, Obligations, and the International Economic Legal System. What Are Our Duties to the Global Poor?' in Krista Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System* (2013) 7.

seek to improve relative poverty.[98] In other words, the poverty focus and the targeted approach only aim at securing the absolute minimum core obligations of social rights,[99] at mitigating the negative effects on social rights enjoyment, rather than seeking to avoid them altogether. The economics of growth through austerity, of prosperity through suffering introduced by the Washington Consensus remain intact; and social rights continued to be understood as antagonists of economic growth rather than preconditions. This is miles away from a more holistic understanding of this relationship seeking to maximize both human rights enjoyment and economic development. Another problem of the poverty-centred, targeted approach is its narrow focus and relative blindness to wider structural issues such as the role of macroeconomic imbalances between the Global North and the Global South.[100]

Nevertheless, there appears to be some light at the end of the tunnel at long last as a result of a series of piecemeal changes following the Great Financial Crisis. Since 2010, the IMF has required social spending floors in programme conditionalities.[101] They still follow the logic of the targeted approach, and their impact remains limited, as all sorts of expenditures with dubious social effects count as social spending.[102] The 2015 Revised Operational Guidance on conditionality called for mitigating programme effects on the 'most vulnerable'.[103] While this continued the minimalistic approach to social rights known from the turn to poverty, the use of this particular term approximated human rights discourse. The 2017 report on social protection by the IMF's Independent Evaluation Office, otherwise a rather sobering stock-taking, suggests that the targeted approach is aligned with a human rights-based approach.[104] In effect, the IMF approach to social rights changed in more than just cosmetic fashion. In 2019, the IMF launched a new strategy for engaging in social spending. This strategy takes stock of the targeted approach; realizes that IMF programmes have reduced social spending in a significant number of cases, despite a global trend towards lower social expenditure; recognizes that social spending might often bear critical significance for both political stability and development; and addresses how this should influence programme design.[105] With a view to the mandate of the IMF, the new strategy stresses that social spending issues are usually 'macrocritical', that is, bearing significance for domestic or external stability and therefore

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[98] Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale Journal of International Law 113, 114; see also Moyn (n 65), 3–9.

[99] Arguing for an absolute understanding of minimum core obligations: John Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now' (2017) World Bank Nordic Trust Fund Research Paper (2017) 23. For the opposite view see Asbjørn Eide, 'Economic, Social, and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social, and Cultural Rights: A Textbook* (2001) 27.

[100] Celine Tan, 'Life, Debt and Human Rights: Contextualising the International Regime for Sovereign Debt Relief' in Krista Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System* (2013) 307ff; Ben Thirkell-White, 'Ambitious Goals, Limited Tools? The IMF and Poverty Reduction' in *ibid.*, 256, 273ff.

[101] IMF, 'The IMF Response to the Global Crisis: Meeting the Needs of Low-Income Countries' (Background Note, July 2009).

[102] IMF Independent Evaluation Office, 'The IMF and Social Protection: Seven Low-Income Country Cases' (Background Document No. BD/17-01/06, 5 July 2017) para 19.

[103] IMF, 'Revised Operational Guidance to IMF Staff on the 2002 Conditionality Guidelines' (IMF Policy Paper, July 2014) para 2.

[104] IMF Independent Evaluation Office (n 96), 13 (footnote 40).

[105] IMF, 'A Strategy for IMF Engagement on Social Spending – Background Papers' (IMF Policy Paper, June 2016).

meeting the threshold for the IMF to take them into account.[106] It also considers social spending as a means for achieving 'inclusive growth'.[107] This comes on top of repeat statements by former Managing Director Christine Lagarde in which she established a relationship between social policies and growth.[108] These developments stir the hope that a more ambitious, more egalitarian concept of social rights, whichever term the IMF uses to address them, is becoming an integral part of IMF programmes.

Recent programmes such as those for Barbados or Argentina confirm this expectation, indicating that social spending is actually understood as a development strategy, rather than a necessary evil deflecting from the austerity objectives.[109] There is reason to be cautious, though. Social spending does not equal social rights and the associated duties of progression and non-discrimination. As late as 2014, an IMF report on the Portuguese programme considered upcoming decisions by the Constitutional Court unequivocally as a risk for the successful implementation of the programme, not as a chance for development or social stability.[110] On the whole, however, there are encouraging signs that the prospect of populism and instability finally propelled the IMF effectively towards greater respect for social rights.

b. Corporate Social Responsibility: The Equator Principles

As finance is a driver of much economic activity, the financial sector holds the keys to implementing CSR and ensuring that business corporations live up to their (indirect) obligations to respect social rights.[111] This is why as early as the 1970s, advocates from the Global South called for greater accountability for multinational enterprises in the form of a binding treaty. Western states avoided this step by offering voluntary codes as a substitute, particularly the OECD Guidelines for Multinational Enterprises inaugurated in 1976.[112]

Nevertheless, the effects of CSR codifications and voluntary commitments are mixed at best. After a decade and a half, it is safe to say that the success of the Equator Principles has been moderate. Much of the dilemma derives from their voluntary nature. As of this writing, less than 100 financial institutions adhere to them. Not many of them come from the newly capital-exporting countries, such as China. The Equator Principles lack a complaint mech-

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[106] IMF (n 105), para 17. On the concept of macrocriticality, see IMF, 'Guidance Note for Surveillance under Article IV Consultation' (IMF Policy Paper, March 2015) 8, 34.

[107] IMF (n 105), para 20.

[108] *Cf.* Van Genugten (n 30), 7.

[109] 'In Argentina, the IMF has been neither toxic nor triumphant' (*The Economist*, 22 June 2019) <www.economist.com/finance-and-economics/2019/06/22/in-argentina-the-imf-has-been-neither-toxic-nor-triumphant> (5 November 2019); 'IMF Executive Board Approves US$290 Million Extended Arrangement Under the Extended Fund Facility for Barbados' (*IMF Press Statement*, 1 October 2018) www.imf.org/en/News/Articles/2018/10/01/pr181370-imf-exec-board-approves-us-290-million-ext-arr-under-ext-fund-facility-barbados (5 November 2019).

[110] IMF, 'Portugal – Tenth Review under the Extended Arrangement and Request for Waivers of Applicability of End-December Performance Criteria – Staff Report; Press Release; and Statement by the Executive Director for Portugal', IMF Country Report No 14/56, February 2014, paras 13, 16, 23.

[111] Bert Scholtens, 'Finance as a Driver of Corporate Social Responsibility' (2006) 68 Journal of Business Ethics 19.

[112] Ana María Suárez Franco and Daniel Fyfe, 'Voluntary vs. binding: Civil Society's Claim for a Binding Instrument' in Jernej Letnar Černič and Nicolás Carrillo-Santarelli (eds), *The Future of Business and Human Rights* (2018) 139, 140.

anism, and introducing one would make them even less attractive for their few, precious subscribers.[113] Only recently have publicly backed development banks established a complaint mechanism.[114] Beyond institutional issues, their substance also raises concerns. Prevalent in the Equator Principles – as in the World Bank – is a managerial attitude towards development through growth that tends to entrench existing power relationships, rather than promoting effective emancipation,[115] which one might understand as the true purpose of social rights.

It is difficult to assess the impact of the Principles for Responsible Investment at this stage. Nevertheless, the case of Mozambique's tuna loans raises initial doubt. Staff members of Credit Suisse arranged a multibillion-dollar scheme of loans, official guarantees, bribes and kickbacks that defied both ethical and economic common sense.[116] It did not take much more than a few assurances and tricks to overplay Credit Suisse's compliance department. Credit Suisse, while a subscriber to the Principles, apparently sees no ethical or human rights issue in reclaiming the full amount of this loan, even though not a single penny of it remains in the empty vaults of Mozambique. On the whole, therefore, it seems that CSR codes in the financial sector, though well intended, presently bear enormous potential for whitewashing.

Another loophole in current social rights discourse concerns the responsibility of private financial institutions for financial stability. CSR codifications, even if drafted for the financial sector, take a project-specific approach to social rights issues and turn a blind eye to the social rights dimensions of systemic crises.[117] While the prevention of major financial meltdowns is clearly in the interest of social rights, prudential measures imposed by regulators or taken by private financial institutions may have adverse social rights impacts. For example, they might incentivize loan policies that discriminate against vulnerable groups, either directly or indirectly. There is thus a huge disconnect between stringent requirements put in place via financial regulation, on the one hand, and financial institutions' human rights obligations, on the other.[118]

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[113] But see Annegret Flohr, 'A Complaint Mechanism for the Equator Principles – And Why Equator Members Should Urgently Want It' (2014) 5 Transnational Legal Theory 442.

[114] www.fmo.nl/independent-complaints-meachanism.

[115] Michael Riegner, 'The Equator Principles on Sustainable Finance Assessed from a Critical Development and Third World Perspective' (2014) 5 Transnational Legal Theory 489, 496ff.

[116] The case has been widely reported. See 'A $2bn loan scandal sank Mozambique's economy' (*The Economist*, 22 August 2019) <www.economist.com/middle-east-and-africa/2019/08/22/a-2bn-loan-scandal-sank-mozambiques-economy> (5 November 2019); Matthias Goldmann, 'The Law and Political Economy of Mozambique's Odious Debt', Keynote delivered at CIP Conference, Maputo, 15 March 2019, https://dx.doi.org/10.2139/ssrn.3513651.

[117] Mary Dowell-Jones and David Kinley, 'Minding the Gap: Global Finance and Human Rights' (2011) 25 Ethics & International Affairs 183, 188.

[118] Mary Dowell-Jones and David Kinley, 'The Monster under the Bed: Financial Services and the Ruggie Framework' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2011) 193, 196.

IV. CHALLENGES: TAKING SOCIAL RIGHTS BEYOND COURTS

a. From Courts to Politics

At a general level, there has certainly been considerable progress in the enforcement of social rights over the last decades. Courts in various jurisdictions have demonstrated how to 'juridify' social rights despite their alleged political character.[119] Compared with this success, social rights adjudication in the aftermath of the financial crisis has been underwhelming. In particular, courts granted wide margins of discretion to governments in addressing economic crisis. This applies to both European and domestic courts, perhaps with the exception of the Portuguese Constitutional Court.[120] Most lawsuits in this context concerned wages of employees who do not count among the most vulnerable in society. By contrast, structural issues such as healthcare were hardly addressed.[121] The young and unemployed were left aside.[122]

Some of these problems have had to do with the legal nature of the adjustment programmes adopted in Europe, which have placed high hurdles before citizens willing to litigate them.[123] This replicated at the regional level the refusal of the IFIs to recognize social rights as binding standards. Other problems relate to the specific circumstances of the financial crisis, which constrain the enforcement of social rights. The crisis character of retrogressive measures makes them hard to check due to the wide discretion granted to governments.[124] Hope for better, more precise standards governing retrogressive measures appears to be in vain.[125] Domestic or supranational courts might simply not feel well positioned to micromanage potentially far-reaching political issues in highly uncertain environments. In addition, IFI-imposed austerity involves a foreign policy aspect, which is for many courts around the globe a reason for judicial self-restraint. An additional factor is that individual plaintiffs may only invoke their individual rights, while 'structural adjustment' is actually structural. It is extremely difficult for courts to scrutinize structural measures concerning largescale redistributive schemes through the lens of the rights of an individual plaintiff. Austerity programmes might comprise multiple measures which might lead to greater inequality in the aggregate.[126] However, it seems notoriously difficult for courts to pin down these aggregate effects in the frame of an

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[119] For an overview see Malcolm Langford, 'The Justiciability of Social Rights: From Practice to Theory' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 3.

[120] Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in Bruno de Witte, Claire Kilpatrick and Thomas Beukers (eds), *Constitutional Change through Euro-Crisis Law* (2017) 279, 294ff.

[121] *Ibid.*, 290.

[122] Anastasia Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation' (2014) 15 German Law Journal 1145, 1161.

[123] Matthias Goldmann, 'The Great Recurrence: Karl Polanyi and the Crises of the European Union' (2017) 23 European Law Journal 272, 284.

[124] Joe Wills and Ben TC Warwick, 'Contesting Austerity: The Potential and Pitfalls of Socio-economic Rights Discourse' (2016) 23 Indiana Journal of Global Legal Studies 629, 646.

[125] But see *ibid.*, 658.

[126] Juan Pablo Bohoslavsky, 'Economic Inequality, Debt Crises and Human Rights' (2016) 42 Yale Journal of International Law Online 181, 189ff.

individual lawsuit. Under these circumstances, one is almost unable to end up with any more than a mere control for arbitrariness.[127]

Awareness of these limits to social rights adjudication and enforcement is all the more important as austerity is likely to be not only a transitory phenomenon. Many developed economies face deep structural difficulties, including an ageing population, an ailing infrastructure and the social costs caused by the transition to a digitalized economy and the increasing use of artificial intelligence.[128] In light of this, many of the austerity measures introduced and justified against the background of an acute emergency are unlikely to be fully repealed. Yet, even though this transformation from the exceptional to the permanent undermines the justification of these measures in accordance with the criteria applicable to retrogressive measures,[129] it will be extremely difficult for courts to determine the point at which a certain measure becomes illegal, especially since financial crises might quickly return and seem to be a regular feature of a capitalist economic model.[130] As time passes, measures that used to be exceptional will be considered the new normal.

For these reasons, one should expand the focus of social rights analysis in the context of austerity and economic reform beyond the fixation on adjudication and enforcement. As much as they are entitlements, social rights also provide a discursive framework for policy-making and analysis. This potential has not yet been fully explored, given the IFIs' resistance to social rights. While it has been demonstrated that the IFIs have effectively moved towards greater respect for social rights in *substance*, moving towards social rights *discourse* would be likely to make a difference. In particular, it would make it more difficult for the IFIs and for governments to subordinate rights to economic considerations, or to gloss over crucial choices, such as the decision to focus on poverty (or minimum core obligations) rather than striving towards a higher level of redistribution generally. Structural features, such as the aggregate effects of multiple austerity measures, are also better addressed at the political level, especially the controversial relationship between budget cuts and taxation, or financial regulation and social policy. Political discourse might invoke the long historical record of the negative impact of trickledown economics on social rights. By contrast, courts would find it difficult to question the wisdom of imposing specific budget cuts while cutting taxes elsewhere. They would need to project the combined impact of two vastly different measures on social rights – an exercise that appears to reach well beyond the capacity and legitimacy of courts.

The means and tools for using social rights as a comprehensive discursive framework for economic reform are available. For one, the conceptual framework within which the IFIs operate would have to be adjusted accordingly. For example, one might doubt why the IMF understands debt sustainability as a purely economic criterion, namely as the ability to roll over existing debt in the medium term without major policy changes.[131] An alternative understanding would consider debt sustainability as the ability of a state to roll over existing debt

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[127] *Cf.* Ben TC Warwick, 'Debt, Austerity, and Social Rights' in Ilias Bantekas and Cephas Lumina (eds), *Sovereign Debt and Human Rights* (2018) 381, 384.

[128] Mary Dowell-Jones, 'The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments' (2015) 15 Human Rights Law Review 193.

[129] See above section II.a.iii.

[130] Hyman P Minsky, 'The Financial Instability Hypothesis' (1992) Levy Economics Institute Working Paper No 74 <www.levy.org/pubs/wp74.pdf> (5 November 2019).

[131] IMF, 'Assessing Sustainability' (IMF Policy Paper, May 2002), 4.

in the medium term while complying with its social rights obligations, including the duty of progressive realization.[132]

Moreover, the most important tool for this framework is arguably the comprehensive use of social rights impact assessments.[133] They ensure that every economic measure is questioned for its impact on social rights, thereby establishing a clear hierarchy among discursive spheres. To be effective, impact assessments need to be comprehensive, transparent and participatory. Only this will ensure that the right information is included.[134] Many of these aspects are addressed in the Guiding Principles on Human Rights Impact Assessments of Economic Reforms.[135] They stir the hope that ultimately global governance and democracy might not be as inimical as some claim,[136] at least if one accepts non-traditional and non-representative forms of democratic governance.[137]

b. From CSR to Capital Requirements

While social rights discourse at the IFIs should expand beyond adjudication and enforcement, the reverse is true for private financial institutions. The voluntary approach has reached a dead end. Cross-country competition is unlikely to subside anytime soon, especially since competition for jobs for low-skilled workers is likely to increase in the face of a growing world population and progressing automation and digitalization. Investments are anything but ethical, as the corruption scandals engulfing public debt in Mozambique, Venezuela and other places currently demonstrate.[138] This calls upon the regulator to intervene. The binding treaty currently under negotiation will presumably add little substance except for stipulating the duty of states to implement measures protecting human rights against businesses. Its impact will therefore depend on the approach chosen for its implementation.

In this respect, I believe that the most appropriate way would be to include social (and environmental or other) criteria in the calculation of regulatory capital. The first reason for this is that competition in the financial sector is fierce. Companies and products are structured similarly, and even small concessions to social rights and sustainable development might matter a lot in the aggregate. This puts a limit on the willingness of the financial industry to make decisions about investments on the basis of other than purely profit-oriented criteria. To overcome the structural advantage of profit-related criteria over social rights and any other public interest, one has to make the latter relevant for profit. Regulatory capital provides a framework for this. Including social performance criteria in the calculation of regulatory capital would make it more expensive for private financial firms to finance projects threatening to impact social rights negatively.

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[132] Juan Pablo Bohoslavsky and Matthias Goldmann, 'An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law' (2016) 42 Yale Journal of International Law Online 13.

[133] *Cf.* Ana Maria Esteves, Daniel Franks and Frank Vanclay, 'Social Impact Assessment: The State of the Art' (2012) 30 Impact Assessment and Project Appraisal 34.

[134] Spelling out this idea in great mastery: Amartya K Sen, *The Idea of Justice* (2009).

[135] See above (n 39).

[136] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014).

[137] Sepúlveda Carmona (n 7), 29.

[138] E.g. Mitu Gulati and Ugo Panizza, 'Maduro Bonds' (2019) Duke Law School Public Law & Legal Theory Series.

Second, capital requirements need to be respected at all times and are the subject of constant supervision. By contrast, suing companies for violations of social rights is much more difficult and burdensome. It takes someone with the means and skills to sue, and such lawsuits always only take place *ex post*.

Third, including social considerations in regulatory capital offers the chance to ensure that prudential measures do not defeat social rights.

Of course, this proposal requires independent, standardized social rights impact assessments of funded projects and institutional practice. The example of environmental impact assessments, which have been practised in many jurisdictions for decades, shows that this is doable. Credit rating assessments are routinely used for regulatory purposes. The same would have to happen with social impact assessments, with the only difference that flawed social impact assessments would be unlikely to trigger a worldwide financial crisis.

V. CONCLUSION: FROM THE LAGARDE CONCORD TO POST-GROWTH

The financial crisis has exposed the strengths and the flaws of social rights in relation to financial institutions. On the one hand, the IFIs, while still refusing to be bound by social rights, finally now consider social rights and social spending as crucial for economic development and stability. One might go so far as to claim that the Washington Consensus has finally been replaced by the 'Lagarde Concord', a position characterized by the conviction that growth and social rights are two sides of one and the same coin and that the latter need to be an inclusive part of policy-making. While one might criticize this position for its instrumental use of social rights, it constitutes a huge leap compared to the heyday of the Washington Consensus.

On the other hand, the crisis mode has exposed the limits of social rights adjudication. One should therefore think about their discursive function in a broader sense. This is all the more necessary as current macroeconomic and political risks, stemming from demographic development, digitalization and climate change, give reason to expect major fiscal constraints on governments in the years to come. This chapter has argued that social rights therefore need to be integrated into a comprehensive framework for developing adjustment policies. Otherwise, political stability will be at risk. Similarly, there will be competition for private lending and investments, with potential negative effects for social rights. Ideally, this requires including social rights performance criteria in the calculation of regulatory capital. Improving the liability of private financial institutions alone is unlikely to fundamentally change the present situation, as it would not modify the existing structural disadvantage of social rights compared to profit-oriented criteria.

An open issue that is beyond the scope of this chapter is still looming, however. Both our current social rights regime and the legal framework applicable to financial institutions show a surprising convergence, in that they are both premised on the expectation of economic growth. The progressive realization of human rights and economic development in a post-growth age will likely look very different and require us to rethink the very notions of social and economic progress.

27. Social rights and the Sustainable Development Goals

Inga T Winkler and Matheus de Carvalho Hernandez

I. INTRODUCTION

'Ships passing in the night' – this was the metaphor Philip Alston used in 2005 to describe the state of the relationship between human rights and development through the lens of the Millennium Development Goals (MDGs), which shaped the key debates in the development realm at the time. Despite many common concerns, the development and human rights communities did not embody the connections between the two United Nations pillars.[1]

To be sure, the MDGs triggered some positive inputs to social rights. The MDGs increased the visibility and the prominence of some rights historically neglected in the development realm, such as sanitation and maternal health. However, the human rights community criticized the MDGs for their limited focus: substantively almost exclusively on poverty reduction, and geographically on so-called developing countries.[2] Human rights advocates criticized the technocratic and non-inclusive way the MDGs were elaborated, the limitations of the goals and targets, the failure to tackle structural causes, the lack of addressing inequalities and the complete absence of civil and political rights, as well as, initially, women's rights.[3] Finally, the community considered the monitoring and follow-up to the MDGs to be weak. Due to the broad perception of the absence of human rights in the MDGs, human rights advocates were latecomers to the process and largely resistant to seeing this development platform as an opportunity.[4] While human rights elements and language in particular in relation to social rights were added throughout the process, including some aspects of reproductive rights,

[1] Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals' (2005) 27(3) HRQ 755, 755.

[2] OHCHR, 'Claiming the Millennium Development Goals: A Human Rights Approach' (2008) 4–5.

[3] Malcolm Langford, Andy Sumner and Alicia Ely Yamin, 'Introduction – Situating the Debate' in Malcolm Langford, Andy Sumner and Alicia Ely Yamin (eds), *The Millennium Development Goals and Human Rights: Past, Present and Future* (2013) 1, 3. OHCHR's assessments of the MDGs acknowledged some overlap between those goals and the economic and social rights. In a 2008 publication, the OHCHR asserted, for example: 'The content of the MDGs partly resembles some economic and social rights, and both provide tools to hold Government accountable (p.vii) […] Many of the MDGs targets and economic and social rights overlap to a certain degree (p.3) […] MDGs help to highlight the need to realize often neglected economic and social rights (p.4)' (OHCHR 2008 (n 2)). However, at the same time, the OHCHR critiqued the MDGs for the lack of capturing important social rights dimension, their failure to address inequalities and significant gaps in ensuring accountability.

[4] Jan Vandemoortele, 'Making Sense of the MDGs' (2008) 51(2) Journal of the Society for International Development 220, 221.

women's political representation and decent work,[5] human rights continued to be perceived as marginal to the MDGs.

Advocates hoped that human rights would occupy a more central position in the new UN agenda post-2015, now called Agenda 2030 (which contains the Sustainable Development Goals or SDGs).[6] Broadly speaking, they argued that basing a development agenda on human rights has implications for the process, scope and content of the agenda. This required that the new set of goals and targets be elaborated through an inclusive and participatory process; that they be universally applicable to all countries in the world; that they be consistent with international human rights law; that they address inequalities, prioritize the most marginalized populations and foster the collection of disaggregated data; and that states can be held accountable for the implementation of the goals.[7]

Many human rights actors engaged in the process leading to Agenda 2030. At the UN, the main actors that participated were the Office of the High Commissioner for Human Rights (OHCHR), the Special Rapporteurs and the Treaty Bodies. While some non-governmental organizations (NGOs) such as the Center for Economic and Social Rights (CESR) and Amnesty International (leaders of the Human Rights Caucus on the post-2015 agenda) stood out as important voices defending a high-profile presence of human rights in the SDGs,[8] a large number of organizations and coalitions were engaged throughout the process of negotiations.[9] In addition, in particular in the early stages, the UN held extensive consultations (national, thematic and online)[10] to which anyone who was aware of the process, had internet access or had the means and availability to take part in person could contribute.

These actors provided technical input, lobbied state delegations, identified human rights champions among UN member states and actively participated in the deliberations and negotiations inside the UN system. Their presence and pressure throughout the Open Working Group

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[5] Sakiko Fukuda-Parr and David Hulme, 'International Norm Dynamics and the "End of Poverty": Understanding the Millennium Development Goals' (2011) 17(1) Global Governance 17, 24.

[6] The SDGs are formed by 17 goals on different global issues: poverty, hunger, health, education, energy, work, industry, inequalities, climate change, ocean, forests, peace and international cooperation for implementation. Each goal has its specific targets, resulting in a total of 169 integrated and interdependent targets. In addition, each target has indicators to track the states' progress in their implementation.

[7] OHCHR, 'UN System Task Team on the Post-2015 UN Development Agenda' (2012) 11 <www.un.org/millenniumgoals/pdf/Think%20Pieces/9_human_rights.pdf> (5 November 2019).

[8] In 2013, in the context of the negotiations to elaborate the new set of goals, the OHCHR and the CESR edited a joint publication about human rights, accountability and the post-2015 development agenda (OHCHR and CESR 'Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda' (2013) <www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf> (27 May 2019)).

[9] The Post-2015 Human Rights Caucus was formed in 2013. It is a heterogeneous coalition of human rights, development, trade union, feminist and environmental entities worldwide. The first joint statement of the coalition was supported by 350 groups; however, the main membership includes around 80 entities. CESR, Amnesty International, and the Association for Women's Rights in Development (AWID) are the coconveners of the Caucus. The shared objective of the Caucus has been to introduce human rights principles and norms in the whole 2030 Agenda: goals, targets, financing, implementation and monitoring (see <www.cesr.org/post-2015-human-rights-caucus> (27 May 2019)).

[10] UNGA Res A/65/1 (19 October 2010). The United Nations Development Group (UNDG) elaborated two reports on these consultations in 2013: 'The global conversation' and 'A million voices'. The reports explained the whole process of consultations and summarized the main inputs coming from them.

(in 2013 and 2014), where the list of goals and targets was drafted, and the Intergovernmental Process (in 2015), in which the whole Agenda 2030 was negotiated and ultimately approved, helped to put human rights closer to the centre of the Agenda, at least compared to the MDGs. As we will show in the next sections, the document includes references to human rights throughout – explicitly in the Declaration and more implicitly in the 17 goals and 169 targets and the associated indicators. The dimension of social rights is particularly important in the SDG framework as it relates closely to one of the three dimensions of sustainable development (the other ones are economic and environmental). The SDGs intend to tackle many issues that hinder the enjoyment of social rights: poverty, hunger, disease, inequalities, illiteracy, among many others. Thus, social rights are reflected in the 2030 Agenda to a significant extent.

Why does it matter? Why was the human rights community engaged throughout this process seeking to integrate human rights in development efforts? Why do human rights actors continue to do so? Where do they see the potential of the SDGs to serve as a tool for the realization of human rights? First, the SDGs have become one of the main agglutinative narratives of a myriad of global actors, including governments, international organizations, civil society and many multinational corporations, or what Sakiko Fukuda-Parr refers to as 'consensus norms'.[11] It is difficult to understand exactly why and how the SDG process captured the attraction of so many different actors worldwide. Arguably, it has to do with a coincidence of global debates in that specific moment: the awareness of climate change, the strength of the criticism of the financial system's responsibility for the financial crisis and a consistent wave of arguments condemning rising inequalities.[12] In any case, whether we appreciate them or not, it is undeniable that the SDGs have been able to attract and keep the world's attention.[13]

Second, the problems and challenges that Agenda 2030 promises to tackle are complex and interconnected. In this regard, international human rights law can provide universal guides, tools, practices and accountability frameworks to contribute to the five 'Ps' upon which the Agenda 2030 is built: people, planet, prosperity, peace and partnerships.[14]

Third, goal and target setting is a powerful development tool. Targets aim to modify behaviours and assess performance. They may become incentives for states based on reputational benefits. Goals are persuasive, tangible and easy to communicate to decision-makers and to the general public. The numerical component of target setting produces abstractions that can make it easier to reach global consensus. By incorporating human rights elements into the relevant targets, the realization of human rights may benefit from these dynamics.[15] Social rights such as education, health, food security, sanitation and social security – all reflected in the 2030 Agenda – might be particularly amenable to (at least partially) being monitored through quantitative measures.

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[11] Sakiko Fukuda-Parr, 'Keeping Out Extreme Inequality from the SDG Agenda – The Politics of Indicators' (2019) 10 (Supplement 1) Global Policy 61, 61.

[12] Piketty's bestseller book on wealth inequality was launched in 2014, during the negotiations of the SDGs. Thomas Piketty, *Capital in the 21st Century* (2014).

[13] Lynda M Collins, 'Sustainable Development Goals and Human Rights: Challenges and Opportunities' in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (2018) 66.

[14] Inga T Winkler and Carmel Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review' (2017) 21(8) International Journal of Human Rights 1023, 1024.

[15] Sakiko Fukuda-Parr, 'Global Goals as a Policy Tool: Intended and Unintended Consequences' (2014) 15(2–3) Journal of Human Development and Capabilities 118, 120.

On the other hand, human rights, including social rights, are embedded into complex concepts such as human dignity, inclusion, equality, participation and empowerment and put a focus on qualitative features that are not always easily measurable. Target setting bears the risk of privileging measurable and quantitative outcomes over the complex, qualitative and procedural means necessary to tackle structural causes of violations of human rights. In this sense, the SDGs may be not the best way to channel the demands of the human rights community, at least not in their comprehensiveness and complexity.

Against this background, in section II we present the definition of sustainable development embodied in the 2030 Agenda, and we examine the extent to which human rights, social rights in particular, and the underlying principles of human rights are reflected in the Agenda 2030. Throughout the chapter we point to the potential for the SDGs to contribute to the realization of human rights, in particular social rights, but section III is devoted to the key challenges related to inequalities and accountability, two central gaps that make it difficult for the SDGs to become a platform to promote social rights. We conclude that the SDGs have significant potential to contribute to the realization of human rights, and in particular social rights, but that this potential can only come to fruition if the frameworks for monitoring and accountability are strengthened.

II. THE 2030 AGENDA AS A POLICY FRAMEWORK AND ITS REFLECTION OF HUMAN RIGHTS

Initially, the post-MDG framework was developed in two separate processes: the post-2015 Agenda and the SDGs. The merging of these two processes started in September 2013,[16] which allowed for the integration of economic, social and environmental dimensions in Agenda 2030. The human rights framework is most closely related to the social dimension, and by relying on human rights in the process of developing the SDGs this dimension has been strengthened.

In this section, we present the definition of sustainable development, which is structured in three dimensions – social, economic and environmental – as well as the SDGs' guiding principles, which echo the universality of human rights, in particular the objective of universal coverage (such as universal health coverage, for instance). Based on that, we will proceed to analyze the extent to which human rights are reflected in the SDGs framework.

a. Key Features of the SDGs

The SDGs stress the notion of sustainable development, which has been defined as:

> development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
> - the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and
> - the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[17]

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[16] UNGA Res A/68/6 (9 October 2013). See also Nicole Rippin, 'Post 2015: Special Event on Post-2015 – Stuck in the Process?' (Briefing Paper 19/2013).

[17] UNGA Doc A/42/427 (4 October 1987) 'Annex: Our Common Future', para 1.

The interplay of needs and limitations is key to ensuring sustainability. The concept is based on the pillars of economic, environmental and social development, which are all reflected in the SDGs. Whereas the MDGs were narrower in scope, the shift to the SDGs integrates all three dimensions.

The SDGs are characterized by a number of principles that resonate with human rights: global reach, universality and the principle 'leave no one behind'. First, whereas the MDGs were largely perceived as an agenda drawn up in the Global North for the Global South – and the main role of developed countries was as donors in supporting developing countries through MDG 8,[18] which lacked any accountability[19] – the SDGs have a global reach. Many, if not most, of the SDG targets are relevant for all countries in the world. Participation in the voluntary national reviews (VNRs)[20] demonstrates that countries from across the globe are engaged. Up to May 2020, a total of 171 countries had participated, including countries such as Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hungary, Indonesia, Israel, Japan, Mexico, Nigeria, Pakistan, Rwanda, Sudan, the UK and Venezuela.[21]

Second, within all countries, the SDGs endeavour to be relevant for all people. With few exceptions, the targets are set on the basis of universal reach.[22] While some commentators have questioned whether universal reach is achievable within the SDGs' 15-year timespan,[23] the notion of reaching everyone resonates with the principle of the universality of human rights, which in its simplest form implies that all people, everywhere, are entitled to human rights.[24]

Third, this notion of reaching everyone is corroborated by the objective 'leave no one behind'. This central idea of the SDGs is further underlined by Goal 10 on reducing inequalities. The focus on leaving no one behind and reaching the most marginalized goes beyond the commitment to ensure universal reach. It demands that priorities be set in a way that prioritizes the most disadvantaged and marginalized parts of the population.[25] Universality could theoretically be achieved at some point, even if leaving the most disadvantaged as the last to be targeted. However, the commitment to leave no one behind requires at least evenhanded

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[18] 'Develop a global partnership for development' is MDG 8 and it was devoted to designing and guiding policies and aid in different realms: trade, financial system, debt issues, essential drugs, and technology. See <www.un.org/millenniumgoals/global.shtml> (27 May 2019).

[19] Mac Darrow, 'Master or Servant? Development Goals and Human Rights' in Malcolm Langford, Andy Sumner and Alicia Ely Yamin (eds), *The Millennium Development Goals and Human Rights, Past, Present and Future* (2013) 67, 79.

[20] The Voluntary National Review is part of the Agenda 2030 followup and review mechanism. States present – regularly, but voluntarily – their assessments on the progress made by themselves in the achievement of goals and targets at the High-Level Political Forum.

[21] SDG Knowledge Platform – Voluntary National Reviews Database, https://sustainabledevelopment.un.org/vnrs/ (16 May 2020).

[22] Target 1.2 is such an exception, aiming at reducing by half the proportion of people living in poverty.

[23] William Easterly, 'The SDGs Should Stand for Senseless, Dreamy, Garbled' *Foreign Policy* (28 September 2015) <https://foreignpolicy.com/2015/09/28/the-sdgs-are-utopian-and-worthless-mdgs-development-rise-of-the-rest/> (27 May 2019).

[24] United Nations Development Group, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies' (2003).

[25] Elizabeth Stuart and Emma Samman, 'Overseas Development Institute Briefing Note – Defining "Leave no one Behind"' (2017) <www.odi.org/sites/odi.org.uk/files/resource-documents/11809.pdf> (27 May 2019).

progress, while achieving substantive equality indeed requires that the most disadvantaged are prioritized to redress past injustices.[26]

b. The Reflection of Human Rights in the SDGs

The 2030 Agenda refers to 'human rights' repeatedly; it states that it is grounded in the Universal Declaration of Human Rights and international human rights treaties.[27] Para 8 reads:

> We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity.[28]

Para 19 continues:

> We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.[29]

Overall, however, the language is very much one of seeking, striving, committing and envisaging, rather than mandatory obligations.

The Goals themselves are not drafted in human rights language. However, in a comprehensive review, the Danish Institute for Human Rights maintains that '[m]ore than 90% of SDG targets are linked to international human rights and labour standards'.[30] It has developed an extensive guide that matches the SDG targets with relevant human rights provisions. For instance, there are linkages and overlaps between Goal 2 on achieving food security and the human right to food, Goal 3 on ensuring healthy lives and the human right to health, Goal 4 and the human right to education, Goal 5 and Goal 10 and the human rights principles of non-discrimination and equality, Goal 6 and the human rights to water and sanitation, Goal 8 and labour standards and human rights in work, Goal 11 and the right to housing, among many others. According to the OHCHR, it is possible to link every goal with a human rights component.[31] In this sense, some SDG targets reflect certain components of social rights, such as Target 1.3 about the implementation of adequate social protection systems for all, particularly

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[26] CESR, 'Human Rights Policy Brief – From Disparity to Dignity: Tackling Economic Inequality Through the Sustainable Development Goals' (2016) 10 <www.cesr.org/disparity-dignity-inequality-and-sdgs> (27 May 2019).

[27] UNGA Res A/70/1 (25 September 2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development', para 10.

[28] *Ibid.*, para 8.

[29] *Ibid.*, para 19.

[30] The Danish Institute for Human Rights, 'Human Rights and the 2030 Agenda for Sustainable Development' (2017) 5.

[31] The OHCHR also developed a structured chart to show the links between the SDGs and the international human rights norms: <www.ohchr.org/Documents/Issues/MDGs/Post2015/SDG_HR_Table.pdf> (27 May 2019).

for the poor and the vulnerable, or Target 5.4 which acknowledges the value of unpaid care and domestic work, requesting (among other elements) the provision of social protection policies.

Yet, what does it really mean that there are linkages and overlap? It does not mean that all human rights guarantees are comprehensively covered in the SDGs, nor indeed that all their elements are captured in the SDGs. It only means that linkages and overlap can be established and that the SDGs and human rights, in particular social rights guarantees, complement each other. With regard to SDG3, Carmel Williams and Paul Hunt argue that the targets and indicators unfortunately fail to capture important elements of the right to health, such as acceptability, quality of care, the financing and overall functionality of the health system and engagement of vulnerable and marginalized populations. This means that the SDG3 indicators do not, for example, measure if people receive quality treatment by their health systems. The authors therefore conclude that the specific indicators of SDG3 do not fully reflect the human rights obligations embodied in international norms on the right to health.[32]

Moreover, civil and political rights are only covered to a very limited extent in the SDGs. Goal 16 recognizes that peace, justice and accountable institutions are essential for development, and it was one of the most controversial goals during the negotiation process.[33] While the final version of Goal 16 reflects some civil and political rights,[34] many others, such as freedom of religion, expression, assembly and association, are only touched on marginally – if at all – in the SDGs. The OHCHR and the chairs of the UN treaty bodies advocated for the inclusion of explicit mentions on 'freedoms of expression, association and peaceful assembly',[35] but were ultimately unsuccessful. Moreover, SDG16 does not adequately cover a serious contemporary issue that is at the centre of the human rights community's concerns: the shrinking of civil society space in many countries.[36] If we are serious about the indivisibility of human rights, we need to recognize that the realization of civil and political rights is the necessary precondition for the realization of economic, social and cultural rights, and vice versa. Thus, if Agenda 2030 is to succeed as a broad agenda for the next decade, we would need to see civil and political rights covered in a more comprehensive and extensive way.[37]

In relation to all goals and targets, the importance of indicators must not be underestimated. While the goals and targets are often broad and comprehensive, the indicators determine what will be measured, monitored – and in the end acted upon. By determining what is counted,

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[32] Carmel Williams and Paul Hunt, 'Neglecting Human Rights: Accountability, Data and Sustainable Development Goal 3' (2017) 21(8) International Journal of Human Rights 1114, 1129–30.

[33] Alexandra Ivanovic, Hannah Cooper and Athena M Nguyen, 'Institutionalisation of SDG 16: More a Trickle Than a Cascade?' (2018) 37(1) Social Alternatives 49, 49.

[34] *Ibid.*, 50. For example, Indicator 16.3.2. on 'unsentenced detainees as proportion of overall prison population' can be linked to human rights.

[35] United Nations Human Rights Treaty Bodies, 'Joint Statement of the Chairpersons on the Post-2015 Development' (18 January 2015) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15505> (27 May 2019).

[36] Sarah E Mendelson, 'Why Governments Target Civil Society and What Can be Done in Response: A New Agenda' (Center for Strategic & International Studies 2015) 2: 'Lateral learning between governments seeking to inhibit the work of human rights activists and civil society more generally is evident. In the last few years, numerous governments have mimicked or simply copied laws that shrink the administrative and legal space in which NGOs work.' <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150422_Mendelson_GovTargetCivilSociety_Web.pdf> (27 May 2019).

[37] Collins (n 13), 88.

they also shape what *counts* in development outcomes.[38] Indicators often shape and reshape our understanding of key aspects of the targets,[39] by determining what we know and do not know. Indicators determine which data will be gathered, which has been referred to as the 'lifeblood of decision-making'[40] and is likely to determine government action and priorities at many levels.[41]

Most indicators are narrower in scope than the corresponding targets. While this is inevitable to some extent for purposes of measurability,[42] there is a risk of losing out on important elements, as in the SDG3 indicators, as we pointed out above. Similarly, while Target 6.2 on sanitation calls for 'paying special attention to the needs of women and girls', the relevant Indicator 6.2.1 does not address their needs in particular in relation to menstrual hygiene.[43] In the context of Goal 16, Target 16.3 refers to the central tenet of the rule of law and access to justice. While some aspects of the rule of law and criminal justice are captured through the indicators, access to justice more broadly is not addressed.[44]

All in all, the SDGs certainly do reflect human rights. Many of the targets take up some important elements of social rights,[45] while others are more loosely related and miss key issues. In the next section, we will discuss two key challenges that were major points of advocacy and deliberation during the SDG negotiations, but in which the SDGs ultimately fell short of meeting human rights standards: reducing inequalities and ensuring accountability.

III. KEY CHALLENGES

a. Reducing Inequalities

During the MDG era, one of the major criticisms was the focus on aggregate outcomes and the disregard for improving the lives of marginalized communities and reducing inequalities.[46] In response to this failure of the MDGs, as well as much greater awareness of the devastating impact of inequalities,[47] advocates put significant emphasis on ensuring that reducing ine-

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[38] CESR (n 26), 33.

[39] Sally Engle Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 (Supplement 3) Current Anthropology 83, 92.

[40] United Nations Independent Expert Advisory Group, 'A World That Counts: Mobilising the Data Revolution for Sustainable Development' (2014) 2, <www.undatarevolution.org/wp-content/uploads/2014/12/A-World-That-Counts2.pdf> (27 May 2019).

[41] Kevin E Davis, Benedict Kingsbury and Sally Engle Merry, 'Indicators as a Technology of Global Governance' (2012) 46(1) Law and Society Review 71.

[42] Malcolm Langford, 'The Art of the Impossible: Measurement Choices and the Post-2015 Development Agenda' Background Paper for Governance and Human Rights: Criteria and Measurement Proposals for a Post-2015 Development Agenda – OHCHR/UNDP Expert Consultation, New York, 13–14 November 2012.

[43] Inga T Winkler, 'Glass Half-Full or Glass Half-Empty? A Human Rights Assessment of the WASH Targets in the SDGs' (2018) 37(1) Social Alternatives 25, 28.

[44] Margaret L Satterthwaite and Sukti Dhital, 'Measuring Access to Justice: Transformation and Technicality in SDG 16.3' 10 (Supplement 1) Global Policy 96.

[45] Winkler (n 43), 27–28.

[46] Mac Darrow (n 19), 75.

[47] See Facunda Alvaredo *et al*, World Inequality Report 2018 <https://wir2018.wid.world> (27 May 2019).

qualities would become a cornerstone of the Agenda 2030. For instance, in September 2015, during the Summit for the Adoption of the Post-2015 Development Agenda, Zeid Ra'ad Al Hussein, then the UN High Commissioner for Human Rights, made a statement on equality which included the following:

> The 2030 Agenda is a powerful framework, and its implementation will address all these inequalities. The human rights promise of equality and non-discrimination is at its heart […]. Monitoring data that is disaggregated along multiple axes of discrimination will help ensure that no one is being left behind.[48]

The result can be seen in the principle 'leave no one behind' and in the 2030 Agenda's underlying purpose that everyone should have equal and universal access to a range of goods and services which are imperative to implement social rights.[49] However, the most explicit part of the document concerning inequality is Goal 10 on reducing inequalities (within and among countries), which is reinforced through a range of targets that put a particular focus on specific population groups.[50] For instance, Target 10.4 refers to adoption of social, fiscal and wage protection policies as a way to increase levels of equality. The inclusion of inequality as a priority in the SDGs can be considered a victory for the human rights community, as the full realization of rights depends on tackling inequalities and not only on addressing poverty.[51]

However, Goal 10 and its commitment to tackle inequalities are not without challenges, which undermine reaching its comprehensive objectives. Some targets are means to decrease inequalities, instead of quantifiable benchmarks which would be indispensable in seeking to verify whether inequality is in fact being reduced or not. This is exacerbated by the fact that some targets do not have deadlines.[52]

Target 10.1 calls for '[b]y 2030, progressively achiev[ing] and sustain[ing] income growth of the bottom 40 per cent of the population at a rate higher than the national average'. Accordingly, it focuses on the 'bottom 40%' and reducing poverty through income growth.[53] This income growth is required at a higher rate than the national average, but the target does

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[48] To access the complete speech: <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16514&LangID=E> (27 May 2019).

[49] According to Agenda 2030: 'In these Goals and targets, we are setting out a supremely ambitious and transformational vision. We envisage a world free of poverty, hunger, disease and want, where all life can thrive. We envisage a world free of fear and violence. A world with universal literacy. A world with equitable and universal access to quality education at all levels, to health care and social protection, where physical, mental and social well-being are assured. A world where we reaffirm our commitments regarding the human right to safe drinking water and sanitation and where there is improved hygiene; and where food is sufficient, safe, affordable and nutritious. A world where human habitats are safe, resilient and sustainable and where there is universal access to affordable, reliable and sustainable energy' (UNGA Res A/70/1 (25 September 2015)).

[50] Targets 10.1, 10.2, 10.3 and 10.4 establish benchmarks for decreasing inequalities within countries. Targets 10.5, 10.6 and 10.7 set yardsticks for decreasing inequalities among countries. Targets 10.a, 10.b and 10.c are the means for achieving the goal and its targets. Because of space constraints we only address the targets on inequalities within countries.

[51] Ignacio Saiz and Kate Donald, 'Tackling Inequality Through the Sustainable Development Goals: Human Rights in Practice' (2017) 21(8) International Journal of Human Rights 1029, 1032.

[52] Gillian MacNaughton, 'Vertical Inequalities: Are the SDGs and Human Rights Up to the Challenges?' (2017) 21(8) International Journal of Human Rights 1050, 1057.

[53] *Ibid.*, 1054.

nothing to address the top end of the income and wealth distribution.[54] Actually reducing inequalities would require relating the top and bottom percentiles to each other. According to Gillian MacNaughton, Target 10.1 fails to do so and 'is in fact a means for poverty reduction rather than a benchmark for a reduction in inequalities'.[55] While Goal 10 is framed in terms of inequalities, 'a critical flaw is the omission of a target to reduce inequalities in income and wealth',[56] that is, the target fails to live up to the Goal and does not respond to the concerns about ever increasing economic inequalities.

Targets 10.2 and 10.3 bring welcome attention to forms of discrimination and inequalities beyond wealth and income, referring to 'age, sex, disability, race, ethnicity, origin, religion or economic or other status'. However, in the translation from the target to the indicator, important dimensions are lost. Target 10.2 refers to social, economic and political inclusion of all,[57] whereas Indicator 10.2.1 only looks at median income, thus only capturing economic inclusion, if at all. The indicator will not generate any data that pertains to other forms of inequalities such as participation in social and political life. In addition, even for economic inequalities (using the percentage of people below median income as a proxy), the indicator only calls for disaggregation by age, sex and disability, thus dropping important grounds of discrimination including race, ethnicity, origin and religion that are explicit in the target.[58]

Target 10.3 is accompanied by a similarly reductionist indicator.[59] The target is a broad one calling for a reduction of inequalities of outcome, yet the indicator focuses on perception data based on people's experiences of discrimination or harassment. While such studies can be very powerful and the indicator captures different forms of discrimination by referring to any prohibited ground of discrimination under human rights law, it does not capture inequalities in outcome. During the process of elaboration, an indicator proposal linked Goal 10 with many of the sectoral goals. It would have required monitoring the reduction of inequalities in outcome in relation to health, education, food security, water and sanitation and other sectors,[60] and could have proven to be a very powerful tool. However, the proposed indicator was not adopted, and more generally the opportunities of linking Goal 10 on reducing inequalities with different sectoral goals have not been seized to the greatest extent possible. While technical and feasibility considerations have played a role in the development of indicators, these cannot be disentangled from political considerations that guide these choices.[61]

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[54] *Ibid.*; Joel E Oestreich, 'SDG 10: Reduce Inequality in and among Countries' (2018) 37(1) Social Alternatives 34, 35.

[55] MacNaughton (n 52), 1058.

[56] Fukuda-Parr (n 11), 65.

[57] Target 10.2: 'By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.' SDG Knowledge Platform – Transforming Our World: The 2030 Agenda for Sustainable Development <https://sustainabledevelopment.un.org/post2015/transformingourworld> (27 May 2019).

[58] Inga T Winkler and Margaret L Satterthwaite, 'Leaving No One Behind? Persistent Inequalities in the SDGs' (2017) 21(8) International Journal of Human Rights 1073, 1080.

[59] Target 10.3: 'Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard.' SDG Knowledge Platform – Transforming Our World: The 2030 Agenda for Sustainable Development <https://sustainabledevelopment.un.org/post2015/transformingourworld> (27 May 2019).

[60] Winkler and Satterthwaite (n 58), 1080.

[61] Fukuda-Parr (n 11), 67.

A further significant target on monitoring inequalities is Target 17.18, which calls for enhancing the capacity for generating disaggregated data 'by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts'.[62] Such disaggregation would go a long way in producing powerful data that could be used to monitor the reduction of inequalities along several axes. However, despite this commitment and the acknowledgement of the importance of disaggregation, a recent analysis of the entire set of SDG indicators demonstrates that they call for very limited disaggregation. While disaggregation according to sex, age and disability is relatively common, none of the indicators call for disaggregation according to race or ethnicity.[63]

Goal 10 is testament to the recognition that reducing inequalities is one of the key challenges of our time. This could have been enhanced by establishing a sound and comprehensive definition and conceptualization of what it means to reduce inequalities.[64] However, in spite of these shortcomings, governance through goal setting may create peer pressure between states to invert current trends of rising inequalities.[65]

Yet, the vagueness and broadness of the political commitment is undeniable. While much work has been done at the technical level to develop proposals for monitoring various forms of inequalities, such work is not comprehensively reflected in the official indicators. At the point where the technical turns political – through adoption of indicators in the UN Statistical Commission – states disregarded key aspects of monitoring discrimination and inequalities.[66] Due to the heavy focus on income inequality and the reductionist indicators which leave aside significant forms of discrimination and inequalities, there needs to be a shift in how Goal 10 is monitored and linked to the other Goals to avoid it becoming a lost opportunity. The High-Level Political Forum (HLPF) in July 2018 included an official session on 'Leave No One Behind – Are We Succeeding?', and the answer among all the speakers was a resounding 'no'.[67] Turning this trend around is one of the key challenges for the success of the entire Agenda 2030.

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[62] Target 17.18: 'By 2020, enhance capacity-building support to developing countries, including for least developed countries and small island developing states, to increase significantly the availability of high-quality, timely and reliable data disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts.' SDG Knowledge Platform – Transforming Our World: The 2030 Agenda for Sustainable Development, <https://sustainabledevelopment.un.org/post2015/transformingourworld> (27 May 2019).

[63] Winkler and Satterthwaite (n 58), 1082.

[64] Oestreich (n 54), 35.

[65] Lucas Chancel, Alex Hough and Tancrède Voituriez, 'Reducing Inequalities Within Countries: Assessing the Potential of the Sustainable Development Goals' (2018) 9(1) Global Policy 5, 9. According to Freistein and Mahlert, despite the vagueness of some formulations, the existence of Goal 10 demonstrates that the SDGs go further in their commitment to reduce inequalities than any previous development platforms. Katja Freistein and Bettina Mahlert, 'The Potential for Tackling Inequality in the Sustainable Development Goals' (2016) 37(12) Third World Quarterly 2139.

[66] Winkler (n 43), 31; see also Satterthwaite and Dhital (n 44).

[67] SDG Knowledge Platform, <https://sustainabledevelopment.un.org/index.php?page=view&type=20000&nr=4166&menu=2993> (27 May 2019).

b. Ensuring Accountability

Accountability is the central defining tenet of the human rights framework based on the relationship of individuals as rights-holders and states as duty-bearers. While challenges abound in practice, the key idea is that states can be held accountable to their obligations to realize the rights to health, food, education, sanitation, among many other human rights. During the negotiations of the SDGs, one of the most important issues for the human rights community was ensuring accountability, as the lack of accountability had been considered one of the main deficits of the MDGs. In particular, human rights organizations pointed out that the MDG framework had not been clear enough on who was responsible to whom and for what.

A joint report on accountability by the OHCHR and the CESR stressed that goals should be aligned with the obligations to which states have already committed when ratifying international human rights treaties. This alignment was considered by the OHCHR and the CESR not only as a legal imperative, but also as a practical tool that could stimulate and enhance the implementation of the goals in practice.[68] Throughout the SDG deliberations, accountability was a key theme for advocacy and many human rights advocates suggested alternatives such as a model inspired by the Universal Periodic Review (UPR) in the Human Rights Council (HRC),[69] which would have required all states to submit comprehensive, regular reports that would be subject to peer review, with opportunities for other stakeholders to provide input.[70]

However, during the negotiations of the SDGs, the term accountability turned into a concept that was excluded from the negotiations and became a taboo among member states.[71] Instead, the final Agenda 2030 refers to 'Follow-up and Review'.[72] This review takes place at various levels. At the global level, the review takes place during the HLPF held in New York every July. The first week consists of thematic reviews, while the second provides an opportunity for states to present their VNRs. As the title suggests, these reviews are voluntary. While 171 states have participated thus far,[73] what they present is also voluntary. Time is extremely limited, so the reviews do not allow for actual scrutiny. And while some delegations have invited civil society organizations and other stakeholders as part of their delegation,[74] overall civil society participation is very limited. The Civil Society Partnership for Development Effectiveness published a study showing that civil society organizations found very few spaces to contrib-

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[68] OHCHR and CESR (n 8), 2.

[69] According to the UN System Task Team Report on the Post-2015 UN Development Agenda: 'Post-2015 accountability arrangements should therefore also build upon the human rights accountability standards and infrastructure that already exist, including the Universal Periodic Review of the UN Human Rights Council.' UN System Task Team on the Post-2015 UN Development Agenda, 'A Renewed Global Partnership for Development' 2013, 23, <www.un.org/en/development/desa/policy/untaskteam_undf/glob_dev_rep_2013.pdf> (27 May 2019).

[70] On the UPR see <www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (27 May 2019).

[71] Kate Donald and Sally-Anne Way, 'Accountability for the Sustainable Development Goals: A Lost Opportunity?' (2016) 30(2) Ethics & International Affairs 201, 201.

[72] UNGA Res A/70/1 (25 September 2015), para 47.

[73] https://sustainabledevelopment.un.org/vnrs/#keyword (16 May 2020).

[74] Switzerland is an exception in this sense. 'Aware that all relevant stakeholders in society must be included to achieve the SDGs, the Swiss delegation will be supported, as it is every year, by representatives from civil society, the private sector and the academic world.' See <www.fdfa.admin.ch/agenda2030/en/home/actualite/news.html/content/agenda2030/en/meta/news/2017/7/schweiz-hochranginges-politisches-forum-2017> (27 May 2019).

ute to the review of the SDGs and faced significant uncertainty if the informal inputs they provided were taken into consideration.[75] The comparison between the reports presented by states during the HLPF and shadow reports developed by civil society organizations, such as the Spotlight Report,[76] shows clearly that the HLPF is not a sound accountability mechanism.

However, the HLPF is only one of the forums that seeks to ensure follow-up to the SDGs. While a review mechanism similar to human rights mechanisms did not materialize,[77] this does not mean that there are no opportunities to review the commitments under the SDGs in more depth. Many commentators have suggested strengthening the linkages between the SDGs and human rights and using human rights mechanisms that already exist, such as the UPR, to review commitments made under the SDGs, in particular where they overlap with human rights obligations.[78]

UN member states in the HRC have heeded this call and have repeatedly included Agenda 2030 or the SDGs in its resolutions, decisions and HRC's President Statements. According to a recent study, between the adoption of Agenda 2030 in September 2015 and March 2018 the HRC adopted 289 texts (not including UPR outcome decisions). Of these, 119 or 41.1 per cent made explicit references to the 2030 Agenda and/or the SDGs. Moreover, almost half (44.7 per cent) of the reports presented by the Secretary-General, the High Commissioner for Human Rights and the OHCHR at the regular sessions of the HRC have specific references to Agenda 2030 and/or the SDGs.[79] The SDGs have thus clearly been integrated in the realm of human rights at the conceptual level.

This leads to the question whether the existing human rights review mechanisms can and will be used to monitor commitments under the SDGs. A preliminary analysis of the UPR data shows that this is not yet occurring on a large scale. We searched in the UPR Info database for three terms related to the SDGs in the recommendations that states made to each other between September 2015 and May 2018 (thus using a similar time frame as the study analyzing texts

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[75] '[The m]ajority of the respondents […] cited that implementation remains to be government-centric, weaknesses in development policy objectives, lack of resources to communicate with stakeholders and the absence of a clear system for implementation to be hindering factors in cascading the SDGs in their countries'. Report by the Civil Society Reflection Group on the 2030 Agenda for Sustainable Development, 'Spotlight on Sustainable Development 2017 – Reclining Policies for the Public (2017), see <www.csopartnership.org/single-post/2018/07/18/High-awareness-but-limited-role-of-civil-society-in-SDG-implementation---CPDE-study> (27 May 2019).

[76] The Spotlight Report 2017, a document prepared by the Civil Society Reflection Group on the 2030 Agenda for Sustainable Development, highlighted aspects of states' initiatives that are not addressed by the VNRs, like the side effects of privatizations, partnerships, corporate capture, and their consequences on sustainability and inequalities. Bissio's chapter on alternative national reports is especially interesting in this sense. Report by the Civil Society Reflection Group on the 2030 Agenda for Sustainable Development, 'Spotlight on Sustainable Development 2017 – Reclaiming Policies for the Public' (2017), see <www.2030spotlight.org/sites/default/files/download/spotlight_170626_final_web.pdf> (27 May 2019).

[77] Donald and Way (n 71), 204.

[78] Judith Bueno de Mesquita *et al*, 'Monitoring the Sustainable Development Goals Through Human Rights Accountability Reviews' (2018) 96(9) Bulletin of the World Health Organization 627; Donald and Way (n 71), 209–10.

[79] Olivia Babe, 'The Human Rights Council and the SDGs: An Overview' (2018) 3 https://sustainabledevelopment.un.org/content/documents/18221HRC_and_the_2030_Agenda_HLPF_2018.pdf (27 May 2019).

adopted by the HRC): 'SDGs', 'Sustainable Development Goals' and 'Agenda 2030'.[80] In all, 54 recommendations mentioned at least one of these terms. Considering that states made 17,581 recommendations in the UPR during that period of time, 54 is not a significant number. This means that SDGs are still predominantly used as a conceptual framework rather than as a basis on which to hold government accountable for their commitments.

However, there are some interesting aspects to highlight. Of the 54 recommendations, 53 were accepted by the states under review. Among the specific themes, a frequent one is health.[81] Even more common is the articulation between sustainable development and an entire set of economic and social rights, such as health, education, housing, food and water and sanitation. Examples of this articulation are the recommendations made by United Arab Emirates to Sri Lanka ('Focus on economic, social and cultural rights as a first step towards achieving programmes within the framework of the United Nations 2030 Sustainable Development') and by Nigeria to Benin ('Sustain and scale up the ongoing efforts to attain the Sustainable Development Goals, such as access to drinking water, food security, access to health care and education'). These are encouraging examples, as they show how the implicit presence of social rights in the SDGs may give the UPR the practical possibility of reviewing the progress achieved (or not) by the states in implementing the goals related to social rights.

Another interesting point is that the specific issue that appears the most among the 54 recommendations is women's rights. Of the 54 recommendations, 10 address women's rights. 'Adopt a comprehensive policy to ensure universal access to reproductive health and rights according to the programme of action of the Beijing Conference and in line with the 2030 Agenda' (Peru to Honduras) is one example of policy level recommendations aligned with the SDGs. Therefore, there is evident potential for human rights actors to push states to develop more specific recommendations at the policy level. As Judith Bueno de Mesquita and colleagues argue, the UPR can be a unique opportunity to guarantee some level of accountability for the intertwined SDGs.[82] Similarly, Steven Jensen highlights that the UN human rights treaty bodies have significant potential in monitoring commitments under the SDGs.[83]

Moreover, global accountability through centralized mechanisms is not all there is. Indeed, the strength of the SDG framework might lie in giving rise to an ecosystem of quantitative and qualitative monitoring,[84] review and accountability mechanisms that focus on specific

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[80] To explore UPR data, <www.upr-info.org/database/> (27 May 2019). At the time of writing, data were available up to May 2018.

[81] For instance, Bhutan recommended to Japan: 'Continue its leadership role in supporting the achievement of the Sustainable Development Goals as exemplified, among others, by the pledge to contribute USD 1.1 billion for SDG 3.'

[82] Bueno de Mesquita *et al* (n 78), 630.

[83] Steven LB Jensen, 'UN Human Rights Mechanisms Proving Effective SDGs Monitor' (*OpenGlobalRights*, 4 July 2019), www.openglobalrights.org/un-human-rights-mechanisms-proving-effective-sdgs-monitor/.

[84] By an ecosystem, we refer to a pluralistic set of data formed by multiple and complementary national and global indicators extracted from different sources as a way to ensure that we may measure what we treasure, and not the contrary. The expression 'ecosystem' related to monitoring and/or accountability is used by both UN agencies, like UNDP, and National Human Rights Institution, as the Danish Institute for Human Rights. See, e.g., Serge Kapto, 'Layers and Power Struggles in the SDG Indicators Process' (2019) 10 (Supplement 1) Global Policy 134, 136; see also <www.undp.org/content/dam/undp/library/Sustainable%20Development/Data%20Ecosystems%20for%20Sustainable%20Development.pdf>; and <https://www.humanrights.dk/publications/human-rights-data> (27 May 2019). More broadly

sectors or take place at the national level. For instance, in the context of health, Williams and Hunt applaud the model of accountability developed by the Commission on Information and Accountability for Women's and Children's Health, which led to the establishment of the Independent Accountability Panel linked to the Secretary General's Global Strategy for Women's, Children's and Adolescents' Health.[85] In the context of water and sanitation, a recent study of 25 states reviewed national accountability mechanisms. While the study pointed to many challenges, it also pointed to positive examples of ensuring accountability through joint sector reviews, parliamentary reviews and social audits.[86] Another example is the city of Baltimore, which established a partnership with the United Nations Sustainable Solutions Network and the University of Baltimore in 2017 to design ways to implement the SDGs locally. After consultations with the municipal population, many local indicators were designed, including indicators devoted to tracking, for instance, the number of residents earning a living wage, the proportion of houses whose water services are unaffordable and the percentage of people who have limited access to nutritious and affordable food.[87] Such national and sectoral initiatives can be found in many countries and in many fields, and all these initiatives contribute to an ecosystem of accountability.

The SDGs can play an important role in tying the various initiatives in this ecosystem of accountability together and elevating various initiatives to the global level. Global accountability serves to identify overall trends and patterns. Reporting, reviews and scrutiny may lead to incentives for progress. Global forums have the potential to bring together national and global civil society and other states to build peer pressure – but the HLPF has yet to live up to its potential.

IV. CONCLUSION

The SDGs are an opportunity for the realization of human rights, in particular social rights. They present the potential to analyze and question powerful structures responsible for generating inequalities and discrimination at a local, national, regional and global scale. As the result of a complex multilateral negotiation process among states, the SDGs are far from perfect. They are characterized by compromises and inconsistencies and do not entirely satisfy the demands of human rights advocates. However, the consensus achieved by all UN member states should not be underestimated by the human rights community, as this global consensus provides Agenda 2030 with a high level of legitimacy (greater than that of the MDGs). Because all countries in the world agreed to this agenda in 2015 and continue to consider it significant, an opportunity arises for human rights advocates to strategically use it in local, national, regional and global spaces to challenge the structural causes of inequality and discrimination. However, it is undeniable that absences, challenges and problems persist

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on the idea of a human rights ecosystem, see César Rodríguez-Garavito, 'The Future of Human Rights: From Gatekeeping to Symbiosis' (2014) 20 SUR International Journal of Human Rights 499.

[85] Williams and Hunt (n 32), 1119.

[86] End Water Poverty & Partners, 'Global Review of National Accountability Mechanisms for SDG 6' (2018) <www.wsscc.org/wp-content/uploads/2018/07/EWP_National-Accountability-Report-2018.pdf> (27 May 2019).

[87] Risa E Kaufman, 'Localizing Human Rights in the United States Through the 2030 Sustainable Development Agenda' (2017) 49(1) Columbia Human Rights Law Review 99, 114–15.

when the SDGs are seen through the lens of human rights, especially with regard to addressing inequalities and ensuring accountability. Accountability through the SDGs is vague, voluntary and piecemeal. These shortcomings do not set aside the SDGs' potential in terms of advancing human rights, but they have given rise to fair scepticism and demands for proof from the SDG agenda that it can live up to its promise. Human rights and development may no longer be 'two ships passing in the night', but whether the development agenda has the means to strengthen the human rights ship remains to be seen.

28. The environment and social rights

Danwood M Chirwa and Amanda ZT Mkhonza

I. INTRODUCTION

While some vital characteristics are shared between social rights,[1] on the one hand, and environmental rights,[2] on the other, the preoccupation of environmental rights has been those obligations imposed on individuals and entities whose objective is to prevent interference with the surroundings of other human beings. Environmental law, whether in its common law context or its statutory context, is typically associated with the principles of prevention of harm rather than facilitating survival, though survival may be inferred from the principle of prevention. When so defined, environmental rights are typically connected to the physical environment, but not necessarily to the socio-economic conditions on which life also depends. The socio-economic context becomes relevant only when it affects or is affected by the physical environment. Because some social rights, such as the rights to water, food, housing, land or sanitation, depend on the physical environment for their fulfilment, they are seen as posing a threat to the physical environment, especially when access to water, food, housing or land are presented in human rights terms. This approach has led to dissonance between environmental rights and social rights, despite the clear connection between the environment and the material conditions that sustain life on earth.

This chapter offers a different trajectory of environmental rights and social rights that underscores not only the indivisibility but also the indispensability of both sets of rights. It starts by tracing the separate evolution of these rights and exploring the ramifications of such division. To emphasize the interrelatedness of the two sets of rights, the chapter undertakes a survey of comparative human rights jurisprudence and practice. Lastly, the chapter presents some arguments for recognizing environmental rights as a distinct and separate set of rights.

II. CONTEXTUALIZING THE DICHOTOMY BETWEEN ENVIRONMENTAL AND SOCIAL RIGHTS

a. Brief Historical Overview

Environmental rights and social rights share a history of neglect in comparative international and constitutional law compared with civil and political rights, which have received relatively stronger protection. However, environmental rights have lagged behind to a greater degree in

[1] See the editors' introduction to this *Research Handbook*.

[2] In this chapter, we consider environmental rights to include the substantive right to a healthy or clean environment and procedural environmental rights such the right of access to environmental information, the right to participate in environmental decision-making and the right to redress for environmental wrongs.

terms of formal legal recognition. Critics of both environmental and social rights have long challenged the eligibility of both sets of rights as true human rights, citing concerns about their vagueness and therefore their amenability to judicial enforcement; their lack of universal character, that is, that they cannot be enjoyed equally through space and time; their positive nature, which means that their realization depends on positive action from the state and not mere non-interference, as is the case with civil and political rights; and their lack of fundamentality, which means that they are not inherently good for their own sake but rather for the sake of other, more fundamental rights.[3]

Although environmental rights and social rights have both been subjected to similar criticisms, international law has been more receptive of social rights than of environmental rights. This is despite the fact that the idea of an independent right to an environment has formed part of the environmental discourse since as early as 1964.[4] The Universal Declaration of Human Rights(UDHR),[5] the first international instrument to define the rights mentioned in the UN Charter,[6] recognized civil and political rights and social rights side by side as individual rights, without any express mention of environmental rights. As the rearguard action against social rights that followed the adoption of the UDHR resulted in the bifurcation of the UDHR into the International Covenant on Civil and Political Rights (ICCPR)[7] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[8] effectively formalizing social rights' inferiority to civil and political rights,[9] environmental rights were not even included as part of social rights. The only context in which the word 'environment' is mentioned in the ICESCR is the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2)(b) particularizes the 'improvement of all aspects of environmental and industrial hygiene' as one of the steps states are obligated to take to ensure that the right to health is realized. While this article underscores the close link between the environment and the right to health – a social right – it represents a narrow conception of the environment and the rights connected with it, in this instance environmental hygiene as an aspect of the right to health.

At this stage of the development of international human rights law, the gulf between environmental rights and social rights emerged, as the former were being considered as distinct not just from civil and political rights in the manner described above, but also from social rights. Considered as third generation rights (meaning the rights to emerge after the first generation rights – civil and political rights – and then the second generation rights – social rights), envi-

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[3] L Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (2011) 59–62, 91–94; Sionaidh Douglas-Scott, 'Environmental Rights in the European Union' in Alan Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 109, 110; Cass R Sunstein, 'Against Positive Rights' (1993) 2(1) *East European Constitutional Review* 35; Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1.

[4] William A Shutkin, 'International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment' (1991) 31 *Virginia Journal of International Law* 479, 503.

[5] UNGA Res 217A (III) (10 December 1948).

[6] (26 June 1945) 1 UNTS 26.

[7] (16 December 1966) 999 UNTS 171.

[8] (16 December 1966) 993 UNTS 3.

[9] Unlike civil and political rights under the ICCPR which were subject to the possibility of enforcement via a complaints mechanism, the ICESCR did not have such a mechanism for social rights.

ronmental rights were viewed as collective rights whose implementation required solidarity from all actors, international and domestic.[10]

Apart from these general concerns, more specific arguments have been raised against the recognition of environmental rights as a distinct set of rights, or against the idea of a human rights approach to the environment. Critics of a human rights approach to the environment maintain that human rights address concerns of fundamental importance to human beings and are therefore inherently anthropocentric.[11] Treating the environment as a human rights issue is counterproductive to the environment because human beings pose the greatest danger to the environment. This argument is implicit in the debate about how rights related to the environment should be formulated. There are some who object to the narrow articulation of the right to the environment and prefer the right of the environment.[12] The former represents an anthropocentric conception of the right, in keeping with the general idea that the primary and direct beneficiaries of human rights are individuals. In this sense, the environment is protected not for its own sake but for its enjoyment by human beings. The idea of environmental rights is meant to convey the notion that the rights belong to the environment as a whole, not just to a part of it, that is, human beings.

Currently, environmental rights are not recognized as an independent set of rights in a binding treaty at the UN level. For the most part, these rights are recognized in declarations, resolutions and other soft law instruments.[13] Greater strides in protecting environmental rights have been made at regional and domestic levels. In Africa, the African Charter on Human and Peoples' Rights (African Charter)[14] became the first human rights treaty in 1981 to recognize a justiciable right of peoples to 'a generally satisfactory environment favourable to their development'.[15] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights followed suit in 1998,[16] recognizing 'the right to live in a healthy environment and to have access to basic public services'.[17] Crucially, domestic constitutions have increasingly enshrined environmental rights, with some estimating that between 75 and 125 countries have already done so.[18]

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[10] Karel Vašák, 'A 30-Year Struggle: The Sustained Effort to Give Force of Law to the Universal Declaration of Human Rights' (1977) XXX UNESCO Courier 29.

[11] See generally Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan Boyle and Michael R Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 71–84.

[12] Dinah Shelton, 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 *Stanford Journal of International Law* 117.

[13] Lynda Collins, 'The United Nations, Human Rights and the Environment' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (2015) 219, 232.

[14] (27 June 1981) 1520 UNTS 217.

[15] *Ibid.*, Art 24.

[16] (17 November 1988) OAS Treaty Series 69 (1988), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser L V/II.82 doc 6 rev 1 at 67 (1992).

[17] *Ibid.*, Art 11.

[18] See Chris Jeffords and Joshua C Gellers, 'Constitutionalizing Environmental Rights: A Practical Guide' (2017) 9 Journal of Human Rights Practice 136; see also David R Boyd, 'Constitutions, Human Rights, and the Environment: National Approaches' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (2015) 170.

b. Ramifications of Separating Environmental Rights from Social Rights

The environment is often taken to mean either 'the complex of physical, chemical and biotic factors that surround and act upon an organism or ecosystem', or the entirety of the ecosphere.[19] While these definitions seek to deemphasize the centrality of humans in the environment, they neglect the social aspect of the environment. The environment consists of the totality of the physical, social, cultural and economic conditions that make all life possible on earth. In this conception, the environment comprises both the biotic and the non-biotic aspects of nature,[20] and while its existence is not explicable by reference to the environment's usefulness to human beings, human beings form part of the biotic aspects of nature and the relations between individuals and groups inter se and with other biotic and non-biotic entities likewise form an essential part of the environment.

If the environment consists of both the physical and the social, then it should be expected that the province of environmental rights would overlap greatly with that of social rights. Such a strong link between the environment and access to social rights was recognized in 1987 by the World Commission on Environment and Development (Brundtland Report)[21] which identified environmental protection, social equity and economic growth as constituting the central tenets of development. According to the Report: 'A world in which poverty and inequity are endemic will always be prone to ecological and other crises.'[22]

On the one hand, environmental factors such as shortage of fertile land, climate change and disasters (floods, droughts, drying of water sources and earthquakes) affect agricultural production, food security and other forms of livelihood.[23] On the other hand, lack of access to basic social rights such as the rights to education, social security and an adequate standard of living renders individuals more vulnerable to environmental and natural disasters and to the use of technologies that are harmful to the environment.[24]

Thus, treating environmental rights as being separate from social rights has wideranging consequences. At the normative level, it poses a serious challenge to developing linkages between these sets of rights. If in the conception of environmental rights, sight is lost of the social dimension of the environment, a considerable proportion of what should form part of environmental rights would be lost. Similarly, if the conception of social rights does not recognize the importance of the environment, it would not be possible to guarantee sustainable access to basic services.

One of the consequences of not recognizing environmental rights at the UN level has been that issues concerning the environment have been addressed from a management rather than from a human rights perspective. In this regard, the UN Environment Programme has served

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[19] Leib (n 3), 11–12.

[20] *Ibid.*

[21] World Commission on Environment and Development, *Our Common Future* (1987).

[22] *Ibid.*, para 4, ch 2.

[23] See, e.g., Michael Redclift, *Development and the Environmental Crisis: Red or Green Alternatives* (2010).

[24] See, e.g., World Commission on Environment and Development (n 21), ch 1, paras 14–17; Stephane Hallegatte *et al*, *Unbreakable: Building the Resilience of the Poor in the Face of Natural Disasters* (2017) 25–104; Padma Lal *et al*, 'Relationship between Disasters and Poverty: A Fiji Case Study' (2009) SOPAC Miscellaneous Report 678, <www.unisdr.org/files/11851_11851R25PovertyAFijiCaseStudylowres.pdf> (20 March 2019) 20.

as the overall global coordinating institution in environment management, complemented by several autonomous secretariats established by specific environmental law treaties such as those on waste management, climate change, transboundary management of wastes, management of persistent organic substances and endangered species. From an institutional point of view, therefore, while the implementation of social rights has been monitored by the Committee on Economic Social and Cultural Rights (CESCR) and other UN human rights monitoring bodies, environmental rights have not had a dedicated human rights body. Not surprisingly, significant attention has been given to interpreting and monitoring the implementation of social rights and civil and political rights by human rights bodies. The right to environment has been interpreted and enforced only to the extent that it is implicit or referred to in civil and political rights or social rights. This has meant, at least at the UN level, that environmental rights have received less attention than other rights from human rights monitoring bodies. To the extent that environmental rights have been protected and enforced within mainstream international human rights praxis, this has happened largely indirectly through the interpretation of other rights, as will be seen later below.

With institutional fragmentation also comes the risk of incoherent jurisprudence and sectoral discord, which is not conducive to sustainable development. Both environmental rights and social rights need to be implemented within a balanced and integrated policy framework that harnesses the environmental, the social and the economic.[25] Only then can there be sustainable development that guarantees the realization of social and environmental rights of the people.

III. COMPARATIVE JURISPRUDENCE ON THE LINK BETWEEN ENVIRONMENTAL AND SOCIAL RIGHTS

The existing jurisprudence in comparative international, regional and domestic law clearly establishes that environmental rights defy easy classification as first, second or third generation rights. On the contrary, it shows that environmental rights are multifaceted rights that at once provide the foundation for other human rights and complement many other human rights. Comparative, regional and domestic jurisprudence also demonstrates that there is a close interlinkage between social rights and environmental rights. This section seeks to demonstrate such interlinkages. As the discussion will show, such linkages have been drawn not just between environmental rights and social rights, but also between environmental rights and civil and political rights.

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[25] In underlining the importance of the three-tiered approach to development based on the environment, the UN Sustainable Development Goals state: 'We recognize that social and economic development depends on the sustainable management of our planet's natural resources. We are therefore determined to conserve and sustainably use oceans and seas, freshwater resources, as well as forests, mountains and drylands and to protect biodiversity, ecosystems and wildlife. We are also determined to promote sustainable tourism, tackle water scarcity and water pollution, to strengthen cooperation on desertification, dust storms, land degradation and drought and to promote resilience and disaster risk reduction.' See UNGA Res A/70/1 (25 September 2015) 'Transforming Our World: The 2030 Agenda for Sustainable Development', para 33.

a. The Environment as a Foundation for the Protection of Human Rights

In keeping with the reality that all life depends on the environment, it has been widely recognized that the protection of the environment is indispensable to the protection of all human rights. For instance, the UN Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment has said that 'all human rights are vulnerable to environmental degradation' and, therefore, that 'the full enjoyment of all human rights depends on a supportive environment'.[26] Although the International Court of Justice (ICJ) has never ruled on the existence of environmental rights,[27] in the *Case Concerning the Gabčíkovo-Nagymaros Project*,[28] Judge Weeramantry noted that:

> [t]he protection of the environment is […] a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[29]

This sentiment is shared by regional human rights bodies. For example, the African Commission on Human and Peoples' Rights (the African Commission) described the environment as being essential to the protection of social rights and environmental rights as constituting an essential element of human rights in Africa in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,[30] where it said:

> These [rights to enjoy the best attainable state of physical and mental health and to a general satisfactory environment favourable to their development] recognize the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual. As has been rightly observed by Alexander Kiss, 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and the development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health'.[31]

Likewise, the Inter-American Court on Human Rights (IACtHR) emphasized the 'undeniable link between the protection of the environment and the enjoyment of other human rights'.[32]

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[26] John H Knox, 'Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' UN Doc A/HRC/22/43 (2012), para 19.

[27] Collins (n 13), 233.

[28] 1997 ICJ 7 (Judgment of 25 September 1997). This dispute concerned the large hydraulic project consisting of a system of locks to be constructed on the Danube river to generate hydroelectric power and protect the environment pursuant to a bilateral agreement between Hungary and Czechoslovakia. Subsequent political developments in both countries resulted in significant public opposition to the project, which led Hungary to suspend the project citing serious environmental concerns. The ICJ held that these environmental concerns *per se* did not entitle Hungary to suspend its obligations under the treaty.

[29] *Ibid.*, Separate Opinion of Weeramantry, 91–92.

[30] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (Ogoniland)*, ACHPR, Communication No 155/96 (27 October 2001), para 68.

[31] *Ibid.*, para 51.

[32] See, e.g., *Kawaz-Fernández v Honduras* (Merits, Reparations and Costs), IACtHR, Judgment of 3 April 2009, para 148.

Perhaps more aptly, its sister body, the Inter-American Commission on Human Rights (IACHR), has said:

> [A]lthough neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights includes any express reference to the protection of the environment, it is clear that several fundamental rights enshrined therein require, as a precondition for their proper exercise, a minimal environmental quality, and suffer a profound detrimental impact from the degradation of the natural resource base. The IACHR has emphasized in this regard that there is a direct relationship between the physical environment in which persons live and the rights to life, security, and physical integrity. These rights are directly affected when there are episodes or situations of deforestation, contamination of the water, pollution, or other types of environmental harm on their ancestral territories.[33]

For its part, the European Court of Human Rights in *López Ostra v Spain*,[34] has said: 'Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.'[35]

Recognizing the foundational role of the environment in the protection of all human rights unlocks possibilities for exploring the linkages between social rights and environmental rights.

b. Environmental Rights as Social Rights and Vice Versa

Although the UDHR and the ICESCR did not include the right to an environment in its corpus of rights, social rights have provided a potent avenue for protecting various aspects of environmental rights via what has been dubbed the 'expansion theory' of environmental rights.[36] This theory holds that several existing human rights can be interpreted to include and protect elements of environmental rights. In this way, environmental rights are derived from certain existing social rights, thus often also referred to as 'derivative rights'.[37] Within the context of the international system for the protection of human rights, this strategy has been deployed mainly through general comments of human rights monitoring bodies,[38] as well as reports of special rapporteurs,[39] and not via complaints mechanisms, mainly because until recently social rights were not subject to complaints procedures.[40]

For instance, the CESCR, which monitors the implementation of the ICESCR, has interpreted the right to health under Article 12(1) as

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[33] *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members v Panama*, IACHR, Case 12.354, Report No 125/12, 30 November 2012, para 233 (footnotes omitted).

[34] ECtHR, App No 16798/90, Judgment of 9 December 1994.

[35] *Ibid.*, para 51.

[36] Leib (n 3), 71–72.

[37] *Ibid.*, 72.

[38] See, e.g., CESCR 'General Comment No 14 on the Right to the Highest Attainable Standard of Health' (11 August 2000) UN Doc E/C.12/2000/4; CESCR 'General Comment No 15 on the Right to Water' (20 January 2003) UN Doc E/C.12/2002/11.

[39] See, e.g., Knox (n 26).

[40] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 December 2008) UN Doc A/RES/63/117; Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (19 December 2011) UN Doc A/RES/66/138.

> an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions.[41]

The ICESCR itself in Article 12(2)(b) specifically requires states, as part of their obligations in relation to the right to health, to take steps necessary for the 'improvement of all aspects of environmental and industrial hygiene'. According to the CESCR, the measures envisaged by this provision include those intended to

> ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.[42]

At the regional level, various adjudicative bodies have derived and enforced environmental rights from and through social rights.[43] In Europe, the European Social Charter (ESC)[44] makes provision for a number of social rights, including the right to health,[45] but does not explicitly recognize environmental rights. However, through its collective complaints mechanism, it has derived environmental rights from certain social rights. In *Marangopoulos Foundation for Human Rights (MFHR) v Greece*,[46] for example, it was alleged that Greece had defaulted on its obligation to ensure public health in that it allowed the operation of lignite mines and power stations which emitted fumes polluting the air, resulting in the prevalence of respiratory ailments in the area. In finding that Greece was 'too slow to act' to mitigate or prevent the pollution, the European Committee of Social Rights, which is responsible for monitoring the implementation of the ESC, held that the right to health under Article 11 of this treaty provides protection for ill health resulting from environmental pollution. The Committee also found Greece to be in violation of the right to a healthy work environment, arguing that it had failed to ensure the health and safety of the miners. This interpretative approach was reaffirmed in *International Federation of Human Rights (FIDH) v Greece*,[47] in which Greece was, yet again, found to have violated the right to health of the people living in a catchment area close to an industrial area near Athens by failing to prevent and address largescale environmental pollution in the catchment area.

Within the Inter-American system, indigenous peoples' rights, such as the right to ancestral lands and natural resources and the right to enjoy their culture, have played an important

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41 CESCR (GC 14) (n 38), para 11; CESCR (GC 15) (n 38), para 8.

42 CESCR (GC 15) (n 38), para 15.

43 For a summary of jurisprudence on protecting the environment through human rights in Europe, see Council of Europe, Manual on Human Rights and the Environment (2012) <www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf> (20 March 2019).

44 (10 October 1961) ETS No 35.

45 *Ibid.*, Art 11.

46 ECSR, Complaint No 30/2005, Decision of 6 December 2006. For a detailed discussion of the case, see Mirja Trilsch, 'European Committee of Social Rights: The Right to a Healthy Environment' (2009) 7(3) *International Journal of Constitutional Law* 529–38.

47 ECSR, Collective Complaint No 72/2011, Decision of 7 December 2011.

role in protecting the environment and the environmental rights of these groups.[48] In *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples*,[49] for example, the IACHR said:

> States have the duty to adopt measures to prevent harm to the environment in indigenous and tribal territories and to adopt the measures necessary to protect the habitat of the indigenous communities, taking into account the special characteristics of indigenous peoples, and the special and unique relationship that they have with their ancestral territories and natural resources found therein. In adopting these measures, as the IACHR has pointed out, the states should place 'special emphasis on protecting the forests and waters, which are fundamental for their health and survival as communities'.[50]

In the famous case of *Yanomami v Brazil*, the IACHR invoked the right to health of the Yanomami to protect the environment in the area traditionally occupied by this indigenous group from massive incursion by outsiders.[51] The government of Brazil had authorized the construction of a highway across the land occupied by the Yanomami and corporations to commence mining operations in the area. The penetration of these traditional lands by outsiders led to the spread of illnesses among the Yanomami, causing many deaths.[52] Although the case was decided based on the rights to life and health of the Yanomami, partly because the right to a healthy environment is not recognized as a justiciable right in the Inter-American system of human rights,[53] the result was that the environment was protected from further massive violation.

Within the African context, it has already been pointed out that the African Charter is the only binding international human rights instrument which enshrines a justiciable right to a generally satisfactory environment.[54] This has not stopped the African Commission from drawing connections between this right and other rights such as the right to health and the right of access to safe drinking water. In *Sudan Human Rights Organization and Another v Sudan*,[55] the Commission found that the poisoning of water sources such as wells exposed victims to serious health risks and amounted to a violation of the right to enjoy the best attainable state of physical and mental health.[56] Citing CESCR's General Comment No 14, the Commission said that the right to health requires states to 'refrain from unlawfully polluting air, water and soil' and 'to enact or enforce laws to prevent the pollution of water'.[57]

In *SERAC*,[58] the African Commission interpreted the right to enjoy the best attainable state of physical and mental health and the right to a general satisfactory environment favourable to development together as obligating 'governments to desist from directly threatening the

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[48] This has included the indigenous peoples' right to ancestral lands and natural resources and to practice their culture. See, e.g., *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits, Reparations and Costs), IACtHR, Judgment of 31 August 2001; *Yanomami Community v Brazil*, IACHR, Case 7615, Resolution No 12/85, 5 March 1985.

[49] *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples* (n 33).

[50] *Ibid.*, para 234.

[51] *Yanomami Community* (n 48).

[52] Leib (n 3), 80.

[53] See Art 11 of the Additional Protocol to the ACHR (n 16).

[54] Art 24 of the African Charter.

[55] ACHPR, Communication No 279/03-296/05 (27 May 2009).

[56] *Ibid.*, para 212.

[57] *Ibid.*, para 210.

[58] *SERAC* (n 30).

health and environment of their citizens'.[59] According to the African Commission, for a state to comply with both these rights, it has to do the following: order or at least permit 'independent scientific monitoring of threatened environments'; require and publicize environmental and social impact studies prior to any major industrial development; undertake appropriate monitoring; provid[e] 'information to those communities exposed to hazardous materials and activities'; and provide 'meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.[60]

While some have doubted the viability and reliability of the environmental right as providing an independent basis of a legal claim,[61] given that the African Commission invoked the right to health together with the right to a generally satisfactory environmental right in SERAC, this doubt emanates from a misunderstanding of the established practice of the African Commission which shows that it does not favour the approach whereby the most relevant right is applied to the facts. Indeed, in the same communication, the Commission said:

> The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.[62]

In keeping with these remarks, the Commission's practice shows that it invokes all rights pleaded in a communication provided that they are relevant to the facts.[63]

Just as environmental rights can be implicitly protected through social rights and civil and political rights, the opposite is also the case. It is not common for environmental rights to be recognized without social rights or civil and political rights in the same human rights instrument, but there are instances where this has been the case. In these instances, the reductive theory would be used to deduce social rights or civil and political rights from environmental rights since the latter are more encompassing. As will be seen under (c) below, environmental rights include procedural rights such as the rights of access to information, to participate and to redress, and substantive rights such as the right to life.

Environmental rights also include such social rights as the right to health, the right to water, the right to sanitation and the right to an adequate standard of living, just to mention a few. For instance, Article 110(b) of the Constitution of Norway provides that '[e]very person has a right to an environment that is conducive to health and natural surroundings whose productivity and diversity is preserved'. The Ugandan Constitution provides that every citizen has the right to a 'clean and healthy environment'. Many other countries recognize the right to a healthy environment in their constitutions.[64] The inclusion of the words 'clean' and 'healthy' provide

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[59] *Ibid.*, para 52.

[60] *Ibid.*, para 53.

[61] See, e.g., Leib (n 3), 80.

[62] *SERAC* (n 30), para 68.

[63] See Danwood M Chirwa, 'African Human Rights System: The Promise of Recent Jurisprudence on Social Rights' in Malcolm Langford (ed.), *Social Rights Jurisprudence – Emerging Trends in International and Comparative Law* (2008) 323, 332.

[64] See, e.g., Art 41 of the Constitution of Argentina as amended up to 1994; Art 50 of the 1949 Constitution of Costa Rica as amended up to 2011; Art 34 of the 1983 Constitution of El Salvador as amended up to 2014; Art 24 of the Constitution of Greece as revised in 2001; Section 42 of the 2010 Constitution of Kenya; Section 30 of the 2015 Constitution of Nepal; and Art 22 of the 1993 Constitution of Peru as amended up to 2009.

entry points for deducing health rights and the right to sanitation. Indeed, the CESCR has already understood the right to environmental hygiene in this way. In its General Comment No 15, it said:

> Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (b), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. For example, States parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes.[65]

In *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd*,[66] the High Court observed that the right to a healthy environment was concerned with 'the physical and mental well-being of humans' and 'about linkages in human well-being', such as 'social injustice, poverty, diminishing self-esteem and poor access to health services'.[67] In a similar fashion, the Constitutional Court in Guatemala has held that a healthy environment requires that environmental measures should facilitate the realization of 'the right to health and the achievement of a standard of living that guarantees the future generations'.[68] These are just a few examples that demonstrate the capacious nature of environmental rights.

c. Environmental Rights as Civil and Political Rights

Contrary to the assumption that environmental rights are a distinct set of rights that do not fit the conventional description of human rights, these rights share strong affinities with not just social rights but also civil and political rights, which are presumed to be negative rights ('freedom from' rights).[69] It is therefore not surprising that regional human rights bodies, especially those in Europe and the Inter-Americas where the right to environment is not expressly recognized as a justiciable human right,[70] have increasingly resorted to civil and political rights in order to protect aspects of the environment or environmental rights.

In Europe, the initial hesitance to protect environmental rights through the right to life, freedom from torture and the right to liberty and security of the person, as demonstrated in *X and Y v Federal Republic of Germany*,[71] has now given way to greater awareness of the linkages between the environment and civil and political rights. In this regard, the right to privacy and family life has presented itself as one avenue for protecting individuals from various

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[65] CESCR (GC 15) (n 38), para 8.

[66] Miscellaneous Cause No 181 of 2004 (unreported).

[67] *Ibid.*

[68] David R Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' (2011) 20(2) RECIEL 171, 173, citing Concesiones Otorgadas por el Ministerio de Energia y Minas a Empresas Petroleras, Resolucion en Conciencia del Procurador de los Derechos Humanos de Guatemala en Materia Ambiental, Exp 002-98/D.s, 10 October 1998.

[69] See Mariana Acevedo, 'The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights' (2000) 8 *NYU Environmental Law Journal* 437, 458.

[70] See, e.g., Evadne Grant, 'International Courts and Environmental Human Rights: Re-Imagining Adjudicative Paradigms' in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (2015) 384.

[71] ECommHR, App No 7407/76, Decision of 13 May 1976, 711.

kinds of pollution.[72] In *Tatar v Romania*,[73] for example, the ECtHR concluded, following the granting of a gold mining license to a company to operate in an area close to the plaintiff's home and a dam breach which released cyanide-contaminated water into the environment, that

> [t]he Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the company's activity might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes […] and more generally their right to enjoy a healthy and protected environment.[74]

Similarly, in *Guerra and Others v Italy*,[75] where a fertilizer plant had released large quantities of inflammable gas and other toxic substances in its production cycle, the ECtHR held that Italy was responsible for violating the right of the plaintiff to private and family life.[76]

In the Inter-American human rights system, the right to life and personal integrity has been interpreted expansively to protect the environment and environmental rights. In a recent advisory opinion, for example, the IACtHR said that this right requires states to 'prevent environmental damages (sic) within and outside their territory' and, consequently, to 'regulate, supervise and monitor the activities under their jurisdiction that could cause significant damage to the environment'.[77] This manner of interpreting the right to life has received wide support at the domestic level. In Bangladesh, for example, a court held in *Dr M Farooque v Bangladesh & Others* that the right to life 'encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air and water, and sanitation without which life can hardly be enjoyed'.[78] The Supreme Court of Costa Rica has held similarly that life 'is only possible when it exists in solidarity with nature' and can only be enjoyed when citizens 'live in an environment free from contamination'.[79] In Malaysia, the Court of Appeal has held that the right to life 'incorporates all those facets that are an integral part of life itself' and 'the right to live in a reasonably healthy and pollution free environment'.[80]

A trio of civil and political rights – freedom of information, the right to participate and the right of access to justice – has metamorphosed into what are now called procedural

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[72] See, e.g., *Hatton and Others v The United Kingdom*, ECtHR, App No 36022/97, Judgment of 8 July 2003, pertaining to noise pollution; *López Ostra* (n 34), pertaining to nuisance arising from unacceptable smells; and *Guerra and Others v Italy*, ECtHR, App No 14967/89, Judgment of 19 February 1998, pertaining to toxic emissions.

[73] ECtHR, App No 67021/01, Judgment of 27 January 2009.

[74] This decision was made in the admissibility judgment: see European Court of Human Rights, 'Press Release issued by the Registrar: Chamber Judgment, *Tatar v Romania*' (27 January 2009), para 3. It involves an applicant and his son who lived in the vicinity of a gold mine. Due to an environmental accident, a nearby dam had breached and released cyanide-contaminated tailings water into the surrounding environment. The company did not cease its operations.

[75] *Guerra and Others* (n 72).

[76] *Ibid.*, paras 228, 360.

[77] *The Environment and Human Rights*, IACtHR, Advisory Opinion OC-23/17 of 15 November 2017, requested by the Republic of Colombia, Official Summary issued by the IACtHR. The official advisory opinion was issued in Spanish.

[78] (1997) DLR 1, para 101.

[79] *Carlos Roberto Carcía Chacón*, Constitutional Chamber of the Supreme Court, Vote No 3707 (30 July 1993), cited in Boyd (n 68), 172–73.

[80] *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* (1996) 2 CLJ 771, 801 (Court of Appeal), cited in Boyd (n 68), 175.

environmental rights; namely, the right of access to environmental information, the right of access to justice for environmental wrongs and the right to participate in environmental decision-making. These procedural rights are now widely recognized as an important part of environmental rights in environment-specific legal instruments and legislation.[81]

IV. THE RIGHT TO AN ENVIRONMENT AS AN INDEPENDENT RIGHT

The foregoing discussion of human rights practice shows that environmental rights have evolved by way of litigation relying on interpretations of social and/or civil and political rights, the so-called greening of existing international human rights or using the expansion theory. The success of the expansion theory has in turn lent credence to the argument that recognizing environmental rights as a separate set of rights is not necessary since other rights can achieve what environmental rights seek to do.

This argument fails to recognize the significance of the environment and environmental rights to other human rights. Proponents of environmental rights have thus argued for a shift from the expansion theory to the 'indispensability theory' of environmental rights.[82] The indispensability theory holds that 'a human right to environment is indispensable to the fulfilment of basic human rights'.[83] This justifies recognizing environmental rights as standalone rights.

Arguments about vagueness and the difficulty of formulating such rights no longer hold water given that domestic constitutions, regional treaties and declarations and other soft law international instruments have recognized this right.[84] Together with the burgeoning case law in comparative human rights practice, these sources prove that there is an emerging international right to a healthy environment.

As more domestic courts and regional human rights courts and other monitoring bodies have adjudicated these rights, it has become clear that environmental rights are capable of judicial interpretation and enforcement and are not as vague as has traditionally been claimed. Comparative case law shows that environmental rights engender similar obligations to social rights and civil and political rights, such as the duties to respect, to protect, to promote and to fulfil. The courts find it relatively easy to enforce the duty to respect and, to some extent, the duty to protect environmental rights.[85] As is the case with other rights, the duty to promote and fulfil environmental rights is more difficult to enforce, but the tools that have been developed

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[81] See, e.g., Principle 10 of the Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol 1); Art 3(8) Espoo Convention on Environmental Impact Assessment in a Transboundary Context (25 February 1991) 1989 UNTS 309; UNGA Res A/37/7 (28 October 1982) 'World Charter on Nature', Principle 23; see also Art 35(2) of the Constitution of the Czech Republic; IACtHR, Advisory Opinion OC-23/17 (n 77); *Guerra and Others* (n 72); *Öneryildiz v Turkey*, ECtHR, App No 48939/99, Judgment of 30 November 2004.

[82] Leib (n 3), 88.

[83] *Ibid*. See also Acevedo (n 69), 452.

[84] See sections II.a and III of this chapter.

[85] The cases of environmental pollution and interference with the rights of indigenous groups referred to earlier address these two interlocking duties. See, e.g., *Hatton and Others* (n 72); *López Ostra* (n 34); *Guerra and Others* (n 72); *SERAC* (n 30); *Mayagna (Sumo) Awas Tingni Community* (n 48); *Yanomami Community* (n 48).

with regard to social rights, such as the concepts of reasonableness, progressive realization, available resources and international cooperation can be used to interpret these obligations in relation to environmental rights.

Establishing an independent environment right has several advantages. First, this makes it possible for environmentalists to address environmental rights issues without having to invoke the existing human rights, and hence avoid the trouble of having to fit 'the potentially round peg of environmental concerns into the square hole of staunchly anthropocentric human rights'.[86] Instead of needing to prove a causal link between environmental degradation and the violation of a human right,[87] the environment can be protected, conserved and managed for its own sake. Related to this is the problem of ensuring that all aspects of environmental rights are protected in the existing right. Not only is this hard to guarantee, but there is also the obvious problem of fragmentation and, possibly, incoherent jurisprudence. In general, expressly recognized rights are better understood than implied rights,[88] which are insecure and dependent on judicial interpretation. Implicitly recognized rights also take long to gain political legitimacy, if at all, and thus might not readily stimulate policy review and reform. In short, expressly recognizing environmental rights as an independent set of rights would enable a comprehensive and holistic protection of the environment.

V. CONCLUSION

There is no sharp boundary between social and environmental rights, and this is for a very good reason: these rights share strong affinities that make efforts to separate them futile. Much progress has been made to give full recognition to social rights in international law. By contrast, environmental rights have received less attention. The neglect of environmental rights and the division between these rights and social rights has resulted in both normative and institutional fragmentation, which has adversely slowed the development of environmental rights and undercut efforts to achieve sustainable development.

Despite this history of fragmentation and unequal treatment, international and regional human rights monitoring and enforcement bodies and domestic courts across the world have increasingly recognized the significance of the environment to the realization of human rights, especially social rights. These institutions have also developed jurisprudence that establishes the links between environmental rights and social rights, and even civil and political rights. This jurisprudence shows that environmental rights are not just fundamental rights: they defy easy classification as third, second or first generation rights. It is possible to enforce both negative and positive obligations implicit in these rights, just as it is possible to enforce social rights and civil and political rights.

However, the fact that environmental rights are integrally linked with other rights does not mean that they should not receive full recognition as an independent set of rights. The interdependence, indivisibility and interrelatedness of all human rights is well recognized, and this principle will not be threatened if environmental rights are given full recognition.

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[86] Leib (n 3), 88.

[87] See a discussion of *Tauira and 18 Others v France*, ECommHR, App No 28204/95, Decision of 4 December 1995 in Leib (n 3), 89.

[88] Acevedo (n 69), 463.

Encouragingly, domestic constitutions have increasingly recognized these rights expressly. There is much to be gained from this development. Not only does it increase the chances of ensuring that the environment is protected in its fullness, but comprehensive protection of environmental rights could also bolster policy and legislative efforts to protect the environment and enhance the holistic development of social rights and environmental rights.

29. Climate change and social rights: perspectives on legal obligations

Siobhán McInerney-Lankford[1]

I. INTRODUCTION

Risk is generally understood as severity of hazard combined with probability of occurrence. Put in these terms, the risks associated with rapidly increasing climate change are extreme. Nowhere is that risk more evident than in severe negative impacts on the enjoyment of human rights.[2] The plight of people made vulnerable by climate change has been the subject of extensive research. This chapter analyzes climate vulnerability through the lens of social rights protected under international human rights law, which, it argues, provide a relevant and universally binding framework for: (i) understanding the disproportionate impacts of climate change on those who are already vulnerable or suffer discrimination, and (ii) developing appropriate responses for both climate mitigation and adaptation measures.

The international legal framework governing social rights is used to explore the social and human impacts of climate change and to consider the consequences of characterizing an entitlement as a *right* in terms of the obligations it generates in this context, and the concrete legal and policy implications this may have for state parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR). As the most widely ratified treaty governing social rights, the ICESCR treaty provisions will be relied upon in two distinct but complementary ways: first, climate impacts will be assessed in light of the specific requirements of the obligations to respect, protect and fulfil; second, as the chapter will argue, the rights contained in the ICESCR can and should be relied upon to bolster protection against climate change and to strengthen policy responses to it, whether in assessments, planning, financing, implementation of adaptation or mitigation programmes or monitoring and evaluation.

The analysis borrows from human rights impact assessments (HRIAs) to make the critical connection between the documented social and human impacts of climate change and the international human rights framework and the applicable obligations. An HRIA is an instrument for examining policies, legislation, programmes and projects to identify and measure their effects on human rights. HRIAs provide a reasoned, supported and comprehensive answer to the question 'how does the project, policy or intervention affect human rights?' Their fundamental purpose is to help prevent negative effects and to maximize positive effects.

[1] This chapter was written in the author's personal capacity and should not be attributed to the World Bank, its Board of Executive Directors or the governments it represents. Responsibility for errors or omissions remains with the author.

[2] Mary Robinson, 'Justice, Human Rights and Climate Change' (2015) 39 Fletcher Forum of World Affairs 9.

As such, 'HRIAs are an indispensable part of making human rights considerations operational in a range of legal and policy contexts'.[3]

II. VALUE-ADDED OF HUMAN RIGHTS LAW TO THE CLIMATE CHANGE DEBATE

The social and human impacts of accelerating climate change are extensively documented.[4] According to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change adopted in 2007,[5] as well as the Fifth Assessment Report of the Intergovernmental Panel on Climate Change adopted in 2013,[6] global warming is causing rising sea levels, warmer sea temperatures and acidification, the melting of sea ice and shrinking of snow-covered areas and more tropical cyclones and droughts.[7] The 2018 Special Report on Global Warming of 1.5°C confirmed that limiting global warming to 1.5°C would require rapid, far-reaching and unprecedented changes in all aspects of society.

Climate impacts have also been viewed in human rights terms,[8] and some have gone as far as to characterize them as violations of human rights law.[9] The rights potentially impacted include the rights to life, self-determination, adequate standard of living, food, water, sanitation, housing, education and health.[10] In addition, the further impacts of climate change on marginal, vulnerable or minority groups, or individuals belonging to such groups, also potentially raise equality claims,[11] with clear disparities among impacts felt by protected groups,[12]

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[3] World Bank, *Human Rights Impact Assessments* (2012).

[4] See the World Bank's analytical work on the Social Impacts of Climate Change at (13 June 2019).

[5] IPCC, Climate Change 2007: Synthesis Report – An Assessment of the Intergovernmental Panel on Climate Change Providing an Integrated View of the IPCC's Fourth Assessment (2008).

[6] IPCC, Climate Change 2013: The Physical Science Basis (2014).

[7] The outline of the Sixth IPCC Assessment Report was agreed at the 46th session of the IPCC (Montreal, 6–10 September 2017): <http://ipcc.ch/scripts/_session_template.php?page=_46ipcc.htm> (13 June 2019).

[8] Sumudu Atapattu, 'Global Climate Change: Can Human Rights (and Human Beings) Survive This Onslaught?' (2008) 20 Colorado Journal of International Environmental Law and Policy 35; Stephen Kass, 'Integrated Justice: Human Rights, Climate Change and Poverty' (2009) 18 Transnational Law & Contemporary Problems 115; OHCHR, 'Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (6 May 2016) UN Doc A/HRC/32/23; OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' (15 January 2009) UN Doc A/HRC/10/61, 12, para 32.

[9] OHCHR Report 2009 (n 8), 8.

[10] Jessie Hohmann, 'Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?' (2009) 18 Transnational Law & Contemporary Problems 295. It is contended, however, that the human impacts of climate change should not be equated with human rights impacts, and nor do they automatically amount to human rights violations.

[11] HRC Res A/HRC/RES/16/11 (12 April 2011) 'Human Rights and the Environment' notes that environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights and recognizes that environmental damage is most acutely felt by those segments of the population already in vulnerable situations.

[12] See Barry Levy, 'Climate Change, Human Rights and Social Justice' (2015) 81(3) Annals of Global Health 310, 313–14.

such as women,[13] minorities, children,[14] persons with disabilities and indigenous peoples.[15] Climate change will be felt most acutely by groups who are already in vulnerable situations, and whose vulnerability is likely to be exacerbated by it.[16]

There have been a number of global efforts to link human rights and climate change.[17] They include the 2005 Inuit petition before the Inter-American Commission on Human Rights,[18] brought for violations of Inuit rights protected under the OAS Declaration on the Rights and Duties of Man resulting from acts and omissions related to climate policy;[19] the Malé Declaration on the Human Dimension of Global Climate Change;[20] and five UN Human Rights Council resolutions.[21] Finally, the Paris Agreement outcome document of COP 21 in December 2015 contained explicit recognition of the linkage between human rights and

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[13] IBA Climate Change Justice and Human Rights Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption* (July 2014) 43.

[14] *Ibid*.

[15] OHCHR Report 2009 (n 8), 15–18. See also Emily Gerrard, 'Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples' (2008) 31(3) University of New South Wales Law Journal 941; Marguerite E Middaugh, 'Linking Global Warming to Inuit Human Rights' (2006) 8 San Diego International Law Journal 179. See also IBA Report (n 14), 43.

[16] HRC Res A/HRC/RES/29/15 (30 June 2015) 'Human Rights and Climate Change'. See also HRC, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox – Compilation of good practices' (3 February 2015) UN Doc A/HRC/28/61, paras 93–102; HRC, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H Knox – Mapping report' (30 December 2013) UN Doc A/HRC/25/53, paras 69–78.

[17] A well-developed body of literature exists connecting human rights and the environment, tracing back to the early 1990s: Dinah Shelton, 'Human Rights, Environmental Rights and the Right to Environment' (1991) 28 Stanford Journal of International Law 103; W Paul Gormley, 'The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms' (1991) 3 Georgetown International Environmental Law Review 85; Iveta Hodkova, 'Is There a Right to a Healthy Environment in the International Legal Order?' (1991) 7 Connecticut Journal of International Law 65; Alan Boyle, 'The Role of International Human Rights Law in the Protection of the Environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 43; Dinah Shelton, 'Environmental Rights' in Philip Alston (ed.), *People's Rights* (2001); See also UNGA Res 2398 (3 December 1968) 'Problems of the Human Environment' noting the link between the impairment of the environment and the enjoyment of human rights; Principle 1, Annex, Rio Declaration on Environment and Development (10 August 1992) UN Doc A/CONF.151/26; Principle 1, Stockholm Declaration on the Human Environment (16 June 1972) UN Doc A/CONF.48/14.

[18] The NGO that brought the petition is the Inuit Circumpolar Conference representing the Inuit people of Alaska, Canada, Greenland and Russia. See Hari Osofsky, 'Inuit Petition as a Bridge – Beyond Dialectics of Climate Change and Indigenous Peoples' Rights' (2007) 31 American Indian Law Review 675; Joanna Harrington, 'Climate Change, Human Rights and the Right to be Cold' (2007) 18 Fordham Environmental Law Review 513.

[19] The Commission declined to process the petition on the basis that the information provided did not enable it to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.

[20] Malé Declaration on the Human Dimension of Global Climate Change (14 November 2007) <www.ciel.org/Publications/Male_Declaration_Nov07.pdf> (13 June 2019).

[21] The Human Rights Council has issued five resolutions on human rights and climate change: HRC Res 7/23 (2008); HRC Res 10/4 (2009); HRC Res 18/22 (2011); HRC Res 26/27 (2014); HRC Res 29/15 (2015).

climate change.[22] In a 2017 Advisory Opinion, the Inter-American Court of Human Rights (IACtHR) recognized a freestanding right to a clean and healthy environment under Articles 4 and 5 of the Convention, which guarantee the rights to life and personal integrity.[23] In this Advisory Opinion, the IACtHR elaborated a range of substantive and procedural obligations flowing from the Convention relative to the environment to respect and ensure human rights.

But what is the significance of characterizing a problem in human rights terms, and what is the value-added of invoking human rights discourse?[24] In the context of climate change, what is the distinct benefit of characterizing environmental or climate harm as violations of human rights?

Characterizing an entitlement as a human right, and a harm thereto as the violation of a human right, introduces the concept of duty.[25] Rights imply duties,[26] and legal rights depend on correlative legal obligations.[27] Rights exist only in respect of rights-holders and duty-bearers, giving agency to both.[28] As Jack Donnelly observed, quoting Feinberg, 'claiming a right can "make things happen"'.[29] The value-added is that rights advance accountability by providing concrete legal and moral baselines against which to assess processes and outcomes:

> Along with the human factor, human rights also introduce an accountability framework that is an essential element of the promotion and protection of human rights itself, by holding governments, the duty-bearers accountable to reducing the vulnerability of their citizens to global warming and assisting them in adapting to the consequences […] International human rights law imposes several obligations on States that are relevant to addressing human vulnerabilities to climate change.[30]

The ICESCR in particular provides a binding legal basis for integrating human rights concerns into legal and policy responses to climate change, focusing on treaty obligations,[31] voluntarily assumed by states and binding under international law.[32] As noted by Mboya,

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[22] See, e.g., Decision 1/CP.21, Adoption of the Paris Agreement (12 December 2015) FCCC/CP/2015/10/Add.1, Preamble. While the reference to human rights represented an advance, its significance may be more symbolic and its operational impact likely to be limited given its place in the preamble.

[23] *The Environment and Human Rights*, IACtHR, Advisory Opinion OC-23/17 of 15 November 2017.

[24] See John G Merrills, 'Environmental Rights' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (2007) 666.

[25] Simon Caney, 'Climate Change, Human Rights and Moral Thresholds' in Stephen Humphreys (ed.), *Human Rights and Climate Change* (2009) 69.

[26] On the 'correlativity of rights and duties', see Bernard Mayo, 'What Are Human Rights?' in David Raphael (ed.), *Political Theory and the Rights of Man* (1967) 68, 72; Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (2001) 22.

[27] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 68.

[28] Thérèse Murphy, *Health and Human Rights* (2013) 10.

[29] Jack Donnelly, *The Concept of Human Rights* (1985) 8, citing Joel Feinberg, *Rights, Justice and the Bound of Liberty: Essays in Social Philosophy* (1980) 150.

[30] Deputy High Commissioner for Human Rights, Kyung-wha Kang, 2007 Bali Conference of Parties (COP 13).

[31] On procedural and substantive human rights obligations relating to the environment, including climate change, see Knox Mapping Report (n 16).

[32] OHCHR Report 2009 (n 8), para 23; see generally Siobhán McInerney-Lankford, 'Climate Change and Human Rights: An Introduction to Legal Issues' (2009) 33 Harvard Environmental Law Review 437; see also UNEP, *Climate Change and Human Rights* (10 December 2015).

> [p]arties responsible for disrupting the global climate are the duty-bearers and those suffering negative climatic impacts are the rights-holders […] Duty bearers have an obligation to reduce their emissions in quantities and at rates that will prevent dangerous climate change.[33]

Invoking human rights discourse situates the analysis in binding human rights law and requires a more precise and granular analysis of what exact entitlement (right) has been impacted, by the action or omission of which duty bearer with what consequences, which are questions a HRIA may help answer:

> HRIAs are based on a framework of binding international human rights. As such, HRIAs introduce distinct normative, moral and legal elements into the assessment process […] The legal nature of the human rights framework can give greater force to recommendations arising from an HRIA, since the framework imposes clear legal obligations on states and other duty-bearers, *i.e.* those who have responsibility to remedy any human rights problems identified in the impact assessment.[34]

Another clear benefit of a human rights approach relates to antidiscrimination. Human rights law registers the disproportionate impacts of climate impacts on groups that are already at the margins and already suffering discrimination and exclusion and conceives of such impacts as discrimination. As Dinah Shelton has observed:

> a human rights framework addresses the needs of those who are disproportionably affected by climate change and who, if empowered to do so, can make important contributions to improving climate change policy – at the very least by ensuring that measures taken are not additionally discriminatory.[35]

III. THE IMPACT OF CLIMATE CHANGE ON SOCIAL RIGHTS

As explained above, climate change will continue to have devastating effects on a wide range of social rights, a select number of which will be analyzed here.[36] These effects have been the subject of extensive indepth analysis by the OHCHR, the Center for International Environmental Law (CIEL) and the World Bank, among others.

a. The Right to Health

Climate change is projected to affect the health status of millions of people, including through increases in malnutrition, increased diseases and injury due to extreme weather events, and an increased burden of diarrheal, cardiorespiratory and infectious diseases.[37] The right to the highest attainable standard of health is protected under Article 12 ICESCR. It is a foundational

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[33] Atieno Mboya, 'Human Rights and the Global Climate Change Regime' (2018) 58 Natural Resources Journal 51, 54.

[34] World Bank, 'HRIA: A Review of the Literature, Differences with Other Forms of Assessment and Relevance to Development' (2013) executive summary, page x.

[35] Dinah Shelton, 'Human Rights and Climate Change', Buffett Center for International and Comparative Studies Working Paper No 09-002 December 2009, 5.

[36] Statement following the release of a new scientific report from the Intergovernmental Panel on Climate Change (IPCC), David R Boyd, the UN Special Rapporteur on human rights and the environment (8 October 2018) (13 June 2019).

[37] OHCHR Report 2009 (n 8), 12, para 32.

right upon which the enjoyment of other rights depends, including the rights to the highest attainable standard of living, self-determination, family and a host of cultural rights. Still, a human rights approach to climate change not only focuses on conventional aspects covered by the right to health such as the enjoyment of, and access to, appropriate health care.[38] It also takes other factors into account, such as 'access to safe and potable water and adequate sanitation, an adequate supply of safe food and nutrition, healthy occupational and environmental conditions, and adequate housing'.[39]

Climate impacts, both existing and projected, will increasingly threaten the right to health[40] – through malnutrition and stunting, global pandemics, an increase in diseases due to higher temperatures and air pollution, extreme weather events resulting in injuries, negative impacts on mental health due to the destruction of social safety nets and erosion of cultural traditions, as well as the loss of access to adequate healthcare due to climate-induced migration.

b. The Rights to Adequate Food, Water and Sanitation

Closely related to the threats to the right to health are the negative impacts of climate change on the rights to adequate food, water and sanitation.

Protected under Article 11 ICESCR, the right to food includes the availability of adequate food (including through the possibility of feeding oneself from natural resources) and accessibility to all individuals under the jurisdiction of a state. States must also ensure freedom from hunger and take necessary action to alleviate hunger, even in times of natural or other disasters.[41] The right to food requires that special attention be given to vulnerable and disadvantaged groups, including people living in disaster prone areas and indigenous peoples whose livelihoods may be threatened. The right to food is also directly impacted by climate change through the deleterious impact on the quality and quantity of food production, which in turn threatens food security and potentially results in starvation and malnutrition.

The rights to water and sanitation, while not explicitly provided for in the text of the ICESCR, have been implied into it through the interpretation of the Committee.[42] It defines the right to water as the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, such as drinking, food preparation and personal and household hygiene. Loss of glaciers and reductions in snow cover are projected to negatively affect water availability for more than one sixth of the world's population. Weather extremes, such as drought and flooding, will also impact on water supplies.[43] Climate change will thus exacerbate existing stresses on water resources and compound the problem of access

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[38] *Ibid.*, para 31.

[39] OHCHR Report 2016 (n 8), para 50, citing CESCR, 'General Comment No 14' (11 August 2000) UN Doc E/C.12/2000/4, paras 4 and 11.

[40] See generally OHCHR Report 2016 (n 8); see also S Hales, SJ Edwards and RS Kovats, 'Impacts on Health of Climate Extremes' in AJ McMichael *et al* (eds), *Climate Change and Human Health: Risks and Responses* (2003) chapter 5.

[41] OHCHR Report 2009 (n 8), para 25.

[42] CESCR, 'General Comment No 15' (20 January 2003) UN Doc E/C.12/2002/11.

[43] OHCHR Report 2009 (n 8), para 29; see also Climate Change and the Human Rights to Water and Sanitation, Position Paper (undated), <www.ohchr.org/Documents/Issues/Water/Climate_Change_Right_Water_Sanitation.pdf> (13 June 2019), para 18.

to safe drinking water, particularly in developing countries and for the poorest within those countries.

c. The Right to Adequate Housing

The right to adequate housing is protected under the right to an adequate standard of living under Article 11 of the ICESCR. It has been defined by the Committee on ESCR (CESCR) as 'the right to live somewhere in security, peace and dignity'.[44] Core elements of this right include security of tenure, protection against forced evictions,[45] availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.[46]

Climate change will impact the right to housing in both direct and indirect ways. 'Sea level rise and storm surges will have a direct impact on many coastal settlements. In the Arctic region and in low-lying island states such impacts have already led to the relocation of peoples and communities.'[47] 'Settlements in low-lying mega-deltas are also particularly at risk, as evidenced by the millions of people and homes affected by flooding in recent years.'[48]

The OHCHR has characterized indirect impacts of climate change on the right to housing in the following way:

> The erosion of livelihoods, partly caused by climate change, is a main 'push' factor for increasing rural to urban migration. Many will move to urban slums and informal settlements where they are often forced to build shelters in hazardous areas. Already today, an estimated 1 billion people live in urban slums on fragile hillsides or flood-prone riverbanks and face acute vulnerability to extreme climate events.[49]

d. The Right to Education

Article 13 ICESCR protects the right to education, which is also indispensable to the realization of other rights in the ICESCR and central to empowerment, participation and accountability. Like the right to health, the right to education can be conceptualized in terms of key constitutive elements, including availability, accessibility, adaptability and acceptability.

Climate change is likely to affect the right to education primarily through the ways in which extreme weather events will destroy education infrastructure or impair physical access to schools and training establishments,[50] as well as result in interruptions to the school curriculum,[51] most likely resulting in poorer children being removed from school and unable to

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[44] CESCR, 'General Comment No 12' (12 May 1999) UN Doc E/C.12/1999/5, para 6.
[45] See CESCR, 'General Comment No 7' (20 May 1997) UN Doc E/1998/22.
[46] CESCR (GC 12) (n 44), para 8.
[47] CESCR, 'General Comment No 13' (8 December 1999) UN Doc E/C.12/1999/10.
[48] OHCHR Report 2009 (n 8), para 36.
[49] OHCHR Report 2009 (n 8), para 37.
[50] See, e.g., UNDP, *Zimbabwe Human Development Report 2017 – Climate Change and Human Development: Towards Building a Climate Resilient Nation* (2017) chapter 6; Simon Thacker, *Education and Climate Change in the Middle East and North Africa* (2013).
[51] UNESCO, *Global Education Monitoring Report – Education for People and Planet: Creating Sustainable Futures for All* (2016) 33.

finish secondary school.[52] Less direct, but equally impactful, will be the ways in which climate change will force changes to a range of sectors and livelihoods in ways that may result in children being taken out of schools to support their families. This is likely to affect vulnerable groups disproportionately, including girls over boys and poorer children over those from more affluent families. Relatedly, climate-induced migration will result in indirect negative impacts on the right to education due to the social upheaval and sociocultural challenges it presents for both climate migrants and host communities. Finally, the economic cost of recovery after extreme weather events may divert funding from education programmes in a way that undermines the realization of the right to education.

e. The Right to Work

The ICESCR provides for the right to work in Article 6 and develops the individual dimension of the right to work through the recognition in Article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions.[53] In similar ways to the right to education, climate change is likely to cause various severe impacts on its enjoyment. Extreme weather events have and will continue to destroy infrastructure and people's workplaces, or transportation infrastructure which people rely upon to get to work. In some instances, erosion, storms, rising sea tides, salinification and increased temperatures will wipe out entire forms of livelihoods, whether farming, fishing or tourism. At the level of health and safety, climate change will directly and indirectly impact the right to safe working conditions through causing increasingly dangerous and unhealthy work environments.

f. The Right to Self-Determination

The right to self-determination is protected in common Article 1 ICESCR, ICCPR allowing people to 'freely determine their political status and freely pursue their economic, social and cultural development'. As such it is a collective right that both implies and depends upon a range of political, social and cultural rights. In many contexts, it relies on the preservation of the natural environment and land. The right to self-determination is undermined by the threats to habitability (including the impacts described above with respect to other rights); in some cases, the very existence of the natural environment is threatened with annihilation. In either case, the right to self-determination is threatened with partial or total evisceration. This can be seen in the case of small island developing states which are threatened with being submerged in a way that directly and irreversibly threatens an entire nation's right to self-determination (such as the Marshall Islands, Maldives and Kiribati).

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[52] *Ibid.*, 34.

[53] CESCR, 'General Comment No 18' (24 November 2005) UN Doc E/C.12/GC/18.

IV. LEGAL IMPLICATIONS OF ASSESSING CLIMATE CHANGE THROUGH THE LENS OF SOCIAL RIGHTS: OBLIGATIONS TO RESPECT, PROTECT AND FULFIL

a. General Legal Obligations

Given the wide range of existing and projected impacts of climate change on social rights, what are the legal implications of this analysis in terms of obligations under the ICESCR? Human rights law generates obligations for state parties,[54] irrespective of whether a country has contributed to climate change. Human rights law applies at all times and its protection is triggered by the mere fact that a right is affected, raising a presumption that an obligation has not been complied with: it demands action by a state party. Thus, '[h]uman rights obligations provide important protection to the individuals whose rights are affected by climate change'.[55] Moreover, 'human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change'.[56] They may operate as substantive standards to provide guidance on the 'levels of protection for individual rights that can be regarded as the minimum acceptable outcome under a given policy scenario'.[57] They also mandate a minimum standard of 'do no harm', such that the acts and omissions of states in respect of climate change must not lower the standard of human rights enjoyment that currently prevails. More positively, these treaty obligations require that states act to protect persons under their jurisdiction from the impacts of climate change, regardless of whether the harms of climate change result from their acts or omissions. As John Knox has highlighted, '[w]hether a state causes climate change is a separate question from whether it has a duty to address the effects of climate change on human rights'.[58]

b. Specific Legal Obligations Generated by the ICESCR

As noted by the CESCR,[59] the primary frame of reference for the analysis of ICESCR obligations is the tripartite framework of 'protect, respect, and fulfil'.[60] The ICESCR provides

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[54] In addition to direct obligations incumbent upon state parties, Article 18 VCLT establishes the obligation not to defeat the object and purpose of a treaty prior to its entry into force.

[55] OHCHR Report 2009 (n 8), para 71.

[56] HRC Res A/HRC/RES/10/4 (25 March 2009).

[57] ICHRP, *Climate Change and Human Rights: A Rough Guide* (2008) <www.ohchr.org/Documents/Issues/ClimateChange/Submissions/136_report.pdf> (13 June 2019), 18.

[58] John Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 477, 491.

[59] The CESCR has relied on this typology since 1999: see CESCR (GC 12) (n 44); CESCR (GC 14) (n 39); CESCR (GC 15) (n 42). For a thoughtful critique of the typology in relation to economic, social and cultural rights, see Ida Koch, 'Dichotomies, Trichotomies or Waves of Duties' (2005) 5(1) Human Rights Law Review 81–103. The typology was originally introduced by Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (1996) 160, though the current formulation of respect, protect and fulfil is generally attributed to Asbjørn Eide and his work as the Special Rapporteur to the HRComm, see, e.g., Report on the Right to Food as a Human Right (7 July 1987) UN Doc E/CN.4/Sub.2/1987/23.

[60] OHCHR, *Frequently Asked Questions on a Human Rights Based Approach to Development* (2006) 9. See also new UNEP Report 2015 (n 32), 15, which provides a comprehensive study of the links between human rights law and climate change.

a binding legal basis and justification for adaptation and mitigation responses to climate change that address the immediate and projected impacts on the social rights protected by the Covenant. As such, the fact that climate impacts trigger legal obligations does not mean that new obligations are created, but rather underscores the legal imperative for action by state parties through existing obligations to respect, protect and fulfil the rights enshrined in the Covenant.

i. The obligation to respect

The obligation to respect mandates that a state party refrain from behaviour that deprives people of human rights enjoyment,[61] or diminishes a reasonable level of enjoyment attained.[62] It can be understood as an obligation of restraint, reflecting a principle to 'do no harm'.[63] The extraterritorial impact of the ICESCR was recently confirmed by the CESCR in General Comment No 24:

> Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.[64]

The obligation to respect targets 'violations through acts of commission',[65] requiring that a state refrain from actions that result in direct or indirect violations of the rights within the treaty's coverage,[66] or from undermining the level of enjoyment of rights.[67] Given its emphasis on restraining action that may negatively impact human rights and fulfilling a preventative and precautionary function, an HRIA may be a useful tool for states parties to carry out the due diligence implied in the obligation to respect. One may draw by analogy on the International Court of Justice (ICJ) judgment in *Pulp Mills*,[68] which confirmed the existence of a 'duty of vigilance' and 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 impact in a transboundary context.

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[61] Sigrun Skogly, *Beyond National Borders: States Human Rights Obligations in Development Cooperation* (2006) 68.

[62] Rolf Künnermann, 'A Coherent Approach to Human Rights' (1995) 17 HRQ 323, 328.

[63] ICCPR, Art 2(1) provides that: '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.'

[64] CESCR, 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24, para 27.

[65] International Commission of Jurists *et al*, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), para 6.

[66] HRCttee, 'General Comment No 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21Rev.1/Add.13, para 6; Frédéric Mégret and Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) HRQ 314, 319 citing the Vienna Declaration, Part I, 23.

[67] Margaret Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) Yale Human Rights & Development Law 1, 12.

[68] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* 2010 ICJ 14 (Judgment of 20 April).

In the climate change context, the obligation to respect requires that state parties' actions not accelerate climate change to the detriment of existing levels of enjoyment of social rights such as the rights to health, education, work, self-determination and an adequate standard of living, all of which have and will be threatened by emissions caused by all state parties.[69] One may view mitigation policies as a reflection of this obligation if such policies operate to constrain state action that contributes to climate change, such as emitting carbon dioxide and other greenhouse gases,[70] overexploitation of natural resources,[71] unsustainable fossil fuel extraction or deforestation. In this way, the obligation to respect is violated by emissions and by the failure to take action to curb those emissions through effective mitigation measures; put differently, the obligation to respect could be viewed as requiring all states to take some mitigation measures. Notwithstanding the potential application to all states, differentiations between state parties' obligations may be justified, and such an obligation may attach more easily to larger emitters than to smaller ones, possibly even generating a responsibility for remedial action in favour of smaller emitting. Moreover, a particularly tangible application of the obligation to respect arises in adaptation policies:[72] governments should take into account the social impacts of their policies to prevent and reduce the impacts on economic and social rights.[73] In this, the obligation applies to action (rather than omissions) undertaken in response to climate change that is potentially harmful to social rights. Put differently, a state may not commit a human rights violation against certain groups social rights 'as a by-product of a given mitigation or adaptation policy'.[74]

As noted above, the obligation to respect also extends extraterritorially under certain circumstances.[75] In this regard, the CESCR cites the obligation to 'refrain from interfering with the enjoyment of human rights in other countries', along with the obligation to ensure that international agreements do not adversely affect human rights.[76] Such an extraterritorial application of the obligation to respect in the context of climate change mitigation would require states to refrain from causing harm to human rights enjoyed outside the state territory,[77] and to neither interfere with the enjoyment of rights in another state nor undermine another state's ability to fulfil its human rights obligations,[78] including through emissions that result in

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[69] Some support for such an obligation may be drawn from environmental human rights jurisprudence under the ECHR: see *Lopez-Ostra v Spain*, ECtHR, App No 16798/90, Judgment of 9 December 1994.

[70] Rights-based approaches to mitigation already exist: for a GHG mitigation model based on the right to development see Paul Baer, Tom Athanasiou and Sivan Karhta, *The Right to Development in a Climate Constrained World* (2007).

[71] IUCN WCC Res 4.074 (2008) 'Climate Change and Overexploitation of Natural Resources'.

[72] See Zackary Stillings, 'Human Rights and the New Reality of Climate Change' (2014) 35 Michigan Journal of International Law 637, 658–68.

[73] UNHCR, *Human Mobility in the Context of Climate Change – Recommendations from the Advisory Group on Climate Change and Human Mobility* (COP 21, November 2015) 4.

[74] ICHRP, Rough Guide (n 57), 18.

[75] This is bolstered also by ICESCR, Art 2(1). See also CESCR (GC 24) (n 64), para 29.

[76] See OHCHR Report 2009 (n 8), para 86 (citing the CESCR). See generally, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011).

[77] This would be so, even where the state's level of control falls short of that of an occupying power. John Cerone, 'Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict' (2007) 40 Israel Law Review 369, 423–24.

[78] Skogly (n 61), 68–69. See more generally Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 82. For a thorough discussion of the extraterritorial application of the

harm to the enjoyment of human rights in another state's territory. The case law of the ICJ,[79] and of a number of human rights bodies,[80] supports the existence of such an extraterritorial responsibility for violations of human rights law and humanitarian law where a state exercises effective control.[81]

It may also be possible to argue for a general obligation to respect rights in other states, notwithstanding the limitations on extraterritorial application of human rights treaties. In both the ICJ's *Nuclear Weapons* Advisory Opinion and the *Trail Smelter Arbitration*,[82] the existence of an environmental and transboundary duty to 'do no harm' as 'part of the corpus of international law relating to the environment' is recognized.[83] Matthew Craven has observed that although the CESCR has consistently held that Covenant imposes certain extraterritorial obligations upon states – at least as regards a duty to 'respect' or 'protect' the enjoyment of ESC rights on the part of those living in other states – the issue has clearly remained a contentious one.[84] The position of the OHCHR is that states must refrain from interference with the enjoyment of rights in other countries, ensure that human rights are given due attention in international agreements and guarantee that such agreements do not adversely impact human rights.[85] Applied to the climate change context, such an obligation could require that state parties to the UNFCCC pay due attention to human rights and not undermine them.

For adaptation, the obligation to respect would require that whatever measures are adopted also take human rights into consideration and do not result in negative human rights impacts – or at least balance the human rights impacts with potential human rights benefits. In regard to mitigation, the obligation to respect would require states to scrutinize their policy actions to assess the effects of actions that might degrade the environment and thereby harm individuals'

ECHR, Michael Kearney, 'Extraterritorial Jurisdiction of the European Convention on Human Rights' (2002) 5 Trinity College Law Review 126.

[79] See, e.g., *Armed Activities on the Territory of the Congo (DRC v Uganda)* 2005 ICJ 116, 220 (Judgment of 19 December); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, 2004 ICJ 136, para 111 (Advisory Opinion of 9 July).

[80] *Lopez Burgos v Uruguay*, HRCttee, Communication No 52/1979, CCPR/C/13/D/52/1979; *Coard et al v United States*, IACHR, Case 10.951, Report No 109/99, 29 September 1999.

[81] The HRCttee stated that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situation within the territory of the State Party' (HRCttee (GC 31) (n 66), para 10).

[82] *Trail Smelter Case (USA v Canada)*, III RIAA 1905 (Award, 16 April 1938; 11 March 1941), where the tribunal established a general duty of care on the part of a state to protect other states from injurious acts by individuals within its jurisdiction.

[83] *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, 241, para 29 (Advisory Opinion of 8 July), where the ICJ held 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'.

[84] Matthew Craven, 'The Violence of Dispossession: Extraterritoriality and Economic, Social and Cultural Rights' in Mashood Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (2007) 77.

[85] OHCHR Report 2009 (n 8), para 86.

rights,[86] and require them to develop effective and human rights-sensitive climate policies, to minimize or mitigate negative impacts and provide procedural safeguards.[87]

The use of biofuels as a mitigation measure would be one such example, where states use biofuels in order to reduce the concentration of greenhouse gases in the atmosphere. While such mitigation measures could bring positive benefits for farmers in developing countries, the production of biofuels may have adverse impacts on the enjoyment of the right to adequate food and freedom from hunger as it contributes to an increase in the price of food commodities, leaving poor communities without an adequate supply of food. As noted, the obligation to respect requires state parties to assess the impacts of such programmes on the right to food. Thus, the CESCR has urged states to implement measures to fight climate change that do not have a negative effect on the right to adequate food and freedom from hunger, but rather promote sustainable agriculture. Other examples of rights potentially impacted by states' mitigation and adaptation measures in response to climate change are the right to work and the right to an adequate standard of living. For example, the implementation of a policy measure such as Reducing Emissions from Deforestation and Forest Degradation (REDD+) could have a negative impact on the right to work and the right to an adequate standard of living for those whose livelihoods depend on forestry. In countries that depend on coal fired power generation, there is a risk that the shift to low carbon economies under mitigation policies will lead to job losses in the mining sector. In this way, the obligation to respect would require that states ensure that mitigation and adaption policies be accompanied by efforts to create new opportunities for green investment, alternative green jobs and vocational training/retraining in order to respect the right to work in the context of climate mitigation measures. Moreover, the obligation to respect would also require that the employment opportunities of the green economy be provided in a non-discriminatory way.

ii. The obligation to protect

The CESCR has confirmed that obligations under the Covenant are obligations of conduct as well as of result.[88] The obligation to protect requires states to prevent human rights violations,[89] including interference by third parties.[90] This obligation requires a range of state actions,[91] including preventing, investigating and punishing violations caused by abuses of human rights by state instrumentalities or third parties – whether these are private individuals,

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[86] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (*Ogoniland*), ACHPR, Communication No 155/96 (2001); *Taşkin v Turkey*, ECtHR, App No 46117/99, Judgment of 11 November 2004; *Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Judgment of 28 November 2007. See generally Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998) 2161 UNTS 450.

[87] Knox Mapping Report (n 16), paras 36–40, drawing on UDHR Art 21; ICCPR Art 25.

[88] CESCR, 'General Comment No 3' (14 December 1990) UN Doc E/1991/23, para 1.

[89] Künnermann (n 62).

[90] Knox (n 58), 491.

[91] In the humanitarian context, see the responsibility to protect (so-called R2P) debate, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001). Other duties flowing directly from the terms of Art 2 are the duties to promote and fulfil, which is confirmed in HRCttee (GC 31) (n 66), para 7.

commercial enterprises or other non-state actors.[92] It can be fulfilled through appropriate policies, regulation and administrative and judicial enforcement action. Nevertheless, such 'positive obligations are also limited by considerations of fairness and the effectiveness principle itself'.[93]

A number of human rights bodies have confirmed that the obligation to protect applies in the context of environmental degradation that harms human rights.[94] As noted by Knox,

> although most of the cases involve the obligation to protect against private actions that infringe a human right, states also have such duties *vis-à-vis* other threats beyond their control such as natural disasters.[95]

As noted above, human rights law demands action: a state cannot 'do nothing', irrespective of whether or not it has caused or contributed to the problem of climate change. The obligation to protect has two dimensions: (i) it implies that states take *preventative* action to stop or prevent third party causes of climate change that destroy social rights; and (ii) it has also a *remedial* dimension, requiring states to respond to threats to social rights when they occur.[96] As with the obligation to respect, an HRIA could be used to carry out the requisite due diligence to gauge the extent of the impacts of third party actions or natural disasters on the enjoyment of social rights and thereby inform governments on climate change, to elucidate the impacts (including discriminatory impacts) on particular rights and underscore the relevant ICESCR obligations at issue. HRIAs could also facilitate the fulfilment of a second, remedial dimension of the obligation, informing the development of policy frameworks and action plans to protect social rights, including through the balancing of competing rights in the climate context. In this way, HRIAs provide a frame within which states must fulfil their human rights obligations. In the context of climate change, this is a frame that allows them to balance competing rights and interests:

> The human rights obligations relating to the environment also include substantive obligations to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors. The obligation to protect human rights from environmental harm does not require states to prohibit all activities that may cause any environmental degradation; states have discretion to strike a balance between environmental

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[92] Discussing Art 2(2) of the ICCPR, the HRCttee has observed in GC 31 (n 66), para 8 that 'the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'. The obligation to protect also targets harm that may result from state *omission*, that is, harm resulting from a state failure to act.

[93] Damira Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations' (2007) 13 Buffalo Human Rights Law Review 87.

[94] Knox (n 58), 491, citing HRCttee (GC 31) (n 66), para 8.

[95] *Ibid.*, citing CESCR (GC 14) (n 39), para 40.

[96] From the environmental human rights jurisprudence, one may again draw useful analogies to the climate change context. See, e.g., *Ogoniland* (n 86), where the Commission underscored Nigeria's obligations to both refrain from violations of human rights and protect its citizens from damaging acts that may be perpetrated by private parties (in this case Shell Oil).

> protection and other legitimate societal interest. But the balance cannot be unreasonable, or result in unjustified, foreseeable infringements of human rights.[97]

In the context of climate impacts on the enjoyment of social rights, the obligation to protect entails elaborating a comprehensive legal and policy framework to effectively regulate emissions, including those of private actors,[98] in a way that takes account of the aforementioned impacts on social rights. State parties could accomplish this through concluding international agreements on climate change that take account of social rights and through implementing mitigation policies at the national level that ensure protection of social rights, particularly of those vulnerable groups made even more vulnerable by climate change.

For example, with respect to the right to education, the obligation to protect would require that state adaptation policies take account of the disproportionate impact of climate change on poorer children and on girls,[99] and protect them from the actions of third parties (even their families) in removing them from schools.[100] Given the discriminatory nature of the impacts on the right to education, the obligation to protect could also be understood to require affirmative obligations on states to provide special protective measures in adaptation policies for girls or poorer children whose enjoyment of the right to education is likely to be disproportionately and negatively impacted by climate change.

According to the CESCR, the obligation to protect may also have an extraterritorial dimension,[101] though this is controversial and subject to limitations, which will be addressed in section IV.[102] Nevertheless, despite the well-known objections to applying human rights jurisprudence to transboundary *environmental* harm,[103] the *Trail Smelter Arbitration* or *Pulp Mills* case may once again be relied upon to argue for a general duty of care on the part of a state to *protect* other states and their residents from injurious acts to ESCR related to climate change carried out by corporations and individuals within their jurisdiction.[104] These precedents could be relied upon to argue for an obligation on the part of emitting states to take action to protect ESCR and to curb actions of third parties under their jurisdiction or control, whether such third parties' operations are occurring within or outside their territory.[105] The third party actions in

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[97] Knox Mapping Report (n 16), para 80.

[98] See, *e.g.*, *Massachusetts v EPA* (2007) 549 US 497; 127 S Ct 1438, 167 L Ed 2d 248.

[99] Christina Kwauk and Amanda Braga, '3 Ways to Link Girls' Education Actors to Climate Action' (*Brookings Institution*, 27 September 2017) <www.brookings.edu/blog/education-plus-development/2017/09/27/3-ways-to-link-girls-education-actors-to-climate-action/> (15 November 2019).

[100] UNESCO Report (n 51), 34, highlighting that climate-related shocks result in far greater impacts on poorer children (GEMS Report team analysis (2016) household survey data).

[101] OHCHR Report 2009 (n 8), para 86 (citing the CESCR). See also CESCR (GC 14) (n 39), paras 30–35.

[102] The obligation may nevertheless be more limited where the effects of a state's action impact the human rights of people located physically outside the state's territory.

[103] John Knox, 'Diagonal Environmental Rights' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (2010) 82.

[104] *Trail Smelter* (n 82), 1965. The arbitral agreement in this case recognized the responsibility of a state for the acts of non-state actors in addition to those of the state and its organs. Understood in this way, the duty can be seen to be related to a general international law duty not to harm foreign nationals and to make reparations for breaches: *Pulp Mills* (n 68).

[105] Skogly (n 61), 70. See also CESCR (GC 14) (n 39), para 39: 'States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means'; see

question could include emitting greenhouse gases or the overexploitation of natural resources upon which people depend for their homes, shelter or culture. Bolstered by analogy from international environmental law, human rights law offers normative grounding for the obligation to protect through the legally binding frame of the ICESCR.

iii. The obligation to fulfil

The obligation to fulfil is potentially the most onerous type of obligation,[106] since it requires states to create enabling conditions for individuals to fully enjoy their rights,[107] and to 'secure the existential status for human beings in situations where that status has not been attained (i.e. situations of deprivation)'.[108] Article 2(1) of the ICESCR provides that

> [e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

States are therefore under an immediate obligation to take 'deliberate, concrete and targeted steps'[109] toward the full realization of human rights: the obligation to fulfil is one of conduct and result.[110] States are under a 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'.[111] According to the CESCR,

> even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.[112]

Although General Comment No 24 relates to business activities, the CESCR was clear that the obligation to fulfil has extraterritorial effect:

> Article 2(1) of the Covenant sets out the expectation that States parties will take collective action, including through international cooperation, in order to help fulfil the economic, social and cultural

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similar language in CESCR (GC 15) (n 42) and CESCR, 'General Comment No 19 on the Right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19.

[106] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 HRQ 156, 186 noting that the obligation to guarantee represents 'the highest rung of state obligation under the Covenant'.

[107] Satterthwaite (n 67).

[108] Künnermann (n 62).

[109] CESCR (GC 3) (n 88), para 9.

[110] *Ibid.*, para 1.

[111] *Ibid.*, para 9 (noting, *inter alia*, that at a minimum, states are required to provide for the basic needs of the population). For arguments that even the 'minimum core' socio-economic rights require sensitivity to national resource constraints see Eide (n 26), 27; Asbjørn Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 Human Rights Law Journal 35; Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16 South African Journal of Human Rights 206, 250, positing a distinction between absolute core minimums (applicable to all states) and relative (state-specific) core minimums in which some degree of differentiation is warranted.

[112] CESCR (GC 3) (n 88), para 9.

> rights of persons outside of their national territories. Consistent with article 28 of the Universal Declaration of Human Rights, this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. To that end, States parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment.[113]

Perhaps even more pronouncedly than the obligation to protect, the obligation to fulfil could be relied upon to argue that states must ensure the conditions necessary for the realization of social rights through mitigation and adaptation measures.[114] The affirmative and programmatic nature of the obligation to fulfil is inherently suited to spurring the collective and longterm action required by a range of global actors to stem the negative impacts of climate change on social rights.[115] It may also be seen as directly informing whatever action a state party will take in relation to climate change. In the words of the 2015 Paris Agreement adopted at COP 21:

> Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.[116]

Substantive element

In terms of substantive rights, a state's obligation to fulfil would be especially relevant to the rights to health, food, education and adequate housing.[117] The right to adequate housing has been defined as comprising both freedoms and entitlements,[118] and provides a vivid example of a right that will be affected by climate change. Its core elements include security of tenure and protection against forced evictions, harassment and other threats;[119] availability of services; affordability; habitability; accessibility and cultural adequacy.[120] In the context of climate change, the right to adequate housing will generate specific obligations under the rubric of the obligation to fulfil, and the OHCHR has confirmed the range of freedoms and elements underpinning the right that state parties are under an obligation to fulfil:

(a) adequate protection of housing from weather hazards (habitability of housing);
(b) access to housing away from hazardous zones;

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[113] CESCR (GC 24) (n 64), paras 36–37.

[114] See Peninsula Principles on Climate Displacement within States (18 August 2013), Principle 6 on adaptation assistance and Principle 8 on international cooperation and assistance. See also HRComm, Guiding Principles on Internally Displaced Persons (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, Principle 18(1).

[115] CESCR (GC 3) (n 88), para 9.

[116] Paris Agreement (n 22), Preamble.

[117] Enshrined in several international human rights instruments including the UDHR (Art 25(1)) and most comprehensively under Art 11(1) of the ICESCR as part of the right to an adequate standard of living. See also CESCR, 'General Comment No 4' (13 December 1991) UN Doc E/1992/23.

[118] CESCR (GC 4) (n 117) and CESCR (GC 7) (n 45).

[119] Such other threats would presumably cover environmental threats and those resulting from climate change.

[120] CESCR (GC 4) (n 117).

(c) access to shelter and disaster preparedness in cases of displacement caused by extreme weather events;
(d) protection of communities that are relocated away from hazardous zones, including protection against forced evictions without appropriate forms of legal or other protection, including adequate consultation with affected persons.[121]

Another example is the right to health: the broad range of negative impacts generated by climate change for health mean that a wide range of significant adaptive actions may be required on the part of ICESCR state parties under the obligation to fulfil, including developing responsive health policies that will deliver health services and respond to the increased need for health services and emergency responses. This could include the passing of laws and regulations governing the health sector, and potentially mitigation measures in sectors such as transport, clean cooking technology, infrastructure and agriculture.

Procedural element

More generally, the obligation to fulfil may have promotional dimensions to support the fulfilment of substantive rights.[122] These may relate to the right to recognition before the law,[123] the right to information, the right to participate in decision-making and the right to redress, which would require governments to make information available to groups or individuals whose substantive social rights are threatened by climate change.[124] These dimensions may have special importance for groups that are already marginal or those that are especially vulnerable due to their dependence on the natural environment, such as certain groups of indigenous peoples.[125]

In these more procedural aspects, or what some have termed 'Aarhus rights',[126] an HRIA can once again provide useful guidance. An HRIA requires public participation and access to information and transparency. In terms of public participation, HRIAs should assess whether effective participatory mechanisms are in place during the whole life cycle of the development intervention (from formulation to evaluation), as well as ensure that such mechanisms are integrated in the process of the HRIA itself. Stakeholder participation is central to the acceptance and legitimacy of the HRIA process and its results.

Access to information, meanwhile, is critical for both meaningful participation processes and effective accountability mechanisms. Transparency relates to: (i) the extent to which the policy or project being assessed is transparent and its contents available to the public in sufficient detail before its adoption; (ii) the extent to which the HRIA process itself is transparent both in terms of the methodologies used and the findings of the particular assessment.[127] These two procedural aspects were confirmed in the Advisory Opinion of the IACtHR, confirming

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[121] OHCHR and UN Habitat, The Right to Adequate Housing (Factsheet No 21/Rev 1, 15 January 2015).

[122] Certainly the UNHCR Guiding Principles on IDPs (n 114) support the expansion of process rights to IDPs moving internally and those moving across international borders, although clearly the human rights law argument is on more solid ground for the former, with the latter overlapping with spheres governed by international refugee law which is well known not to cover climate refugees (see Principle 15).

[123] *Ibid.*, Principle 20(1).

[124] *Ibid.*, Principle 7.

[125] *Ibid.*, Principle 9.

[126] After the Aarhus Convention (n 86).

[127] WB HRIA Study (n 4).

states' obligations to ensure (i) the right of access to information and (ii) the right to public participation of the persons subject to their jurisdiction in relation to possible damage to the environment.[128]

As with the other constitutive obligations under the ICESCR, the obligation to fulfil can also be argued to have an extraterritorial dimension such that state parties should 'take steps through aid and cooperation to facilitate fulfilment of rights abroad'.[129] The anchor for such an obligation in the Covenant is the ICESCR provision on 'international assistance and co-operation' in addition to individual action as a way for states to fulfil their obligations under the ICESCR.[130] The Committee has confirmed that this depends on the mobilization of resources within a state and those available from the international community through international cooperation and assistance,[131] recalling the central role of such cooperation in securing the full realization of ICESCR rights.[132]

V. CHALLENGES OF ADDRESSING IMPACTS OF CLIMATE CHANGE THROUGH THE LENS OF SOCIAL RIGHTS

Despite existing human rights obligations under the ICESCR's relevance to climate change, a number of enduring structural, substantive and procedural challenges exist, due to features inherent to international human rights law,[133] and to its relationship with the regimes governing climate change and the environment.[134]

First, there exists a historical divergence between the 'treaty-based sub-systems' that govern human rights, on the one hand, and the international agreements governing climate change on the other.[135] Each represents a technically specialized legal framework with global scope,[136] whose specialized rules and systems have no clear relationship to the other and reflect compartmentalization.[137] The international bill of rights is a product of the post-war era and is

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[128] IACtHR Advisory Opinion OC-23/17 (n 23), 2.

[129] OHCHR Report 2009 (n 8), para 86 (citing the CESCR).

[130] ICESCR, Art 2(1). Sigrun Skogly also views the provision on international cooperation and assistance as part of the obligation to fulfil: see Skogly (n 61), 71.

[131] See, e.g., ICESCR, Arts 22 and 23. See also CESCR, 'General Comment No 2 on International Technical Assistance Measures' (2 February 1990) UN Doc E/1990/23.

[132] CESCR (GC 3) (n 88), paras 13–14. In this connection the CESCR highlighted the 1986 Declaration on the Right to Development (UNGA Res 41/128 of 4 December 1986).

[133] See, e.g., Knox (n 103); Sam Adelman, 'Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse' in Stephen Humphreys (ed.), *Human Rights and Climate Change* (2009) 159.

[134] See generally Philippe Sands *et al*, *Principles of International Environmental Law* (2012) 297–307.

[135] *Ibid.*, 9.

[136] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) UN Doc A/CN.4/L.682, para 481.

[137] The limitations identified here resemble the disconnects between human rights law and development policy which coexist in parallel legal and policy spheres, despite connecting and overlapping in a range of ways: Siobhán McInerney-Lankford, 'Human Rights and Development: Some Institutional Perspectives' (2007) 23(3) Netherlands Quarterly of Human Rights 459. But beyond analogies they can be seen as connected, since tackling climate change raises questions about access to and use of resources, which have direct bearing on human rights. This links also to the fact that public international law pos-

oriented towards preventing certain grave moral harms and preserving a set of substantive and procedural entitlements for all.[138] The climate change regime emerged later,[139] the outcome of disparate movements; it was aimed at tackling harms that were not contemplated in the design of human rights frameworks, leaving the latter ill equipped to tackle them. Central to the climate regime are concepts such as equity and common but differentiated responsibilities,[140] which contrast with the human rights terminology of equality, rights, violation and redress. Climate change frameworks are more forward looking, designed to collectively address projected harms of a more general and diffuse sort, while human rights frameworks and methodologies tend address specific infringements and violations of the rights of identifiable individuals and the obligations (primarily) owed to them by their states.[141]

The frameworks are different in formal terms too: climate change frameworks such as the UNFCCC are more 'horizontal' in nature, particularly with respect to mitigation,[142] concluded between states to regulate the equitable distribution of global burdens of emissions and promote cooperation to address a collective problem. Human rights treaties by contrast reflect more 'vertical' commitments between a state and its citizens, establishing formal and substantive norms to govern the behaviour of duty bearers and constrain their exercise of power. Climate change remains a collective global problem,[143] with aggregate causes and disparate impacts; the international human rights law framework is structured around direct entitlements and violations,[144] and has as its aim redressing such violations: '[T]his framework requires identifiable violations, and identifiable harms attributable to the violations.'[145]

Second, and related, is the issue of 'legalism', which is both a distinguishing feature and strength of human rights law and a source of challenges.

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sesses no clear means for evaluating development activities in explicit and comprehensive human rights terms or upholding clear human rights accountability in development policy and activities. See ILC Fragmentation (n 136), para 483; Satterthwaite (n 67).

[138] Collectively the UDHR, the ICESCR and the ICCPR. Hersch Lauterpacht, *An International Bill of Rights of Man* (1945); Louis Henkin (ed.), *The International Bill of Rights* (1981); Brian Simpson, 'Hersch Lauterpacht and the Genesis of the Age of Human Rights' (2004) 120 Law Quarterly Review 49.

[139] The two principal instruments regulating international climate change are the United Nations Framework Convention on Climate Change (UNFCCC) (9 May 1992) 1771 UNTS 107, and the Kyoto Protocol to the UNFCCC (11 December 1997) 2303 UNTS 162. The UNFCCC originally set a voluntary goal of reducing emissions of developed countries; these voluntary reductions were replaced by binding emissions limits in the Kyoto Protocol.

[140] See Stephen Humphreys, 'Competing Claims: Human Rights and Climate Harms' in Stephen Humphreys (ed.), *Human Rights and Climate Change* (2009) 37, 47, discussing equity and common but differentiated responsibilities.

[141] That is not to discount the more forward-looking, programmatic approaches which can be derived from human rights law.

[142] Adaptation can be argued to appear more 'diagonal' since it may involve financial support or technology transfer from one state for the benefit of another.

[143] This has sometimes generated the argument that such generalized harms or injuries are best addressed by political rather than legal branches.

[144] Such limitations have led some commentators to argue in favour of a free-standing right to a sustainable environment or a universal environmental right, see Adelman (n 133), 172. However, on the risks of declaring new human rights, see Philip Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) AJIL 607.

[145] OHCHR Analytical Study, Observations by the United States of America on the Relationship Between Climate Change and Human Rights (2008), 14, <www2.ohchr.org/English/issues/climatechange/docs/submissions/USA.pdf> (13 June 2019).

> This is a strength of a human rights approach: it seeks to make basic rights enforceable. But a strategy of legal enforcement has dangers too: the huge costs and the slow pace of seeking justice through the legal system; possible shrinking attention to within national boundaries insofar as the legal systems are national; demobilization of popular movements if there is reliance purely on the legal system; and a consequent easy buying-off of campaigns that lack a broad mass base (like the case brought in 2009 to the UN High Commission for Human Rights by the Republic of the Maldives regarding damage caused by global warming).[146]

Third, a related problem is the limited jurisdictional reach of international human rights treaty frameworks: human rights treaties are directed at states and contain primarily statecentric obligations owed between a government and its citizens or persons under their jurisdiction. Climate change, by contrast, results from aggregative actions of public and private actors alike throughout the world.[147] Despite the potential for the extraterritorial application of human rights law obligations, including those underpinning social rights, such application is limited,[148] and also contested,[149] creating very real limitations to its potential to address negative impacts on social rights. Even a duty to refrain from causing (transboundary) harm within human rights law would still 'treat climate change as a series of individual transboundary harms, rather than as a global threat to human rights'.[150] It would be difficult to argue that it would amount to a general obligation for larger emitting developed countries to provide adaptation resources to smaller emitting developing countries.

Fourth, and also related to the two foregoing challenges, is the issue of the extraterritorial application of human rights including social rights, which is particularly germane to the context of climate change. According to the IACtHR, states are obligated to prevent significant environmental damage within *and outside* their territory. The Court detailed the actions incumbent on the states to comply with this obligation, including carrying out impact assessments, also recalling the precautionary principle.[151] Similarly, the CESCR has reiterated the extraterritorial application of the Covenant: 'such extraterritorial obligations of states under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction.'[152] In other General Comments,[153] the

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[146] Des Gasper, 'Climate Change: The Need for a Human Rights Agenda within a Framework of Shared Human Security' (2012) 79(4) Social Research Winter 983, 1005.

[147] John Knox, 'Climate Change and Human Rights Law' (2009) 50(1) Virginia Journal of International Law 163, 210–11.

[148] The ICCPR and ACHR limit their application to persons within their jurisdiction: this limits the clear and direct application to territorial jurisdiction, leaving in doubt what form of protection could lie beyond that. Fons Coomans and Menno Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 2. In the case of the ECHR, extraterritorial application is considered exceptional: Michal Gondek, 'Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52(3) Netherlands International Law Review 349–87.

[149] While the ICESCR would appear to envisage extraterritorial application in its provision on international assistance and cooperation under Article 2(1), this also remains contested and politically divisive. Nevertheless, almost every General Comment adopted by the CESCR has relied this provision to set forth extraterritorial obligations. See also ETO Consortium, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013).

[150] Knox, 'Climate Change and HR Law' (n 148), 215.

[151] IACtHR Advisory Opinion OC-23/17 (n 23).

[152] CESCR (GC 24) (n 64), para 27.

[153] See generally CESCR (GC 3) (n 88), para 13. See also CESCR (GC 2) (n 131), and CESCR (GC 12) (n 44), para 38; CESCR (GC 14) (n 39), para 40 and CESCR (GC 15) (n 42), para 34.

CESCR has relied on the provision on 'international assistance and co-operation' to argue for extraterritorial obligations under the ICESCR[154] – though, as noted above, opinions diverge on this point,[155] with developed countries traditionally rejecting the proposition that the Covenant generates a legal obligation for them to provide international financial assistance to other states.[156] Nevertheless, the obligations of international cooperation and assistance have been interpreted to apply to both developed and developing countries: for the latter, the obligation has been understood to include a requirement to 'actively seek assistance' where needed and to identify technical cooperation needs, ensure that assistance programmes are monitored, refrain from obstructing these, and ensure that assistance prioritizes the minimum core entitlement of rights and the rights of the most vulnerable.[157] The OHCHR has also supported the extraterritorial application of the obligation to fulfil in the climate context, recalling states' obligations to take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries.[158] Difficulties with the extraterritorial application of human rights are rooted in the fact that a state 'may not ordinarily exercise authority in the territory of another state, there is no obligation upon it to act to ensure respect for rights there whether by the government of the state or by private individuals'.[159] Thus it is generally accepted that '[h]uman rights obligations requiring the adoption of affirmative measures may be more limited in an extraterritorial context'.[160]

Fifth, there are generalized problems of attribution and causation given the complexity of the linkages between the relevant acts and omissions on the one hand and negative impacts on the other, given the diffuse, cumulative, longterm, historical and indirect nature of the causal relationships between these.[161] Put simply, human rights, like tort law, seeks to locate accountability and blame for the damage done by party X to party Y – and such an approach inevitably

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[154] E.g. ICESCR, Arts 11, 15(4), 22 and 23.

[155] Sigrun Skogly, 'The Obligations of International Assistance and Cooperation in the International Covenant on Economic, Social and Cultural Rights' in Morten Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide* (2003) 403; Skogly (n 61); Sigrun Skogly, 'Global Responsibility for Human Rights' (2009) 29 Oxford Journal of Legal Studies 827; Magdalena Sepúlveda, 'Obligations of International Assistance and Cooperation under the International Covenant on Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal' (2009) 13(1) International Journal of Human Rights 86.

[156] HRComm, Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the ICESCR, 'Report on Economic, Social and Cultural Rights' (10 February 2005) UN Doc E/CN.4/2005/52, para 76. See also Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate as Seen Through the Lens of the Millennium Development Goals' (2005) 27 HRQ 755, 777.

[157] See also Magdalena Sepúlveda, 'Obligations of "International Assistance and Cooperation" in an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2006) 45(2) Netherlands Quarterly of Human Rights 287; more generally, see Margot Salomon, Arne Tostensen and Wouter Vanderhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty Bearers* (2007) which aims to identify (new) duty bearers in relation to development and world poverty, and clarify their various obligations in that regard. For an argument about global responsibility for world poverty from a moral and political philosophy perspective, Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002).

[158] OHCHR Report 2009 (n 8), para 86.

[159] Louis Henkin, *The Age of Rights* (1990) 45.

[160] Cerone (n 77), 441.

[161] Knox 'Climate Change and HR Law' (n 148).

runs into difficulties in the current context.[162] Several of these and related points were raised by the United States in respect of the UN Human Rights Council Resolution on Climate Change:

> [C]limate change is a highly complex environmental issue, characterized by a long chain of steps between the initial human activities that produce greenhouse gas emissions and the eventual physical impacts that may result from those emissions. […] Furthermore, many uncertainties exist regarding the magnitude of current and future climate change, including distinguishing between those impacts that are part of natural climate variability and those that are influenced by anthropogenic climate change.[…] Related to these are the challenges with assessing responsibility due to the multiplicity of actors who contribute to greenhouse gas emissions, the fact that the impacts of climate change are long term and cumulative.[163]

VI. CONCLUSIONS

It is difficult to discern any formal legal protection against the widespread ravages of climate change borne disproportionately by poor and vulnerable people. Yet, 169 state parties to the ICESCR have socio-economic rights obligations which can and should inform responses to climate change, from global level initiatives aimed at forging international agreement on mitigation to adaptation policies of various sorts. In this way, human rights provide a set of substantive and procedural parameters that are legally binding on the majority of the world's countries and which can and should guide those states' actions in the realm of climate change. Thus,

> by relying on a set of internationally agreed values around which policy responses can be negotiated and motivated, human rights has the potential to contribute, qualitatively, to the construction of better policy responses at both the national and international level. Human rights principles and rules are further strengthened by the existence of monitoring and accountability mechanisms, including rights of access to administrative and judicial remedies.[164]

The presumption against normative conflict could be drawn upon to support coherent and mutually reinforcing interpretations of the relevant norms from the two different legal frameworks.[165] In particular, the obligation to respect, protect and fulfil social rights may inform legal responses to climate change.[166] Of particular relevance is how HRIAs may be used to carry out the relevant due diligence to identify and understand the human rights impacts of climate change, including the disproportionate impacts and inequalities faced by poor, vul-

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[162] Gasper (n 146), 1005.

[163] US Observations (n 145), 14.

[164] Shelton (n 35), 6.

[165] See generally, Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) AJIL 291.

[166] See, e.g., 'systematic integration' discussion in ILC Fragmentation (n 136), paras 410–80; see further Campbell McLachlan, 'The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2005) 54 ICLQ 279.

nerable and already discriminated against groups,[167] such as by highlighting existing forms of discrimination, which may themselves be concurrent and mutually reinforcing.[168]

As a general matter of public international law, international human rights obligations apply at all times: as such they are not suspended due to climate change or in the context of international climate law and policy. In this way, international responses to climate change must register the relevance, applicability and implications of human rights law, including obligations relative to social rights, whether domestically or internationally. In strict legal terms, the treaty obligations flowing from the provisions of the ICESCR are part of the legal landscape that governs the actions and omissions of states – whether they have contributed to climate change or not – and these obligations can and should guide the global response to climate change. As the Paris Climate Accord affirmed, state parties must respect, promote and consider their respective obligations on human rights when they act to address climate change.

[167] Amy Sinden, 'Climate Change and Human Rights' (2007) 27 Journal of Land Resources and Environmental Law 255.

[168] Jan Salick and Anja Byg, *Indigenous Peoples and Climate Change* (May 2007); Frances Seymour, *Forests, Climate Change and Human Rights: Managing Risk and Trade-offs* (CIFOR 2008) <www2.forestsclimatechange.org/downloads/seymour_humanrights.pdf> (13 June 2019).

30. International criminal law and social rights

Evelyne Schmid[1]

I. INTRODUCTION

Abuses of social rights raise legal questions in international criminal law and in transitional justice more broadly. Conduct that affects people's enjoyment of social rights is common in many situations in which international crimes are committed, particularly in situations of armed conflict.[2] Such abuses can include the destruction of the livelihoods of a population, the often associated forced displacement, looting or destruction of property and other abuses that can constitute violations of social rights. In line with the focus of this *Research Handbook*, the term social rights is used loosely in this chapter to take into account those rights that are particularly crucial to achieve 'a society which protects and advances the enjoyment of basic human needs and ensures the material conditions for a life in dignity',[3] such as the right to food, housing, social security, work, health or education.

Twenty years since the establishment of the International Criminal Court (ICC), after countless initiatives to deal with past injustices following armed conflicts or other situations of violence and more than 50 truth commissions,[4] it does not seem unusual that societies try to punish conduct involving at least some so-called civil and civil human rights violations. In contrast, the analysis of social rights dimensions of past injustice is a rarer part of what is now known as transitional justice,[5] that is, the 'processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses'.[6] Such attempts include criminal proceedings but also other approaches that often take international criminal law as at least one of their normative frameworks.

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[1] Some of the text of this chapter is based on the following previous publications by the same author, notably Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (2015); *ibid.*, 'Möglichkeiten und Grenzen des Völkerstrafrechts als Instrument gegen die illegale Ausbeutung von natürlichen Ressourcen und Landraub' (2017) 6 Zeitschrift für Friedens- und Konfliktforschung 129; *ibid*, 'L'économie' in O Beauvallet (ed.), *Dictionnaire encyclopédique de la justice pénale internationale* (2017) 383. I warmly thank Nitya Duella, BSc and BLaw, for proofreading the manuscript.

[2] See the contribution by Amrei Müller in this *Research Handbook* (Chapter 24).

[3] See the editors' introduction to this *Research Handbook*.

[4] Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2011).

[5] Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 New York University Journal of International Law and Politics 1; Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 International Journal of Transitional Justice 266; Dustin Sharp, 'Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice' (2012) 26 Harvard Human Rights Journal 149.

[6] Secretary-General, *Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice* (March 2010) 2.

Explicitly or implicitly, many international criminal lawyers have taken it for granted that international criminal law deals with abuses of certain civil and political rights and excludes conduct affecting social rights. Some have dismissed – at least until very recently – the legal feasibility of addressing economic, social or cultural rights abuses within the framework of criminal law.[7] Sometimes, economic, social and cultural rights abuses are relegated to the background, as if they are significant only in terms of the context they provide to other serious crimes. Yet, as this chapter will demonstrate, considerations of social rights abuses were part and parcel of international criminal law from its very beginning.

Over the past decade, in the aftermath of various mass atrocities, scholars, the United Nations and policy-makers have called attention to the denial of access to food, water, work, education, health and other economic or social rights. In 2006, Louise Arbour, the former High Commissioner for Human Rights, asserted that efforts to address the legacy of widespread human rights abuses are biased toward civil and political rights. She stated the need for further exploration of 'the use of statutes of existing international and national courts to adjudicate economic, social, and cultural violations as international crimes'.[8]

In the meantime, many accepted Arbour's invitation to reconsider traditional assumptions and examine the relevance of social rights abuses to established processes dealing with the legacy of past crimes.[9] The Secretary General emphasizes that '[i]nvestigating and prosecuting crimes under national or international law where the conduct involves violations of economic, social and cultural rights as well as civil and political rights' is part of the UN approach to transitional justice.[10] Pablo de Greiff, the first Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, stressed in his initial report that the developments in the Middle East and North Africa after 2011 testify to the relevance of the

> prominent role that claims relating to economic rights occupy in these transitions; claims against corruption and in favour of economic opportunities have been raised at par in the regions with claims for the redress of violations of civil and political rights.[11]

In this chapter, I present a condensed overview of the idea that certain abuses of social rights can overlap with existing definitions of international crimes. The analysis is then broadened to include at least three other ways in which social rights abuses can be relevant to international criminal law. Arguably, social rights abuses can trigger or facilitate the commission of international crimes or the outbreak of conflict and violence (I call this the 'root causes argument'). Moreover, the commission of international crimes can have severe consequences on the enjoyment of social rights, for instance in the case of the remaining family members of

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[7] See below, section III.a; for references to authors who suggest that current international criminal law cannot address social rights, see n 29.

[8] Arbour (n 5), 9–10, 15–16 and note 26.

[9] The International Journal of Transitional Justice dedicated a special issue to transitional justice and development with a series of articles dedicated to ESCR. For the editorial, see R Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development' (2008) 2 International Journal of Transitional Justice 253.

[10] Secretary-General (n 6), 10. The UN Office of the High Commissioner for Human Rights prepared a 'Special Issue on Transitional Justice and Economic, Social and Cultural Rights'. OHCHR, *Transitional Justice and Economic, Social and Cultural Rights* (2014).

[11] Pablo de Greiff, 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' UN Doc A/HRC/21/46 (2012), para 17.

a disappeared person. Last, the decision to initiate prosecutions for international crimes can have implications for social rights protection.

The chapter is structured in the following way. It will introduce the legal framework by defining international criminal law and by outlining how it can interact with human rights law, with an emphasis on social rights enjoyment (section II). Section III will provide an overview of the various factual and legal relationships between social rights and international criminal law. At the end of the chapter, I discuss the prospects of the ICC engaging more with social rights and conclude with some reflections on the major limitations but also the possibilities of using international criminal law as a tool to increase social rights protection.

II. LEGAL FRAMEWORK

In a first step, I will briefly clarify the use of the term international criminal law in this chapter. I will then go on to examine how international criminal law relates to human rights law and why it is crucially important to keep in mind the distinctiveness of these branches of international law.

a. Definition of International Criminal Law

International criminal law is not limited to those crimes over which the ICC has jurisdiction. The Rome Statute is a useful starting point to understand the elements of some international crimes; however, it is important to stress that states only chose to entrust the ICC with jurisdiction over a limited number of international crimes.[12] Understandings of the term 'international criminal law' vary.[13] In this chapter, international crimes are understood to encompass all those crimes for which the following two cumulative features are present.[14]

First, for all international crimes, international law foresees mechanisms for international cooperation and enforcement in the repression of certain conduct, such as international tribunals, mandatory or permissive universal jurisdiction or obligations to cooperate in criminal matters. Second, to constitute an international crime, international law must either directly establish criminal liability at the international level or require states to criminalize conduct in domestic criminal law.[15] The best known groups of international crimes – genocide, crimes against humanity, aggression and war crimes – are examples of crimes that are criminalized at the international level itself.[16] Some authors limit their use of the term 'international criminal law' to the body of law dealing with these crimes only;[17] sometimes the focus is narrowed further to concentrate on the definition of those crimes as they are contained in the Rome Statute of the ICC.[18] Other international crimes deal with conduct that is not directly crimi-

[12] Rome Statute of the International Criminal Court (17 July 1998) 2187 UNTS 90, Arts 10 and 22(3).

[13] Robert Cryer, *An Introduction to International Criminal Law and Procedure* (2007) 4.

[14] This section is based on Schmid 2015 (n 1), chapter 1.

[15] Cryer (n 13), 4–6 (who limits the term 'international criminal law' to the first category).

[16] Yoram Dinstein, 'International Criminal Law' (1985) 20 Israel Law Review 206, 221.

[17] Neil Boister, 'Transnational Criminal Law?' (2003) 14 EJIL 953, 961ff.

[18] Crimes under the Rome Statute are sometimes labelled as 'core crimes' but there is no reason to exclude other crimes from the analysis. For recent definitional discussions, see in particular Harmen van der Wilt and Christophe Paulussen, *Legal Responses to Transnational and International Crimes* (2017).

nalized by general international law, but that states must, by virtue of international law, criminalize in their domestic legal systems. Some authors refer to these crimes as 'transnational' or 'treaty-based'.[19] The perpetrator does not incur penal responsibility directly under international law but indirectly under national criminal laws, which the state must adopt by virtue of international legal obligations to criminalize the conduct. Such obligations are contained in treaties, and sometimes in customary international law. Because the criminal conduct actually or potentially affects the interests of more than one state, there is a mutual interest in suppressing these crimes. Such crimes include, among others, slavery-related practices, certain forms of corruption, money laundering, movements of hazardous waste or apartheid and torture.

Social rights are defined in international human rights law, not in international criminal law. If we want to identify the precise relationship between international criminal law and social rights, it is necessary to clarify how international criminal law and international human rights law relate to each other. This is the purpose of the next section.

b. Assessing the Relationship Between International Criminal Law and Human Rights Law

By far not every violation of human rights is an international crime. The protection of human dignity plays a central role in the development of both international criminal law and human rights law, but there is no convergence. The two bodies of law follow different logics and pursue different purposes.[20] Human rights treaties are concluded by states. At least as human rights law is traditionally understood, to identify a violation of social rights it is necessary to attribute relevant conduct to a state based on the customary rules on the responsibility of states for internationally wrongful acts.[21] The protection of social rights in human rights law, therefore, focuses primarily on the role of the state, including its role in interfering with rights enjoyment and taking, or failing to take, positive measures to protect and fulfil social rights. All states have ratified international treaties and are bound by customary international law norms that require them to respect, protect and fulfil human rights: that is, states must not fail to *respect* rights by unlawfully interfering with the enjoyment of existing rights (such as by arbitrarily evicting people from their homes); states must *protect* individuals from interference by third parties (such as through protection from health-endangering environmental pollution by private companies); and states have moreover undertaken to *fulfil* the complete realization of these rights to the extent possible (such as by taking measures to improve access to voca-

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[19] Boister (n 17), 953.

[20] See the contribution by Amrei Müller in this *Research Handbook* (Chapter 24); see also Andrew Clapham, 'Human Rights and International Criminal Law' in William Schabas (ed.), *The Cambridge Companion to International Criminal Law* (2016) 11; Hans-Peter Gasser, 'The Changing Relationship Between International Criminal Law, Human Rights Law and Humanitarian Law' in Jose Doria *et al* (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (2009) 1111.

[21] UNGA Res A/56/83 (12 December 2001) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), Arts 4–11.

tional education).[22] Where the state does not breach an international obligation, there is no human rights violation – at least as traditionally understood.[23]

On the other hand, international criminal law focuses on the individual responsibility of persons, such as commanders of armed forces or rebel groups, government officials, corporate executives, soldiers or whoever else meets the objective and the mental elements of an offence that constitutes an international crime. International criminal law is primarily a tool to decide on the guilt or innocence of individuals accused of criminal conduct and to establish mechanisms of cooperation between states in the repression of certain conduct. 'In so doing, international criminal law aims to serve an indirect protective purpose [ideally] by deterring future crimes and by affirming the importance of the normative values protected.'[24]

The task of judges at an international criminal tribunal consists of assessing whether the elements of specific crimes are met; an international criminal judge is not tasked in analyzing whether state responsibility has been engaged in the commission of these crimes.[25] Given this fundamental distinction between the law of state responsibility for human rights violations and international criminal law, it is entirely unsurprising that the number of international criminal cases with explicit references to social rights is very limited. To identify the area of overlap between international crimes and social rights (or other human rights), we must ourselves complement the international criminal law analysis with an analysis of human rights law. Criminal tribunals do not generally refer to social or other human rights abuses because no criminal court prosecutes human rights violations as such, independent of whether they concern civil, political, economic, social or cultural aspects.[26] Rather, the instruments of international criminal law define crimes by their specific objective and subjective (mental) elements. These elements of crimes, just like in domestic criminal law, delineate the conduct that constitutes an international crime. Lawyers apply these elements of a crime to concrete factual scenarios to decide on the criminality of the examined conduct. This logic applies irrespective of the type of underlying abuse. Hence, even if there are few cases in which international criminal tribunals have explicitly referred to social rights,[27] this observation does not imply that social rights abuses are not relevant for international criminal law. In the following sections, we will consider examples that illustrate how the elements of some important international crimes can overlap with conduct pertaining to the protection of social rights and in what other ways social rights abuses can be related to international criminal law.

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[22] See the contribution by Veronika Bílková in this *Research Handbook* (Chapter 2).

[23] For the argument that non-state actors can commit human rights violations, see most notably Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006).

[24] Schmid 2015 (n 1), 68. For a summary of the approaches to justify the use of international criminal law, see Cryer (n 12), 22ff.

[25] For the outline of the distinctions between state responsibility and individual criminal liability, see Andrea Bianchi, 'State Responsibility and Criminal Liability of Individuals' in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 16.

[26] Schmid 2015 (n 1), 67–73.

[27] The most notable exception is the *Kupreškić* trial judgment in which the ICTY explicitly referred to economic and social rights, notably in relation to housing, education and health as the underlying issues. *Prosecutor v Kupreškić*, IT-95-16-T, 14 January 2000, paras 597, 599, 615, 630, 634. Yet, a legal finding of state responsibility for violations of human rights is not required by an international criminal tribunal.

III. HOW SOCIAL RIGHTS ARE RELEVANT TO INTERNATIONAL CRIMINAL LAW

Social rights are relevant to international criminal law in multiple ways. As mentioned in the introduction, these relationships can be grouped into four categories. First, the commission of an international crime may overlap with abuses of social rights; this is the area of legal overlap between the two branches. Second, abuses of social rights can be the root causes or drivers of the commission of international crimes. Third, international crimes can have negative consequences on the enjoyment of social rights. Fourth and finally, criminal prosecutions or other transitional justice approaches relying on international criminal law can influence social rights protection, both positively and negatively.

a. The Same Factual Background May Constitute an International Crime and a Violation or an Abuse of Social Rights

We will first consider situations that can be described simultaneously as a violation or an abuse of a social right and as an international crime. In other words, this section deals with the area of overlap between substantive definitions of international crimes on the one hand and social rights violations or abuses on the other hand.[28] In these scenarios, social rights abuses are directly relevant to international criminal law as part of the factual scenario that might lead to a criminal conviction.

In previous research, I presented evidence that all four groups of war crimes, at least eight of the crimes against humanity, genocide, and a number of other offences in treaties that contain obligations for states to criminalize harmful offences in their domestic law can overlap with economic, social and cultural rights violations.[29] My findings are contrary to widespread expectations that dealing with social rights (and their economic or cultural 'siblings') in processes aimed at addressing past abuses is a departure from the original conceptions of international criminal law (and of transitional justice more broadly). I call this the 'legal impossibility argument': several authors explicitly state that contemporary international criminal law prescribes an exclusive or at least a primary focus on civil and political rights. According to this view, such a focus is obvious from the provisions containing the current definitions of international crimes.[30] Hence, it is often taken for granted that the international crimes set out in the Rome Statute and in other sources are relevant to civil and political rights violations and exclude considerations of economic, social or cultural rights. Such statements suggest that the hierarchical treatment of human rights in international criminal law is a necessary consequence of

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[28] The term 'violation' is reserved for social rights abuses in which conduct is attributable to a state, for example because the state interferes with rights or because it fails to protect against abuses despite having the means and knowledge to avoid harm. The term 'abuse' is used to designate harm to social rights enjoyment without necessarily constituting a violation of human rights law.

[29] In more detail, Schmid 2015 (n 1).

[30] Paul D Ocheje, 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity' (2002) 15 Leiden Journal of International Law 749, 779; Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 Social & Legal Studies 171, 173. With more nuance: Larissa Van den Herik, 'Economic, Social and Cultural Rights – International Criminal Law's Blind Spot?' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges* (2014) 343, 344.

existing international law as such, rather than of its interpretation and application.[31] Yet, the research I conducted revealed that these assumptions are inaccurate and we do not need to expand international law in order to pay attention to at least some social rights considerations within international criminal law. Some of the earliest materials on international criminal law already indicate that abuses of socio-economic and cultural rights have always been part of the thinking on international criminal law. The following subsections provide illustrations of the neglected overlap between social rights and existing definitions of international crimes.[32]

i. Crimes against humanity and genocide

Crimes against humanity are the group of international crimes for which the largest amount of information relevant to the overlap with social rights is available. This is because the legal development of crimes against humanity was inspired by the international community's desire to punish mass abuses of human rights by states against their own citizens.[33] Within the category of crimes against humanity, the offence of forcible transfer often goes hand in hand with abuses of social and economic rights, particularly forced evictions or deliberately imposed discriminatory measures in the realm of people's access to jobs and livelihoods.[34] The destruction of livelihoods – by burning victims' homes, for example,[35] or by singling out inmates in prisons for starvation and forced labour – can constitute a serious deprivation of fundamental rights for the purpose of a persecution charge.[36] Some examples from the case law of international criminal tribunals are straightforward illustrations of conduct that is recognized as crimes against humanity (or genocide or war crimes – depending on the legal qualification of the situation and the intent with which the conduct was inflicted). They include: the hindrance of humanitarian assistance;[37] contaminating water sources;[38] and withholding essential (and available) food,[39] water,[40] or medicine to individuals under one's control. Apart from constituting international crimes, such conduct can potentially also constitute a violation of social or economic rights, such as violations of the right to freedom from hunger, the right to an adequate standard of living or the right to health.

Genocide is a particularly complex offence and social rights abuses can play a decisive part in genocidal conduct. To Raphaël Lemkin, the driving force behind the Genocide Convention, there is a central relationship between abusive social, economic and cultural policies and the definition of genocide.[41] Genocide is a complex offence because it requires proof of a *dolus specialis* (specific intent) to *destroy* a protected group. Despite prevailing interpretations

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[31] Schmid 2015 (n 1), chapter 2.

[32] Further references and a more detailed analysis, Schmid 2015 (n 1), chapters 4–7.

[33] For an outstanding account, see Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (2017).

[34] *Prosecutor v Krajišnik*, ICTY, IT-00-39-T, 27 September 2006, para 729.

[35] *Kupreškić* (n 27), para 336.

[36] *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea* (7 February 2014) A/HRC/25/CRP.1, paras 1084 and 1115ff.

[37] *Second Decision on the Prosecution's Application for a Warrant of Arrest against Al Bashir,* 12 July 2010, Pre-Trial Chamber I of the ICC, ICC-02/05-01/09, para 35.

[38] *Ibid.*, paras 37–38.

[39] *Prosecutor v Delalić*, ICTY, IT-96-21-T, 16 November 1998, paras 1092–96.

[40] *Ibid.*, paras 1097–1100. *United States of America v Toshino et al*, US Military Commission at Yokohama, Case No 154, 4 May 1948.

[41] Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944).

that the verb 'destroy' is limited to the 'physical or biological' destruction of a group,[42] social rights dimensions of genocide remain part of the existing law in ways that are often unacknowledged by scholars and tribunals.[43] A perpetrator intending to displace, starve or otherwise deprive a protected group of access to essential social rights enjoyments can have the requisite genocidal intent if he or she aims, by his or her conduct, to destroy the group in whole or in part. It does not matter if the perpetrator summarily executes members of the group or denies them access to essential food, health, water, sanitation or life-saving health care. As the International Criminal Tribunal for Rwanda (ICTR) explained in *Akayesu*, all 'methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction' may constitute genocidal acts,[44] and may consequently attract genocidal intent. Kress correctly points out that the verb 'destroy' must 'not be reduced to the physical destruction of the members of the group as it exists at the time of the overall genocidal campaign but must extend to all possible results of overall campaigns which take the form of a pattern of one or more prohibited acts'.[45] It is, therefore, necessary to take into account a possible (real or merely intended)[46] temporal lag between the commission of abuses and the intended destruction. One should not limit the analysis by taking an unwarrantedly narrow conception of immediate physical violence involving gunfire, machetes or gas chambers. If these considerations are born in mind, social rights abuses squarely play a role in the law on genocide and existing case law has dealt with abuses that human rights lawyers today qualify as social rights abuses.[47]

ii. War crimes

International criminal law deals with a large number of war crimes, some of which are specific to armed conflicts of an international character and some of which attract special legal consequences (so-called grave breaches).[48] For the purpose of this chapter, let us consider a few examples of how social rights can relate to war crimes.

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[42] For example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* 2007 ICJ 43, 185, para 344 (Judgment of 26 February). *Prosecutor v Krstić*, ICTY, IT-98-33-T, 2 August 2001, para 580.

[43] Evelyne Schmid, 'Genocide & Socio-Economic Rights: A Response' (*IntLawGrrls,* 2012) <www.intlawgrrls.com/2012/03/genocide-socio-economic-rights-response.html> (3 June 2019). Schmid 2015 (n 1), chapter 6.

[44] *Prosecutor v Akayesu*, ICTR, ICTR-96-4-T, 2 September 1998, para 505.

[45] Claus Kress, 'The Crime of Genocide under International Law' (2006) 6 International Criminal Law Review 487.

[46] The actual result of group destruction must not occur for a finding of genocide.

[47] See notably the judgment against *Hauptsturmführer* Amon Göth, in which the tribunal explicitly refers to the 'economic, social and cultural connotations' of the crime of genocide. *Prosecutor v Göth*, Case No 37, VII Law Reports of War Criminals 1, 5 September 1946, Supreme National Tribunal of Poland 8.

[48] It is recommended that readers consult the specialized literature on war crimes for the various distinctions between different types of war crimes. For war crimes included in the Rome Statute, e.g., Knut Dörmann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003). For war crimes in non-international armed conflicts (Rome Statute and beyond): Eve La Haye, *War Crimes in Internal Armed Conflicts* (2010).

Arthur Greiser, a 'model Nazi'[49] and the territorial leader (Gauleiter) of the Warthegau in Poland, was convicted of crimes against humanity and war crimes based on his dreadful policies against the Polish population during World War II. If we study his trial from a contemporary human rights perspective, the documents read like a primer of how international crimes can be committed by way of very serious violations of victims' social, economic and cultural rights – including the right to education, food, health, housing and work and the right to take part in cultural life. Most notoriously, Greiser introduced a set of regulations that

> completely deprived the Poles of all rights to real property … deprived the Poles of the right to choose their employment, fixed their conditions of employment and wages, of the scale of nourishment, terms of health and other social services for the Poles at a considerably lower level than that for the Germans … forbade their taking any part in cultural life or sport, and compulsorily limited the education of Polish children to its elementary stages only.[50]

Unfortunately, his trial has been almost completely forgotten – despite the fact that Greiser was the very first individual ever convicted in accordance with the Nuremberg Charter.[51]

In the interest of being succinct, an additional recent and interesting example must suffice. The Trial Chamber II of the ICC, for example, recognized that the theft of household items, food or livestock can have extremely serious consequences for the daily life of survivors and can constitute the ancient war crime of pillage.[52] In situations in which individuals acting on behalf of a state commit the pillage, it is possible to identify a war crime as well as a violation of, for instance, the right to food.

iii. Other crimes

Many international crimes not included in the Rome Statute can also have close relationships with abuses of social rights – slavery-related practices, apartheid, the laundering of proceeds of crime or corruption being just some examples.[53] For instance, victims of human trafficking are victims of a criminalized contemporary slavery-related practice and are often simultaneously prevented from exercising their right to social security and an adequate standard of living. Where states fail to protect victims despite the knowledge of their plight, the situation in which the international crime of trafficking is committed can at the same time constitute a violation of social rights. Corruption is another offence which states agreed, by virtue of international treaties, to criminalize in their domestic legal system,[54] and is therefore the subject of international (or transnational) criminal law.[55] Under certain (rather narrow) circumstances, corruption can itself constitute a violation of social rights.[56] Moreover, a state that takes insufficient

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[49] Catherine Epstein, *Model Nazi: Arthur Greiser and the Occupation of Western Poland* (2010).

[50] *Prosecutor v Greiser,* Case No 74, XIII Law Reports of Trials of War Criminals 70, 7 July 1946, Supreme National Tribunal of Poland 73.

[51] For more analysis on his trial, see Mark Drumbl, '"Germans Are the Lords and Poles Are the Servants": The Trial of Arthur Greiser in Poland, 1946' in Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (2013) 411; Schmid 2015 (n 1), 166–70.

[52] *Prosecutor v Katanga*, Trial Chamber II of the ICC, Judgment Pursuant to Article 74 of the Statute, 7 March 2014, No ICC-01/04-01/07, para 953.

[53] For more analysis, Schmid 2015 (n 1), chapter 7.

[54] For example, United Nations Convention against Corruption (31 October 2003) 2349 UNTS 41.

[55] For the definitional delimitations of international criminal law, see section II.a.

[56] See the contribution by Kolawole Olaniyan in this *Research Handbook* (Chapter 22).

action against corruption or that is itself involved in corrupt practices will often fail to fulfil social rights. The African Commission on Human and Peoples' Rights found that the right to education is violated if schools are closed for two years without explanation and if teachers are not paid because of widespread corruption.[57] By the same mechanism, a state tolerating corruption can also violate its duty to fulfil the right to social security. As Bacio Terracino explains, 'embezzlement from a pension scheme will reduce the resources available for retired people and can result in payments that are not sufficient for living'.[58]

These examples illustrate how violations and abuses of social rights can overlap with existing definitions of international crimes. As a consequence, there is no legal justification for claiming that social rights problems are categorically excluded from the scope of the existing mechanisms that rely on international criminal law.

b. Social Rights Violations as Causes or Drivers of International Crimes?

International criminal law also has links with social rights insofar as widespread abuses of social rights and a generally weak protection of the population's enjoyment of these rights, high levels of inequality and discontent with the state may cause or reinforce cleavages that can lead to armed conflicts or other situations in which international crimes are committed. Several truth commissions and academic reports suggested, for example, links between economic marginalization and discrimination with regard to access to social rights and the commission of international crimes (for example, the truth commissions in Guatemala, Kenya, Liberia, Sierra Leone or Timor Leste).[59] Political scientists caution against deterministic and monocausal explanations for the outbreak of civil war or other types of unrest. The reasons for the outbreak of violence are complex and there is rarely a single cause.[60] That said, socio-economic variables do seem to play a role.[61]

Another aspect must be treated with caution. Care must be taken not to equate the legal term 'violations of social rights' with all types of unpleasant socio-economic aspects of a society's current or past situation. Although violations of social rights, root causes or drivers of a conflict, structural inequality and other socio-economic problems can all be related, it is often inaccurate to equate them without further explanation. Conflating these terms risks undermining advances made in the protection of social rights as legal rights, because the

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[57] *Free Legal Assistance Group and Others v* Zaire, ACHPR, Communications 25/89, 47/90, 56/91, 100/93 (1 October 2005). See also Paolo Mauro, 'Corruption and the Composition of Government Expenditure' (1998) 69 Journal of Public Economics 263, 264, finding a correlation between corruption and lower levels of investment in education. The Inter-American Commission on Human Rights has equally expressed concern about the negative effects of corruption on social rights, see its Resolution 1/18 on Corruption and Human Rights (2 March 2018), section 3.

[58] Julio Bacio Terracino, 'Hard Law Connections between Corruption and Human Rights' (Review Meeting: Corruption and Human Rights) 30, <www.ichrp.org/en/projects/131> (16 July 2019).

[59] For the experiences of truth commissions, see in particular OHCHR (n 10). More recently Amanda Cahill-Ripley and Diane Hendrick, *Economic, Social and Cultural Rights and Sustaining Peace: An Introduction* (2018).

[60] For example, Jeffrey Dixon, 'What Causes Civil Wars? Integrating Quantitative Research Findings' (2009) 11 International Studies Review 707.

[61] James D Fearon and David D Latin, 'Violence and the Social Construction of Ethnic Identity' (2000) 544 International Organization 845; Paul Collier, Anke Hoeffler and Dominic Rohner, 'Beyond Greed and Grievance: Feasibility and Civil War' (2009) 61 Oxford Economic Papers 1.

conceptual confusion easily contributes to the inaccurate impression that all social rights issues are always vague and that dealing with any aspect of social rights would inherently overburden transitional justice approaches.[62] Yet, it is fair to argue that a widespread lack of social rights protection tends to increase the population's dissatisfaction with the government and correlates with other indicators that point to possible danger.[63] On that basis, the United Nations urge that social rights violations and abuses be part of the aspects analyzed in conflict prevention,[64] and should be monitored in early warning strategies.[65]

The argument that abuses of social rights can contribute to the commission of international crimes can also be made in relation to torture outside the context of crimes against humanity, genocide or war crimes. The World Organization Against Torture, an NGO, published findings based on interdisciplinary and empirical research suggesting that socio-economic inequality and violence correlate with the commission of torture in significant ways. According to the study, '[s]tate violence, understood as political terror, torture and incarceration, is highly correlated with broader composite socio-economic indexes, with income as the single most powerful explanatory socio-economic factor'.[66] Of course, correlation does not mean causation and careful statistical analysis warns us against overly quick conclusions that tend to equate the two.[67] Yet, the results prove that there are significant relationships between socio-economic deprivation and high levels of violence. Interestingly, for instance, the study found that improved water sources correlate with reduced levels of homicides with the use of a firearm, writing that '[i]mproved water sources alone can hardly explain homicides in a country, yet […] [e]conomic inequality is seen as a powerful variable in explaining the existence of violent crime such as homicides'.[68] These findings indicate that there are important links between weak social rights protection and the commission of crimes. Vice versa, the next section looks at the *consequences* of crimes on the protection and enjoyment of social rights.

c. Consequences of International Crimes on Social Rights

Unsurprisingly, the commission of international crimes can have negative consequences on social rights. International crimes usually imply a general decline in rights protection and the economic and social wellbeing of a large proportion of the population. Potentially, the commission of international crimes goes hand in hand with emigration of qualified personnel; decreases in the availability, accessibility and quality of healthcare, education, social security

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[62] Evelyne Schmid and Aoife Nolan, '"Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 International Journal of Transitional Justice 362.

[63] Lemkin (n 41), 80. Office of the UN Special Adviser on the Prevention of Genocide, 'Analysis Framework' 2009) <www.un.org/ar/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf> (3 June 2019); CERD Committee, 'Decision on Follow up to the Declaration on the Prevention of Genocide: Indicators of Patterns of Systematic and Massive Racial Discrimination' (14 October 2005) CERD/C/67/1, paras 3, 14, 15.

[64] Report of the Secretary-General, 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping' (17 June 1992) UN Doc A/47/277 – S/24111, paras 15, 18, 81.

[65] OHCHR, 'Early Warning and Economic, Social and Cultural Rights' (2016) <www.ohchr.org/Documents/Issues/ESCR/EarlyWarning_ESCR_2016_en.pdf> (3 June 2019).

[66] Thomas E McCarthy and World Organisation Against Torture, *Attacking the Root Causes of Torture: Poverty, Inequality and Violence* (2006).

[67] *Ibid.*, 35.

[68] *Ibid.*, 42.

and public services in general; and reduced possibilities for people to gain their economic livelihoods. Moreover, a state can face economic sanctions, for example, if the UN Security Council finds that there is a threat to international peace and security and decides to adopt measures under Chapter VII of the UN Charter (such as in the cases of Iraq or North Korea),[69] or if individual states or regional organizations adopt trade or other economic sanctions.

At a more individual level, the commission of many international crimes can very severely affect the enjoyment of social rights of direct or indirect victims. It is well known, for instance, that the family members of a disappeared person often face significant problems in accessing social security or are prevented from access to land or other forms of inheritance.[70] In the absence of certainty about whether an individual has died (and thus, for instance, the possibility of getting a death certificate), family members face difficulties in obtaining pensions to which a widow or a widower or their children would be entitled. These problems can be exacerbated by gender discrimination and stereotypes, particularly those affecting women. According to the former Deputy UN High Commissioner for Human Rights:

> In societies where gender-based discrimination in laws and policies hinders the full realization of the human rights of women and limits their autonomy and participation in aspects of public and political life, the social and economic impact of disappearances is felt more strongly and, in turn, renders women and their children more vulnerable to exploitation and social marginalization.[71]

Other international crimes can negatively impact the enjoyment of social rights. Terrorism and ensuing counterterrorism measures and policies can severely hamper the enjoyment of civil, cultural, economic, political or social rights. As an example, in the wake of terrorist crimes, governments have sometimes restricted the provision of humanitarian relief to areas in which the government suspects support for the alleged terrorists, and evicted people or destroyed housing as a measure to counter terrorism.[72] Other examples include the stigmatization and criminalization of social protests in the wake of terrorist crimes. These measures often seem to target particularly those protesting for social rights, and groups such as trade unions, labour or women's rights movements and human rights defenders more broadly.[73]

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[69] UNSC Res S/RES/661 (6 August 1999) 'The Situation between Iraq and Kuwait'; UNSC Res S/RES/2397 (22 December 2017) 'Democratic People's Republic of Korea'.

[70] HRC, 'Report of the Working Group on Enforced or Involuntary Disappearances: Study on Enforced or Involuntary Disappearances and Economic, Social and Cultural Rights (9 July 2015)' UN Doc A/HRC/30/38/Add.5, para 23.

[71] OHCHR, 'Protecting Women from the Impact of Enforced Disappearances, 14 December 2012' <www.ohchr.org/EN/NewsEvents/Pages/ProtectingWomenFromImpactOfEnforcedDisappearances.aspx> (3 June 2019).

[72] UN Counter-Terrorism Implementation Task Force Working Group Protecting Human Rights While Countering Terrorism, *Expert Seminar on the Impact of Terrorism and Counter-Terrorism Measures on the Enjoyment of ESCR, Summary of Discussions* (5–7 November 2008), para 25.

[73] *Ibid.*, paras 26–30. The struggle over social rights and the targeting of those raising 'fears about dearth' is, e.g., well documented for the French revolution. Charles Walton, 'Les graines de la discorde: Print, Public Spirit, and Free Market Politics in the French Revolution' in Charles Walton and Robert Darnton (eds), *Into Print: Limits and Legacies of the Enlightenment* (2011) 158, 169.

d. International Criminal Proceedings Impacting on Social Rights

Last but not least, there are relationships between the existence of mechanisms relying on international criminal law (criminal proceedings, but also truth commissions, vetting strategies or reparations programmes) and the enjoyment of social rights. These relations can be positive or negative.

On the negative side, transitional justice mechanisms, and particularly international criminal proceedings in international or hybrid courts, are expensive and thus have considerable opportunity costs. The ICC, for instance, is frequently reprimanded because of the financial costs incurred for each case.[74] Rachel Kerr summarizes the pragmatic critique: the same resources could instead be spent on public services, development or reconstruction, and it would seem dishonest not to mention that transitional justice measures can potentially have destabilizing effects.[75] Unavoidable and difficult questions on prioritization, sequencing and selectivity arise. These are not questions that lawyers or other external experts should decide in The Hague, New York or Geneva. Rather, external actors should facilitate serious national consultations on transitional justice to resolve or at least deal with the thorny questions of who should focus on what at what moment, how and with what resources.[76]

On the other hand, the argument goes, the use of international criminal law can have positive effects on the enjoyment of human rights if the reliance on international criminal law contributes to the establishment or strengthening of the rule of law and signals an effective break with past abuses, increasing trust and leading to a state and a society that are more responsive to human rights concerns.[77]

IV. CURRENT DEVELOPMENTS, CHALLENGES AND OUTLOOK

Over the course of the past few years, consideration of the economic, social or cultural dimensions of international criminal law, and transitional justice more broadly, has intensified. With very few exceptions,[78] there is relative consensus that social rights have and should have some role to play in mechanisms relying on international criminal law and, more broadly, transitional justice.[79] Most notably, the Chief Prosecutor of the ICC, Fatou Bensouda, stated

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[74] Bruno Cotte, 'La Cour pénale internationale' (2017) 11 La Revue des droits de l'homme <http://journals.openedition.org/revdh/2776> (3 June 2019).

[75] Rachel Kerr, 'International Criminal Justice' in Oilvera Simic (ed.), *An Introduction to Transitional Justice* (2017) 47, 57.

[76] In order to set legitimate priorities, the OHCHR recommends that good quality consultations are organized, OHCHR, *Rule-of-Law Tools for Post-Conflict States: National Consultations on Transitional Justice* (2009).

[77] Kathryn Sikkink, *Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2012). See also the concluding paragraphs of section IV below for the argument on the expressive capacity of approaches based on international criminal law.

[78] Notably Waldorf (n 30).

[79] For overviews of the debate, Juan Carlos Ochoa-Sánchez, 'Economic and Social Rights and Transitional Justice: A Framework of Analysis' (2019) Journal of Human Rights <https://doi.org/10.1080/14754835.2019.1609349> (16 July 2019); Clara Sandoval-Villalba, 'Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition'

in 2016 that her office 'will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land'.[80] On behalf of victims' groups, a law firm filed a detailed communication in relation to forced evictions and forced dispossession of land in Cambodia, possibly constituting crimes against humanity overlapping with economic and social rights abuses.[81] More recently, in 2018, Chief Prosecutor Bensouda requested a ruling by the Pre-Trial Chamber on whether the ICC has territorial jurisdiction over the deportation of Rohingya people from Myanmar to Bangladesh,[82] leading, in 2020, to an investigation of facts relating, *inter alia*, to the enjoyment of social rights by the Rohingyas. This could mean that the Office of the Prosecutor of the ICC might increasingly take into account allegations that relate to social rights abuses.

At the same time, it would be very unrealistic to expect the ICC to play a significant role in the protection of social rights. The ICC faces many challenges, not all of which can be controlled by the Court, as some of the challenges are due to structural peculiarities in international relations (in particular the difficulties to enforce arrest warrants and to persuade unwilling states to cooperate). The ICC and the multilateral efforts for a global judiciary and international law in general are currently in a crisis whose outcome cannot yet be assessed. Successful attempts to severely restrict the budget of the ICC,[83] and disappointment with the ICC's performance over the first 20 years of the Court, as well as withdrawals, could lead to an additional decline in support for the institutions of international criminal law.[84] Furthermore, a continuing lack of appetite from domestic prosecutors and tribunals to engage with international criminal law, let alone with those types of underlying facts and rights abuses that are not the focus of much contemporary attention, means that the impact of these mechanisms on social rights protection remains uncertain.

In any event, international criminal law is not a panacea. Just because there are manifold relationships between social rights and international criminal law – including overlap between social rights abuses and international offences – does not mean that it would necessarily be a good idea for the ICC, truth commissions or other mechanisms to begin uncritically focusing on social rights. Rather, there are important limitations of relying on international criminal law for the purpose of remedying social rights abuses and enhancing their protection. It is diffi-

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in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (2017) 166, 168; Barrie Sander, 'Addressing the Economic Dimensions of Mass Atrocities: International Criminal Law's Business or Blind Spot?' (*Justice in Conflict*, 8 June 2015) <https://justiceinconflict.org/2015/06/08/addressing-the-economic-dimensions-of-mass-atrocities-international-criminal-laws-business-or-blind-spot/> (3 June 2019).

[80] Office of the Prosecutor of the International Criminal Court, *Policy Paper on Case Selection and Prioritisation* (2016), para 41.

[81] Global Dilligence LLP, 'Cambodia: ICC Preliminary Examination Requested into Crimes Stemming from Mass Land Grabbing' (2014) <www.globaldiligence.com/2014/10/07/global-diligence-file-article-15-communication-international-criminal-court/> (3 June 2019).

[82] *Request for a Ruling on Jurisdiction under Article 19(3) of the Statute*, 9 April 2018 (ICC).

[83] And the ICC's own contribution to this situation: Amnesty International, 'Don't Ask and You Won't Receive – Will the ICC Request the Resources It Needs in 2019?' (2018) <https://hrij.amnesty.nl/icc-zero-growth-dont-ask-and-you-wont-receive/> (3 June 2019).

[84] Douglas Guilfoyle, 'This Is Not Fine: The International Criminal Court in Trouble (three-part series of blog posts)' (EJIL: *Talk!*, 21, 22 and 25 March 2019) <www.ejiltalk.org/part-iii-this-is-not-fine-the-international-criminal-court-in-trouble/> (3 June 2019).

cult to obtain remedies for victims and international criminal law is ill suited as a standalone tool for social change. As mentioned at the outset, international criminal law focuses on the binary question of whether or not certain objective and mental elements are present in order to assess if an international crime has been committed or not. Criminal proceedings based on international criminal law operate within narrow confines given that criminal sanctions impose constraints on important legal interests, such as the liberty or property of the individual who is convicted of a crime. Truth commissions, reparations programmes or commissions of inquiry have more leeway, particularly when they do not single out individual perpetrators but 'merely' make factual and legal findings on the (non-)existence of grounds to believe that international crimes have been committed.

Another concern that must be raised is that relying on international criminal law in relation to human rights concerns carries a risk of downgrading other serious human rights problems.[85] As mentioned, not every – even very serious – human rights violation constitutes an international crime. From a human rights perspective, it is clearly not justifiable that only those abuses that states decided to declare international crimes should merit attention.

The legal argument that some social rights violations and abuses simultaneously constitute international crimes does, however, justify one important recommendation: alleged crimes related to social rights enjoyment should be taken seriously – for the same reasons for which we take other crimes under international criminal law seriously. Hence it is, for instance, legally inaccurate if legal advisors tell survivors, truth commissioners or others that international criminal law must automatically and always lead to an inevitable focus on a few civil and political rights. If a truth commission, for instance, has a mandate covering crimes against humanity, it is legally erroneous to conclude that nothing can be done to address or at least analyze social rights considerations from an international criminal perspective. In addition, links between international criminal law and social rights should play a conscious role in the work of policy analysts, journalists or NGOs reporting on abuses. It plays a crucial role whether they describe the hunger in Cambodia during the Khmer regime as the result of a presumed crime, or whether hunger is presented as 'mere' contextual information.[86] If social rights abuses are presented without reflection as contextual background information or 'only' as a consequence of other abuses, this is an implicit signal to the affected population that these abuses cannot be analyzed on their own terms (and consequently that the affected individuals are not victims of legally relevant conduct unless they also faced abuses of civil and political rights). This underscores the tendency to view civil and political rights abuses as the forefront issues when discussing human rights and conflicts, with social rights abuses constituting their context and consequences. Even if not intended, such framings can be grist to the mill of those who present social rights as mere political fairweather ambitions rather than legal rights.[87] Therefore, care should be taken to avoid portraying all social rights problems 'merely' as context, consequences or needs.

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[85] Clapham (n 20), 18.

[86] Randle DeFalco, 'Accounting for Famine at the Extraordinary Chambers in the Courts of Cambodia: The Crimes against Humanity of Extermination, Inhumane Acts and Persecution' (2011) 5 International Journal of Transitional Justice 142. On the framing issues of abuses/crimes versus contextual background information, see Sam Szoke-Burke, 'Not Only "Context": Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights' (2015) 50 Texas International Law Journal 465.

[87] Schmid and Nolan (n 62).

Why is this important? The recognition that social rights interact with international criminal law and that violations of social rights can sometimes amount to international criminal offences serves a potentially powerful expressive purpose. Mark Drumbl eloquently describes how international criminal law has the potential to enhance 'expressive value in asserting the importance of law, the stigmatization of the offender who transgresses that law, and the authenticity of the historical narrative that ensues'.[88] For better or worse, international criminal law is 'able to mobilize authority in ways that make it more powerful at a global level' than other approaches employed to address the legacies left by a violent past.[89] In a recent empirical study, testing some of my previous findings, political scientist Tine Destrooper examined the 'expressive relevance' of the lack of incorporating social and economic rights considerations in the Extraordinary Chambers of in the Courts of Cambodia (ECCC). Destrooper used structural topic modelling 'to examine how the prioritization of civil and political rights issues by the [ECCC] affected the agendas of Cambodian human rights NGOs with an international profile'. She found that these NGOs' focus on a small range of civil and political rights issues can be traced back to the near exclusive focus on the same issues by the ECCC. The ECCC thus systematically disregarded economic, social and cultural rights aspects. This neglect triggered a similar blind spot for socio-economic and cultural rights issues on the side of human rights NGOs, who had the potential to play an important role in creating or amplifying a debate on the accountability around social rights.[90] Arguably, this is a missed opportunity. If the ECCC had considered social rights relevant conduct, the opposite effect would have likely taken place, that is, civil society might have taken up an active role with regard to social rights – which would have been in tune with the wishes of large proportions of the Cambodian population according to population surveys.[91] If the focus of a tribunal has such a significant influence on the work and discourse of civil society actors in a given context, these recent findings support the idea that the expressive potential of addressing at least some social rights issues in international criminal law has the potential to contribute, at least in a modest way, to putting social rights on the political agenda and enhancing their protection.

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[88] Mark Drumbl, *Atrocity, Punishment, and International Law* (2007) 175. Expressive theories of international criminal law go back notably to Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 The Monist 397.

[89] Peter Dixon and Chris Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims' (2013) 7 International Journal of Transitional Justice 393, 393.

[90] Tine Destrooper, 'Neglecting Social and Economic Rights Violations in Transitional Justice: Long-Term Effects on Accountability' (2018) 37 Journal of Current Southeast Asian Affairs 95.

[91] Most notably Phuong Pham *et al*, *So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia* (Human Rights Center, University of California Berkeley 2011) 45.

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