

***For the Rule of Law***

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***The Review***

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***International Commission of Jurists***

***Economic, Social  
and Cultural Rights  
and the Role of Lawyers***

***Special***

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## Introduction

The International Commission of Jurists (ICJ) organized a Conference on Economic, Social and Cultural Rights and the Role of Lawyers in Bangalore, India, between 23-25 October 1995.

The objective of the Conference was to examine, discuss and formulate recommendations on a number of issues related to the justiciability of economic, social and cultural rights. The role lawyers should play in reinforcing economic, social and cultural rights was abundantly discussed.

This Special Issue of the Review contains papers presented by the participants at the Bangalore Conference. It also comprises other articles on economic, social and cultural rights, written by a number of experts who were not present at the Conference but who, in their daily lives and professional activities, are concerned by the question. The outcome of the Conference: *The Bangalore Declaration and Plan of Action* is annexed to this Special Issue.

More than 100 jurists from all continents adopted *The Bangalore Declaration and Plan of Action*. The document criticises jurists for neglecting the issues of economic, social, and cultural rights of vital importance to humanity. The statement suggests that, by concentrating on the familiar territory of civil and political rights, to the exclusion of the other human rights of importance to people everywhere, lawyers and judges neglected to use the opportunities provided by the

International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the challenge it presents. On this occasion, Mr. Adama Dieng, Secretary-General of the ICJ stated:

"We are not downgrading civil and political rights. We are simply appealing to judges and lawyers everywhere to see the legitimate role of the law to address the vital issues of economic, social, and cultural rights. To ordinary citizens, who never enter a court room or a police station, the most urgent human rights are often those concerned with access to medical care, education, food and housing. The meeting in India is a timely reminder of the way in which the legal profession and the judiciary can use the legal process to stimulate the provision of economic, social, and cultural rights. The lawyers and courts of India have often shown the way in this regard. We can all learn from India and take this message back to judges and lawyers in all parts of the world."

### *The Bangalore Plan of Action Proposes Initiatives at Various Levels*

At the international level, the conference calls for the universal ratification of

the ICESCR. It criticises international organizations for not having made more efforts to monitor violations of economic, social, and cultural rights and report such incidences to the UN in the past. It urges a total reversal of this trend. It also urges immediate adoption of an Optional Protocol to the ICESCR to give NGOs and individuals a mechanism to voice their complaints directly to the UN. The universal enjoyment of economic, social, and cultural rights implies, in particular, that measures be urgently taken to halt or check the huge burden of military expenditure and the control of international trade in arms. The redress of corruption and offshore placement of corruptly obtained funds, and the empowerment of women were also seen as urgent necessities.

At the national level, the document highlights the central role of an independent judiciary in the effective implementation of such rights. While participants recognised that the judiciary is not the only means of securing these rights, they stated that an independent judiciary is nonetheless essential in getting jurists to give added clout to laws that guarantee them. Judges, lawyers, government officials, and legal institutions should be made more aware of their obligations in this field of human rights. Independent public legal aid and assistance schemes in appropriate cases should be set up and the legal profession should be seen to provide more *pro bono* services. The empowerment of disadvantaged groups; the need for educational programmes; the need for judges to apply international norms in their countries; the need to incorporate these rights domestically and revise laws to make them more precise

and, hence, justiciable, were also deemed absolutely necessary.

At the individual level, it was repeated that jurists should not only focus on civil and political rights, as they had in the past, but also play a central role in the attainment of economic, social, and cultural rights. Jurists should also work closely with civil society institutions to help promote the ICESCR and other relevant treaties. Finally, it was stressed that the establishment of Ombuds-type institutions would be extremely helpful.

## **Background Information on Economic, Social and Cultural Rights**

### **Introduction**

Human rights are not limited to only civil and political rights but include economic, social and cultural rights. They, together determine the integral development of the human person.

The basic principles of the Rule of Law enunciated in New Delhi in 1959 and reaffirmed in the Law of Lagos in 1961, on both occasions under the auspices of the International Commission of Jurists (ICJ), recognise the importance of the use of law for the advancement of "the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realise his legitimate aspirations."

The universality, indivisibility, interdependence and interrelatedness of human rights were restated at the Vienna Conference in 1993. The Vienna Declaration enjoins the world community to "treat human rights globally in a fair and equal manner on the same footing, and with the same emphasis."

In spite of the observation of the Universal Declaration of Human Rights (UDHR) that "the highest aspiration of the common people" is to live in a world in which human beings "shall enjoy freedom of speech and belief and freedom from want," the international instru-

ments and mechanisms for promoting and protecting human rights create an impression of an hierarchy or order of importance of these rights.

The existing emphasis on monitoring civil and political rights as opposed to economic, social and cultural rights has been as a result of the fact that international actors have found it easier to determine how many people are being tortured and in many cases, by whom than to determine how many people are dying from starvation and who to hold responsible for such loss of lives.

Implementation and monitoring of economic, social and cultural rights as enunciated in the ICESCR and in other international instruments have been hampered by the lack of intellectual clarity as to the definition and scope of these rights and the obligation of States Parties to the Conventions.

The different nature of economic, social and cultural rights, the vagueness of many of the norms, the absence of national institutions specifically committed to the promotion of these rights as human rights, and the type of information required to monitor compliance effectively all present challenges.

Many of the academics and writers' contributions to the debate on how to ensure compliance with the ICESCR, have identified justiciability or the lack of

justiciability of these rights as the main problem affecting the enjoyment of economic, social and cultural rights.

In many parts of the world today, the situation is being exploited by governments who ordinarily have no political will to ensure the respect for human rights principles. They erroneously claim that the promotion and protection of civil and political rights is cheaper for them to attain as their obligations are limited to non-interference with their citizens' enjoyment of these rights; i.e. as long as they are not detaining their citizens arbitrarily then they are fulfilling their obligations.

It has been shown however, in decisions passed in some jurisdictions especially in the European Court of Human Rights (see *Airey v Ireland* (1979) 2 EHRR 305) that States' obligations go beyond mere non-interference and include taking concrete steps to ensure that the dignity of man is preserved. Therefore States are obliged to ensure that the conditions in their national prisons and other places of detention are in conformity with international standards.

### *The Limburg Principles*

The ICJ in 1986 organized a meeting of experts in Maastricht to examine the erroneous notion being floated by some international lawyers especially in the West that the ICESCR places no real or legal obligations on States and that the instrument was merely a statement of aspirations.

The Limburg Principles which emerged from the meeting identified the

nature and scope of States' obligations, the role of the implementing mechanism, and set out possible guidelines for the consideration of States Parties' reports by the Committee. The Principles observe that "although the full realisation of the rights recognised in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time."

It emphasised the need for a concerted effort in all countries which would ensure that all components of civil society are involved in the process towards the progressive realisation of economic, social and cultural rights.

### *Protecting Economic, Social and Cultural Rights Today*

In spite of the well known rhetoric of the interrelatedness and indivisibility of rights which emphasise that human rights are all extensive in character, lesser interest seems to be placed on ensuring minimum adherence to the provisions of the ICESCR.

Going by the level of jurisprudence and literature available, there seems to be greater effort at the local and national levels than at the international level towards promoting and protecting economic, social and cultural rights. These efforts, though minimal, are significant in the sense that they help to correct the notions that these rights are not justiciable or that their justiciability is costly.

At the level of the United Nations,



not much has been done to facilitate the effective monitoring of the Covenant by the Committee on Economic, Social and Cultural Rights established in 1987. The Committee is composed of independent experts, its main role is to consider States Parties' reports and to make general recommendations to States on how to better comply with their obligations under the Covenant.

There are over 60 countries which have not ratified the Covenant and there is no visible effort being made to encourage the universal endorsement of the instrument.

States Parties' do not take their reporting obligations seriously, in some cases there is the will, but the States lack the necessary expertise or the means required to prepare the report. It is important to note here that the report envisaged by the Committee is expected to also highlight problems which countries may be facing that affects their progressive implementation of the ICESCR, this for a number of developing countries may include the effect of Economic structural adjustment programmes.

The Committee does not have adequate resources with which to function effectively and facilities such as the advisory services available within the UN Centre for Human Rights are not readily available to the Committee for use by needy States.

The lack of adequate NGO support for the work of the Committee is evidenced by their dwindling presence during the Committee's sessions.

To enhance the use of the Covenant and elevate it from its present second-class status, the Committee has been calling upon the UN to consider drafting an optional protocol to the Covenant which will make it possible for individual and group complaints alleging violations of these rights to be submitted for examination by the Committee.

The Commission on Human Rights considered this proposal during its last session in January 1995 under items 7 & 19, but it did not receive much support. There was a general concern as to whether an individual or group petition procedure is the most logical approach towards strengthening the use of the instrument. The issue of justiciability was again raised as a problem and the Committee was urged to develop its existing powers further in relation to the effective examination of States reports. The Committee was invited to report on the proposed optional protocol at the next Commission's session.

### *Lawyers , the Rule of Law and the Protection of Economic, Social and Cultural Rights*

Following the basic principles of the Rule of Law adopted in Lagos in 1961, the Congress of Rio, organized by the ICJ in 1962, adopted principles relating to the role of Lawyers in a changing world.

The Rio resolution stated that "the lawyer today should not content himself with the conduct of his practice and the administration of justice. He cannot remain a stranger to important developments in economic and social affairs if he

is to fulfil his vocation as a lawyer: he should take an active part in the process of change."

To fulfil this social obligation, the Congress called on lawyers to recognise and concern themselves with the prevalence of poverty, ignorance and inequality in the world and to play a leading role in the eradication of "those evils, for while they exist, civil and political rights cannot of themselves ensure the full dignity of man."

These statements, when read in conjunction with the Limburg Principles (cited earlier), make it imperative for lawyers to be involved in the emerging global campaign for the protection of economic, social and cultural rights.

The protection of economic, social and cultural rights, using the existing local and international legal system, requires skills which lawyers working in the field of human rights are traditionally not accustomed with. Steps are being taken by lawyers with the support of the judiciary in some countries like India, New Zealand and Benin to debunk the theory of non-justiciability of economic, social and cultural rights.

The ongoing debate on how to monitor the violation of these rights envisages that lawyers will have to work more closely with other professionals, especially economists and financial institutions to further develop an effective methodology.

The ICJ Conference on Economic, Social and Cultural Rights and the Role of Lawyers, held in Bangalore between 23-25

October 1995, discussed these issues with a view to make suggestions relating to achieving global endorsement of economic, social and cultural rights and ensuring effective implementation of the ICESCR by creating awareness of the Covenant and the Limburg Principles at all levels and supporting the work of the UN Committee on Economic, Social and Cultural Rights. The Conference lengthily discussed the specific role that lawyers and NGOs should play in the implementation of these rights especially in relation to monitoring and reporting of violations at the local and national levels and in assisting in defining concepts and making applications in court.

## Opening Speech by the Secretary-General

Ladies and Gentlemen,

We are here today to examine some emerging aspects of the Rule of Law and in particular the question of the justifiability of economic, social and cultural rights.

I am particularly pleased to thank the President and the Members of the Karnataka Commission of Jurists who are hosting this conference, the interest and implications of which are so considerable.

We commit ourselves to show to the funders, who have helped us out so generously, and to the Government and the People of India, that have so kindly offered us their hospitality, that their actions have not been in vain.

To paraphrase a former President of the ICJ, the late Judge Vivian Bose, I would like to recall that a tree is esteemed for the quality of its fruits, and that we will neglect nothing to make the fruits of this conference be the best we can produce.

I would like to take this opportunity to express my gratitude to Mr. Fali Nariman who gives of Asia, every day, the image of a continent which makes tremendous efforts in the domain of the Rule of Law. Mr. Nariman, far beyond the borders of India, you honour Asia because your competence, your integrity,

and your authority, are recognised by the great capitals of the world who consult you on their problems and listen to your enlightened words on all aspects of the juridical life of the international community.

The International Secretariat of the ICJ is very grateful to you for the support and advice that you have provided so spontaneously.

Our conference is meant to be a contribution to the commemoration of the 50th anniversary of the United Nations which is headed by our former member, Dr. Boutros Boutros-Ghali. He continues to view the ICJ as an essential cornerstone in the domain of law, and in his *curriculum vitae* he is proud to refer to his belonging to our family: the great family of jurists of all horizons!

And as the century draws to a close, and with the countless challenges that confront human conscience, what should be our contribution as jurists? How should we tackle the problems that are linked to economic and social upheavals, which are also, in a certain way, indicative of the crises of identity that have spared no continent?

The drafters of the Universal Declaration, having witnessed the horrors of the Second World War, knew fully well that the rights and freedoms contained in the Declaration could only

find their full effect if there reigned a social and international order protected by the Rule of Law.

Two years before, the drafters of the Constitution of the International Labour Organization (ILO) had reaffirmed a fundamental principle contained in the Declaration of Philadelphia, which stated *inter alia*: "Freedom of expression and association is an indispensable condition for sustained progress"; "poverty wherever it exists, constitutes a danger for the prosperity of all"; "all human beings, whatever their race, their belief, or their sex, have the right to pursue their material progress and their spiritual development in liberty and dignity, in economic security and with equal opportunities".

Thirty six years ago, here in India, and more precisely in New Delhi eminent jurists meeting under the auspices of the International Commission of Jurists, solemnly reaffirmed that the Rule of Law is a dynamic concept, and that it pertains above all to jurists to ensure its implementation and development not only to safeguard and promote the civil and political rights of the individual in a free society, but also to establish the economic, social and cultural conditions that allow individuals to realise their legitimate aspirations and preserve their dignity.

Everybody already perceived the overwhelming necessity for a social and international order that would lead to the full well-being of the world's people. However, as the third millennium is approaching, a major question remains: is there any future for those who have nothing? The fall of the Berlin Wall that

signalled the nascent rumour of a world in gestation made us believe in the advent of a new era in which noble ideals and the challenge of adventure would overwhelmingly prevail. But if this dream has not altogether vanished it has nevertheless been obscured, taking into consideration the preoccupying situation which prevails in most of the countries of the South that suffer from the undesirable effects of structural adjustment programmes on labour and social development.

It is worthwhile noting that economic instability, a consequence of the debt burden and the remedies that have been applied until now by the donor countries and the international financial institutions - beyond their negative impact on production and employment growth - constitute a menace for human rights, democracy and social stability. No doubt, you will agree, that the present state of our world does not reflect all the high aspirations of our predecessors. Nevertheless, efforts are being made even by the World Bank to identify the ways and means that would allow individuals and groups to realise their full potential, to believe in themselves and to lead a life full of dignity. However, there are still many obstacles in the path that leads to social justice. In order to succeed, development involves the changing of our destiny. Development is a human right. This has been reiterated in the UN Declaration on the Right to Development, a normative document which was born out of the struggle of the International Commission of Jurists. The concept had first been presented by the then ICJ President, Judge Keba Mbaye, on the occasion of an inaugural lecture given in Strasbourg before the

participants of the annual session of the International Institute of Human Rights, also referred to as the René Cassin Institute.

A number of western jurists had expressed doubts, if not reservations on whether this thesis was opportune.

The ICJ conference on the theme of the Rule of Law and Development in 1981 constituted a turning point in the formulation of this new concept - a "discovered" right - constituting a synthesis of civil and political, economic, social and cultural rights.

Always in an avant-gardist spirit, and willing to translate the Delhi Declaration into concrete acts, these numerous efforts inspired non-governmental organizations to integrate the human rights and development dialectic in their daily work. These dedicated NGOs have become, in their countries, the privileged partners of peasants' organizations that support their struggle against injustice, poverty, and deprivation.

As a prelude to the commemoration of the 10th anniversary of the adoption of the Limburg Principles, the ICJ vows to mobilise jurists to give to the International Covenant on Economic, Social and Cultural Rights, the place that it should have in educational programmes, in the case law of courts and tribunals, and in the elaboration of development strategies.

Our ambition is to bring this Covenant out of the oblivion it has too often been confined to in human rights debates. Once again it is up to jurists to

revive the flame of justice whilst keeping a close eye on the implementation of the Covenant, and whilst favouring the adoption of an Optional Protocol that would install a mechanism of accountability in cases of violation of a guaranteed right.

Article 2 of the International Covenant states that "each State Party to the present Covenant undertakes 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

However, it is not unusual to find a State squander its resources to equip its security forces; which are also in many cases its repressive forces, to the detriment of the realisation of the right to health or education. Sometimes it is the powerful elites that pursue the goals of illicit self enrichment. The problem of the fraudulent enrichment of State officials is a phenomenon that spares no continent and that requires a serious policy of international judicial cooperation.

At the ceremony marking the inauguration of the new Human Rights Building of the Council of Europe, in Strasbourg, we invited Europe, to commit itself towards the establishment of a new just economic order governed by principles of justice rather than by the often false ideas inherent in the granting of development aid.

This new partnership in development would then be conducted in reciprocal transparency in the rendering of accounts to the peoples of Europe and of the concerned countries. In a special issue of the ICJ Review in 1968, Felipe Herrera the then President of the Inter-American Bank for Development wrote that: "current events prove every day, sometimes in a violent way or under another negative form, that the stability of the international order warrants the strengthening of an economic and social structure which is both vast and complex and that ignores national borders". This assertion is still valid: it is sufficient to cast a glance at the folly of our global village.

Be it at the local, regional or international levels, the onus is on us, as jurists, defenders of human rights and the Rule of Law, to challenge all acts which hinder the full enjoyment of economic, social and cultural rights. We must envisage pragmatic ways of ensuring that all parties in the struggle, especially policy makers, take their obligations under the Covenant seriously.

It is our hope that the outcome of this Conference will be another step towards achieving the global realisation of the International Covenant on Economic, Social and Cultural Rights.

*Adama Dieng, Secretary-General*

## **Inaugural Address by the Honourable Shri A. M. Ahmadi\***

**Chief Justice of India**

Mr. Justice Michael Kirby, Mr. Fali Nariman, Mr. Justice Bopanna, Mr. Adama Dieng, Excellencies, distinguished guests, delegates and invitees, ladies and gentlemen.

I consider it a great honour and a special privilege to be invited to address this august gathering which has assembled today under the auspices of the International Commission of Jurists to deliberate on Economic, Social and Cultural Rights and the Role of Lawyers in relation thereto. The main theme of the Conference is perhaps inspired by the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations Commission on Human Rights in 1966 which was brought into force almost a decade thereafter. The subjects chosen for discussion at the sessions to follow are of great significance to the international community and the conclusions you will reach at the end of the Conference will be of great use in formulating specific proposals to be made to the UN body. I thank Mr. Fali Nariman but for whose kindness I would not have been in your midst this morning and the organization for inviting me to speak at this function.

Since the termination of the Second World War we are witnessing rapid

socio-economic changes. Every aspect of life - social, economic and political - is undergoing a change. The world has always been changing. The pace of change which was initially slow has suddenly picked up alarming speed and those who cannot keep pace with the changing world may be left far behind with hardly anyone to give company. We live in a complicated world, a world made more complicated by rapid socio-economic changes. The speed is so great that it gives little time to think and ponder, you are virtually swept away and become a co-passenger on a speeding vehicle whether you like it or not. With the socio-economic scenario undergoing a rapid change, cultural changes cannot be far behind. Social change is not one single process, it is multifaceted. In some areas it is total and revolutionary, whilst in others it is gradual and evolutionary. The economic changes are no more easy paced, the free market economy concept is promising to transform society by generating more funds to ameliorate the conditions of the poor. The cultural changes, besides altering the lifestyle and social behaviour of people, are also threatening to change the *inter-se* relations of members of the society, thereby adversely affecting the unity and integrity of the Nation. Besides changes in customs and patterns of life, we also see society drifting in values so far as sexual behaviour is

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\* Given at the Bangalore Conference.

concerned, the attitude towards pornography is more relaxed than what it was in the recent past which shows a definite decline in morality values.

India is one of the world's ancient civilisations and legitimately takes pride in its rich heritage. It is the land of Mahavir, saints and sufis and is one country where peoples of all religious faiths the world knows of live in harmony. It can also take pride in the fact that it could bring about a political change through a bloodless revolution which forced the colonial masters to concede freedom to India. India is one country which has firmly believed in peace and unity. Tolerance has been the *ethos* of this country which has enabled peoples of all faiths to live in harmony with each other. Peace and harmony are vital for coexistence and that is why the world over the emphasis is on peace and coexistence. They are vital to the cause of human beings. But this does not mean that in the name of peace the strong can suppress the weak or the rich can exploit the poor. That clearly brings out that what we must strive for is equality and absence of exploitation by one dominating group over another not equally strong group. It is obvious that in the face of injustice and exploitation, the suffering group will not accept an imposed peace. No one can expect any group of people to accept the domination of the strong and powerful group. It is this attitude of the strong and powerful to dominate over others which has been largely responsible for breaking the peace and forcing the other group to fight for its right by demolishing and tearing down an unjust order. Lasting peace can be realised only if we cultivate the habit to respect the rights of others, treating them as equals and developing

the culture of tolerance and mutual respect. We must accept the fact of diversity within the country and between nations and unless we form a habit of forging unity in diversity we cannot expect peaceful coexistence. The people of India were and by and large are tolerant and strongly believe in peaceful coexistence, notwithstanding occasional hiccups. This is evident from the social and political philosophy of our Constitution. The basic features of our Constitution reflect a philosophy of equality, equitable distribution of the nation's material resources and upliftment of the poor and the downtrodden and equality on the political front also with a right to vote given to every adult citizen. A hurried look at a few provisions of the Constitution of India will highlight the socio-economic and political and cultural aspirations of the people encapsulated by the framers of the Constitution.

The Constitutional edifice stands on four pillars: Justice, Equality, Liberty and Fraternity. It speaks of Justice, social, economic and political, liberty of thought, expression, belief, faith and worship, Equality of status and opportunity and fraternity assuring the dignity of the individual and the unity and integrity of the Nation.

The preamble of the Constitution has, therefore, been rightly described as the conscience of the Constitution. Ours is a Constitution with a written Bill of Rights which are described in part III thereof as the Fundamental Rights. I would like to make a special mention to Article 14 which enjoins that the State shall not deny to any persons equality before the law and equal protection of the laws.



Articles 15 and 16 prohibits discrimination on grounds only of religion, race, caste or sex, although reservation for Scheduled Castes, Scheduled Tribes and other backward classes has been permitted on account of historical reasons because of the existence of graded inequality. Article 19 confers to all citizens the right to freedom of speech and expression, to assemble peacefully, to form associations or unions, to move freely and to reside and settle in any part of India and practise any profession, occupation, trade or business. Another important article is Article 21 which mandates that no person shall be deprived of his life or personal liberty except according to procedure established by law. It will be seen that the Indian Constitution is quite tolerant in that it confers the right to equality and the right to life and liberty on every person and does not restrict those rights to citizens only. The provision in the Preamble granting liberty of belief, faith and worship is emphasised in Article 25 which provides that all persons shall be equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. Similarly Article 26 grants freedom to manage religious affairs, Article 29 protects minority interests and Article 30 confers a right to establish and administer minority educational institutions. These are just a few provisions which reflect tolerance. Insofar as economic and social philosophy are concerned certain Directive Principles have been enumerated which the State is expected to abide by in taking policy decisions in future. On the social front it speaks of men and women having equal right to an adequate means of livelihood, equal pay for equal work for both men and women, the right to work and the right to a living

wage subject to economic capacity, the right to free education up to the age of 14 years, the right to health care, etc. Provision is also made for free legal aid to the poor and for protection and improvement of the environment. On the economic front it is provided that State policy shall be directed towards securing distribution of material resources of the community to sub-serve the common good thereby avoiding concentration of wealth in the hands of a few. One of the fundamental duties set out in Part IV A is to promote harmony and the spirit of brotherhood amongst all the people of India transcending religious, linguistic and regional diversities and to develop a scientific temper. These are but a few provisions which indicate the social, economic and cultural philosophy of our Constitution.

When you see a person or a group of persons or a nation showing signs of intolerance, a thought crosses your mind as to the cause for such behaviour. It is not normal behaviour. Why? If it is possible to discern a reason one may be able to appreciate such behaviour. And if there is a genuine reason for such behaviour you may be able to effectively deal with it. If the reason is to gain political mileage or to satisfy self interest, you are able to comprehend the rationality or irrationality for the behavioural pattern of the other person or group of persons or nation. If there is a genuine reason, it may be possible to redress the grievance and restore normal behaviour.

India is a secular democracy. Although the expression "secular" was introduced in the Preamble of the Constitution in 1976, it was nothing

more than stating the obvious - that which could easily be discerned from the provisions of the Constitution. The Supreme Court of India unanimously ruled in *Bomai's case* that secularism was the basic feature of the Constitution. The concept of secularism carries with it the philosophy of tolerance. Tolerance was our creed which was practised in India during the rule of Ashoka and Akbar and was propagated by the Saints and Sufis. Diversity comprises of strands of different colours. These different strands are woven into a beautiful tapestry which is beautiful because it is a single piece. That is the beauty of unity, diversities notwithstanding. A fine blending of *ethos* and values that one witnesses in the philosophy and folklore of Saints and Sufis like Swami Vivekananda, Kabir, Guru Nanak and others has made India a country which fascinates the West, particularly its tradition of Atithi being welcome.

India, though poor, has never been found wanting in hospitality. But poverty is a curse which must be removed as early as possible. Almost 30% of the people inhabiting the globe are not able to get even a single square meal. In a country where more than 10% of its people live in villages, many of them in abject poverty, it goes without saying that the economic policy of the country must be directed at improving the economic condition of the poor masses. The recent shift in the economic policy from the projectionist to the free market economy or the liberalisation policy, if it will bring about the promised prosperity must ultimately percolate to the poor if the constitutional objective of eradicating poverty is to be realised. Affluent countries must play the role of supporting economic policies, the objec-

tive whereof is to serve the poor with a view to improving their lot. If the economic policy does not help eradicate poverty, and if it results in concentration of wealth in the hands of a few, it will not be acceptable to the masses, the sovereign in a democratic set up.

Hitherto I have dwelt on the social, economic and cultural scenario in the Indian context. Certain aspects e.g. tolerance, concept of equality, eradication of poverty, etc., however, have universal application. Article 51 of the Constitution says that the State shall endeavour to promote international peace and security and maintain just and honourable relations between nations. I may now shift to the international scenario.

The International Covenant on Economic, Social and Cultural Rights (1966) lists a large number of rights which are grouped under 15 Articles. The right of self-determination, the right to work, the right to fair wages, the right to form trade unions, the right to protection of families, the right to physical and mental health, the right to education and the right to take part in cultural life are the most important ones that found recognition in the Covenant. They are essentially Human Rights. All these rights are echoed in Part III and IV of our Constitution to which I have referred earlier.

Although civil and political rights and the economic, social and cultural rights have been enumerated separately, they go hand in hand as one cannot be fully realised without the other. The Vienna World Conference on Human Rights 1993 which emphasized action for the

promotion and protection of economic social and cultural rights is as important as action for civil and political rights. Here it becomes essential to mention that the rights of the individual listed as civil and political rights and economic and social rights again can be promoted, only with development as a whole. This brings us to the Right of Development adopted in the UN General Assembly in December 1986. This is a third generation right that inheres in 'peoples' as distinct from individuals. The resolution declares, *inter alia*:

"1. The human being is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community which alone can ensure the free and complete fulfilment of the human beings."

Despite the endeavour to achieve economic and social rights, and the serious efforts at the international level, we are far behind the goal. Even the basic economic right viz., freedom from hunger has not been fully achieved when we look at the Third World countries particularly in situations like drought or crop failure. Available resources then have to be redistributed so as to reduce expenditure on war efforts and to increase that on welfare and develop-

ment. Further redistribution between different groups of people or sections of the economy may also be required. So far as military expenditure is concerned, international relations dominate the decision making. National interests, therefore, have to be balanced with economic aspirations although the economic rights cannot be altogether overlooked.

Different countries may have to adopt different strategies to realise economic, social and cultural rights. The extent to which such rights can be achieved will also vary from society to society depending upon its socio-economic situation and cultural *ethos*.

The role of State in realising human rights, particularly economic and social rights, emerge at three levels, viz. in relation to ensuring their respect, their protection and in assisting in their fulfilment on concrete realisation. A valid yardstick for realisation of these rights might be found in what is termed as the minimal threshold approach, measured by means of indications developed for specific national situations relating to minimal standards for nutrition, infant mortality, exposure to illness and disease, with regard to minimal income thresholds, unemployment and the like. States have to endeavour to ensure these minimal standards, below which no one should be permitted to fall, through the concrete exercise of right to work, the right to adequate food, to social security, to optimal conditions for health, and other basic rights in the corresponding economic, social, educational and cultural situations. State action should be i: supplemented by national and international NGOs and specialised agencies.

The United Nations held the World Conference on Human Rights in 1993, 45 years after the adoption of Universal Declaration on human rights, to review and assess the progress that had been made in the field of Human Rights and to identify the obstacles to further progress in this area. The Vienna Conference specially emphasized that "human rights are universal, indivisible, interdependent and interrelated." Civil, economic, cultural, political and social rights must consequently be treated in a fair and equal manner and with the same emphasis. The Vienna Programme of Action calls for ratifying the Rights of the Child by 1995 and the Convention on the Elimination of All Forms of Discrimination against Women by the year 2000. The convention also focused on the Right of All Migrant Workers and Members of their Families. A new chapter in Rights opened in April 1994 by the appointment of United Nations High Commissioner for Human Rights pursuant to recommendation of the World Conference.

The present concern is to find a resolution or a synthesis between the conflicting claims of growth, development, environment and human rights. The current enthusiasm in liberalisation and globalisation is directly connected with growth.

It may not necessarily lead to development which is "understood as a process designed progressively to create conditions in which every person can enjoy, exercise and utilise under the Rule of Law all his human rights, whether economic, social, cultural, civil or political" (as formulated by the International Commission of Jurists in 1981). In fact,

there are apprehensions that such growth may favour the urban sectors as against the rural and the rich as against the poor. Growth again has its own effect on environment and environment protection has its effect on economic rights. When the polluting industries are required to close, there is an immediate impact on those earning out of the industry. A power project may be required for growth which may have its adverse effects on the environment and on the civil and economic rights of the people who may have to be displaced. We have to view the social, economic and cultural rights in the background of this complex situation. The planners, the policy makers, the jurists as well as social activists have to navigate the future course of development of humanity keeping in view all these complex and conflicting factors. The only constant guiding principle that can be offered is the well-being of humankind. Lawyers and Jurists who have gathered here have an important role to play in shaping the course of events to follow. I wish you good luck in your endeavour to serve humanity.

Once again thank you for inviting me and for your kind words and warm welcome. Thank you for your time.

# ***A New Approach to Monitoring the International Covenant on Economic, Social and Cultural Rights\****

**Audrey R. Chapman, Ph.D.\*\***

The thesis of this paper is that effective monitoring of the International Covenant on Economic, Social and Cultural Rights is not currently taking place and that rectifying this situation requires a change in the paradigm for evaluating compliance with its provisions. Monitoring is central to the realization of the rights enumerated in the Covenant. Without systematic and ongoing collection and analysis of relevant data, countries which ratify or accede to the Covenant cannot be held accountable for implementation. "Progressive realization," the current standard used to assess the performance of State parties, renders economic, social, and cultural rights very difficult to monitor. A "violations approach" constitutes a more feasible alternative. Although the United Nations Committee on Economic, Social and Cultural Rights has not acknowledged a change in orientation, it currently focuses

on assessing inadequacies in or concerns about the performance of countries that have ratified the Covenant, rather than on progressive realization. If economic, social, and cultural rights are to be taken seriously, it is necessary that the United Nations system and nongovernmental organizations that monitor the Covenant openly adopt a "violations approach."

## ***Methodological Problems Intrinsic to Monitoring "Progressive Realization"***

There is a fundamental contradiction underlying the international human rights regime. Ostensibly there is consensus that the two major categories of rights, civil and political rights on the one hand and economic, social and cultural rights on the other, are interrelated, interdependent, and indivisible and

\* Parts of this article are based on a longer study evaluating the work of the United Nations Committee on Economic, Social and Cultural Rights published in the *Human Rights Quarterly*, Vol. 18 February 1996.

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therefore of equal importance and status. This principle has been endorsed on innumerable occasions by the General Assembly, the Economic and Social Council, the Commission on Human Rights, and international conferences, most recently at the 1993 World Conference on Human Rights. Nevertheless, economic, social, and cultural rights tend to be ignored or treated more as aspirations and goals than as fundamental rights. As the Statement to the World Conference on Human Rights on behalf of the Committee on Economic, Social and Cultural Rights (hitherto referred to as the Committee) observes, the principle of the indivisibility of human rights has been more honoured in the breach than in the observance.<sup>1</sup> Ritualistic affirmations in the Vienna Declaration and Programme of Action at the World Conference were followed by near-silence regarding specific issues or concerns. Despite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community, including the international human rights movement, has treated civil and political rights as more significant and has consistently neglected economic, social, and cultural rights. The international community has invested little attention and few resources to the realization or monitoring of economic, social, and cultural rights.

Contributing to this situation is the fact that the preconditions for effective monitoring of economic, social, and cultural rights are largely absent; there is neither the political will nor the required methodological capabilities. In terms of the former, monitoring requires that countries make a sustained commitment to assessing and improving their performance, that international human rights bodies assigned responsibilities for evaluating compliance have sufficient expertise and resources to do so, and that non-governmental organizations participate in this process so as to motivate governments to implement the Covenant while providing monitoring bodies with fuller and more accurate data than are likely to be forthcoming from official channels. As of March 1995, 130 countries had ratified or acceded to the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> and thereby become State parties to the Covenant. Currently, State parties to the Covenant are requested to submit an initial report dealing with the entire Covenant within two years of its entry into force and to submit a periodic report every five years thereafter. These reports are reviewed by the United Nations's Committee on Economic, Social and Cultural Rights, a body of experts. However, a majority of State parties do not comply with these reporting requirements: of the 130 State parties, 76 had reports that were overdue

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1 Committee on Economic, Social and Cultural Rights, Seventh session, Geneva, 2 November-11 December 1992, "Draft report of the Committee on Economic, Social and Cultural Rights to the Economic and Social Council in accordance with Economic and social Council resolution 1985/17," E/C.12/1992/CRP.2/Add.1, 8 December 1992, par.2.

2 Committee on Economic, Social and Cultural Rights, Twelfth Session, *States Parties to the International Covenant on Economic, Social and Cultural Rights and Status of the Submission of Reports in Accordance with the Programme Established by the Economic and Social Council in Resolution 1988/4 and Rule 58 of the Rules of Procedure of the Committee*, Geneva, E/C.12/1995/2, 22 March 1995, par. 2.

in 1995, and several States, among them a few ratifying the Covenant as early as 1976, have never submitted even an initial report.<sup>3</sup> Moreover, most of the reports which are submitted are very superficial and appear to be designed to camouflage rather than to reveal problems and inadequacies.

Governments, the Committee, and nongovernmental organizations have all been hampered by fundamental methodological problems inherent in monitoring economic, social, and cultural rights. Systematic monitoring of the degree to which countries have implemented these rights has five methodological preconditions:

1. conceptualisation of the specific components of each enumerated right and the concomitant obligations of State parties;
2. delineation of performance standards related to each of these components, including relevant indicators;
3. collection of relevant data, appropriately disaggregated by sex and a variety of other variables;
4. development of a computerised information management system for processing these data; and
5. analysis of these data so as to be able to ascertain the performance of a particular country. For reasons

which will be discussed below, none of these five preconditions are currently being met.

The source of many of these methodological problems is that the standard for evaluating the performance of State parties to-date is "progressive realization" rather than the identification of violations. Article 2 (1) of the Covenant commits State parties "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 rights recognized." This approach differs considerably from the standard set forth in Article 2 of the International Covenant on Civil and Political Rights, which specifies an immediate obligation to respect and ensure all enumerated rights. Evaluating progressive realization within the context of "the maximum of its available resources" considerably complicates the methodological requirements outlined above: this standard assumes that valid expectations and concomitant obligations of State parties under each enumerated right are not uniform or universal but instead relative to levels of development and available resources. This necessitates the development of a multiplicity of performance standards to fit the many social, developmental, and resource contexts appropriate to specific countries.

Much has been written about the lack of intellectual clarity in regard to the def-

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3 These figures were compiled by the author from tables in Committee on Economic, Social and Cultural Rights, *States Parties to the International Covenant on Economic, Social and Cultural Rights and Status of the Submission of Reports in Accordance with the Programme Established by the Economic and Social Council in Resolution 1988/4 and Rule 58 of the Rules of Procedure of the Committee*, E/C.12/1995/2, Geneva, 22 March 1995.

inition and scope of economic, social, and cultural rights. Understanding of the full implications of these rights is far less advanced than is the case with respect to civil and political rights. In contrast with civil and political rights, the rights contained in the Covenant on Economic, Social and Cultural Rights are not grounded in significant bodies of domestic or international jurisprudence. Whereas the rights enumerated in the International Covenant on Civil and Political Rights evolved during several centuries of struggle and their formulation and interpretation reflect the experience of a series of democratic countries, many economic, social, and cultural rights were first articulated in an international context and have yet to be translated into national law, even among the countries ratifying the Covenant on Economic, Social and Cultural Rights. The different nature of economic, social, and cultural rights, the vagueness of many of the norms, the absence of national institutions specifically committed to the promotion of economic, social, and cultural rights *qua* rights, and the range of information required in order to monitor compliance effectively all present challenges.<sup>4</sup> What is often not appreciated sufficiently, is that this conceptual underdevelopment also affects monitoring of these rights.

Moreover, the standard of progressive realization cannot be used as a mea-

suring tool for evaluating compliance without gaining clarity as to what the phrase "maximum of its available resources" entails in specific circumstances. In a recent article, Robert E. Robertson observes that the phrase has little more definition today than when it was first written. He comments that the resources issue is so complicated that universal agreement on standards seems unattainable. "It is a difficult phrase - 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."<sup>5</sup> Despite his considerable efforts, Robertson is unable to put forward a methodology that provides a comprehensive method for analysing resource availability and usage, and he concludes that such a comprehensive method would itself require significant resources and constant fine-tuning to keep pace with new thinking in human rights, economics, and other fields.<sup>6</sup>

The Committee on Economic, Social and Cultural Rights, while acknowledging the constraints imposed by limitations on available resources, interprets progressive realization as requiring State parties to move expeditiously and effectively toward the goal of full realization of the constituent rights. According to the language of their General Comment on this subject,

4 On these problems see Philip Alston, "The Committee on Economic, Social and Cultural Rights," in Philip Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), pp. 490-491.

5 Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 16 (November 1994):p. 694.

6 *Ibid.*, p.713.



"The concept of progressive realization 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.... 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 State parties in respect of the full realization of the rights in question."<sup>7</sup>

However, the Committee has not yet defined what moving expeditiously and effectively entails. The Committee therefore lacks concrete standards for evaluating the performance of governments and their compliance with the Covenant. Further, no other body or individual has proposed standards even for specific enumerated rights.

Evaluating the progressive realization of economic, social, and cultural rights requires the availability of compa-

rable statistical data from several periods in time in order to assess trends. Measuring progressive realization requires an assessment not only of current performance, but also of whether a State is moving expeditiously and effectively towards the goal of full implementation. Consistent with the Committee's reporting guidelines, much of these data would be disaggregated in relevant categories, including gender, ethnicity, race, region, socio-economic groups, urban/rural divisions, and linguistic groups. Recognizing that national averages reveal little about the situation of specific groups and communities, the Committee's reporting guidelines for many of the constituent rights request that data be broken down as outlined above. Because of the Committee's concern with the status of vulnerable and disadvantaged communities, the list with regard to the right to adequate food specifies that detailed information, including statistical data broken down in terms of different geographical areas, also be provided for landless peasants, marginalized peasants, rural workers, rural unemployed, urban unemployed, urban poor, migrant workers, indigenous peoples, children, elderly people, and other especially affected groups.<sup>8</sup>

A thorough evaluation would therefore require complicated analyses of an enormous quantity of data. Many gov-

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7 Committee on Economic, Social and Cultural Rights, "General Comment 3: The Nature of States Parties Obligations (art.2, para.1 of the Covenant," (Fifth session, 1990), par. 1, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRJ/Gen/1, 4 September 1992, par.9

8 Philip Alston, "The International Covenant on Economic, Social and Cultural Rights," in *Manual on Human Rights Reporting* (New York: United Nations Centre for Human Rights and United Nations Institute for Training and Research, 1991), p.60.

ernments do not have appropriate data of good quality for this type of analysis, and those which do have the data generally do not make them available to the United Nations or to nongovernmental organizations. Additionally, the Committee lacks regular access to relevant statistical data collected by other parts of the United Nations system. Moreover, analysis of these data to evaluate performance, were such data to be available, requires statistical expertise that members of the United Nations Committee on Economic, Social and Cultural Rights, staff of the UN Centre for Human Rights, and nongovernmental organizations do not generally possess.

The volume of statistical data that would be generated if State parties provided appropriately disaggregated data as requested in the Committee's guidelines would require a computerised information system, something that the UN Centre for Human Rights currently lacks. At present, the Committee operates on the basis of a League of Nations-style filing system where information from previous reports has to be recovered manually. Despite repeated calls from the Chairs of the various human rights treaty-monitoring bodies for the establishment of a computerised information system, the Centre is still at the early stages of installing computers even for the simplest word processing.<sup>9</sup> Current plans of the coordinator for office automation do not include the cre-

ation of a comprehensive and integrated information and documentation system that would facilitate the retrieval and analysis of complex statistical data, and the establishment and management of such an information system seems beyond the capabilities of most nongovernmental organizations.

To attempt to circumvent some of the problems outlined above, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Human Rights Commission together appointed Danilo Türk as a Special Rapporteur in 1988, giving him a mandate to prepare a study of the problems, policies, and practical strategies relating to the more effective realization of economic, social, and cultural rights. In his reports, the Special Rapporteur discusses the potential use of economic and social indicators for assessing progress in the realization of these rights. Among the roles that indicators can play, he identifies the following: indicators can provide a quantifiable measurement of direct relevance to the array of economic, social, and cultural rights, a means of measuring the progressive realization of these rights over time, and a method for determining difficulties or problems encountered by States in fulfilling these rights. In addition, indicators can assist with the development of the "core contents" of this category of rights and offer yardsticks whereby countries can compare their

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9 "Improving the Operation of the Human Rights Treaty Bodies," Fifth Meeting of Chairpersons of Treaty Bodies, Geneva, 19-23 September 1994, HRI/MC/1994/2, 12 August 1994, p.5.

progress with other countries.<sup>10</sup> Türk's report recommends that the UN convene a seminar for discussion of appropriate indicators to measure achievements in the progressive realization of economic, social, and cultural rights, and to offer an opportunity for a broad exchange of views among experts.<sup>11</sup>

In January 1993, the Centre for Human Rights convened such an expert seminar for which this author served as the rapporteur. After an extensive review, however, the members of the Seminar concluded that far from being a shortcut to defining and monitoring economic, social, and cultural rights, the development of indicators requires the conceptualisation of the scope of each of the enumerated rights and the related obligations of State parties. Thus it is not yet possible to formulate indicators to assess progressive realization of these rights. After an extensive review of the problems in measuring the implementation of economic, social, and cultural rights, the Seminar concluded that additional work is required in particular to:

- a. clarify the nature, scope and contents of specific rights enumerated in the Covenant;
- b. define more precisely the content of the specific rights, including

the immediate core obligations of State parties to ensure the satisfaction of, at the very least, minimum essential levels of each of these rights; and

- c. identify the immediate steps to be taken by State parties to facilitate compliance with their legal obligations toward the full realization of these rights, including the duty to ensure respect for minimum subsistence rights for all.<sup>12</sup>

In addition, the Seminar stated the need to improve evaluation and monitoring of progressive realization, to identify and address violations, to institute improved cooperation within the United Nations system, to facilitate the participation of non-governmental organizations and affected communities in each of the tasks outlined above, and to apply scientific statistical methodologies.<sup>13</sup>

The Seminar also put forward a variety of cautions about the use of indicators to assess progressive realization of economic, social, and cultural rights. It emphasized that human rights indicators are not necessarily identical to statistical indicators utilised by specialized agencies to measure economic and social development. Therefore, monitoring the performance of State parties in the pro-

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10 *The New International Economic Order and the Promotion of Human Rights*, Progress report prepared by Danilo Türk, Special Rapporteur, Commission on Human Rights/ Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-second session, 6-31 August 1990, E/CN.4/Sub.2/1990/19, p.31.

11 *Ibid.*, p.63.

12 *Report of the Seminar on appropriate indicators, op. cit.*, par.159.

13 *Ibid.*, par. 181.

gressive realization of economic, social, and cultural rights requires new approaches in data collection, analysis, and interpretation including in particular a focus on the status of the poor and disadvantaged groups, as well as disaggregation for a number of variables, among them gender.<sup>14</sup> Use of existing statistical indicators to evaluate human rights compliance requires at the very least a re-analysis from a human rights perspective.<sup>15</sup> Finally, the Seminar concluded that it may be premature or inappropriate at times to apply quantifiable indicators; because not all indicators can be expressed in numerical terms, it is important to develop criteria, principles, and standards for evaluating performance.<sup>16</sup>

### *The Alternative: A "Violations Approach"*

Given all of the limitations outlined above, there is a need for a new approach to monitoring economic, social, and cultural rights. Instead of attempting to evaluate compliance with "progressive realization," it seems more fruitful and significant to focus on identifying violations of the rights enumerated in the International Covenant on Economic, Social and Cultural Rights. What is being advocated here is the open and explicit adoption of a violations oriented review process for evaluating compliance with the Covenant. This review process should be consistent with those used for

other international instruments. If effective and systematic monitoring of economic, social, and cultural rights is to take place, then nongovernmental organizations, governmental efforts, and human rights monitoring bodies need to reorient their work to identifying and rectifying violations. This is not to diminish the importance of continuing with efforts to conceptualise the content of the constituent rights in the Covenant and to develop indicators, but rather to separate these initiatives from the monitoring process.

It may also be argued that the identification of violations in order to end abuses and the rectification of such abuses is a higher priority than does promoting progressive realization. The monitoring of human rights is not an academic exercise. It is intended to be a means to ameliorating the human suffering that results from serious violations of international standards. The Committee's own Statement to the World Conference on Human Rights provides an eloquent testimony to the importance of addressing what were termed "massive and direct denials of economic, social and cultural rights."<sup>17</sup> According to the Committee,

"The shocking reality, against the background of which this challenge must be seen, is that States and the international community as a whole continue to tolerate all too often breaches

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14 *Ibid.*, par.160.

15 *Ibid.*, par. 171.

16 *Ibid.*, par.170.

17 *Report on the Seventh Session.*, Annex III, par.5

of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they are far more serious, and more potently intolerable, than are massive and direct denials of economic, social and cultural rights."<sup>18</sup>

The identification of violations as a means to ending and rectifying abuses may also be a more effective path to conceptualising the positive content of economic, social and cultural rights than the more abstract legal or philosophical analysis attempted thus far. Henry Shue's conception of "standard threats" is useful here. Shue argues that a fundamental purpose of acknowledging any basic rights is to prevent or eliminate, insofar as possible, the degree of vulnerability that leaves people at the mercy of others. Hence "one fundamental purpose served by acknowledging basic rights at all is, in Camus' phrase, that we 'take the victim's side, and the side of the potential victims.' The honouring of basic rights is an active alliance with those who would otherwise be helpless against natural and social forces too strong for them."<sup>19</sup> Historically, the positive content of key security rights, such as rights not to be subjected to murder, torture, rape, and

assault, was defined in relationship to identifying the relevant "standard threats," in particular the powers of an unlimited or absolute State. Thus, the articulation of civil and political rights occurred in relationship to and to provide protection against the acknowledged "standard threats" or actual and potential violations.

There would be many advantages in adopting a "violations approach." While requiring further specification, violations are more readily defined and identified, particularly for nongovernmental organizations and perhaps for governments and international bodies as well. The work of the Committee on Economic Social and Cultural Rights attests to the fact that it is possible to identify violations of enumerated rights without first conceptualising the full scope of a right and the obligations of State parties in relationship to it. While the Committee has not formulated general comments setting parameters for interpreting each of the constituent rights in the Covenant, its members have been able to come to agreement on a range of concerns and problems relating to the performance of State parties.

Moreover, a violations approach does not necessarily require access to extensive statistical data. Despite the considerable inadequacies, superficiality, and lack of good-quality statistical data in reports, the Committee has been able to identify violations. While the availability of extensive, appropriate and reliable statis-

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18 *Ibid*, par. 6.

19 Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, New Jersey: Princeton University Press, 1980), p. 33.

tics disaggregated for major subgroups and organized in time-series certainly would facilitate the assessment of the performance, it is not essential, at least for identifying many types of violations. Thus, monitoring economic, social and cultural rights utilising a violations approach does not depend on major improvements in States' statistical systems or in the public release of large quantities of data. Consequently, a violations approach is more feasible given grass roots organizations' current limited access to official statistical data, as well as their likely lack of methodological sophistication.

In addition, a violations approach offers a greater possibility of promoting and protecting the economic, social and cultural rights of individuals, while providing more incentives for State parties to provide means of redress. Many of the arguments the Committee put forward in its rationale for drafting an Optional Protocol to the Covenant to permit the submission of complaints by individuals and groups pertain more generally to the advantages of adopting a violations approach. According to the Committee, an Optional Protocol would enhance the practical implementation of the Covenant as well as the dialogue with State parties. In addition, it would focus public attention to a greater extent on economic, social, and cultural rights, bringing concrete and tangible issues into relief. The existence of a potential "remedy" at the international level would provide an incentive to individuals and groups to formulate economic and social claims in more precise terms and in relation

to specific provisions of the Covenant. Despite the fact that the Committee's view or opinions would not be binding, the possibility of an adverse "finding" by an international committee would give economic and social rights greater political salience.<sup>20</sup>

While not labelling it as such, the Committee's current format for its concluding observations on the reports of State parties details its concerns and suggestions/recommendations, thus approximating a violations approach. Moreover, the openness of the Committee to the involvement of nongovernmental organizations is likely to accentuate even further the emphasis on infringements and violations. The present working methods of the Committee invite the participation of nongovernmental organizations in a variety of ways: nongovernmental organizations are invited to submit relevant and appropriate documentation to the secretariat in preparation for the pre-session working group, which identifies in advance the questions which might most usefully be discussed with the representatives of the reporting States. The Committee provides opportunities for nongovernmental organizations to submit written reports at any time. In addition, the Committee sets aside the first afternoon at each session to enable representatives of nongovernmental organizations to provide oral testimony. Although the subject matter of this oral testimony formerly was confined to matters related to the State parties being reviewed at the session, at its eleventh session the Committee agreed to open the procedure to nongovernmental organizations wish-

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20 *Ibid.*, par.37

ing to address the performance of any State party. Nongovernmental organizations can also participate as experts in the Committee's days of general discussion on topical issues. Initially, only a few human rights organizations took advantage of these opportunities to participate, but the numbers of nongovernmental organizations represented has increased at each of the Committee's most recent sessions. In the 1994 regular and supplementary sessions of the Committee, nongovernmental organizations from Panama, Argentina, Hong Kong, and the Dominican Republic reported violations related to their respective countries' implementation of the Covenant. In the future, more nongovernmental organizations are likely to take advantage of this opportunity.

Nongovernmental organizations, motivated to submit reports or to send representatives to Geneva in order to provide evidence, undoubtedly will do so because they perceive problems and hope that the Committee can help rectify them. Although the Committee is reluctant to use explicit violations terminology, preferring to express its "principal subjects of concern" and make "suggestions and recommendations," nongovernmental organizations do not have to adhere to such diplomatic niceties. Nongovernmental organizations therefore can and should call a violation a violation both in issuing their own reports and in reporting on the Committee's concluding observations.

### *Types of Violations*

The Limburg Principles on the nature and scope of the obligations of State parties to the Covenant, developed in 1986 by a group of distinguished experts in international law convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg, and the Urban Morgan Institute for Human Rights of the University of Cincinnati, defined a violation as a failure by a State party to comply with an obligation articulated therein.<sup>21</sup> Because the Covenant, like other international human rights instruments, confers obligations that require both positive action and restraint on State parties, violations can result either from the failure to implement a mandate or from interference by the State party in the free exercise of a right. Examples of the former would be the failure to take adequate steps to ensure the equal rights of men and women to the enjoyment of the rights set forth in the Covenant (Article 3) or to submit reports as required under the Covenant (Article 17). Examples of the latter include imposing restrictions on the right to form trade unions (Article 8(1)) or the right of parents to choose for their children schools other than those established by the public authorities (Article 13(3)).

To facilitate monitoring the Covenant, this article proposes a tripartite categorisation of violations. The three categories are:

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21 "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, *Human Rights Quarterly*, Vol. 9 (May 1987): par. 37, p.131.

1. violations resulting from actions, policies, and legislation on the part of the government;
2. violations related to patterns of discrimination; and
3. violations related to the State's failure to fulfil minimum core obligations of enumerated rights. Violations resulting from State actions, policies, and legislation are the type of violation most comparable to infractions of civil and political rights.

These are predominantly acts of commission, activities of States or governments which contravene standards set in the Covenant. Others are policies or laws which create conditions inimical to the realization of recognized rights. In labelling these failures of State policy as violations of the Covenant, the language of Article 5 should be borne in mind. It states that "nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein."<sup>22</sup>

The following list provides some examples of the types of State initiatives that would qualify for the first category of violations:

- annexation of an independent country or the refusal to allow a

colonial territory to exercise the right of self-determination (Article 1(1));

- refusal to grant the Covenant full legal status under domestic legislation or to allow complainants to cite provisions of the Covenant in cases before national courts and tribunals (Article 2(1));
- interference with the rights of association, to form labour unions, and to strike (Article 8(1));
- forced evictions and removals of persons from their homes by State agencies (Article 11(1));
- coercive birth control practices, including abortions and large-scale sterilisation, such as those being carried out in several Asian countries, most notably China, as a matter of State policy to accomplish fertility control (Article 12);
- legalisation or policy support for medical or cultural practices which endanger girls' or women's health, such as female circumcision (Article 12);
- infringements on academic freedom (Article 14(4));

<sup>22</sup> *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No.16, at art. 25, U.N. Doc. A/6316.



- destruction of the cultural heritage of minority communities (Article 15); and
- non-submission of reports required under the Covenant (Article 17).

Violations related to patterns of discrimination also represent a fundamental breach of the Covenant. Under the Covenant, State parties have the immediate obligation to ensure non-discrimination. Article 2(2) calls on State parties to guarantee that the rights enumerated in the 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." Article 3 further amplifies that State parties are required "to undertake to ensure the equal rights of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant." Articles 2(2) and 3 therefore ensure that non-discrimination is not subject to progressive realization. According to Philip Alston, the current Chair of the Committee, discrimination

"may be understood to cover any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and

which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, or all of the rights set forth in the Covenant."<sup>23</sup>

These provisions have been interpreted as requiring both measures to prevent discrimination and positive affirmative action initiatives to compensate for past discrimination. Moreover, the Committee has indicated that the positive measures needed to give effect to Article 2(2) go beyond the enactment of legislation.<sup>24</sup>

Examples abound of violations reflecting discriminatory policies and actions by State parties, both in the failure to ensure non-discrimination and in initiatives and policies which perpetuate or worsen forms of discrimination. These include the following:

- Many State parties do not provide legal protection against discrimination consistent with the requirements of Article 2 of the Covenant.
- Some countries systematically discriminate against particular ethnic, religious, or cultural minorities; an example would be the plight of the Kurdish people in Iran and Turkey.

23 Philip Alston, "The International Covenant on Economic, Social and Cultural Rights," in *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* (New York: United Nations Centre for Human Rights and United Nations Institute for Training and Research, 1991), p.47.

24 *Ibid.*, pp. 47-48.

- Women in many countries do not enjoy equal rights to work or to the enjoyment of just and favourable conditions of work under Articles 6 and 7.
- Children born out of wedlock are discriminated against in many societies contrary to rights of protection of and assistance to the family (Article 10).
- There are persistent gender differences in laws and custom regulating marriage and family relations in many societies (Article 10).
- Women's health needs are rarely given equal resources. Many countries do not incorporate reproductive health services in primary care, health problems predominantly or solely affecting women tend to not receive sufficient attention, and women are rarely included in research trials (Article 12).
- In countries where single-sex schooling is common, there is frequently a serious imbalance in the number of school places available and the quality of schools designated for boys and girls, resulting in a lack of equality of educational opportunity (Article 13).
- In some countries, ethnic and linguistic minorities are denied

the right to use their native language for schooling or broadcasting (Article 15(1a)).

The third category of violations consists of those resulting from the failure to fulfil minimum core obligations. In its third General Comment, the Committee "is of the view 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."<sup>25</sup> Similarly, the Committee underscores that even in times of severe resources constraints the vulnerable members of society "can and indeed must" be protected by the adoption of relatively low-cost targeted programs.<sup>26</sup> Women constitute one such vulnerable and neglected community. The Committee has yet to define the minimum obligations related to specific rights. Although there is an urgent need for the Committee or other experts to proceed to define this core, some of these violations of omission are so obvious and blatant that they can already be identified. They include the following:

- Despite the obligation under Article 2 to adopt legislative measures to implement the Covenant, many State parties fail to consistently incorporate provisions of the Covenant into domestic law.
- Many countries do not pay sufficient attention to the implementation of Article 2 of the Covenant as it related to non-

25 Committee on Economic, Social and Cultural Rights, "General Comment," *op.cit.*, par.10

26 *Ibid.*, par. 12.

discrimination in relationship to women and minorities.

- Countries often fail to implement laws and regulations related to obligations outlined in the Covenant. For example, child labour continues in many countries despite laws prohibiting employment of children under the age of 14.
- Although Article 13 requires the introduction of free and compulsory primary education, and Article 14 mandates that countries which lack free and compulsory primary education develop a detailed plan of action within two years of becoming a State party, many countries fail to do so.
- Many countries submit reports that do not conform to the reporting requirements set down by the Committee under Articles 16 and 17.

This listing of violations is only preliminary. Compiling a fuller inventory of specific examples of each of the three types of violations in relationship to each of the enumerated rights in the Covenant would represent an important step toward developing improved monitoring capabilities. By anticipating the kinds of violations that monitors are likely to encounter, an inventory can provide the foundation for formulating instructions and guides on what monitors should consider and check in relationship to specific rights. Through a better understanding of the most significant violations, it will

also be possible to develop standards and indicators to evaluate compliance with the Covenant. The Science and Human Rights Program of the American Association for the Advancement of Science is currently proposing to undertake such a project in collaboration with Human Rights Information and Documentation Systems International (HURIDOCS) and the Canadian Bar Association.



## Protecting the Rights of all Human Rights Defenders

Allan McChesney\*

This article looks at the achievements and shortfalls of the UN Working Group drafting a Declaration on the rights of human rights defenders,<sup>1</sup> including those individuals, groups and organizations who defend economic, social and cultural rights. In each year from 1986 to 1996, the Working Group has met for one or two weeks to draft a Declaration on the right of everyone to promote and protect human rights without suffering reprisals or undue restrictions. While there has been a call from grassroots and international groups for rapid achievement of a "Defenders' Charter," only three Articles in the Draft Declaration were agreed to in the 1995 session and none in the March 1996 meeting (see the concluding page of this article). The points of contention that have prevented full consensus in the Defenders' Working Group concern protection of defenders who strive for the implementation of economic, social and cultural rights, as well as civil and political rights. Before

analysing developments thus far in the drafting process, this paper will look at a few issues that relate to the rights of human rights defenders who work in the sphere of economic and social rights.

In the Defenders' Working Group, a small cadre of government delegations has sought to weaken protections for human rights defenders provisionally agreed to in the draft text. These delegates sometimes suggest that non-governmental organizations (NGOs) active in the field of human rights are too selective, or that the rights they advocate are in conflict with local cultural or ideological norms.<sup>2</sup> The view put forward is that human rights NGOs are not legitimate, if they promote and defend only a chosen spectrum of rights and freedoms, such as civil and political rights that apply primarily to individuals. This argument is then offered as supposed justification for inserting clauses into the Declaration that could limit freedom of action for

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- 1 The original mandate of the working group is indicated by its official title: Working Group on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.
- 2 As the ICJ said on 7 March 1995 at the UN Commission on Human Rights, most States in the Working Group have made efforts to draft a Declaration that genuinely protects human rights defenders - one that does not dilute safeguards long established in international human rights law: "*The Protection of Human Rights Defenders*" p. 1.

human rights defenders to an extent greater than has been allowed in international law since shortly after the founding of the United Nations. Looked at closely, the underlying premise of these contentions could be captured as follows: "It is permissible for individuals and NGOs to advocate implementation and defence of human rights, as long as the rights they seek to promote are favoured by the ruling authorities in any given State."

The governments who proffer this perspective of "permissible human rights defence" are also those who have sought to add references in the Declaration to duties of the international community to promote development through aid between States, or to collective rights such as the cessation of neo-colonialism.<sup>3</sup> Ironically, while supporting the rights of States to seek economic justice among themselves, the effect of revisions requested by some State delegations in the Working Group would be to reduce the freedom of human rights defenders to promote economic, social and cultural justice for (and rights of) individuals and collectivities within their societies. For example, it has from time to time been asserted by a few government representatives that the activities of individuals,

groups and organizations promoting or seeking to defend human rights should be subject to the overriding concerns of a "culture," a "people" or a "community" - which in practice can mean "the State." Such broad limitations can be, and have been, abused by national elites to justify maintenance of economic and social power over women, minority groups and indigenous and tribal peoples. Such restrictive clauses in a Declaration on the rights of human rights defenders could be used as an excuse to curtail the activities of NGOs working for realisation and protection of the economic, social and other rights of disadvantaged groups.<sup>4</sup>

Human rights NGOs are one of the mainstays of democratic civil society, and play indispensable roles in independent fact-finding and in exposure of non-compliance with human rights treaties in all fields. Along with many lawyers, paralegals, and judges, there are numerous kinds of human rights defenders:

"...[The] community of human rights defenders includes journalists and other writers who report objectively about human rights violations which ... governments would rather keep in

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- 3 Though these may be important goals, these textual revisions proposed for the Draft Declaration are repetitious of ideas well and more appropriately covered in existing international instruments. If inserted into the Draft Declaration, they would serve only to water down its force as a nexus for supporting and protecting defenders of all human rights.
- 4 In the context of the 1993 World Conference on Human Rights, some governments suggested that notions of universal human rights were Western, and culturally or religiously inappropriate in parts of the world, such as Asia. In contrast to this position, Asian NGOs who assembled for the Bangkok preparatory meeting of the World Conference made it clear that in their eyes, universal human rights precepts were not unwelcome or inappropriate. On the contrary, opposition to the upholding of these globally recognised rights was seen as often being simply a pretext for those in power to rule in an autocratic manner, without regard to the economic, social, civil or political rights of ordinary citizens.

the shadows. They are doctors who refuse to assist in torture, teachers who tell others about their rights, and people who assist organizations of women, indigenous and minority groups, peasants, workers or refugees..."<sup>5</sup>

Regional and UN human rights machinery "would grind to a halt" were it not for the contributions of NGOs and other human rights defenders, because governments, concerned with national honour, too rarely expose their own abuses, or those of their allies.<sup>6</sup> They are also rather touchy about the idea of denouncing the human rights shortcomings of major trading partners. Political elites in general, and autocratic rulers in particular, must not be provided with the gift of a Draft Declaration with wide exemption clauses to lean on when attacking legitimate NGO human rights work, claiming that it somehow undermines national solidarity. The blunt and inventive methods used by States to intimidate and persecute human rights defenders are many, and would no doubt continue even if a clear, forceful Defenders' Charter were allowed to blossom:

"For example, they require all non-governmental organizations ... to register officially, but deny applications from human rights groups, or keep their applications forever at the bottom of the pile. They raid NGO offices, remove documents, destroy equipment and take away human rights workers, who are sometimes never seen again. They refuse permission to allow funding or other assistance from outside sources, or subject human rights NGOs to discriminatory application of currency regulations. They refuse to issue necessary travel documents. They arrest people who speak to the foreign press about human rights matters. They assault the reputations of human rights activists in the national media.... [In] some States, military and paramilitary groups ... violently react to any attempt to conduct human rights work ... [including by] ... "disappearing" or killing ... human rights monitors."<sup>7</sup>

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5 "The Protection of Human Rights Defenders", n.2, *supra* p. 1. The paper was presented for the ICJ by Allan McChesney, with advice and contributions from Peter Wilborn and Mona Rishmawi of the ICJ's Centre for the Independence of Judges and Lawyers (CIJL), and from colleagues of other international and grassroots NGOs attending the UN Commission on Human Rights in 1995. Among "defenders" not mentioned in this open-ended list are volunteers who provide "accompaniment" to protect returnees and others who may be targeted by oppressive regimes.

6 Laurie Wiseberg, *Defending Human Rights: The Importance of Freedom of Association for Human Rights NGOs* (Montréal: International Centre for Human Rights and Democratic Development, 1993), pages 5-6.

7 "The Protection of Human Rights Defenders", n.2, *supra* p. 1. For a more detailed review of how States deny and destroy the rights of human rights defenders, see Wiseberg, *ibid.*

Those governments who are unconcerned about civil society or democratic process "tend to see their own good as the public good and to equate all ... criticism with treason":

"They brandish the term "subversive" to delegitimise and attack NGOs precisely because they cannot control them. Those most vulnerable are local or national NGOs and defenders "on the frontlines," particularly in countries where abuses are egregious."<sup>8</sup>

It ought to be recalled that the final document of the Vienna World Conference on Human Rights, agreed to by all participating States, confirmed that the universal nature of international human rights is "beyond question." The final Vienna statement also affirmed that "it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms," including those, we would add, of independent-minded defenders of economic and social rights.

The position of a small number of country delegations - who seek wording in the Draft Declaration allowing States to control the types of human rights that their citizens may promote - is in marked contrast to the position taken by NGOs who participate in the Working Group on Defenders. Though, on occasion, NGOs have been accused by one or two States of being narrowly-focused, NGO observers in the Working Group have in

fact advocated freedom of thought and expression (and protection) for all human rights defenders. An abiding concern communicated by human rights NGOs in the Working Group, (on this matter, chiefly by the International Commission of Jurists and Amnesty International) has been the right of a human rights defender to choose precisely which issues, rights and cases to focus on in his or her work. It would be a violation of long-standing principles of international human rights for governments to be given the power to determine which categories of rights or which individual causes are appropriate predilections for human rights defenders, whether they be individuals or NGOs.

As is made clear by the Universal Declaration of Human Rights, by the two International Covenants, and by the Vienna Declaration of 1993, economic, social and cultural rights are equally important as, and interdependent with, civil and political rights. If all of the enumerated rights are universal and interdependent, no State pressure should be exerted to force human rights defenders to adopt particular rights or categories of rights as their focus. It would be illogical for defenders of human rights and fundamental freedoms to be unable freely to select their own priorities from among the catalogue of universal rights. A person may believe in human rights generally, and simply feel that she is in a better position to assist with promoting one package of rights than another. Or defenders' choices may be based on their particular disadvantaged circumstances, or on the rights which they feel more

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8 Wiseberg, *Defending Human Rights*, n.6, *supra*, p.7.



compelled to promote because of religious, ethical, ideological, professional, national, historical, livelihood or family reasons. If violations of particular rights have touched individuals, families or communities, why should they not be free to pursue advocacy of specific cases or related rights?

To require human rights defenders to act as conscripted agents of the State, pushing only a favoured manifesto of rights, would be to nullify many of the existing safeguards for human rights defenders, given that the chief abusers of human rights are States themselves:

"[It] is profoundly inappropriate that a few States persistently demand unprecedented protection for governments in the draft Declaration. It is precisely because so many States abuse the protective powers already available to them (administrative, police, and military powers) that a Declaration to protect human rights activists is needed."<sup>9</sup>

The ICJ reiterated, in sessions of the UN Working Group, that there are individuals and human rights organizations that focus on economic and social rights, on environmental rights, and on the right to development, as well as those who devote their energies to advocating civil,

political and legal rights. Defenders of all types of universally recognised human rights are entitled to recognition of their rights as human rights defenders, regardless of which baskets of human rights inspire them.

It is misleading to imply, as some have done in the Defenders' Working Group, that the prominent human rights NGOs are concerned with defence of only civil and political rights. During the 1990s, the most vocal and persistent NGOs active in the Working Group have been the International Commission of Jurists (ICJ) and Amnesty International. The ICJ is committed to strengthening the Rule of Law in all fields throughout the world and to the promotion and implementation of economic and social rights as well as other human rights, including individual and certain collective rights. Although Amnesty International's work has traditionally focused on violations of the civil, political and legal rights of the "disappeared," on political killings, on the death penalty, on victims of torture and on the cases of non-violent "prisoners of conscience," Amnesty's activities are not undertaken solely for human rights activists, let alone for political or civil rights activists. Whether a victim is or is not a "human rights defender," the assistance of Amnesty staff and volunteers<sup>10</sup> is offered, regardless of whether the victim was active in the promotion of economic and social rights or in some other field

9 *The Protection of Human Rights Defenders*, n.2, *supra*, p.2.

10 Amnesty International volunteers are human rights defenders. So is anyone who makes a commitment to and takes up the defence of the human rights of others, often doing so at grave risk to their own lives and safety: Wiseberg, *Defending Human Rights*, n.5, *supra*, at page 4.

considered bothersome for State authorities, or was simply a target for discrimination.<sup>11</sup>

Three organizations that have recently become more actively involved in reporting on and participating in the deliberations of the Working Group on Human Rights Defenders are the International Service for Human Rights (ISHR), the *Fédération internationale des droits de l'homme* (FIDH) and the Lawyers' Committee for Human Rights (LCHR). Like the ICJ and Amnesty, these groups are important rights proponents, information providers, and activists in the field of economic, social and cultural rights as well as in other branches of human rights work.<sup>12</sup> At the World Conference in Vienna, one of the principal presentations made by FIDH

focused entirely on human rights defenders. Just prior to the 1995 session of the Working Group, ISHR published an analytical review detailing the history of negotiations, and drawing together information in a way that is indispensable both for specialists in the field and for human rights defenders generally.<sup>13</sup> The ISHR has an internship programme that enables individuals from southern NGOs to observe at the UN Commission on Human Rights. In recent years, part of the process has been to provide workshops on the Draft Declaration on human right defenders, and to facilitate attendance by these interns at the Working Group, whose sessions have been held immediately prior to meetings of the Commission. The presence of these front-line human rights workers adds a needed reminder of real-world urgency to the delibera-

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- 11 A related criticism sometimes levelled at NGOs in the Working Group is that international NGOs are made up of elite northerners whose notions of human rights are alien to the diverse cultures and impoverished masses of the South. While it is true that it is generally easier for human rights groups to operate in freer, more affluent societies, it is also true that the values prompting the work of human rights NGOs are shared by people around the world, and that longer-established NGOs have supporters in all regions and in a high proportion of countries. For example, Amnesty International reportedly has more than one million members, mostly ordinary people, in a large number of nations. The ICJ and its affiliates have been active for years in many countries of Africa, Asia, Latin America and the Middle East, and can be credited with a catalytic role in the establishment of a number of regional and national human rights instruments in the South, including the African Charter of Human and Peoples' Rights. The latter includes reference to a number of types of "solidarity" rights, in addition to civil and political rights.
  - 12 Also like Amnesty and the ICJ, FIDH, the ISHR and the LCHR carry out work in association with colleagues or members in many parts of the South.
  - 13 See: International Service for Human Rights, *Draft Declaration on Human Rights Defenders - An Analytical Study* (Geneva, November 1994). One of many useful contributions made by this study is to show where decisions have occasionally been made in the Working Group yet are not accurately reflected in subsequent UN reports. In one respect, however, readers should exercise an ounce of caution about the study itself. Although the principal author of the study did excellent documentary and analytical work, supplemented by interviews of a number of regular participants in the Working Group, he had not himself participated prior to the study's production. Thus, he could not know all of the background, or be fully aware of discussions that took place during the lengthy periods of unrecorded informal drafting. As a result, there are (rare) instances in which the analysis misses the mark with respect to what NGOs such as the ICJ did prior to 1995, or the reasoning behind certain positions taken by us.

tions of the Working Group. Having made the above observations, one must acknowledge that neither UN bodies nor international NGOs as a group have acted as vigorously for the implementation of economic, social and cultural rights as for civil and political rights. That is why there are currently a number of efforts afoot to find better ways to monitor and enforce compliance with international treaties enshrining social and economic rights.<sup>14</sup>

It will be recalled that many people suffer violations of their rights and freedoms, not because they are political or human rights activists, but simply because of discriminatory attitudes, laws and practices. When we focus on discrimination, we can see that NGOs and individuals who try to promote tolerance and counteract hatred generally do so without regard to the type of substantive rights being protected. Both the civil and political Covenant and the economic and social Covenant (Article 2 in each) prohibit discrimination with regard to any of the rights collected in those documents.<sup>15</sup> An organization that seeks to promote gender equality, to combat racial or ethnic discrimination, religious intolerance or

denial of opportunities to people with disabilities, "defends" human rights, whether the discrimination or intolerance happens to arise in civil, political, legal, economic, social or cultural fields. NGOs whose work focuses on international human rights instruments dealing with racism, women's rights, children's rights, indigenous peoples' rights or those of minorities would usually be involved in the support and defence of economic, social and cultural rights, because the relevant instruments cover a broad range of rights, including these.

Underscoring the preceding discussion is the idea that both human rights NGOs and "development" NGOs play significant roles in promoting economic, social and cultural rights. Like all human rights defenders, people working with or assisting those NGOs are entitled to have safeguards for their rights, freedoms, reputations, and personal security. A strong UN Declaration on the rights of human rights defenders would be a helpful educational, political and legal tool in this regard.

A partial summary of developments to date concerning the Draft Declaration

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14 The author is one of a number of human rights specialists involved in framing strategies for improving implementation of economic and social rights internationally and in our own countries, by: focusing on violations (rather than on gradual implementation); focusing on discriminatory implementation; linking of NGOs in different countries who are already working for the promotion of particular economic and social rights; identifying and devising indicators of States' compliance and of non-compliance; linking of development NGOs with human rights NGOs and encouraging the use of human rights language to describe pertinent development issues; providing training and guidelines for grassroots NGOs - to help them be aware of relevant international law as it applies to their countries, and to make use of it in national activity and in UN fora; encouraging strategic access to UN treaty bodies for expert and umbrella NGOs. Many of these strategies will be touched on in articles prepared for this edition of the *Review* by Audrey Chapman and others.

15 The prohibition against discrimination is expressed in similar words in both Covenants. The requirement to ensure equal rights for women and men is given additional emphasis by being covered further in Article 3 of each.

on the Rights of Human Rights Defenders is provided in the following pages.<sup>16</sup> At the outset, however, let us highlight an Article of particular interest agreed to "at second reading" in 1995. This provision, referred to as Chapter I, Article 2, requires States to create a legal and political climate conducive to the realisation of human rights in *all* relevant fields, including those most pertinent to economic and social rights. Given the context, it is reasonable to assume that this Article applies as well to the rights of human rights defenders:

"Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia* by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political as well as other fields and the legal guarantees required to ensure that all persons, individually and in association, are able to enjoy all these rights and freedoms in practice."

The UN initiative to develop a declaration on the rights of human rights

defenders was partly inspired by the experience of the Conference on Security and Cooperation in Europe (CSCE) during the Cold War. Principle VII of the CSCE's Helsinki Final Act (1975), containing a "right of the individual to know and act upon" human rights, was one rallying point in discussions of the rights of political dissidents and human rights activists in the Second World. The UN Working Group on defenders' rights that began meeting in 1986 was not mandated to set forth new rights or responsibilities, but to elaborate on rights that States are already obliged to implement within the UN system, and to affirm the importance of and applicability of these rights and freedoms to human rights defenders. Rather than trying to bolster existing rights, some States strive, through the draft text, to impose new duties on individuals and NGOs. NGO observer delegations express doubt that special duties or limitations need to be included in a Declaration on human rights work, since existing international instruments contain sufficient safeguards against possible abuse, and governments are already effective in finding ways to restrict the exercise of human rights. "The purpose of the new Declaration is to shore up rights in the face of real and sometimes violent suppression by governments and their

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16 More comprehensive analysis of the major issues that have engaged the Working Group on Human Rights Defenders may be found in: Allan McChesney and Nigel Rodley, "Human Rights Defenders: Drafting a Declaration", (1992) *International Commission of Jurists Review* 49-55; and in Allan McChesney, "Declaring Defenders' Rights", *Annex to Wiseberg, Defending Human Rights: The Importance of Freedom of Association for Human Rights NGOs*, cited n.6 *supra*, at 33-39. A detailed historical review of the reports of Working Group meetings is provided in International Service for Human Rights, *Study*, cited *supra* at n.13. An excellent brief from Amnesty International was received by me after the core text of the present article was submitted for publication: *Human Rights Defenders: Breaching the Walls of Silence - Issues at Stake in the New Draft Declaration on Human Rights Defenders* (London: AI International Secretariat, August 1995 (39 pages)).

agents. Governments do not need further protection from those seeking to exercise rights and freedoms."<sup>17</sup>

Looking at the provisions already adopted at second reading in the Draft Declaration, it is hard to fathom why States should find them threatening. It is a reasonable, perhaps overly restrained list of rights derived from existing international human rights law. States who intend to honour human rights commitments applicable to them through treaties or as members of intergovernmental organizations should feel no threat from the Draft Declaration, nor from human rights defenders.

A Draft Declaration consisting of all Articles and preambular paragraphs negotiated at "first reading" was completed in 1993. Several of the Articles, some slightly amended, were adopted at the initial "second reading" session in 1994, and consensus was reached on three more in 1995. The slow progress achieved at second reading is attributable to the tactic adopted by a few States (and in some instances, by only one State) of attempting to weaken rights statements reached through compromise and consensus during first reading, or to undercut them by insisting on new

restrictive clauses that would make exercise of the rights and freedoms subject to the whims of national governments. The following summary refers to only some of the Articles adopted at second reading, and a few of the contentious issues still facing the Working Group.<sup>18</sup> Where a draft Article was adopted at first reading, but consensus has yet to be achieved on it (or the precise subject it covers) at second reading, this is indicated by the notation (*first reading*) in italics. Square brackets around words or phrases show that consensus has not been reached on their adoption or omission.

Chapter I,<sup>19</sup> Article 1 states: "Everyone has the right, individually and in association, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels." This Article continues with a reference to State responsibilities: "Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the draft Declaration are effectively guaranteed."

Chapter I, Article 2, as noted above, adds weight to the notion of State responsibility declared in Article 1.

17 McChesney, "Declaring Defenders' Rights," *ibid.*, at 34.

18 For a more complete understanding of the background and meaning of adopted texts, readers should examine the excellent Report prepared by the Chairman-Rapporteur, Prof. Jan Helgesen of Norway, with the assistance of staff of the UN Human Rights Centre: *Report of the Chairman-Rapporteur of the Working Group on its tenth session*, March 1995 (E/CN.4/1995/WG.6/CRP.19 (revised)). I would also recommend that, in addition to reviewing the ISHR Study, (n.13, *supra*) and the relevant publications to which I have contributed (including those at n.16) they also peruse the Chairman's reports of Working Group activities in prior years. They give considerable additional detail and nuance.

19 The Working Group decided that the final version of the Draft Declaration will not be divided into Chapters. The Chapter numbers are retained temporarily for ease of reference during negotiations.

When interpreted as reinforcing one another, Articles 1 and 2 would appear to confirm a duty of States to ensure that the rights of human rights defenders are effectively guaranteed. As the ICJ delegation suggested in the Working Group, since the rights and freedoms of human rights defenders are themselves clearly "human rights," and since Article 2 obliges States to foster *all* human rights, a purposeful reading of Articles 1 and 2 together supports the following conclusion noted by the ICJ in the debate:

"Each State has a duty to protect, promote and implement all human rights and fundamental freedoms of human rights defenders, by providing all conditions necessary in the social, economic, political, legal and other fields to ensure that all human rights defenders, acting individually or in association with others, are able to enjoy all these rights and freedoms effectively in practice."

A novel and important element of Chapter I, Article 3, adopted in 1994, is that it provides that no one shall suffer adverse treatment of any kind for refusing to participate in human rights violations.

Chapter II, Article 1 states: "Everyone has the right to know, to be informed about and to make known to others human rights and fundamental freedoms to which they are entitled."

Chapter II, Article 2 says that everyone

has the right to seek, obtain, receive and hold information about the rights and freedoms covered in the Declaration, as well as the right to publish, impart or disseminate freely such knowledge. (*first reading*)

Chapter II, Article 3 provides the right to study, discuss and form opinions as to whether the relevant rights and freedoms are observed in law and practice. The additional words "[in their own country and elsewhere...]" are in square brackets. (*first reading*)

Chapter II, Article 5 proclaims that each State has the responsibility to take measures to promote the understanding by everyone of her or his human rights, including widespread distribution of relevant national laws and of basic human rights instruments, and full access to the reports made by the State to international supervisory bodies, and to the latter's official reports. (*first reading*)

Chapter III, Article 3 confirms the right of individuals and groups to participate in peaceful activities directed against violations of human rights. One paragraph, derived from an NGO proposal, says that persons and organizations are "entitled to be protected under national law" when taking part in such activities. (*first reading*)

Chapter III, Article 4 covers the right to receive donations at home and from abroad to support human rights work. The issue of permissible restrictions on this freedom remains unresolved.<sup>20</sup>

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20 Discussed in McChesney, "Declaring Defenders' Rights," n.16, *supra*, at 37.

Chapter IV, Article 1 states the right of everyone to protection - and to effective remedies in the event of violations of rights.

Chapter IV, Article 2 says that everyone has the right to draw public attention to violations of human rights and to complain about them to national judicial, administrative or legislative bodies, and to communicate with international bodies in this regard. (*first reading*) The ICJ and Amnesty International cooperated on a proposed additional paragraph to state explicitly the right to have international observers at trials. Another key issue for Chapter IV, Article 2 is the tragic truth that when a person is disappeared or arbitrarily executed, a legal claim seeking redress cannot be made by the victim personally. Any claim must be pursued by a family member, an NGO, or another representative. A few States, while recognising this reality, worry about the draft Declaration proclaiming too wide a right for representative legal actions, i.e. an *actio popularis*. Drafting efforts seeking a compromise in 1996 foundered, but not because of inflexibility by NGOs or by States seeking reasonable procedural limits. The impasse arose because other States persisted in proposing otiose revisions that would subject the relevant clause to vague or open-ended restrictions through national law.

Attempts to reach consensus on Article 2 in 1996 borrowed items from the UN Declaration on Disappearances. The relevant provisions of that instrument demonstrate that when parties focus on the central issues - defence of

human rights and of people - clear, purposeful texts can be achieved. The accord on disappearances proclaims that anyone with knowledge of a disappearance, or an interest in the fate of the disappeared person, has a right, in effect, to lodge a complaint with a competent independent public authority. States are obligated to ensure that a proper investigation and hearing then takes place. As the ICJ's delegation reminded the working group in 1996, the only restriction explicitly provided on this right is a concise statement in Article 21 of the instrument, referring to the Universal Declaration. This is surely the kind of approach that would be advocated by any State genuinely wishing to protect the people and groups who strive to uphold human rights.

According to Chapter IV, Article 3 (adopted in 1994) each State must:

- a. ensure protection of everyone against violence, threats, retaliation, discrimination, or other adversity "as a consequence of their legitimate exercise of the rights referred to in this declaration;"
- b. encourage the development of institutions for the promotion of human rights, such as "ombudsmen, human rights commissions...;"
- c. "Conduct or ensure that a prompt and impartial investigation or inquiry takes place whenever there is reasonable ground to believe that a violation of human rights... has occurred in any territory under its jurisdiction."<sup>21</sup>

21 The original draft of paragraph (c) did not include the words "or ensure that." The ICJ delegation suggested adding these words, to recognise the principle that investigations may be carried out that are independent of, and sometimes focused on, governments.

The types of limitations found in major international human rights instruments are repeated in Chapter V. These include the edict that provisions in the Declaration shall not be construed as limiting other international human rights, and that nothing in the Declaration implies a right to limit its proclaimed rights and freedoms to a greater extent than is specifically provided for in the Declaration. Chapter V, Article 2 is a compromise reflecting the desire by some governments to make the Declaration somehow subject to national laws. From the NGO perspective, it may go too far in that direction. Nonetheless, it does affirm that international human rights law is paramount over national law, an established principle that must not be undermined further:

"Domestic law consistent with the United Nations Charter and other international obligations and commitments of the State in the field of human rights and fundamental freedoms is the juridical framework in which human rights and fundamental freedoms should be implemented and enjoyed, and within which all activities referred to in this Declaration ... should be conducted."

In 1994, Cuba proposed a patently inappropriate "amendment" to Chapter V that would transform it into a virtual code of political crimes for human rights

defenders. Presumably the interpretation and application of this code would rest with national authorities. Many delegations have been forthright in denouncing the proposal's clear disharmony with the Draft Declaration as negotiated over the past decade. Both the ICJ and Amnesty International have proposed revisions that would actually improve Chapter V, or at least head off possible pitfalls for it. One of these, suggested by Amnesty, would make it clear that statements in draft Article 5(3) forbidding the destruction of human rights and democratic "progress" could not be used to support impunity for violations:

"No ... activities aimed at securing acknowledgement of and accountability for past human rights violations shall be considered as being aimed at the destruction of democratic processes and human rights and fundamental freedoms."<sup>22</sup>

Two of the sticking points in the 1995 Working Group related to central tenets of the Draft Declaration, namely the right of people everywhere, *acting individually or in groups*, to demand compliance with human rights norms and speak out against violations, on behalf of themselves or *on behalf of other people*. Given the development of human rights law over the fifty years since the establishment of the UN, and the various morally and legally binding promises made by States in that period, the reasonableness and general applicability of these tenets should be

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22 As an alternative, the ICJ has proposed that if the Amnesty amendment is not adopted, the problematic words of draft paragraph 3, "including progress accomplished in these areas," should simply be dropped.



beyond question. Yet one or two delegations have been willing to hold up progress toward a Draft through efforts to avoid explicit statements in the Declaration that acknowledge the elements highlighted above.

Until 1995, several Articles in the Draft text, including what is now the first operative provision (Chapter I, Article 1) communicated in clear language the right of everyone, "individually and in association with others" to enjoy the rights framed in the Declaration. In the interests of compromise in the Working Group, the words "*with others*," which had not caused notable difficulty previously, were dropped by Working Group consensus in 1995. This change happened for two reasons. Inclusion of the two words in English was said to cause difficulty for one delegation when the entire modified phrase was translated into Arabic, and exclusion of the words enabled the Working Group to achieve compromise. Equally important was the view of those whose first language is English, that the term "in association" means "in association with others," though the latter phraseology is less vague and therefore preferable. As the ICJ representative observed when the shorter version was adopted for Article 1, the enjoyment of rights "in association" applies to informal contact between people, to gatherings and interactions of informal groups, and to activities of NGOs, whether or not such groups or

NGOs are officially regarded as "associations."<sup>23</sup> This analysis is supported by the declaration made by the delegation of France at the time of adoption. As France explained, for clarity the French language version of "in association" must continue to have the explicit connotation of rights held and enjoyed individually or while associating "with others." Moreover, the terms used in French make it clear that the associative rights are not limited to formal associations.<sup>24</sup> No objection was raised by any delegation concerning the French request. The Spanish interpretation also has continued to use modifiers communicating similar meaning.

In 1995, Cuba, sometimes with support, reiterated the surreal position it has raised in recent years, that human rights defenders should not be authorised to seek the implementation of any rights except "their own" rights. If accepted, this perspective of human rights "defence" would result in the Draft Declaration referring to human rights defenders having the right to secure knowledge and carry out activities respecting only "their" rights. This would fly in the face of the reality of NGO human rights work. It would contradict Articles already agreed to in the Draft Declaration. It would also mean that most of the work of human rights defenders contributing to UN human rights bodies would be outside the scope of the Draft Declaration. Another basis for

23 As NGO representatives have reminded the Working Group on occasion during the 1990s, a large and very significant contribution to human rights endeavours is made by informal and unofficial groups of people, who often undergo great personal risks to seek State compliance with international human rights law.

24 See *Report of the Chairman-Rapporteur of the Working Group on its tenth session*, March 1995, cited *supra*, at paragraph 96.

opposing the notion of restricting defenders to promoting only "their own" universal rights has been raised consistently by government delegations, the ICJ, and others, namely that many victims are unable effectively to advocate their own rights, such as children, the internally displaced, and the disappeared.<sup>25</sup>

Similar problems had delayed consensus on Chapter II, Article 1. The compromise language of the Article does not state explicitly that human rights defenders have the right to tell other people that they have rights too. It would have been preferable to accept one of the draft texts that explained plainly that everyone has the right to know and to make known not only their own rights, but "those of others." In plainer language, Chapter II, Article 4, adopted in 1994, says that everyone has the right to discuss and to advocate new human rights ideas. Another provision that required a sophisticated compromise was Chapter IV, Article 4, designed to indicate that people such as police, armed forces personnel, prison doctors, and others often implicated in human rights violations must comply with human rights laws and ethical standards in their work. Again, it was not possible to find a consensus formula that would refer to occupations in a way that makes the purpose of the Article clearly obvious. As adopted in 1994, Article 4 concludes:

"Everyone, who as the result of his [ICJ requests for gender-

neutral language are to be addressed in the UN's final editing stages] occupation or profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant ... occupational ... ethics."

In 1995, an additional issue associated with the question of "Whose rights are to be protected?," prevented adoption of a draft for Chapter II, Article 3. There has been an arduous search for consensus language reflecting a right now expressed in square brackets in the "first language" draft of Chapter II, Article 3, namely the right to monitor and draw attention to human rights implementation or violations in one's own country *and* in other countries. Defence of human rights on the international plane often concerns people showing solidarity with fellow human beings in other lands. Through promotion of the human rights of total strangers, people are acting on the moral duty prescribed for everyone by the Universal Declaration of Human Rights in 1948. Yet some governments continuously seek to avoid textual language that openly endorses the praiseworthy work persistently done by human rights defenders.

In 1995, in addition to the two opening Articles, the Working Group adopted a provision (Text "X") whose placement within the Draft Declaration is to be

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25 "Jurists Denounce States' Obstructions in Elaborating a UN Charter on Human Rights Defenders," International Commission of Jurists, Press Release, 1 February 1995.

determined later. This Text acknowledges the important role of human rights NGOs in public education and in training and research concerning human rights. In one draft version of the original Romanian proposal, the eventual Text was linked to Chapter II, Article 5(3) outlining State responsibility re formal and informal human rights education. The ICJ urged the Working Group to adopt the Text in the separate rather than in the "linked" version, for two reasons. First, Article 5(3) and the Text highlight two distinct and important ideas. Second, draft paragraph (3) is the only place in the Draft Declaration that explicitly spotlights the need for human rights training of "law enforcement officers ... armed forces and public officials."

Other matters left unresolved in 1995 and 1996 arose under Chapter IV, Article 2, spelling out remedies for dealing with human rights violations. As was noted earlier, one area on which divergent opinions appeared was the right of victims to have their causes taken up by human rights NGOs or others when circumstances prevented the victims themselves from pursuing remedies. Another was a hesitation by some States to have the text state directly that there was a right to offer "assistance" other than "legal" assistance to help in the defence of human rights. This hesitation continued despite reminders from NGOs and from other States that interpreters, doc-

tors, social workers and others are often required participants in the process of seeking implementation of human rights remedies. Although the slow productivity of negotiations is discouraging, "the real objectives" of the Working Group are "sufficiently important to warrant continuation of this body's efforts in the future."<sup>26</sup> In recognition of the hampering of progress in 1995 brought on by the recalcitrant attitudes of one or two States, however, the Commission on Human Rights approved a recommendation that the Group's session last only one week in 1996, rather than the usual two.

Over the past six years, the ICJ delegation has expressed concern that the Draft Declaration has drifted away considerably from the ideal of a clear, concise statement that could readily be understood by local human rights defenders around the world, and used effectively to assist them. NGOs cooperating in the context of the Working Group and the Commission on Human Rights demonstrated in 1995 that in short order it was possible to formulate a simple list of rights to include in a minimally adequate Declaration.<sup>27</sup> A revised version of this (non-exhaustive) list was an important element of a joint NGO statement delivered at the 1995 Commission on Human Rights. The statement concerns, *inter alia*, the purposes of the Draft Declaration and the

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26 *id.*

27 The original list was devised jointly by individuals from three or four NGOs of the South, with contributions from the individuals representing the ICJ and Amnesty International at the Working Group. The list was introduced in the Working Group by a representative of the Service for Peace and Justice in Latin America (SERPAJ). See *Report of the Chairman-Rapporteur* n.18, *supra*, paragraph 325.

delaying tactics of certain States.<sup>28</sup> Paragraph 6 of the document deplores the fact "that the legitimate search for consensus has been repeatedly misused by a small number of States as a method of exercising a veto, thus preventing the finalisation of a satisfactory Declaration." Some of the Defenders' rights listed in the joint statement are now only implied or expressed vaguely in the Draft Declaration. Others ought to be in the Draft, but are not. Among the recommended rights set out in the NGO statement were rights:

a) ... to form groups and organizations promoting human rights and aiming at the protection of human rights defenders;

e) ... to monitor States' compliance with their obligations under national and international human rights instruments and to draw public attention to their records of compliance;

g) ... freely to solicit, receive and utilise financial and other contributions - including from foreign sources;

i) ... freely to choose which specific human rights cases will be the focus of their attention."

At the UN Commission, after indicating support for and solidarity with the NGO list of recommended rights, the ICJ representative added the following:

"Elaborating on that list of essential rights, the ICJ asserts that the Declaration must make it explicit that all rights of human rights defenders apply at both the national and international levels. The Declaration should openly express the freedom of activists to promote and strive for protection of the rights of others, and indeed encourage them to do so... [The] Declaration should proclaim clearly the right to rely on any of its provisions without suffering any form of reprisal from State authorities ... [and] ... the right ... to be protected from those ... who seek to intimidate, attack or otherwise harm defenders of human rights because of their human rights work or ideas."<sup>29</sup>

With reference to the last point made in the ICJ presentation noted above, it is heartening that a Commission Resolution adopted in 1995 on "Cooperation with representatives of United Nations human rights bodies"<sup>30</sup> urged governments to refrain from intimidation or reprisal against:

28 The joint statement was presented by a member of a national NGO in Chad associated with FIDH. Although the ICJ was involved from the outset in drafting this joint NGO document, the ICJ chose to support it verbally in a separate ICJ presentation in the Commission, rather than to sign on officially to the final version of the joint statement. One reason for doing so was that each NGO presentation was limited to five minutes. This was not an adequate time in which to cover all issues of importance to NGOs respecting the Declaration.

29 "The Protection of Human Rights Defenders", n.2, *supra*, p.3.

30 E/CN.4/1995/L.108 of 3 March 1995.

- a. those who seek to cooperate or have cooperated with such UN bodies or have provided testimony or information to them;
- b. those who avail or have availed themselves of UN human rights procedures and "those who have provided legal assistance to them for this purpose;"
- c. those who submit or have submitted communications under procedures established by human rights instruments;
- d. those who are relatives of victims of human rights violations.

The Resolution also invited the Secretary-General to submit to the Commission at its 1996 session a report on any alleged reprisals against those referred to in paragraphs (a) to (d) above. The Resolution was a positive step in the direction urged by the ICJ at the 1995 Commission on Human Rights. The ICJ referred back to a Resolution adopted by hundreds of NGO representatives from around the planet at the World Conference on Human Rights in 1993.<sup>31</sup>

"NGOs ... at Vienna adopted a Resolution on human rights defenders, with almost com-

plete unanimity, on 23 June 1993 ... It asked for the inauguration of United Nations protective status for human rights defenders ... in immediate peril because of their human rights activities. It also sought establishment of a Special Rapporteur to conduct timely investigation of threats and attacks against defenders of human rights."<sup>32</sup>

The importance of national and grassroots NGOs in the struggle for implementation of human rights will be amplified if a draft Optional Protocol on communications is adopted for the International Covenant on Economic, Social and Cultural Rights. As Resolutions of the UN Commission on Human Rights have emphasised, special attention is warranted for the alleviation of extreme poverty (e.g. 1992/11) and the safeguarding of the rights of the most vulnerable and disadvantaged (e.g. 1992/10), areas in which human rights NGOs and development NGOs have always been involved. To reach the relevant UN supervisory body, individual and group complaints arising under an Optional Protocol would often need the assistance of NGOs more versed in UN procedures. In my opinion, many of the provisions contained in the Draft Protocol could usefully be adapted for inclusion in the draft Declaration on the

31 The present author was the co-coordinator of the NGO drafting group who prepared and presented the Resolution to the Plenary of NGOs, along with a related Resolution on NGO access to human rights supervisory bodies of the UN.

32 "*The Protection of Human Rights Defenders*", n.2, *supra* p. 3. For further information on the Resolutions adopted by the NGO Plenary at Vienna, see Wiseberg, *Defending Human Rights*, (pp. 29-30) and McChesney, "Declaring Defenders' Rights" (pp. 38-39) cited at n. 16, *supra*.

rights of human rights defenders. For example, Article II(2) (as of February 1995) says that States Parties:

- shall not hinder effective exercise of the right of communication;
- shall protect complainants;
- undertake to cooperate with the supervising UN Committee and to make the Committee's work widely known."

Of equal interest to human rights defenders, and not only those in the field of economic, social and cultural rights, is Article V, which provides that at any time after receiving a communication, the Committee on Economic, Social and Cultural Rights may request an impugned State Party to take interim measures "to preserve the *status quo* or to avoid irreparable harm;" and the State Party must comply. Under Article VIII, if the Committee finds that a State Party to the Protocol has not given effect to its obligations under the Covenant on Economic, Social and Cultural Rights, the Committee may recommend "specific measures to remedy any non-observance." Perhaps other relevant monitoring mechanisms could adopt such an approach. Moreover, all pertinent experts, special rapporteurs, special representatives and Committees could be

instructed to devote part of their reports to general treatment of, attacks on, and protection of, human rights defenders.

During presentation of the 1995 Working Group report to the Commission, the delegate of Norway shared the Chairman-Rapporteur's view that the "careful attention" paid by governments to the drafting exercise shows how important the process is perceived to be. It is regrettable that in 1996 not all governments represented in the Working Group heeded these earlier words of the Chair:

"[In] light of ... the sufferings, the oppression or the harassment to which persons defending human rights sometimes are exposed, we should be aware of the obligations linked to this exercise. The work is of crucial importance to those who are the beneficiaries of the future Declaration. Time is running fast, both seen through the eyes of the victims of human rights violations, as well as through the eyes of the public at large, who looks to the UN with hopes and expectations."<sup>33</sup>

At the 1996 session of the Working Group on Human Rights Defenders, no new clauses were agreed upon. A small number of governments devoted disproportionate energy toward finding new

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33 Introduction to Item 23, presented to the Commission on Human Rights by the distinguished delegate of Norway on behalf of the Chairman-Rapporteur, 7 March 1995. We also urge governments to heed the concern expressed by Amnesty International (a view shared by many other participants) that the consensus rule employed by the Working Group should not be exploited by Cuba or any other State to provide itself with a *de facto* power of veto: *Breaching the Walls of Silence*, note 16, *supra*, at 5 and 30.

multilayered protections for States.<sup>34</sup> These proposals, if adopted, would have undermined balanced articles agreed to over the course of ten years.

Despite the hindering of progress, the true goals of the drafting exercise merit continued negotiations in the Working Group. This initiative continues to have value as a focus for attention on the circumstances faced by defenders of economic, social, civil, legal and other human rights. Yet this educational and discussion process does little to protect grassroots human rights volunteers and workers. One hopes that the UN Commission on Human Rights will be disturbed enough by the stalling of the draft Declaration in 1995 and 1996 to explore additional options. The Commission should extend the mandate of the Working Group. More than that, however, the Commission is urged to look for practical parallel measures that can help to safeguard human rights defenders now, and not just in the next diplomatic millennium.<sup>35</sup>

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34 Those who peacefully defend the human rights of others clearly do not engage in activities "Aimed at the destruction of" rights, yet a few State representatives sometimes put human rights activists into the same theoretical box as terrorists.

35 Editor's note: As this goes to press in April 1996, it appears that positive initiatives similar to some outlined in this Article, will be put forward in NGO statements and in draft resolutions at the 1996 Commission.





# ***Latin-America: Challenges in Economic, Social and Cultural Rights***

**Gustavo Gallón Giraldo\***

## ***I Main Obstacles for the Effectiveness of Economic, Social and Cultural Rights***

1. When we speak about real achievements in economic, social and cultural rights, we must take into account, among other factors, the unequal levels of development in various countries. The concept of progressiveness is derived from the text itself of the International Covenant on Economic, Social and Cultural Rights.
2. This concept has sometimes been used to hide some States' lack of observance of their obligations under the Covenant. It is necessary to point out that progressive development of the rights established under the International Covenant on Economic, Social and Cultural Rights is not left to the unfettered discretion of the States and their governments.
3. In fact, there are certain minimal obligations accruing to the States as well as some basic minimal content
4. Beginning with the minimal obligations of States, one can establish a first level of observance or non observance of the Covenant by the State party to it. At this point, it is worthwhile to stress the importance of the Limburg Principles, adopted in 1986 under the auspices of the International Commission of Jurists, among others. The Committee on Economic, Social and Cultural Rights pursuant to the Covenant also dealt with the topic of States' obligations in its General Remarks, Number One.
5. Without dwelling on the referenced documents, it is necessary to emphasise that today there is no doubt that the obligation of State parties to "take steps" does not permit any conditional or limited compliance which would allow a State party to abstain

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from so doing. On the contrary, the obligation, a positive one of action, complies with the norm's mandates only when it represents the usage of the "maximum resources available." It follows that in order to talk about putting measures into place that are designed for the complete and effective achievement of economic, social and cultural rights, we must ask these questions: "Has this or that State acted effectively to guarantee rights under the Covenant? Has it done so by means of adopting policy measures? If so, has it stopped there, or has it gone on to pass laws which encourage further advances in achieving rights recognised under the Covenant? In all cases, has the State acted to the maximum degree possible, given the available resources? Is it possible to identify progress in the general welfare of the population (i.e., quality of life), access to health care and education, and in the quality of existing health and educational services or levels of employment?"

6. Having asked the foregoing, it must make reference to a few other facets of the problem: the indicators. Due to the close linkage of economic, social and cultural rights with the level of development as well as with political and economic stability, one often uses indicators borrowed from economics and sociology in order to determine the degree of effectiveness and recognition of those rights.

Thus, there is a pressing need at this point to develop or redefine indicators with the focus of human rights to allow an adequate examination of

the current state of effectiveness of rights in any given Nation.

7. Therefore, it is important to work on the development of human-rights indicators based on the content of each of the economic, social and cultural rights. To do this, it is also necessary to pin down the exact content of these rights, in order to identify in a precise way what will be evaluated.

In this area and from this point of view, the indicators need not be limited to simple statistical data. On the contrary, they must be of a type that allows us to record the progress made and obstacles faced in the exercising rights, while at the same time helping us to identify the respective solutions to these obstacles.

8. The satisfaction of these rights on the part of society as a whole is conditioned by intrinsic political factors which suppose the coordinated organization between the various Ministries and State Agencies affected by the fulfilment of duties acquired under international agreements (i.e., an efficient and transparent government structure).
9. As Mr. Danilo Türk warned in one of his reports, another indispensable element required to guarantee effective enjoyment of these rights is "the knowledge throughout governmental circles of international obligations in the area of economic, social and cultural rights, together with the corresponding adhesion to these obligations...". This knowledge should lead to economic planning oriented

toward the achievement of these rights.

10. This perspective on the effective achievement of economic, social and cultural rights is made more difficult in the Latin American Region due to the lack of reliable data, among other things. The basic task of developing an adequate diagnostic tool for this situation is fundamentally in the hands of State Agencies, which at various points may manipulate information for political reasons and at others may lack the capacity to retain true records. In the area of health care, for example, under-recording is common due to the official organism's ineffective information-gathering capabilities.

Among the most frequently found problems are the following: heterogeneity of sources and absence of a methodology which would allow organizing information of diverse origins; lack of independent public offices in charge of record-keeping; the problem of financing research; and the inadequate breakdown of data.

In all aspects of this important activity, it is crucial that the civilian population at large be included with its own mechanisms of follow-up and control to check the statistical systems of the State.

11. Having made the foregoing observations, it is important to say that in the Latin American Region, there is a long way to go before the adequate respect for economic, social and cul-

tural rights is reached, representing the desired goals or minimally the nominal States' obligations. Despite the truth of this generalised overview, it is important to note that actual achievements vary quite a bit from country to country.

12. In fact, the circumstances and reasons which allow one to speak to any extent about similar conditions regarding respect for the States' nominal obligations are so diverse that it is impossible to address strictly equivalent conditions.

These circumstances range from the historical to the political, including economic and social factors as well. Keeping this in mind and in order to expand on the statements made in Paragraph 9 herein, I will limit myself to dealing with a few relevant problems that are shared by a good number of Latin American countries.

The circumstances set forth below are not found in an identical measure in all countries of the region; instead, they reflect the conditions traditionally faced in Latin America that have had an adverse effect on the observance of economic, social and cultural rights.

13. The existence in certain nations of military dictatorships that have traditionally abused political and economic power for extended periods as well as the presence of pseudo-democracies in other areas have been the source of grave problems for the full effectiveness of the general public's civil and political rights, as well as

their economic, social and cultural prerogatives.

Restricting the space available for political discourse, limiting the freedom of the citizenry and disallowing popular participation are all mechanisms that have been used by the economic and social elite, in whose hands the overwhelming bulk of wealth is concentrated.

14. Armed conflict has been the pretext used to invert values. It is common in this Region's countries to cut social expenditures in the national budget, which are traditionally meagre to begin with, in order to increase the already heavily-weighted military spending.
15. Structural Adjustment Programmes (SAP's) (*Programas de Ajuste Estructural - PAE*), along with free-market policies directed at opening up the economy and favouring globalisation, which have already been the subject of a number of studies and research projects, have had notable effects on the right to work (i.e., with increased unemployment, underemployment and informal work arrangements as well as the marginalisation of Social-Security Benefits, etc.).

Without considering whether the above subsidisation policies have been successful, it is clear that the suppression of certain areas as a consequence of the SAP's - or the latest version of similar programmes - has had negative repercussions on the effective achievement of economic, social and cultural rights.

In fact, thanks to such "adjustments," it is not uncommon to encounter a reduction in social spending by the State despite the fact that unemployment is on the rise and poverty is more widespread each day.

16. The level of foreign debt in developing and Third-World countries coincides to a great extent with their lack of respect for economic, social and cultural rights. In fact, debt payments distract the States from dedicating those resources to the fulfilment of rights.

The debt issue is relevant since in many cases this debt was acquired in order to deal with other areas of development and the institution of policies designed to achieve these very economic, social and cultural rights.

17. Corruption in public office is another factor that negatively affects economic, social and cultural rights in the region. Resources which would normally be applied to programmes for the protection of rights are way-laid to benefit private individuals.

## *II International Supervision*

### *A. The World Order*

18. International supervision of States parties to the International Covenant on Economic, Social and Cultural Rights is an integral part of the Covenant itself and is accomplished

primarily through periodic reports from the States on their compliance with duties under the Covenant.

In 1985, ECOSOC created the Committee on Economic, Social and Cultural Rights, which is made up of independent experts with the mission of examining the periodic reports that the States are obliged to submit.

19. This Committee has defined the limits of its own mandate and its work methods quite amply. Besides examining the periodic reports from the States parties to the Covenant, the Committee has issued various General Observations.

As to its work methods, it is safe to say that the Committee's approach is the broadest compared to the general standards of conventional organizations. The Committee has allowed NGO participation, without making this conditional to their having consultative status before ECOSOC.

### *B. Inter-American Regional System*

20. The regional system, which from the outset has voiced ongoing support for establishing full enjoyment of economic, social and cultural rights, does not go much further than the World Order in terms of designing supervisory mechanisms to determine the degree of compliance or non-compliance. This is despite the fact that the OAS Charter proclaims in its preamble that social justice, based on respect for the fundamental rights

of human beings, is one of the Organization's guiding principles, going on to affirm "solemnly" United Nations principles and guidelines. Furthermore, the Charter itself continues the spirit of the Preamble in Chapter VII, where a series of norms on integral development are set forth.

21. In 1988, during the XVIII General Assembly of the Organization of American States in San Salvador, an additional protocol was passed on economic, social and cultural rights. This protocol attempted to solve the evident discrepancy between the spirit of the text and true situation of the region.

Nonetheless, the November 1988 Protocol has had to face quite a few legal entanglements. Despite the fact that the recognition of rights is fairly broad and protectionist and that there is a specific clause in Article 4 that excludes any type of limitation on rights recognised by domestic legislators or by any other international instrument under the pretext that the Protocol does not contemplate said rights or that it recognises them to a lesser extent, the Protocol foresees only a system of individual petitions for the rights enshrined in Subsection (a) of Article 8 (i.e., the right to freedom of labour associations) and in Article 13 (i.e. the right to education). Added to this is the complication that the Protocol has not yet been ratified by the majority of States that are members of the group. At present, it has not entered into force for that reason.

22. Under the regional system, the supervision and control of human rights has been basically assigned to the Inter-American Commission on Human Rights, according to Article 111 of the Charter. The American Convention on Human Rights (the "Pact of San José," Costa Rica) created the Inter-American Court of Human Rights, which has been given jurisdiction for both consultation and litigation; the latter requires express recognition or acceptance by the party States, according to Article 62 of the Convention.

If the San Salvador Protocol does not apply, the mechanisms established in the American Convention will apply.

23. According to the mandate of the Charter, the Inter-American Commission on Human Rights (hereinafter "IACHR") shall "promote the observance and protection of human rights and serve as the consulting body of the Organization in this area." The Charter remits the power to determine the aspects of structure, competence and procedures to the American Convention on Human Rights.

In the pursuit of the stipulations of Article 111 of the Charter, the American Convention on Human Rights - in Articles 33 and following - defines the fundamental aspects of jurisdiction, make-up and functions. The IACHR By-Laws were approved in 1979 by the OAS General Assembly.

24. Article 18 of the By-Laws is the first disposition that opens the doors for the IACHR to exercise its supervisory powers. Based on what is stated therein, the Commission may formulate recommendations to the governments of the party States so that these governments will adopt progressive measures favouring human rights. In addition, the Commission may prepare reports and studies as it sees fit, may request that the governments issue reports and may perform on-site inspections of the States.

25. Article 20 of the By-Laws, on the other hand, extends the IACHR's jurisdiction to supervise the conduct of those of the Organization's Member States that are not parties to the Convention, particularly with respect to the human rights mentioned in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration on the Rights and Duties of Man. In addition, the IACHR is expressly allowed to examine communiqués and information - once all other available recourse has been exhausted - and to formulate recommendations on them.

26. The IACHR Regulations deal in a more detailed way with the Commission's powers. These rules establish mechanisms for reports and on-site observations, in addition to discussing economic, social and cultural rights in Article 64. As per Article 42 of the Convention, the States are required to submit reports on an annual basis to the Inter-American Executive Commissions of the Inter-American Economic and

Social Council and to the Inter-American Council for Education, Science and Culture. With respect to the IACHR Regulations in this area, the main duty of the States is to remit copies of these same reports to the IACHR.

27. According to the IACHR Regulations the State parties are required to submit a copy of aforementioned reports to the Commission on the same day that these reports are handed over to the entities mentioned in the previous paragraph. The regulations allow the Commission to "request annual reports on the economic, social and cultural rights enshrined in the American Declaration on the Rights and Duties of Man from the rest of the Member States."
28. Clause 3 of Article 64 of the IACHR Regulations stipulates as follows, "Any person, group of people or organization [may] present reports, studies or other information concerning the situation of such rights in any or all of the Member States to the Commission." This Article permits the Commission to formulate observations and recommendations about the situation of such rights in any or all of the Member States. Such observations and recommendations should be included in the Commission's Annual Report or in one of its special reports, as the case may be.
29. The norm commented in the preceding paragraph is truly broad and constitutes a layer which has not been suf-

ficiently examined with respect to the supervision of compliance with economic, social and cultural rights.

### *III Justiciability: To Be or not to Be, that Is the Question.*

30. The indivisibility and interdependence of human rights should allow us to affirm without a doubt that economic, social and cultural rights are judicially enforceable. Nonetheless, these fundamental principles of indivisibility and interdependence which are part of the current doctrine relating to human rights have not always been reflected in national and international practice.
31. Doubtless, one of the reasons why this has occurred is that some of the contents of economic, social and cultural rights are simply too vague. Similarly, there is some vagueness regarding the obligations of the States parties to the Covenant with respect to economic, social and cultural rights.

It is likely that these ambiguous areas have contributed to the inattention on the part of the States to economic, social and cultural rights.

32. Another of the many reasons which may explain this reality is that in countries with severe problems of violations of economic, social and cultural rights, there is generally a simultaneous systematic violation of civil and political rights. These circumstances have forced the international human rights movement to

concentrate their energies on guaranteeing the right to life (in its most immediate context of the right not to be assassinated), the right to physical integrity and the right to personal freedom.

This priority, which has been set due to the dictates of reality, can in no way be taken to be an acknowledgement of a hierarchy of rights. It merely means that barbarism has challenged humanity to such an extent that economic, social and cultural rights have necessarily been left a step behind the other rights.

33. As stated in the United Nations Study of *The Right to Adequate Nourishment as a Human Right*, "...The error lies in confusing the question of whether the right constitutes a justiciable prerogative with the question of whether the right exists in terms of international legislation." (This Document is also cited herein in Paragraph 43).
34. Further on in the same Document, in Paragraph 73, it is stated: "... Many recognised human rights have not been conceived in a form that is perfectly enforceable, nor have the means for the reparation or compliance of these rights been secured. Of course, they share this failure with a majority of rights contemplated under international law. [Nevertheless], they are still rights and their imperfection constitutes a challenge to judicial creativity." Considering the full nature of rights, it is clear that the road to justiciability is open and it is still necessary to find it.
35. Several of the rights usually treated as social or economic prerogatives have also been recognised as civil and political rights. Those are here basically the right to work, the right to equality and the right of free association. These prerogatives, which can be called "crossover" rights, establish the link between the two (2) groups in a clear and indisputable way and allow a better understanding of the integrity of human rights.  
  
In terms of domestic rights within a country, there are various judicial actions in domestic law to enforce these "crossover" rights. We may identify processes to enforce regulations on working hours, stability and job protection as well as the various aspects that constitute elements of the right to work. At the same time, judicial procedures generally exist that provide legal protection for the right to equality and the right of free association.
36. As Professor Antonio Cancado Trindade has reminded us, there are various criteria at work in any attempt to classify human rights. It is interesting to examine the criteria that purport to answer the question of whether a given right should be guaranteed by the State or before the State, in order to indicate that those prerogatives, referred here as "crossover" rights, require enforcement both before the State and by the State.
37. While it is true that one of the criteria used for the classification of human rights has been that civil and political



rights require a conduct of abstention on the part of the State - that is, non-interference - while social and economic rights require positive action, these criteria tend to blend together and are not absolute. Furthermore, they cannot be adopted in a simplistic or mechanical way.

38. The fundamental character, then, of those rights having a dual nature, which have been referred to here as "crossover" rights, can be summarised as follows:

- a) the international community, in addition to consecrating these rights in various documents, has progressed from their unadorned and generic enshrinement to the concrete specification of the conceptual contents of these rights for the purposes of various international norms. From these specifications, we can infer, for example, that the right to work is closely linked to those instruments which prohibit slavery, servitude and forced labour, such as the International Labour Organization (ILO) Treaties, which regulate working hours;
- b) within this group of rights, there is no debate as to their being civil and political rights, not even regarding those that are also referred to as economic and social rights;
- c) even when competing meanings have been elaborated by the international community, there is judicial protection for these

rights, without prejudice to the possibility of encountering new, judicially enforceable meanings.

39. As is affirmed in the foregoing paragraph, those rights having a dual nature - or "crossover" rights - have reached a certain level of definition in terms of meaning and content which has, in turn, generated protective mechanisms under domestic law. For example, in the case of the right to work, in which some of the components are understood to be the freedom to choose work and the right to respectable working conditions, under domestic law there are a variety of ways to enforce these components of that particular right judicially. The main problem that exists lies in the area of other rights that do not have the benefit of a consensual definition, such as the right to education or the right to health.

40. Nonetheless, it must be noted that national rights have begun to advance to the point where adequate actions and procedures are being developed to enforce the aforementioned rights.

41. A first step, which is laudable but insufficient, is the constitutionalisation of rights. There is a growing trend to include a Bill of Rights in the national political constitution, which is undoubtedly important and healthy. However, these bills of rights can accomplish nothing without their simultaneous legislative development, including possible judicial actions.

42. Unfortunately, legislators are stingy when it comes to establishing judicial mechanisms to protect and enforce economic, social and cultural rights. Probably, this niggardliness is due to the lack of progress in the area of establishing clear, concrete and precise definitions of the meanings of economic, social and cultural rights.

43. Added to the miserliness of legislators is reticence (and even ignorance and a lack of creativity) on the part of the judicial branch. In Paragraph 23 (*supra*), was quoted a United Nations text that spoke of the challenge to judicial creativity presented by the need for adequate legal solutions in order to guarantee sufficient protection for human rights, specifically of economic, social and cultural rights.

44. On this point, it is desirable for the States' constitutions to provide courses of action available to the citizenry in addition to proclaiming and guaranteeing these rights.

It is important, for example, that any individual or citizen can challenge the domestic norms that contradict the rights recognised in international treaties before the relevant jurisdiction, particularly in defence of economic, social and cultural rights. It is equally crucial for both judges and civil servants to be in a position to hold certain norms inapplicable in the event that they are considered contrary to constitutional mandates. Similarly, it is fundamental that the parties to an action or process may also put forth the unconstitutionality of a norm as a legal exception.

These are but two ways of making the protection of legal guarantees and fundamental rights more democratic.

45. It is also desirable to be able to challenge acts of the administrative authorities for reasons of violation of the Constitution and the Law. It should not be necessary to demonstrate a particular interest in order to challenge administrative acts. On the contrary, it should always be the case that the legal order's violation of fundamental rights is sufficient to give any person the legal right to act to re-establish that prerogative *erga omnes*.

46. In this process of the constitutionalisation of fundamental rights - particularly economic, social and cultural rights, it is also useful for national constitutions to recognise a certain hierarchy for International Human Rights Instruments, either by ordering them according to priority or by recognising them as forming an integral part of domestic law, or by doing both things.

47. As to fundamental rights, economic, social and cultural rights must be protected by means of speedy appeals that are directly accessible to those whose rights have been violated. Due to the fact that violations of economic, social and cultural rights are generally irreparable, protective actions must move quickly. Obviously, given the pace of regular judicial proceedings, the result may be the practical negation of this type of right.

It is clear that in order to consecrate this type of legal action, whether it be called protective action, constitutional action or any other type of action, it is necessary to develop the meanings and essential contents of the rights clearly so that those entitled to such rights, those obligated to honour them and the judges deciding on them, all share an understanding of the elements of the rights that are judicially enforceable.

48. These types of actions may be directed against any agent of the public authorities and against individuals. They must be urgent and extraordinary actions in order to avoid the occurrence or the continued violation of fundamental rights or in order to prevent the violation altogether.
49. As the limits and contents of economic, social and cultural rights are defined, they should also be the object of regular judicial procedures for their guaranteed enforcement.
50. In order for the various procedural institutions that currently exist or which may be created under domestic law to be instrumental in effectively guaranteeing economic, social and cultural rights, it is necessary to guarantee minimally that:
  - a) international instruments be considered a source of law, using the interpretations generated by different international entities;
  - b) the debate regarding the essential content of these rights must

be flexible and must take into account the judicial bodies and control groups from the various countries;

- c) there must be an impartial, independent and qualified judicial authority.
51. The reason that the mechanisms adopted by the international community have assumed a kind of justiciability *latu sensu* is that there has been timid progress at best in the area of national rights with respect to the definition of resources and procedures for placing economic, social and cultural rights before national tribunals, for allowing average citizens access to these rights and for facilitating the joint labour of justiciability and international supervision.

#### *IV The Necessity for an Optional Protocol: What Must Be Must Be.*

52. As can easily be seen, the indivisibility and inseparability of human rights are born of the integral and complex nature of the human being. They derive directly from the dignity of the human being as a species.

Under this mindset, we can assume that human rights, no matter how they are enshrined in the many international instruments, merely constitute the minimum standards that have been agreed upon by the party States.

It is necessary to recognise that within the group of rights recognised by the International Community, there is a smaller group that constitutes obligatory rights which may not be derogated, whether or not they are documented in the various instruments. I refer here, obviously, to the rights that are part of the international *jus cogens*, those considered to be mandatory rights.

It bears mentioning that for a right to be considered part of the *jus cogens*, it does not matter whether it is also considered to be an economic, social or cultural right. The universal legal progress of civilisation is what determines the recognition of rights. As progress is made, such rights become mandatory.

53. Regarding the indivisibility, interdependence and inseparability of human rights, it is important to recall how the International Labour Organization (ILO) Constitution set forth in its preamble that the violation or non-recognition of workers' fundamental rights by even one State would constitute a threat to world peace.

Since 1919, this clear statement has formed a link between the peaceful coexistence of the nations of the world and the respect and guarantee of their citizens' rights, particularly of labour rights. History has proven the scribes of the ILO Constitution correct to a great extent, because many of the wars since that time were fought to reclaim collective human rights or began in an effort to ignore those rights.

54. Thus, a necessary premise is that economic, social and cultural rights are true rights in the strictly legal sense of the term. This means that they are immediately based upon mandatory legal norms and that, moreover, compliance with these norms by the States is inevitable.

55. According to this premise, the fact that the International Community is entitled to require its members to take concrete steps for the effective achievement of these rights goes without saying.

It is obvious that if the International Community has the power to require specific actions that are meant to favour the effective achievement of these rights, then the citizenry may also may oblige States to guarantee these same rights.

56. There are many in the world today who would like to view economic, social and cultural rights as merely points in a political agenda, or at best, as an ethical statement, steadfastly refusing to recognise the clearly legal nature of these rights. This point of view was strengthened at one point by the mistaken use of the term second-generation rights to refer to the group of rights that is the topic of discussion here. This view was popular for a time, but fortunately appears to have lost steam and is widely viewed as a fallacy.

57. The efforts of the Committee on Economic, Social and Cultural Rights under the International Covenant have been directed

towards clearing up the nature of these rights and according them "the same historical and practical importance that has been attributed to civil and political rights." Since its second meeting in Geneva in February 1988, the Committee has aimed its energies at defining the substance of economic, social and cultural rights as exactly as possible, "to give them a normative content comparable to that of civil and political rights." The Committee has been working towards this goal, and to this end, it has planned an annual debate on a particular article or right from the Covenant.

58. Notwithstanding the progress noted above, international supervision of compliance with economic, social and cultural rights leaves much to be desired, especially when compared to the level of compliance achieved in the field of civil and political rights.

In conclusion, it must be stated that, except in the case of the International Labour Organization (ILO), the mechanisms for international supervision of economic, social and cultural rights do not recognise access either by individuals or by NGO's for presenting cases.

59. Since its fifth session, the Committee on Economic, Social and Cultural Rights has dealt with the question of the necessity for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Later, Danilo Türk, Special Secretary for the Subcommittee on the Prevention of

All Forms of Discrimination and the Protection of Minorities, specifically recommended the approval and adoption of the optional protocol in his final report.

60. The Committee on Economic, Social and Cultural Rights presented a declaration to the UN World Conference on Human Rights, held in Vienna in June 1993, which included a paragraph expressing the Committee's conviction regarding the need of adopting an Optional Protocol, stating, "The Committee is convinced that there is sufficient basis for adopting a denunciation procedure (in the form of an Optional Protocol to the Covenant) to cover the whole range of economic, social and cultural rights. Such a procedure would be an entirely non-mandatory disposition and would allow the presentation of communications by individuals or groups claiming the violation of their rights under the Covenant. It could also include an optional procedure for the examination of complaints by the States."
61. Thus, there exists a level of consciousness in the International Community regarding the importance of creating an Optional Protocol which would allow complaints to be presented. In various interventions by NGO's before the Commission on Human Rights and the Subcommission on Prevention of Discrimination and Protection of Minorities with respect to the relevant items on the agenda, the possibility has been raised that an Optional Protocol could be adopted,

with the necessary inclusion of a process for its elaboration and final adoption.

62. The consolidated text of the Draft of the Optional Protocol currently under discussion is that which appears as an Appendix to Mr. Philip Alston's Report (Doc. No. E/C.12/1994/12, p. 15). The subsequent comments refer to this Draft.
63. In general, the Draft looks quite good. Subsection 2 of Article 1 of the Draft seems to be somewhat exotic. Although this text can be explained by the fact that "it appears that this disposition reflects the fact that the Economic and Social Council must continue to be the supervisory body designated by the Covenant and that the powers of the Committee derive from its being the body to which this function was delegated by the Council," it seems that it would be preferable for the Protocol to establish an independent source of power for the Committee while establishing a new form of supervision. ECOSOC would obviously maintain its powers to assign the examination of periodic reports by the party States to another body, even though it seems unlikely that ECOSOC would be disposed to changing this area of competence.
64. It is acceptable that the broad focus of the Draft, both insofar as concerns the rights that may be the subject of complaints and communications as well as regarding the person or group that may present such complaints, thereby allow access to individuals and groups.

65. In general, one can consider that the final Draft is quite good, and its adoption by the United Nations would be desirable so that it could be made available for ratification and adoption by the States. Besides what has been commented in the preceding paragraphs, it is important to point out the Protocol's possibility of requesting that party States adopt provisional measures, with the corresponding obligation by the States to enact such measures (c.f. Article 5 of the Draft) as well as the prohibition of reservations to the Protocol (c.f. Article 15 of the Draft) and the designated competence for follow-up on decisions (i.e., recommendations) by the Committee (Subsection 3 of Article 8 and Article 9 of the Draft).

66. There are two (2) questions which have not been dealt with in the Draft, and which can be considered here. The first is related to the dispositions of Article 7 on work methods.

In fact, notwithstanding the broadness of the methods described in Article 7 of the Draft, it seems that it would be worthwhile to include a disposition of the type contained in Article 27 of the ILO Constitution, which could be stated as follows: "Once a communication is declared admissible, the Committee shall inform all States that are parties to the Protocol. Each party State, whether or directly concerned with the complaint, must place all information in its power related to the complaint at the disposal of the Committee."

67. A second question which could be considered in the Draft is related to the obligation to comply effectively on the part of States with the decisions of the Committee. It would be desirable if the Committee's recommendations, in addition to indicating the measures which States should adopt, could indicate the period of time within which these measures should be adopted. If the State party does not comply with the recommendations or the deadline, the Committee should inform ECOSOC. These provisions which would complement those in articles 8 and 9 of the Draft are inspired by the ILO Constitution.

68. There should also be a mechanism designed to deal with complaints that would also serve as the means by which any individual or any organization could inform the Committee at any given moment regarding non-compliance with the measures recommended or with Court decisions, as the case may be. The Committee should be equipped to adopt the measures it deems necessary, including a procedure for bringing suit against non-complying States before the International Court of Justice at The Hague.

69. On the other hand, the dispositions contained in Subsection 4 of Article 7 of the Draft need to be complemented with the right of the parties (both of the complainant and of the State) to participate in the session, which could take on the form of a hearing, without prejudice to their right to confidentiality until a decision has been rendered. This propo-

sition should not prevent the Committee from holding closed-door sessions or deliberations.

## *VI Conclusions*

70. Progressive implementation is not applicable to all economic, social and cultural rights. There exists a group of these rights that can be implemented immediately.

71. The effective realisation of human rights in general, and of economic, social and cultural rights in particular, is linked to a political environment which allows for participation and stable democracy. Only in this environment can the effectiveness of these rights be guaranteed.

72. The justiciability of economic, social and cultural rights is closely tied to the determination of the minimum content of each right and of the minimum obligations assumed by States.

73. For this very reason, it is important to provide support and input to the international debates carried out on these issues.

74. The general systems of international vigilance which function on the basis of existing international instruments (American Convention and the International Covenant on Economic, Social and Cultural Rights) exist with the limitations imposed by the impossibility of presenting individual communications and reviewing individual cases.

75. The existing international mechanisms of vigilance and control have not been utilised much by the individuals and organizations in the States parties to the Covenant. It is necessary to promote the utilisation of these spaces by means of the preparation of alternative reports to those presented periodically by States under the Covenant, and their presentation before the Committee. It is also desirable - to the extent possible - to participate in the international debate regarding these issues.
76. The Universal system needs to adopt and approve an optional protocol which would allow the control of, and vigilance over, individual violations of economic, social and cultural rights.
77. An optional protocol should include all the rights recognised in the Covenant and not only some of them.
78. International vigilance requires the creation of proper indicators from the human rights perspective, founded upon the content of these rights and the obligations of States.
79. State constitutions should expressly recognise economic, social and cultural rights and grant the international instruments which codify these rights prevalence over internal laws and norms. Judges should be in the position to apply directly the development which the international community gives these rights.
80. The above-mentioned options constitute possibilities for developing the role of lawyers in the implementation of economic, social and cultural rights.



## ***New Path for Economic, Social and Cultural Rights***

***Diego Garcia-Sayan\****

In general, there is no discipline - at least in the social sciences - which can confine itself to a particular issue without depending on other disciplines, and be simultaneously coherent and consistent. In the area of fundamental rights, a similar situation exists. Although economic, social and cultural rights depend on the law, they do not constitute an issue only of concern to lawyers and human rights advocates.

Law - and human rights - are a part of complex institutional and social processes. Their nature, situation and evolution not only depend on the elaboration of substantive rights or on applicational procedures. Specific social and political phenomena tend to be the context and scene where certain rights are made or not made possible, or are interpreted in one manner or another.

Where economic, social and cultural rights are concerned, it remains obvious that implementation and justiciability constitute the key matter. What is the issue? How to ensure an effective protection of economic, social and cultural rights. This requires not only international but also domestic mechanisms

which include receiving complaints and dispensing justice and which go beyond those of legal and judicial spheres. There are other areas of reflection at the international as well as at the national and local levels, which have to do more or less directly with the possible applicability of these types of fundamental rights. This is likely to be the central scenario if we truly want to advance in this direction.

Firstly, I would like to briefly analyse some aspects of the implementation of economic, social and cultural rights at the international level. Taking such rights seriously means tackling political and social issues such as income distribution or the protection of vulnerable groups. There are various actors in the international arena closely linked to this issue, of which I will mention only three: international development and financial organizations, the private sector, and governments. At the global level, certain major issues that are closely linked to the ability to enjoy economic, social and cultural rights in most of the world need to be addressed. I will refer here to only three of these issues:

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- a. External debt. At present, the external debt of the Third World amounts to more than 400,000,000,000 US dollars. Such a sum cannot and, indeed, will not be paid by the Third World to those who have been lending it over the last two decades. This question should be, and must be, addressed if we are really to speak seriously about the enjoyment of economic, social and cultural rights in the Third World.
- b. Military expenditure. Currently, more than 90 per cent of the weapons traded on the world market are sold by the five permanent members of the Security Council. Weapons on the world market are one of the major sources of corruption of both political and, especially, military institutions. If this issue is not clearly and directly tackled, it is impossible to speak seriously about economic, social and cultural rights in the Third World.
- c. Agricultural policies. This is an issue which is very important for most developing countries and which, of course, requires further elaboration. The main problem resides in the policies which are implemented in this area by certain developed, often European, countries. While more than 130 billion dollars are being used each year in Europe to sub-

sidise local agricultural production, there is no way that similar products from the Third World can compete on the world market.

I mention these three issues only as examples. There are others which are equally important. But if we really want to change the current situation *vis-à-vis* economic, social and cultural rights, they are major political and economic issues that need to be addressed at the global level.

### *Multilateral Organizations*

International multilateral organizations such as the World Bank and the IMF constitute another element of this issue at the global level for they are *major actors in this area*. Increased respect for and improvement of economic, social and cultural rights cannot be achieved without dealing with policies of these major multilateral development and financial institutions. It is not only a question of exchanging information, as previously stated in the Limburg Principles,<sup>1</sup> but also of tackling some of the key policies imposed by these organizations.

After some of the disastrous effects of structural adjustments policies on the social conditions in most developing

1 § 96 of the Limburg Principles states:

"Consultations should be initiated between the Committee and international financial institutions and development agencies to exchange information and share ideas on the distribution of available resources in relation to the realisation of the rights recognised in the Covenant. These exchanges should consider the impact of international economic assistance on efforts by States parties to implement the Covenant and possibilities of technical and economic cooperation under Article 22 of the Covenant."

countries, along with the weakening of the State's capacity to deal with the major social issues, important developments have recently occurred in certain of the concerned institutions. These developments must not be underestimated. For instance, over the last few months, the World Bank and the Inter-American Development Bank have been referring to the need to "rebuild the State."

This approach is quite different from the traditional one which these organizations have promoted in previous decades; a sort of *laissez-faire* policy where the down-sizing of the State was the major goal and policy. The World Bank and the Inter-American Development Bank now seem to be raising the importance of the need to increase social spending and to ensure that social policies are a permanent part of States' policies and not only a question of the joint approach of certain governments. These two organizations have also referred to the need to introduce dramatic changes in the way in which States deal with issues such as unequal income distribution in the majority of developing countries.

In Latin America the issue of unequal income distribution was frequently discussed during the 1970s and even during the 1980s. According to World Bank figures, Latin America has the highest unequal income distribution in the world. However, in the last few years, local and national politicians, with very few exceptions, have neglected this important issue. Paradoxically, the Inter-American Development Bank and the World Bank are placing it on the agenda once again and providing concrete information about certain countries and their structural adjustment policies, where

unequal income distribution has become a major problem in political and social stability.

In general, it is no longer left-wing or left-centre politicians who are calling attention to this problem, but the World Bank and the Inter-American Development Bank. Questions concerning the control of military expenditure and corruption - which undermine any possibility of political stability or of real enjoyment of economic, social and cultural rights - are being raised by these institutions.

Nevertheless, it remains quite clear that not all these developments will be immediately translated into dramatic policy changes by the Inter-American Development Bank or the World-Bank. However, there are some concrete results. For instance, the World Bank now has an increasingly important programme on the promotion of judicial reform - a development which would have been extremely difficult to imagine five or six years ago. It could be argued that much of this is only rhetoric and does not yet imply a virtual and important change in the present daily policies of the World Bank. Yet the change of rhetoric does now exist and it is certain that such a change opens the way for human rights to find a place in development finance policies at both global and regional levels.

It will be impossible to achieve a major improvement in economic, social and cultural rights if this evolution is not seriously taken into account and if we do not manage to introduce, alongside such a change, certain alterations in global

development policies, along with placing the issue of human rights on the agenda in a convincing way. If these main issues are not dealt with, improvements in promoting and achieving such aspects as the working methods of the Committee on Economic, Social and Cultural Rights or the adoption of an optional protocol could remain totally irrelevant.

Bearing in mind the crucial role of these institutions, it is perhaps time to imagine what steps could be taken so that this new rhetoric, which opens a path for human rights, could be handled appropriately. I refer, for instance, to the possibility that an institution as important and as crucial as the World Bank might create a sort of Ombudsman, whose duty could be to follow up, not only a specific project but also more generally, for example, structural adjustment policies and their social and environmental effects. The Ombudsman could, for instance, deal with individuals and organizations as well as governments.

Many governments are highly conscious of the social and environmental effects of structural adjustment policies in their own countries. It would be an excellent opportunity to open this new door, to establish a kind of dialogue where the Ombudsman would not only receive communications from individuals or groups regarding the effects of certain policies, but could also counsel or advise governments on how to deal with the effects of adjustment and to implement the concept of the progressiveness of these rights.

The question of economic, social and cultural rights is so complex that to leave

it only to human rights bodies could be quite irresponsible, because these rights now have a major influence on the fate of the world. Whether such rights are violated or not, will not depend only upon what the human rights bodies do or do not do. Thus, the question must also be addressed by those organizations whose policies are crucial.

This is only one idea; what I am really proposing is to open a debate on the best mechanisms which could be suggested and promoted in response to the important change in the rhetoric which has been recently observed.

### *Justiciability*

With regard to the question of justiciability in particular, the first obvious step is to incorporate economic, social and cultural rights into the legislation of the various countries at the national level. In some cases, depending on the prevailing legal system, it could be enough simply to ratify the international treaties, which would then be automatically integrated in domestic law. In other cases, it could be advisable to promote the inclusion of those major substantive rights in the Constitution or in secondary law.

At any rate, it can be acknowledged that in the great majority of countries, in some way or another, key economic, social and cultural rights are now incorporated into the Constitutions or in secondary law, regardless of whether the countries concerned have ratified the International Covenant on Economic, Social and Cultural Rights or not.

Nevertheless, as many authors have stated, the question of justiciability still remains underdeveloped. Many factors contribute to this state of affairs. I will mention only three.

Firstly, the wording of certain provisions. For example, Article 15 of the Covenant refers to the right to enjoy the benefit of scientific progress. Such terms are so broad and vague that it is difficult to imagine a way in which the courts could be involved.

Secondly, international monitoring mechanisms. Their weakness and one of their consequences namely results in a lack of a core jurisprudence that could be used by national or local courts.

Last, but not least, the lack of an independent judiciary and of expeditious procedures is a very important issue in the majority of Latin American developing countries. Obviously, there is no way of achieving strong judicial actions or responses if there is no independent judiciary and if there are no speedy procedures which deal with the claims of groups or individuals. Certain rights can be invoked in courts of law very clearly. For instance, non-discrimination, equality and the rights of parents to choose the education of their child. However, the lack of independence or of speedy procedures will be a constraint.

Thus, it is important to consider as well the convenience of using quasi-judicial mechanisms, bearing in mind, as was stated in the Limburg Principles, that not necessarily all economic, social and cultural rights could be immediately justiciable. In fact, the issue of justiciability is

not confined and, indeed, must not be confined to judicial mechanisms and procedures. Justiciability should be dealt with in a broader manner. Quasi-judicial remedies could be very important. For instance, the involvement of institutions such as national ombudspersons whose procedures are, in principle, more rapid. And who, in many countries, are traditionally more independent than the judiciary.

Such quasi-judicial remedies could be much more accessible and effective. There are several recent and important examples in Latin America countries. I could mention Central American countries such as El Salvador, and to some extent Guatemala and Costa Rica, along with Colombia, where national the ombudsman is dealing with economic, social and cultural rights in a far more successful manner than that of the judiciary.

Very strong support should be given to independent ombuds-type institutions around the world and to promoting procedures concerning economic, social and cultural rights in these institutions on a case-by case basis with individuals or in a collective manner by associations, institutions, political parties, NGOs, Bar Associations or any sort of similar group of persons. Considering the problems which the judiciary in the majority of our countries face and the tendency to use very formalistic procedures, an excellent opportunity arises to strengthen economic, social and cultural rights through these types of quasi-judicial procedures.

It is abundantly clear that there is no handy or easy solution to the implemen-

tation of economic, social and cultural rights. Any real solution or answer would require imaginative responses that tackle all the issues concerned, along with a coherent strategy involving all actors in the struggle. If this were to occur, we would be on the right track towards dealing with this complex issue, and activities in the legal, judicial or quasi-judicial area would eventually be successful.

# ***The Role of Lawyers in the Realisation of Economic, Social and Cultural Rights: A General Overview***

**Tokunbo Ige\***

The role which lawyers must play in the realisation of economic, social and cultural rights stem out of their professional obligations in ensuring respect for the Rule of Law.

The nature of these rights as an integral part of fundamental human rights cannot be overemphasised especially as they continue to be neglected at all levels by actors in the field of human rights. The Universal Declaration of Human Rights adopted in 1948, in its preamble states that "every individual and organ of society" have a duty to protect these rights.

The Basic Principles on the Role of Lawyers adopted at the end of the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in Cuba, 1990 and welcomed by the General Assembly of the UN in 1990<sup>1</sup> in many respects endorsed the basic principles of the Rule of Law adopted in Lagos in 1961 and elaborated upon in the Rio Resolutions of 1962.<sup>2</sup>

In its preamble, the Basic Principles on the Role of Lawyers state that "ade-

quate protection of human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession." It states further that "professional associations of lawyers have a vital role to play ..... in providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest."

The protection of economic, social and cultural rights in today's world is largely being carried out at the international level, without much political will. The overstated assumptions that the protection of these rights are costly, that they are not justiciable and the problem of defining these rights *qua* rights have contributed largely to this situation.

Proponents of the non-justiciability theory have based their arguments on the validity of these rights as opposed to their applicability, claiming that these rights are not capable of being invoked

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1 See General Assembly resolution 45/121 of 14 December 1990 and resolution 45/166 of 18 December 1990.

2 See ICJ 1966: *The Rule of Law and Human Rights: Principles and Definitions*.

in the courts. The Limburg Principles of 1986 made an attempt to clarify this situation by emphasising that the International Covenant on Economic, Social and Cultural Rights (ICESCR) creates international legal obligations which should be interpreted in good faith in accordance with the provisions of the Vienna Convention.<sup>3</sup> The Principles, while accepting that the full realisation of these rights is to be attained progressively, states that the application of some of them can be made justiciable immediately, while others can become justiciable over a period of time.

Lawyers can be very useful in asserting this position especially at the national level. The constitutions of many countries provide guarantees for some economic, social and cultural rights such as the right to work, to education and adequate health facilities.<sup>4</sup> The degree to which these rights can be made justiciable vary, and most legal systems do not have any mechanism specifically committed to the promotion and protection of these rights. Bar associations can help to push for the establishment of such mechanism whose primary role will be geared towards promoting the acceptance of these rights as fundamental and monitoring their protection. In some other countries where international treaties are incorporated into domestic law through an enabling law, the treaty provisions can become applicable in the law courts.

Testing the justiciability of these rights through the courts as has been done in India can help to build the necessary jurisprudence for ensuring global protection of these rights. The Social Action Litigation approach in spite of the controversy it has generated, has helped to inspire legislative reform and creative thinking for the protection of economic, social and cultural rights in India.

Existing jurisprudence has shown that economic, social and cultural rights can be protected through treaties on civil and political rights. The UN Human Rights Committee and the supervisory organs of the European Convention of Human Rights (ECHR) have used this approach to protect some elements of economic, social and cultural rights.<sup>5</sup> These bodies have used the non-discrimination clause in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and the right to a fair trial in Article 6 of the ECHR to strengthen the judicial protection of economic, social and cultural rights. The Limburg principles urge all organs monitoring the ICESCR to pay special attention to the principles of non-discrimination and equality before the law when assessing States parties' compliance with the Covenant.

The achievements of the Committee on Economic, Social and Cultural Rights in developing a legal framework for the

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3 Vienna Convention on the Law of Treaties adopted in 1969

4 See generally, Constitutions of India, Ireland, Namibia, Uruguay

5 See M. Scheinin, 'Economic And Social Rights As Legal Rights' Chapter 3 in Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights: A textbook* (Martinus Nijhoff, Dordrecht, 1995)



protection of these rights is an important step in international law. The adoption of an additional protocol to the American Convention on Human Rights in 1988 and the recent changes to the enforcement mechanisms of the European Social Charter are encouraging steps towards strengthening the legal nature of the obligations created by these treaties.

While we await the establishment of an individual complaints procedure at the level of the United Nations, violations of economic, social and cultural rights can be addressed through already existing procedures at the national and international levels. The amount of case law developed by the International Labour Organization (ILO) through its complaints procedure is highly commendable.

The specific nature of the rights in question requires the adoption of new strategies for ensuring their protection. As Mr. Danilo Türk concluded in his report "while legal approaches can obviously achieve a good deal, these must be coupled with an examination of broader social trends and political realities"<sup>6</sup> especially at the national levels. Some of these realities will require that lawyers team up with other professionals such as statisticians, economists, social workers and possibly ombudsmen to define the rights and set guidelines for monitoring their implementation within national jurisdictions. Such guidelines may include a judicial determination as to who carries the obligation to protect,

respect and ensure the fulfilment of the right in question and even the minimum conditions for the realisation of the right.

This may be a practical way of trying out the suggestions made in the Türk report about creating space instead of more legal standards. For Türk, "[C]reating political, legal, social and economic space, implying the expansion of access to space, decision-making, to individual, family and community choices and to *de facto* opportunity to assert, demand and claim economic, social and cultural rights are processes at least as critical to the attainment of these rights as is the creation of new legal or quasi-legal standards."<sup>7</sup> This will definitely not be an easy exercise for lawyers to be involved in; the creation of space being much less concrete than standards and more difficult to monitor with precision, hence the need for the multi-disciplinary approach.

According to Martin Scheinin "it is evident that effective protection of economic, social and cultural rights requires international and domestic methods of protection other than complaint procedures or justiciability in general. This is primarily due to the strong, even primary role of legislative, budgetary and other *positive State obligations* in the realisation of these rights. Still, it is an important aspect of the effective protection of social and economic rights, or at least many of them, are understood as legally binding individual and collective rights. Thus, the development towards justiciable

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6 See doc E/CN.4/Sub.2/1992/16 par 171

7 *Idem* par 188

social rights on an international, regional or national level is a *contribution* towards the effective protection of economic, social and cultural rights in general. The acknowledgement of their "justiciability" gives new impetus to a general understanding of their legally binding nature and hence, also to the realisation of positive State obligations flowing from them."<sup>8</sup>

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8 M. Scheinin *loc. cit* (note 5) p. 62.

## **Rights of the Poor, Poor Rights ? Reflections on Economic, Social and Cultural Rights**

**Pierre-Henri Imbert\***

During the past few years, the question of poverty in the Western democracies has been the subject of many debates and analyses; politically, several new steps have been taken by governments, as recently seen in France through the establishment of a minimum income support allowance (*Revenu minimum d'insertion*). As far as the media is concerned, public opinion is becoming increasingly sensitive to the extent and seriousness of the phenomenon. In the following pages, we should like to share the thoughts that inspire us in the recognition of the phenomenon of poverty and show why and in what ways this should lead us to reconsider its position in the recognition of economic, social and cultural rights as human rights. To do this, we will rely heavily on the position that the [French]

Economic and Social Council (ESC) [*Conseil économique et social* - CES] adopted on 10-11 February 1987, on the basis of a report prepared by Father Joseph Wrésinski, the founder of the International movement ATD *Quart-Monde Grande pauvreté et précarité économique et sociale*.<sup>1</sup> Indeed, as well as the wealth of important information contained within them, these documents constitute, in our opinion, a decisive contribution to a new approach to human rights that the Western States should adopt.

As a starting point, we can assume that the adoption itself of the ESC opinion could seem to be a further indication of the acceptance that poverty and social

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1 The views and the report of the Economic and Social Council (ESC) are the subjects of a publication in the *Journal Officiel* dated the 28 February 1987. Within this present study, the indication of pages refers to that study.

exclusion are human rights violations.<sup>2</sup> Such a statement seems obvious, when we consider that the central notion of human rights is that of dignity of human beings.<sup>3</sup> However, this acceptance is very recent and this assumption is a long way from being generally accepted. We have still not completely left behind the mentality that appeared several years after World War II. In the first instance, particularly through the Universal Declaration, a global vision of human rights has been confirmed, including civil

and political rights and economic, social and cultural rights.<sup>4</sup>

However, a much more restrictive approach became apparent: the promotion of human rights was fundamentally a reaction against what had just occurred, they were above all perceived as an instrument for peace, an antidote against the return of totalitarianism. Hence the priority accorded to civil and political rights.

- 2 "Uncertainty is the absence of one or several rights ..... that allow persons and families ..... to benefit from their fundamental rights" (Views of ESC, p.6; also see the report on at 63); "Where human beings are condemned to live in poverty, human rights are violated" (Words of Father Wrésinski engraved on a commemorative plaque laid on the 17 October 1987 on the esplanade of the Trocadero, known since then as the "Esplanade of liberties and human rights"; "Poverty: a serious new phenomenon is a violation of human rights" (chapter I.3 of the report by the Secretary-General of the Council of Europe on "Social Cohesion," 6 May 1987); "Considering the fact that social exclusions constitute the real gaps in the fabric of human rights in societies which intend to consider, as they rightly should, these rights as fundamentally theirs" (The resolution on the fight against poverty in the European Community, adopted on 16 September 1988 by the European Parliament).
- 3 In the document addressed in October 1987 to the Committee of Ministers of the Council of Europe, the Committee for human rights wished to "stress that human rights and fundamental liberties flow from the recognition of the inherent dignity of humankind and that the respect of this dignity implicates the protection not only of civil and political rights but also of economic and social rights." This notion of dignity, which is not in the Declaration of 1789, has been accorded, in the Universal Declaration of Human Rights, the Preamble of rights: "All human beings are born free and equal in dignity and rights" (Article 1; see also the first commentary on the preamble).
- 4 See in particular Article 22 of the Universal Declaration: "Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." It is interesting - especially today - to remember that the title of this article was inspired, among other sources, by an intervention of the representative of the United-States, who had indicated that his delegation was in favour of the inclusion of economic, social and cultural rights in the Declaration, because "no individual freedom may exist without economic security and independence. Men in need are not free men" (A. Eide, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his report on "The right to sufficient sustenance as a human right" E/CN.4/Sub.2/1087/23 of 7 July 1987, note 62). In the same context, we may recall that one of the four Freedoms mentioned by President Roosevelt in his famous message to Congress on 6 January 1941 was "to not be in need." In their joint Declaration of 22 August 1941, better known as the Atlantic Charter, the President of the United-States and the Prime Minister of the United Kingdom "hope, after the final destruction of the Nazi tyranny, to see peace established..... which will guarantee to all people, in all countries, the possibility to live free of fear and poverty." We know that these last words can be found in the Preamble of the Universal Declaration and the two International Covenants of 1966.

As, for example, the debates during the elaboration of the European Convention on Human Rights show, this priority was only to be temporary,<sup>5</sup> but has always been maintained for two essential reasons. Firstly, in the West, it was often considered that economic and social rights would flow naturally out of economic progress. Poverty was considered, at best as an accident, a temporary phenomenon, and at worst as an inevitable consequence of global development in society. The idea that those who suffered such a situation were partly to blame for their misfortune was not absent either. It is this view of things that is perhaps evolving today, with the explosion of unemployment and the emergence of the *nouveau pauvre* ("new poor"). However - and this is the second reason - there is a strong and persistent tendency to maintain a clear difference between civil and political rights on the one hand and economic, social and cultural rights on the other.

We know the elements of this opposition, which have become so traditional

that they can almost be viewed as a postulate: rights - freedoms or autonomy/rights - obligations or benefits; Rights of ...../ rights to .....; police State/welfare State; etc.<sup>6</sup>

Such distinctions, which correspond to a certain reality, are not useless. They become dangerous from the moment when simple intellectual tools lead to a clarification of the phenomenon; they end up as political choices and create a hierarchy between rights, with the indisputable conclusion that economic, social and cultural rights cannot be considered in the same way as civil and political rights. This is why it is still so difficult today to consider that a violation of the three former corresponds to a real violation of human rights. It is therefore not without grounds that the main arguments put forward to demonstrate this opposition between rights should be analysed.<sup>7</sup>

a) Economic, social and cultural rights would not be justiciable, that is to say susceptible to be submitted to the control of a judge. This was the

5 In his report presented to the Consultative Assembly of the Council of Europe on 5 September 1949, on behalf of the Commission of Judicial and Administrative Queries, Mr. Teitgen wrote: "It goes without saying that 'professional' freedom and 'social' rights, of prime importance, should also be, in the future, defined and protected, but who would not understand to start at the beginning, to guarantee that in the European Union there be political democracy, then to coordinate our economies before adopting the generalisation of social democracy?" (*Gathering of preparatory works*, vol. I, p. 219). Let us also remember that in the Preamble of the European Convention on Human Rights, signatory governments declare themselves "committed ..... to take the first proper steps to insure the collective guarantee of certain rights contained in the Universal Declaration." (emphasised by us).

6 J. Rivero, *Les libertés publiques* Paris, PUF., tome 1, 5th edition (1987), at 118-124; G. Soulier, *Nos droits face à l'Etat*, Paris, Seuil, Collection "Points-Politique," n° 113, 1981, at 47-49.

7 In a study on the European Convention and the rights of the most destitute (*La Convention européenne et les droits de l'homme des plus démunis*), which we found out about after having finished ours, Mr. Xavier Dijon proceeded to carry out a very precise analysis of objections of a legal and political nature put forward against the recognition of human rights in their economic, social and cultural facets. *Journal des tribunaux* (Brussels), n° 5485, 10th December 1988, p. 716-722.

essential reason cited to oppose a draft protocol that - following the solemn Declaration on Human Rights of 27 April 1978 - should have added such rights to the European Convention on Human Rights.<sup>8</sup> That these rights are already guaranteed by most national legislations and are often the subject of judicial control was overlooked.<sup>9</sup> It was also forgotten that the main right planned to be included in the Convention (i.e. equal salaries for men and women doing the same work) had already given rise to an abundant jurisprudence at the Court of Justice of the European Communities.

The weakness of this argument appeared very quickly, especially as it was able to be easily replaced by that of being not opportune. Experts given the task of elaborating the draft protocol ended up admitting that from a technical point of view, it would be possible to include certain rights of an economic, social and cultural nature in an additional protocol to the European Convention on Human Rights. However, such an instrument did not seem favourable to most of them for several different

reasons (the recent evolution of jurisprudence, an overload of work for the controlling organs and, especially, the unwillingness of States to see their existing obligations in this area increased).

- b) Economic, social and cultural rights involve a necessary, and frequently important, State intervention for their realisation; one could hence think that an extension of these rights, which can only be seen as a reinforcement of the powers of the State, would, in turn, represent a danger for democracy. This state of affairs would constitute a negation of the philosophy that permeates civil and political rights, the realisation of which would be immediate through their proclamation alone and which would require from the State a mere duty to abstain.

Experience has demonstrated that this representation is far from the reality. Because of this, social rights, such as the right to strike, to participation in companies, and trade union rights in general, depend upon the same legal regime as the classic 'liberties.' In contrast, and especially, as was recalled several times by the

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- 8 On the works relating to the draft Protocol (unfortunately most are confidential), see in particular: Recommendation 838 (1978) of the Parliamentary Assembly and its motivations (Doc. 4213), as well as the report presented by Mr. A. Berenstein during the Conference on Economic and Social Rights in Western democracies (Strasbourg, 5-6 November 1981, Doc. A S/Jur (33) 28).
- 9 In an article devoted to the Universal Declaration, Mr. René Cassin wrote: "It is easy to note that, in a number of countries, economic, social and cultural rights may, once they are defined, become the subject of a legal action on behalf of the parties that was previously illegally rejected or alternatively, a request for indemnities (right to social security, health insurance, family allowances, minimum salary or to a minimum old age pension, redundancy payment, etc.)." ("Twenty Years After the Universal Declaration - Liberty and Equality," *ICJ Review*, 1967, No. 2, at 12).

European Court of Human Rights, many civil rights entail for their realisation positive actions by the State.<sup>10</sup> Indeed, this criteria of intervention by public powers makes the difference between these two categories of rights seem more important than it is.

As for the idea that the development of economic, social and cultural rights could lead to a weakening of the protection of civil rights and put democracy in danger, we might be led to believe that only the first of these rights could present such a risk. We must remember, however, that human rights came not from an opposition to power in itself but to the arbitrary. Power seemed in fact to be the best guarantee of the order

necessary for the flourishing of individual freedom. In the purest concept of liberalism, the State is the servant of society. But this service does necessarily imply its passivity: it demands rather an active protection of freedom: the policeman becomes a tutor, more or less well inclined.<sup>11</sup> It would, therefore, be a mistake to think that it is the social rights that introduced the State to the problems of human rights. It was already so.<sup>12</sup>

Let us look at the situation in Western society today. Decreases in areas and attitudes of freedom are becoming painfully apparent - "the exuberance of regulations, the infinite complexity of bureaucratic formalities, the multitude of controls, form a web of constraints, restric-

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10 See in particular the following cases: *The Belgium Linguistic Case* (23 July 1968), series A, n° 6, § 7; *Marckx Case* (13 June 1979) series A, n° 31, § 31; *Airey Case* (9 October 1979), series A, n° 32, § 32; *Campbell and Cosans Case* (25 February 1982), series A, n° 48, § 37; *X and Y v. Netherlands Case* (26 March 1985), series A, n° 91, § 23; *Abdulziz, Cabales and Balkandali Case* (28 May 1985), series A, n° 94, § 67; *Rees Case* (17 October 1986), series A, n° 106, § 35-37; *Johnston and others Case* (18 December 1986), series A, n° 112, § 55 and 75.

From its first general observations, made in accordance with paragraph 4 of Article 40 of the Covenant relating to civil and political rights, the Committee on Human Rights wished to "attract the attention of member States to the fact that the obligation imposed on them by the Covenant was not limited only to the respecting of human rights, but that these States also committed themselves to ensuring that these rights are enjoyed by all persons in their jurisdiction. This obligation demands that member States take specific measures to allow individuals to enjoy these rights and to stress that certain articles "demand not only protective measures, but also constructive measures aiming to ensure the positive benefiting of these rights, which cannot be done by the simple institution of these laws" general observations 3/13 and 4/13, report by the Committee on Human Rights, Doc. NUA/36/40(1981), at 118; see also, *infra*, note 22, as well as the following studies: F. Jhabvala, "On human rights and the socio-economic context," *Netherlands International Law Review*, 1984, at 149-182 (especially, at 160-169); P. Alston et G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly*, 1987, at 156-229 (especially at 183-186) and the report of Mr. K. de Gucht on behalf of the Institutional Commission of the European Parliament on the Declaration of Fundamental Rights and Liberties, Doc. A2-3/89/B dated the 20 March 1989, at 31, 32 and 34.

11 G. Burdeau, "Le Libéralisme," Paris, Seuil, Collection *Points-Politique*, n° 96, 1979, at 42-51 and 164-175.

12 J. Mourgeon, "Les droits de l'homme," Paris, P.U.F., Collection *Que sais-je ?*, n° 1728.

tions and 'interdicts' which slowly, in successive increments, tighten around the individual.<sup>13</sup> If economic, social and cultural rights are present in this evolution, it is obvious that they are far from being the only ones or even play a determining role.<sup>14</sup> In any case, how many regimes became totalitarian following a disproportionate increase in the Welfare State ?

In general, it would appear that trying to oppose a social democracy with a political democracy can lead only to stalemate.<sup>15</sup> The only difference between them is that between an affirmed freedom and an acquired freedom. And, in either case, we do not leave the area of human rights (how could it serve as an alibi to inequality and injustice ?) or the area of democracy (which fundamentally aims at allowing humankind to con-

trol its own destiny). We must not fall into the trap of a "pure" conception of democracy - but, in fact, an abstract and theoretical one - which would cause us to reject or view with suspicion any possible solutions, under the sole pretext that they would imply an intervention of the State: once a government reduces its contribution to the system of social protection, inciting its citizens to rely more on private insurers, do we really have the feeling that democracy has progressed as a result of State disengagement ?

c) Economic, social and cultural rights would be "less fundamental" than civil and political rights. In fact, presented as being not inherent to the human being, they would be more targeted objectives than rights to be respected.<sup>16</sup> This theory of the sec-

13 J. Robert, "Les Libertés dans les démocraties occidentales," *Encyclopaedia Universalis, Universalis* 1978, at 138-142; "Les libertés publiques dans les sociétés libérales," *Encyclopaedia Universalis, Universalis*, supplement II (*Les enjeux*), 1984, at 796-803.

14 It is significant that, that in his analysis of the present decline of liberties in Western democracies, Professor Robert seems to wish above all to show the dangers resulting from the increasing hold of technology and medical progress. Moreover, in the preface of the last edition of his work on public liberties, he adds a new reason for this decline: the absence of the most basic economic, social and cultural rights for certain people (*Libertés publiques et droits de l'homme*, Paris, Montchrestien, 4th edition, 1988, at 2).

15 See in particular the analysis of Claude Lefort : "Droits de l'homme et politique" in *L'invention démocratique*, Paris, Fayard, 1981 (*Le livre de poche* . Biblio-Essais, n° 4002, at 45-86); "Les droits de l'homme et l'Etat providence," in *Essais sur la politique*, XIX - XX siècles, Paris, Seuil, 1986, at 31-58; "La pensée du politique," in *A quoi pensent les philosophes*, Revue *Autrement*, n° 102 November 1988, at 192-199. See also L. Ferry and A. Renaut, 68-86. *Itinéraires de l'individu*, Paris, Gallimard, 1987, especially, at 115-127.

16 The expression "être en fin de droits," an absolute alienation of human rights, is very revealing in this conception. It is surprising to see with what ease we have become used to hearing that human beings have "exhausted their rights."



ondary nature of economic, social and cultural rights<sup>17</sup> - which only reinforces the idea that their violation is less serious than that of civil and political rights - often relies on such examples as: is the outlawing of torture as important as social security payments? The reply - No - seems to go without saying. However, we know that for the poorest elements of society, the absence of social protection could be truly destructive. Leading on from this example, that illustrates the opposition between social and civil rights, we must not forget another question at the heart of these matters: could we put the forbidence of torture on the same level as the length of the procedure<sup>18</sup>? Most of all, is it utopian to think that if corporal punishment in a school is degrading,<sup>19</sup> so is living in a slum? In fact, even today, the notion of

"degrading treatment," in Article 3 of the European Convention on Human Rights,<sup>20</sup> is seen only through the *relationship* between persons and not as resulting directly from *situations*, particularly from extreme poverty.

In a passage - rightly famous for being innovative - contained in the Case of *Airey*, the European Court on Human Rights underlined the fact that if the Convention "Establishes mainly civil and political rights, many of them have extensions of an economic and social character. With the Commission, the Court does not see it as necessary to separate such and such an interpretation for the simple motive that by adopting it we would risk stepping into the sphere of social and economic rights: there is no watertight barrier separating

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- 17 One has to note the shift in emphasis that has occurred: from the idea of different rights we have reached that of rights of lesser importance. On the international level, economic, social and cultural rights are the subject of rules (the Universal Declaration notwithstanding) and mechanisms of control that are not only particular but also far less rigorous and stringent than those that have been designed for civil and political rights. However though - as evidenced by the example of the failure of the reforms that aimed at ameliorating the system of control of the European Social Charter, particularly through the adoption by the Committee of Ministers of individual resolutions - this lower level of protection is not a direct consequence of the so-called particularism of these rights. For an illustration at the national level of the phenomenon, see for example, C. Deves, "Le Conseil constitutionnel et la république sociale", *Le quotidien juridique*, No. 120, 29 October 1988, at. 3-11.
- 18 Moreover, when considering civil and political rights, don't we always distinguish a "core nucleus" made up of those rights that, according to all the terms of human rights related treaties, cant ever be derogated from?
- 19 According to the European Court of Human Rights, the criteria that may be applied to assess whether a judicial corporal punishment is or not degrading are equally applicable in cases of corporal punishment in schools (European Court of Human Rights, *Campbell e Cosans* decision of 25 February 1982, Serie A, No. 48, p.13, § 29). The European Commission of Human Rights decided that Article 3 of the European Convention on Human Rights (see note 20) had been violated in connection to corporal punishment in a school (request No. 9471/81, *Maxine and Karen Warwick V. United Kingdom*, report of 18 July 1986, § 79-89).
- 20 Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

this from the domain of the Convention."<sup>21</sup> One would wish that the relevant institutions would follow through to the fullest logical extent on this taken position, which can only be an more general interpretation of the dispositions in Article 3.

Similar thoughts could be expressed on the subject of the right to life (Article 2 of the European Convention on Human Rights), until now reduced to the right to not being deprived of life. If it is true that at the heart of the philosophy of human rights there is the notion of dignity, we must admit that survival is not life. Only a life full of dignity deserves to be named as such, for oneself and for one's children.<sup>22</sup> That is to say - and this must be strongly underlined - that great poverty is not, in the first place, an economic or

a financial problem. Such an approach can end only - as can be seen in many countries - in the simple management of poverty. *The Restaurants du coeur* [charitable restaurants in France] are all well and good, but they are also scandalous: can Europe really be credible as regards human rights if, in this area, it relies on charities and "good works"? Are our democracies ready to admit that - as we are relentlessly reminded by Father Wrésinski - when fighting great poverty in societies founded on human rights, it cannot be left to governments to decide what is relevant to the poor? It must be understood that if we want to avoid building societies on different levels, we must give people the means to be informed and to elaborate a common opinion, and give it worth, that is to say the means to be heard as full citizens of society.<sup>23</sup>

21 European Court of Human Rights, *Airey* case, decision of 9 October 1979, Serie A, No.32, p.15. §26.

22 In its general observations on Article 6 of the International Covenant on Civil and Political Rights, the Committee on Human Rights notes that "the right to life has been too often construed in a narrow fashion. The expression "right to life is inherent to the human person" cannot be understood in a restrictive way; furthermore the protection of this right obliges States to adopt positive measures." (General Observation 6(16), report of the Committee on Human Rights, Doc. UN A/37/40 819829, p.104, §5). During a round-table on human rights organized by UNESCO (Oxford, 11-19 November 1965), Mr. René Cassin declared that human beings have an indivisible personality. Their right to life requires not only a social order where they can be kept safe from terrorism and the risk of summary execution. They should also be able to find subsistence through work and the active support of their fellow human beings, for them and their families, if they are unable to produce." (UNESCO, *Human Rights Education*, Vol. IV, 1985, at 63).

23 "Recognising the most destitute as partners. Partnership is a necessary condition for the development of the entire population, but the most destitute are not acquainted with it; it depends upon the will of those who have been elected and on the main actors of social life to create conditions propitious to their participation. It is only if the latter take adequate measures to inform them and take their opinion into account that the most destitute will be able to exercise effective citizenship, that is undertake to meet their obligations and be offered recognition as subjects of law which would, in turn, enable them to exercise direct control over their responsibilities." Avis (opinion) of the CES, at. 9). See also A de Vos van Steenwijk, "Des citoyens exclus de la démocratie," *Le Monde diplomatique*, March 1988, at 11.

In giving a rather less restrictive interpretation to the notions of "life" and "degrading treatment,"<sup>24</sup> the responsible institutions of the Convention and the Western States in general would show that they have understood the danger of closing themselves in with sterile distinctions between categories of rights and would do nothing else but give full effect to the indivisibility and universality of human rights.

It is certainly the strongest idea in the report of the Economic and Social Council, that the absence of economic, social and cultural rights would compromise civil and political rights. There are no two independent, groups of rights, some being more respectable than others. They are in fact deeply complementary and closely juxtaposed. Poverty does not

consist only of a denial of economic, social and cultural rights but also of a violation of civil and political rights.<sup>25</sup> It would be wrong to think that the enjoyment of the latter rights can be independent from the economic or social context, even in developed countries.<sup>26</sup> Economic, social and cultural rights are not "supplements," a sort of luxury that the collectivity would only have to worry about in better days;<sup>27</sup> They are an integral part of the fundamental values of all true democracies: according to the maxim of the poet Milton, "amongst unequals no society."

It is in fact from the benefits of all human rights that the poor are excluded. A reality that casts a new light on the universality of human rights, a universality which is more often than not divided in

24 In his study (*supra*, note 7), Mr. Xavier Dijon gives other examples of the dispositions of the European Convention on Human Rights that deserve a more generous interpretation, and in particular of Article 14 which contains the principle of non-discrimination.

25 In its report, the CES highlights "the interdependence between economic, social and cultural rights and civil and political rights. In the absence of minimum security in the fundamental domains of existence, a part of the French population cannot benefit from the means of social insertion and in particular through participation in associations. Because s/he lacks an official residence, a citizen cannot obtain his/her voting card. Because s/he cannot read, s/he cannot get acquainted with political programmes," (p.92). The report recalls the "conditions that must be met for civil and political rights to remain accessible. It is not sufficient for a State to abstain from intervening in any way to enable all citizens to exercise their right to freedom of thought, association, travel and participation, in particular when a situation of economic, social or cultural disadvantage suddenly afflicts them" (*id.*; see also, p. 95 chapter on "poverty and family dislocations" (*pauvreté et dislocations familiales*) and the opinion (*avis*) at 6-7. Already in its Recommendation 893 (1980) relative to poverty in Europe, the Parliamentary Assembly of the Council of Europe underlined that the situation of the poorest members of the population had repercussions beyond material difficulties which meant (for instance) exclusion from society, a lack of participation in political and cultural life, and difficulties to integrate the educational system).

26 On this subject, see the strong words of F. Jhabvala, *op. cit.*, *supra*, note 10.

27 On the contrary, it is precisely when society encounters increasing hardships that it becomes necessary to help with utmost care and solicitude those who risk marginalisation. It is in periods of tension that respect for human rights finds its real dimension. See the report of Mr. Francis Blanchard, Director-General of the International Labour Organization at the 75th session of the International Labour Conference, June 1988 (*Human Rights, a Common Responsibility*, at 10-13).

its geographical dimension. The European Convention on Human Rights does not seem to hold this narrow concept of universality as nearly each of its articles starts with "All persons," "No one shall ...," "But what about the reality of access to rights for everyone, even the most unfortunate? Does not this "all" become all too easily "the greater number;" is it not too general an entity when we know that there is a whole category of people for whom "[M]ake worth your rights" does not mean much, which doesn't have any contact with justice unless it means to be "taken before" it, which does not possess the words to formulate a demand?<sup>28</sup> More generally speaking, if it is true that human rights are rights recognised for all persons

because they are human beings, how is it that some human beings may not exercise these rights due to a lack of means?<sup>29</sup>

We have now reached the heart of the matter, because it is in fact a concept of humankind that is in question in the violation of human rights of the poor: if these rights are not respected, it is fundamentally because the humanity of these men and women is not truly recognised. "At the very bottom of the social ladder, everything happens as if it were no longer a matter of being a human being who has rights, but rather the fact that it is these rights that confer the title of human being."<sup>30</sup>

28 Effective access for all to the law and protection institutions (national and European) certainly constitutes one of the domains where progress must be accomplished today in Western States so as to reinforce human rights protection. It is necessary to go beyond the problem of legal assistance and think about the right that could be granted to certain associations to act in defence of the rights of persons who are particularly destitute. In its report (p.93), the CES mentions a case where the French NGO ATD *Quart Monde* was able, after years of legal proceedings, to represent a family. It is noted, in that regard, that "poverty does not constitute a condition which can give rise to a particular defence, as is the case for the victims of war, child martyrs, consumers or even animals." However, even though the NGO's demand had been accepted by a domestic tribunal, it is probable that it would not have been by the Strasbourg institutions. In its opinion the CES recommended that associations that work for the destitute have *locus standi* in such cases (p.24). On 5 May 1987, the non-governmental organizations in consultative status with the Council of Europe adopted a motion on "the possibilities for NGOs to initiate, at the national as well as at the international level, procedures in the interests of human rights protection." (Doc. H/NGO 8879 4).

On the general question of access to justice, see the remarkable report presented by Mrs. Catherine Lardon-Galeote, President of the *Association européenne d'avocats pour l'accès au droit des plus démunis*, at the congress of the International Movement of Catholic Jurists (*L'assistance judiciaire en Europe. L'accès à la justice*, Strasbourg, 28-29 November 1987), and the article by J.-P. Jean et F. Guichard: "Justice as an amplifier of social divides," (*La justice comme amplificateur des clivages sociaux*,) *Le Monde diplomatique*, August 1988, at 14-15.

29 In its report (p. 62) the CES asks the following question: "In our minds, do these rights really concern all human beings? ... As if, beyond a certain state of inequality and poverty, human beings would appear to be so inferior that we would not be certain that they possess equal rights anymore. Or that the efforts that would have to be made to enable them to regain those rights would appear to be so costly that, in the name of the well being of the greater number, we would admit injustice and exclusion for the destitute minority."

30 H. De Soos: "A Theoretical Approach to Human Rights Violations at the Bottom of the Social Scale" (*Approche théorique sur la violation des droits de l'homme au bas de l'échelle sociale*), in *Le quart monde face aux droits de l'homme*, Revue Igloos, Quart-Monde, Editions Science et Service, No. 108 (1980), at 112.

As we said at the beginning of these thoughts, the sheer magnitude of poverty in Western democracies seems to have led to an evolution of mentalities. There are many who have noticed that poverty does not only happen to "others" - who belong to another world - nor to those who have voluntarily placed themselves at the margins of society. And we (re)discover extreme poverty - in fact misery - in which millions of people "live" and who, such as the lepers of the middle ages, are kept on the outskirts of our cities. The "Fourth World" is recognised, since it has a name; but what an admission ! The West is, therefore, on the point of realising that it might have estimated rather too quickly that, for economic, social and cultural rights, it had reached a maximum level. It knows that it is no longer possible to wait for time to allow each person to benefit from the fruits of growth and that poverty is not a transitional phenomenon, in the process of extinction. Quite the opposite. The paradox of a world which has never produced such wealth and known such poverty.<sup>31</sup> A paradox which seems unbearable to a growing number of people and which could well lead to changes in

the style of life, as it is obvious that the solution cannot lie solely in expenditure by public powers.

In the previous pages, our objective was to invite the jurists to participate in this evolution. Many of them have already denounced the artificial character of the opposition made between civil and political rights and economic, social and cultural rights. We must go further and show the danger because it hides concrete realities that are often tragic and which do not allow themselves to be easily enclosed in categories. Great poverty reveals the truth of our speeches on human rights, especially on their indivisibility. Jurists should help to rid speeches of their ideological substance. There are no capitalist liberties and Marxist rights but only human rights, that is to say rights from which all people should benefit so as to live a life of human dignity. We can never stress enough that this notion of dignity must be the only point of reference, above all utilitarian considerations, if we really want to get rid of the obstacles that prevent human rights from being inalienable, therefore unconditional.<sup>32</sup>

31 See M Beaud, "Sur les causes de la pauvreté des nations et des hommes dans le monde contemporain," in *Le Monde diplomatique*, November 1988, at 10-11.

32 In Belgium there are many studies by jurists that develop similar ideas. See in particular, amongst the most recent: X. Dijon, *supra*, note 7; J. Fierens, "Droit à l'aide sociale et droits de l'homme," *Journal des Tribunaux*, No. 5286, 10 March 1984, at 169-176; F. Ost, "Théorie de la justice et droit à l'aide sociale," in *Individu et justice sociale*. "Autour de John Rawls," Paris, Seuil, *Points Politique* collection, No. 132, 1988, at 245-275. The studies were prompted to a large extent by the Belgian laws of 7 August 1974 and 8 July 1976 on social aid. It is to be hoped that the recent French law of 1 December 1988 on the "minimum income support allowance" (*Revenu minimum d'insertion*) will generate a similar phenomenon. From now on we consider it encouraging that for the first time - to our knowledge - it is written in a manual on public liberties that "one of the ways to violate human rights is for a State to leave too much of the population in a situation of poverty, and sometimes, misery .... The absence of economic, social and cultural rights ineluctably compromises civil and political rights." These phrases appear in the preface written by Professor Robert for the last edition of *Libertés publiques et droits de l'homme* (*supra*, note 14.). It remains to be hoped that in the next edition such opinions will be further developed and integrated in the work's corpus that will shed new light on most of the liberties studied.

Another need appears: that of no longer considering the phenomenon of poverty within a restricted national framework but rather on the larger European level, because it is in fact Europe in its entirety that is concerned and not only each separate State. With this in mind we may reveal certain worries concerning the famous "internal market" promised for 1993. Its social dimension is particularly weak and, once again, the poor seem to have been forgotten. Therefore, the document on the work of the Commission<sup>33</sup> does not analyse the problems of poverty as such.<sup>34</sup> Quite the opposite, it starts from the principle that economic growth will lead to an improvement of social standards for all citizens and plans to only protect the fundamental rights of people in

employment. It especially makes less fortunate Europeans subject to national measures, whilst opening borders for the others.<sup>35</sup>

The "common market" Europe should not forget that it will not be able to constitute a community worthy of the title if it relies solely on macro-economic parameters.<sup>36</sup>

It is fortunate that the "other Europe," that of the Council of Europe, has understood from the start that the right line for the building of Europe is that based on a certain concept of humankind. Strengthened by this heritage, which has been constantly reinforced by the European Convention on

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33 Report of M Marin, *Dimension sociale du marché intérieur*, Doc. SEC. (88) 1148 final, 14 September 1988.

34 See also the Resolutions adopted on 17 November and 15 December 1988 by the European Parliament on the European Council of Rhodes and the social area and the Council's Conclusions (*Agence Europe*, No. 4907, 4 December 1988).

35 A. De Voos Van Steenwijk, *Pour une Europe des droits de l'homme : entre le rapport Wrésinski et le rapport Marin, il faut choisir*, Mouvement international ATD Quart-Monde, November 1988. On 16 November 1988, Mr. Jacques Delors, President of the Commission, declared to the European Parliament: "You know that we had two programmes against poverty; the third one will be more important and some tell me that the new Commission is proposing something too vague. But the States oppose this and don't want us to launch an extensive programme against poverty."

36 B. Cassen, "Le 'social' à la remorque de l'Acte unique," in *Le Monde diplomatique*, December 1988, at 6. During a colloquium held in Saint-Sébastien (Human Rights in Europe, 12-14 December 1988), Mr. Theo Van Boven made a parallel between the four freedoms recognised by the Treaty of Rome (freedom of circulation of goods, of persons, of services and of capital) and the four freedoms enumerated by President Roosevelt in his message of 6 January 1941 (freedom of speech and expression, freedom of cult, freedom to be free from want, freedom from fear). An encouraging sign is, however, given by the resolution adopted on 15 March 1989 by the European Parliament on the social dimension of the internal market, part of which is devoted to the destitute (*personnes défavorisées*).

Human Rights and the European Social Charter,<sup>37</sup> the Council of Europe should be able to play a decisive role in this context.

Yet it must still understand how erroneous it would be to consider only the case of poverty as an isolated one, among a number of activities that would only concern "specialised" sectors of the organization. It is, in fact, the Council of Europe in its entirety that must feel concerned because it is its whole conception of human rights and its credibility in the matter that are in question. Because the poor are deprived of all their rights, it is essential to rethink the manner in which to put into operation what was, after all, only one of the essential objectives of the Council of Europe at the time of its creation: the defence of human rights of all human beings. Now that we have celebrated the 40th anniversary of the Universal Declaration of Human Rights and of the Council of Europe, we should go beyond commemorations, to show that we really wish to return all its original vigour to the message which was then given. It is a matter of will, as the Council of Europe has already shown that it is aware that its humanitarian approach was already invalid if, in reality, it is accepted that there are people who

are unable to benefit from their human rights. It must, together with all member States, resuscitate the courage which it had in 1949-50 and initiate new trends in defence of human rights; if it does not wish to have merely the charm of a glorious past or the reassuring aspect of a well-established institution, its message must, from now on, pass through the effective global consideration of human rights. In a merciless and unforgiving world for the weak and the unfortunate, the Council of Europe must, and can, bring new semantics and a vision that would encourage a change of mentalities which would mean that, one day, we would accept as fact that ignorance of economic, social and cultural rights is a violation of human rights and that this is not due to fate, but to the indifference of some and the resignation of others.

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37 As far as the Social Charter is concerned, we recall Article 13 on the right to social and medical assistance the potentialities of which have not yet been exploited. See also Recommendations 839 (1978) and 1022 (1986) of the Parliamentary Assembly and the speech of the Secretary-General of the Council of Europe at the opening of the colloquium commemorating the 25th anniversary of the signing of the Social Charter (*Grenade*, 26 October 1987, Doc. AS/Soc. Charte (39) 5. The colloquium's papers have been published by the Council of Europe under the title "European Social Charter" (*Charte sociale européenne*), Strasbourg, 1989. During its session of May 1989, the Assembly of the Council of Europe organized a debate on the Social Charter (Report on the future role of the European Social Charter (Rapport sur le rôle futur de la Charte sociale européenne), Doc. 6031, Resolution 915, Recommendation 1107; Report on the first phase of the 10th cycle of control of the application of the European Social Charter, Doc. 6030, Opinion (Avis) No. 145.





## **The Monitoring of Economic, Social and Cultural Rights**

**Kofi Kumado\***

The world community assembled in Vienna in June 1993 under the auspices of the United Nations restated the most fundamental dogma of our contemporary human rights advocacy programme, namely, that human rights are *universal, indivisible, interdependent and interrelated*. To buttress this, the Vienna Declaration enjoined the world community to:

“treat human rights globally in a fair and equal manner on the same footing, and with the same emphasis.”

This restatement was particularly timely, among others, because of the difficulties which have been created, in the meantime, by the grouping of human rights into “generations.” The ‘generations’ approach has increased the arguments about whether economic, social and cultural rights, are really “rights,” arguments which are more intense in relation to the Right of Development. Should the ICJ lead a vigorous campaign to discourage the generational talk in all human rights discourse?

The truth, of course, is that since the Universal Declaration of 1948, international human rights law has recognised economic, social and cultural rights. This recognition finds expression in the most important international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the Convention Against Torture (CAT) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD). These rights are also to be found in the regional human rights arrangements. Indeed, the African Charter on Human and Peoples’ Rights does not only provide for economic, social and cultural rights. It places them on the same juridical plane as the civil and political rights, carrying the same binding legal effect. Besides, these rights feature prominently in the programmes of UN Agencies, such as UNDP, UNICEF, ILO, WHO and FAO, which are active

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in development issues, particularly in the poor parts of the world.

In its re-definition of the Rule of Law in the Law of Lagos in 1961, the International Commission of Jurists (ICJ) drew attention to the centrality of economic, social and cultural rights to human dignity and survival, peace and security in the world. And in the 1960s and 1970s, the ICJ commissioned a number of studies and held some conferences aimed at clarifying the nature and the issues related to this human rights regime. We note also in passing that it was a former President of the ICJ, Mr. Keba M'Baye, who gave birth to the Right to Development.

In spite of this textual recognition and the rhetorical commitment to indivisibility and interdependence, however, it is a fact that greater emphasis has been placed on the civil and political rights than on economic, social and cultural rights. The international community has invested little time and few resources to the realisation of economic, social and cultural rights. Few States take their obligations in this area seriously. Hardly any major steps have been taken to develop the necessary capacity and skills for measuring and evaluating compliance with the agreed international standards. And, as noted above, a few amount of intellectual energy continues to be burnt debating the juridical character and the justiciability of these rights. Philip Alston put the point poignantly in a recent article when he observed:

"For those individuals and groups whose governments have (at one time or other) been sufficiently committed to human rights and to the development of an effective international system for their promotion, opportunities already exist to lodge a complaint with several international bodies seeking a remedy for alleged torture, arbitrary or unjust punishment, the denial of trade union rights, the violation of rights to free speech and freedom of religion and many other abuses. But if one is merely suffering from chronic malnutrition, hopelessness, grossly inadequate health care or a total lack of educational opportunities, or perhaps all of these, then there is no such international right to petition."<sup>1</sup>

Apart from the brutality of two world wars, the twentieth century will be remembered for the explosion and expansion of concern and commitment to Human Rights. What would the twenty-first century be noted for?

The end of the Cold War, the collapse of communism and the dawn of the twenty-first century provide the international community with the breathing space to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of available resources with a view to achieving pro-

1 See, "No Right to Complain About Poor," in Eiden & Helgesen eds., *Essays in Honour of Torkel Opsahl*, 1991, at 80.

gressively the full realisation of the rights recognised as enjoined by Article 2(i) of the ICESCR.

The Committee on Economic, Social and Cultural Rights, the monitoring body for the ICESCR has interpreted "progressive realisation" as obliging States parties to move expeditiously and effectively toward the goal of full realisation of the constituent rights, at least if only to satisfy minimum essential levels of each right. This calls into play the need to monitor compliance with the agreed standards and the observance of the obligations with the same zeal and expertise as NGOs have till now devoted to the civil and political rights.

### *Monitoring System*

Admittedly, there are few concrete standards for determining the performance of governments with respect to economic, social and cultural rights. Besides, as the debate on the complex conceptual issues here involved has shown, measuring State performance with respect to these rights requires us, far more than is the case with the civil and political rights, to rigorously ensure that we are on the same wavelength. But, in developing tools, methods and other resources for monitoring economic, social and cultural rights, we need not reinvent the wheel. Besides, though woefully inadequate, the reporting obligation under the ICESCR is a monitoring device.

Any regime for monitoring observance and implementation of economic, social and cultural rights obligations

must reflect a number of features similar to strategies which have been used in the field of civil and political rights. A brief description of these features is given below:

- a) At the outset, it is necessary to determine which of the several human rights initiatives account would be taken of. The reality is that economic, social and cultural rights standards and obligations are contained in treaties, declarations, principles (e.g. Limburg Principles), plans of action, Resolutions etc. In the case of the specialised UN Agencies the matters are covered in their constitutions or statutes and in the decisions of their Executive Boards and relevant decision-making or monitoring organs.

These initiatives create different types of obligations. This differentiation is important because of the obfuscation which has attended the debate on economic, social and cultural rights and the tendency of NGOs to avoid purely "legalistic" issues. In this respect, it would be preferable if one focused only or primarily on rights contained in instruments about whose legality and or binding character there are not many doubts.

- b) Secondly, we must define the right or rights we wish to monitor. This task involves identification of the constituent elements. For example, it is generally agreed that the *right to life* recognised by the international human rights instruments means more than the absence of the death penalty. It addresses also the material

conditions of our living and the maintenance of adequate standards of living. Therefore, when people do not have food, shelter, access to modern education and technology, when governments pursue policies that impoverish the large majority of their peoples or deny them health delivery services, to mention but a few of the accepted components, then this right is being violated. Of course, rather than provide one's own definitions, where these have been provided by competent bodies or recognised international instruments, it may be a prudent monitoring strategy to adopt these. Thus, in the case of the ICESCR, we may, for example, rely on the definitions provided by the Committee on Economic, Social and Cultural Rights. Having defined the right, we must determine whether we expect implementation to cover all its dimensions at the outset of the assumption of the obligation.

- c) The third issue to address is what constitutes the due observance of the right. Is a programmatic or gradual approach acceptable? The question who are the beneficiaries or are obliged to observe the right must also be settled. Particularly, with respect to Third World countries, the policies of donor countries, multilateral lending agencies such as the World Bank and the IMF and transnational corporations may well have to be kept in view. A multidisciplinary approach will clearly be helpful here to the design of the monitoring system. Prof. Asbjorn Eide's triadic presentation of the nature of the obligation assumed in

the field of economic, social and cultural rights will be useful here. According to him, each right in fact involves three obligations: i) the obligation to respect; ii) the obligation to protect; iii) the obligation to fulfil. The instrument(s) in question may place all these aspects of the obligation with respect to a particular right on the same entity. But this should not be assumed. And while on this subject, we must keep in mind that economic, social and cultural rights require far more intervention in society and in the economy of a country with the objective of securing basic needs than is the case with civil and political rights.

- d) Next, we must determine what constitutes a violation. Is it just the failure to observe the reporting obligations under a treaty? Or to take concrete steps at the domestic level? Shall we take into account misplaced policies, aberrations, inaction, corruption and the looting of national resources which are then stashed away in foreign banks? How about the conduct of foreign banks in opening their doors to acclaimed looters of their countries resources? It is also necessary to determine whether the assessment would focus on the impact on individuals or groups or both. Of course, all the issues raised here may be included in the monitoring regime. However, it is necessary to think carefully about them and to reflect them consciously. Besides, the considerations raised in the context of (c) above are also relevant here.
- e) There is also the need to identify the minimum conditions that will be

acceptable as compliance with or realisation of the right. Political pluralism, good governance, participatory democracy, the Rule of Law, accountability, transparency in decision-making, non-discrimination - these are the key words. Their denial may create a situation that becomes inhospitable or poses a danger to the implementation of economic, social and cultural rights. Africa, provides a good example of how a people become increasingly impoverished by military dictators or one-party rule.

But we must avoid making easy judgments here. There are many countries now engaging in democratisation and the restructuring of their economies. These twin processes, though unavoidable, have been attended by suffering for the great majority of the people. Whether the suffering is considered short term or not, there is no running away from the fact that it constitutes a source of great worry. A major challenge for any one concerned with the implementation of economic, social and cultural rights will be how to integrate these issues into a monitoring regime.

f) It is also relevant to develop a strategy. For it is important whether the object is to monitor all economic, social and cultural rights or only some. If some, which? It is arguable whether an NGO like Amnesty International could have achieved the standing and credibility it presently enjoys if it had begun its life by confronting all rights. Already, there is a discernible recog-

nition of the strategic importance of selectivity in the debates, in the literature and in the reports of the Committee on Economic, Social and Cultural Rights or at least in the writings of some of its present and former key members. It may well be that selectivity helps to initially identify the problems, issues and the pitfalls. On present evidence, therefore, a selective approach would be the appropriate strategy. A selective approach, however, should not be confused with prioritising or ranking of the rights. The latter should be avoided as it undermines comprehensibility which is at the base of the human rights ideology.

g) One issue which cannot be ignored is the objective of the monitoring. Is it for purposes of denunciations or litigation? Or both? Is there a desire to filter the results through government policies to achieve desirable goals? As one has argued elsewhere, it is not the case that governments are necessarily always evil intentioned.

There may be failures caused by ineptitude, bad judgment or the collapse of assumptions made. Sometimes, a government simply lacks the technical know-how. Misguided hostility to certain policies may arise from past colonial experience and fear of recolonisation.

On the whole, in the field of economic, social and cultural rights, a monitoring system mainly designed to provide material with which to denounce a government or engage in

litigation with it is unlikely to be successful. Such an objective may, in the long run, even prove dysfunctional to the due observance of obligations assumed by States.

- h) Finally one must think of the kind of data that will be needed and the sources from which to take that data. The credibility of the monitoring regime depends in part on the care with which this aspect is addressed. Whatever may be said for its accuracy, conclusions drawn from data taken from the American Central Intelligence Agency are not likely to impress many governments or citizens in a good number of countries, particularly in the South. The monitoring system needs data collected from several periods in time to be able to assess trends meaningfully. Further, it would be preferable if the data is desegregated into relevant categories, including gender, race, region, linguistic or ethnic background or religious persuasion. We have to remember that in some parts of the world, land (or portions of it) is left unutilised for religious reasons and certain kinds of food are taboo.

### *Conclusion*

Obviously, we have to keep in mind that the ultimate objective is to monitor implementation of economic, social and cultural rights (e.g. workshops, seminars, education, litigation etc.). The different strategies for the implementation of human rights have to be kept in mind in the designs of the monitoring system. And as with all endeavours having to do

with the human being, we must always remember that the human being is complex and this complexity is reflected in all aspects of our human existence. However, it is undeniable that we owe it to ourselves to push the economic, social and cultural rights agenda forward with all the energy and zeal we can command. The success of the Bangalore Conference on Economic, Social and Cultural Rights will ultimately be measured by whether it enables the legal profession worldwide to recognise its responsibilities in this field and whether the profession is thereby galvanised into taking the appropriate initiatives and actions. A good monitoring regime will undoubtedly serve as an effective midwife to the profession in this field.

# ***Justiciability and Beyond; Complaint Procedures and the Right to Health***

**Virginia A. Leary\***

## ***1 Complaints Procedures Are Needed***

Every country in the world has significant health problems, but they are especially acute in developing countries. Some can be attributed to "acts of God" - earthquakes, typhoons, new and sudden epidemics, cancers - but many are caused or exacerbated by human neglect and violation of fundamental human rights. The poor, minorities, indigenous peoples, women - all members of groups with little representation in political life - bear an undue proportion of health problems everywhere. Discrimination - overt or implicit - is the cause of much of the suffering of groups underrepresented in the political process. The priorities established by national budgets and by international donor agencies often adversely affect the health of certain populations.

Tuberculosis - once thought to be wiped out in industrialized countries - is re-occurring in developed as well as in developing countries. Inadequate information concerning reproductive health causes serious problems for the health of women, often resulting in high maternal mortality and infant deaths. Little attention is paid to the health of women in most

countries. Health research focuses on health problems of males, and, in some countries, such egregious practices as dowry burnings and female infanticide persist. Rural populations often have limited health care since hospitals and doctors and nurses are almost everywhere concentrated in urban areas. The emphasis on curative rather than preventive health care usually means that the more well-to-do members of the population receive much better care than the poorer population.

Thus, many persons are deprived of their "right to health" because of human decisions and priorities of their government or international agencies; their health problems are not caused solely by poverty, lack of resources or "acts of God." But what recourse do such persons have to protest the actions which exacerbate their health problems? There is often no opportunity at the national or international level for those whose health suffers the most from discrimination or the choice of priorities to raise legal challenges. Certainly there is much national and international concern about health problems. International assistance for health care is provided to many coun-

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tries, but such aid may be dependent on political relationships or not sufficiently focused on the needs of the poor or simply too limited; national health priorities may be hindered by the demands of international financial institutions for structural adjustment or by local priorities.

Something more is needed - and that "something more" should be establishing the right of those whose health is adversely affected by human decisions to raise their complaints before national and international organs. The ills which are caused by so-called "acts of God" cannot be remedied by human recourse - although they can often be alleviated - but the problems caused by human neglect or prejudice or false priorities can be and should be capable of protest by those most injured by such action. Procedures which permit legal complaints to be raised by aggrieved groups and individuals have been demonstrated to be the most effective means of protecting civil and political rights. They should now be established for such economic and social rights as, *inter alia*, the right to health. The concept of a "right" necessarily carries with it the implication of the opportunity to demand that the right be protected.

## 2 Clarifying the Concept of the "Right to Health"

If a right to petition or complain concerning the violation of the right to health is to be established, it is essential to clarify the meaning of that concept. The "right to health" is enumerated in many international human rights treaties. It is thus recognised as a legal

right under international human rights law. The Preamble to the WHO Constitution provides that:

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social conditions."

The International Covenant on Economic, Social and Cultural Rights provides in Article 12(1):

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

The Convention on the Rights of the Child (Article 24(1)) and the African Charter on Human and Peoples' Rights (Article 16) contain similar provisions. The Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women contain provisions requiring States to eliminate discrimination on those respective grounds "in the enjoyment of the right to public health, medical care" (Racial Discrimination Convention 5(e)(iv)), and "the right ... to access to health care services, including those relating to family planning." (Women's Convention, Articles 11(1)(f) and 12).

The Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and



Cultural Rights (Protocol of San Salvador) uses the precise language "right to health" in Article 10.

Human rights scholars have used the terminology "right to health" as a shorthand phrase to refer to these various provisions in human rights treaties relating to health issues. The Pan-American Health Organization (PAHO) has published a lengthy study entitled *The Right to Health in the Americas*, edited by two lawyers with extensive experience in health law.<sup>1</sup>

In 1978, the Hague Academy of International Law and the United Nations University organized a multidisciplinary workshop on *The Right to Health as a Human Right* with participants from the fields of law, medicine, economics and international organizations.<sup>2</sup> The Committee on Economic, Social and Cultural Rights, which monitors the application of the Covenant on Economic, Social and Cultural Rights, held a day of general discussion on "The Right to Health" in December 1993.

Theo Van Boven has written that:

"Three aspects of the right to health have been enshrined in the international instruments on human rights: the declaration of the right to health as a

basic human right; the prescription of standards aimed at meeting the health needs of specific groups of persons, and the prescription of ways and means for implementing the right to health."<sup>3</sup>

National constitutions also frequently contain provisions on the right to health. Writing about the American hemisphere, the editors of the PAHO study referred to earlier, report that:

"Twenty of the constitutions of the civil and socialist law countries of the Hemisphere do include a statement on the right to health and/or the duty of the State in regard to the health of the nation. A right to health is proclaimed in five constitutions; a right to health protection is found in eight others. All the socialist law countries proclaim both a right and duty; of the civil law countries, only Argentina, Colombia and Costa Rica do not have a direct reference to the duty of the State in regard to health."<sup>4</sup>

The 1987 Philippine Constitution refers explicitly to the right to health. It provides:

- 1 Hernan L. Fuenzalida-Puelma/Susan Scholle Connor, eds., *The Right to Health in the Americas* (Pan-American Health Organization, Scientific Publication No. 509, Washington, D.C.) 1989.
- 2 René-Jean Dupuy, ed. *The Right to Health as a Human Right*. Workshop, The Hague Academy of International Law and the United Nations University (Sijthoff & Noordhoff, Alphen aan den Rijn, The Netherlands) 1979.
- 3 Theo Van Boven, *The Right to Health*, Id., 54-55.
- 4 5 *Supra*, note 2, at 665.

"(Article II, sec. 15): The State shall protect and promote the right to health of the people and shall instill health consciousness among them.

(Article II, sec.16) The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

A number of other national constitutions also contain references to the right to health.

Although the concept of a "right to health" is unfamiliar to many, it is becoming increasingly understood as efforts are made to define the concept and examine its parameters.<sup>5</sup> It is perhaps more easily understood as an aspect of the right to life.

The "right to health", of course, does not mean that an individual can be guaranteed good health - no person or State or organization can guarantee good health - but the concept of health as a human right emphasises the social and ethical aspects of health care and health status and stresses that, like other rights, individuals may legitimately protest the denial of the right.

What obligations to promote and protect the right to health are incurred by

States through ratification of the international instruments recognizing a right to health? In 1993, the Committee on Economic, Social and Cultural Rights (hereinafter "ESC Committee") examined the implications of a right to health at their *semi-annual meeting* - one of the rare, perhaps unique, occasions on which a UN organ has considered the subject of the right to health. It was pointed out that the obligation to implement the right to health, like other social rights, is a progressive obligation; a State is not required immediately and fully to implement the right, but only to "achieve progressively the full realisation of the right." However, the Committee emphasised that the States parties are required by Article 2 to "take steps" (immediately) to achieve the right. The steps necessary to achieve the full realisation of the right to health listed in the second paragraph of Article 12 include:

- a) the provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child;
- b) the *improvement* of all aspects of environmental and industrial hygiene;
- c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
- d) the creation of conditions which

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5 The concept of a right to health is broader than simply the right to health care. As will be seen by the discussion of the implications of the right in later parts of this section, the right to health care is simply one aspect of the right to health. See Leary, "The Right to Health in International Human Rights Law," *Health and Human Rights*, vol. 1, no. 1, Fall, 1994, for a more extensive discussion of the term "right to health."

would assure to all medical service and medical attention in the event of sickness.

While these steps provide a starting point for understanding the obligation, their generality makes it difficult to determine specific obligations. As pointed out by a number of speakers at the hearing organized by the ESC Committee, it is appropriate to have recourse to the work of the World Health Organization (WHO) to determine more specific means of reducing infant mortality, improving environmental and industrial hygiene and preventing epidemic and other diseases - as well as creating conditions to assure medical care. Several presenters at the hearing emphasised the importance of clean water and sewage disposal to implementation of the right to health.

WHO has elaborated in considerable detail, in its program on Primary Health Care and Health for All by the Year 2000, the means that can be used most effectively by both economically developed and developing countries to achieve the "highest attainable standard of health." The Primary Health Care approach is described in the Declaration of Alma-Ata, adopted in 1978 at an international conference. The essential aspects of that approach may be summarised as follows:

- a) an emphasis on preventive health measures (such as immunisation, family planning) more than on curative measures;
- b) the importance of participation of individuals and groups in the plan-

ning and implementation of health care;

- c) an emphasis on maternal and child health care;
- d) the importance of education concerning health problems;
- e) high priority to be given in provision of health care to vulnerable and high risk groups, such as women, children, underprivileged elements of society;
- f) equal access of individuals and families to health care at a cost the community can afford.

A striking aspect of this list is the emphasis on participation, education, equality and special concern for vulnerable groups - aspects which are particularly important in a human rights approach. The concept of a right to health emphasises the social and ethical aspects of health care and health status. A rights approach to health issues must be based on fundamental human rights principles, particularly the dignity of persons and non-discrimination (equality).

The Preamble to the Universal Declaration of Human Rights states that the "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."

The concept of rights grows out of a perception of the inherent dignity of every human being. Thus, use of rights

language in connection with health underscores that the dignity of each person must be central in all aspects of health, including health care, medical experimentation, and limitations on freedom in the name of health. The focus must be on the dignity of the individual rather than the good of the collectivity. The utilitarian principle is rejected by a rights approach. The greater good of the greater number may not override individual dignity.

Although medical experimentation, for example, may result in good for the general populace, it must not violate the dignity of the individuals subjected to it - particularly the dignity of society's most vulnerable groups: the poor, racial and ethnic minorities, disabled persons and the mentally and physically handicapped - who have often been the subjects of medical experimentation.

Equality is also a fundamental principle of human rights. The rights approach to health implies the rejection of a solely market-based approach to health care and health status. Cost-containment and cost-benefit analyses in health care allocation are important but must not lead to gross inequality in health care and health status.

The WHO Declaration of Alma-Ata on Primary Health Care states:

"The existing gross inequality in the health status of the peo-

ple particularly between developed and developing countries as well as within countries is politically, socially and economically unacceptable and is, therefore, of common concern to all countries."<sup>6</sup>

Yet gross inequality in the allocation of health care and the health status of populations exists in nearly every country. In most countries, the health status of racial or ethnic minorities is far worse than that of the majority population. The dumping of hazardous wastes in areas inhabited by minorities and the poor has been documented and labelled "environmental racism."

Extensive discrimination against women in health care and health status is only beginning to be noted.<sup>7</sup>

Human rights are interdependent and indivisible. Therefore, the right to health cannot be effectively protected without respect for other human rights, such as prohibition of discrimination, the right of persons to participate in decisions affecting them and other social rights such as education and housing.

### 3 *Trend Towards Justiciability of Social Rights*

Can the right to health and other social rights, such as the right to housing and to education, be made "justiciable"

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- 6 Declaration of Alma-Ata, adopted at the International Conference on Primary Health Care, 12 September 1978, World Health Organization, Geneva.
  - 7 See Rebecca J. Cook, *Human Rights in Relation to Women's Health: The Promotion and Protection of Women's Health Through International Human Rights Law*, WHO/DGH/93.1, Geneva, 1993.

so that affected individuals and groups may raise the issue of violations in legal proceedings? The term "justiciability" is used in this article to refer not only to the possibility of raising issues before judicial tribunals but also to refer to the right to bring communications concerning violations before quasi-judicial organs, such as the Human Right Committee - and before the Committee on Economic, Social and Cultural Rights should an Optional Protocol be adopted for that Covenant. The term "justiciability" is not used in the Optional Protocol to the Covenant on Civil and Political Rights nor in the draft protocol to the Covenant on Economic, Social and Cultural Rights prepared at a conference in the Netherlands in January 1995 and referred to below. The more common terminology is "the right to bring communications" concerning violations, perhaps because it has traditionally been argued that economic and social rights are not justiciable.

When the international covenants on human rights were being drafted by the UN Commission on Human Rights in the 1950s and 1960s it became conventional wisdom to conclude that economic and social rights were fundamentally different from civil and political rights; in particular, that completely different methods of enforcement were needed for the two sets of rights. For civil and political rights, it was considered that enforcement or implementation simply required negative action - States could simply be required not to interfere with the rights, positive action by States was not needed. For economic and social rights it was considered that, unlike civil and political rights, such rights were programmatic, needed positive action by

States (requiring financial expenditures) and could not be subject to complaints procedures by individuals and groups.

Thus, an Optional Protocol was drafted for the International Covenant on Civil and Political Rights (ICCPR) permitting victims of violations of rights in that Covenant or persons acting for them to petition the Human Rights Committee for a decision concerning the State's obligations (assuming the State had accepted the Optional Protocol). For the International Covenant on Economic, Social and Cultural Rights, no such Protocol was considered appropriate.

Some of the common arguments raised against the justiciability of the right to health and all social rights are:

- a) that the rights are promotional, require positive measures and government programs, and such measures and programs are not susceptible to implementation through courts or similar formal procedures, but must be handled legislatively or administratively;
- b) that the right to health and other social rights are vague and undefined and, as such, cannot be implemented through justiciable procedures;
- c) that concepts of standing make it difficult to raise issues of health or other social rights;
- d) implementation of the right to health (like other social rights) is expensive and depends on the economic resources of a country.

The simplistic assumption that all civil and political rights require only negative obligations of States and that all economic and social rights all require positive action has been widely criticized by commentators.<sup>8</sup> The protection of the right to a fair trial may require the expensive creation of a judicial system; some economic rights can be enforced by negative prohibitions without the expenditure of funds. It is increasingly recognized that complaints by individuals or groups may also be effective in implementing economic and social rights as well as civil and political rights.

The concept of justiciability is a fluid one subject to evolution. It has been pointed out that:

“Justiciability is a deceptive term because its legalistic tone can convey the impression that what is or is not justiciable inheres in the judicial function and is written in stone. In fact, the reverse is true: not only is justiciability variable from context to context, but its content varies over time. Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its

changing character and evolving capability.”<sup>9</sup>

Examples from the United States help to illustrate the accuracy of the above comment. A number of federal judges in the United States have made decrees concerning government programs such as prison reform and programs to achieve racial integration, that require continuing supervision and development of programs under judicial supervision. United States courts routinely apply general provisions relating to “due process” or “equal protection of the laws” to particular factual situations. These terms were not defined in detail in the amendments to the United States Constitution but their implications have been spelled out through application in particular cases. The same result may be achieved in applying general provisions concerning economic and social rights to particular cases. The concept of standing has been considerably expanded in the United States to permit class action suits in cases where no one individual has a large stake in the outcome but where there has been action affecting large groups of persons. A recent case in the Philippine Supreme Court described later in this essay illustrates a wide expansion of the concept of standing.

In 1992, the Committee on Economic, Social and Cultural Rights

8 See Henry Shue, *Basic Rights, Subsistence, Affluence and US Foreign Policy* (Princeton University Press, Princeton, N.J.) 1980; Asbjorn Eide, “Realization of Social and Economic Rights, The Minimum Threshold Approach”, *The Review, International Commission of Jurists*, No. 43, December 1989, p. 40; Fried van Hoof: “The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views” in Alston and Tomasevski (ed.): *The Right to Food*, (Martinius Nijhof, Publishers, 1984).

9 Craig Scott and Patrick Macklem (1992), “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a new South African Constitution” in *University of Pennsylvania Law Review*, vol. 144, no. 1, p. 17.

argued for an individual right of complaint in its report that year, emphasising that complaint procedures would contribute to the development of the law in the field of economic and social rights.<sup>10</sup> Mr. Philip Alston, the Chair of the Committee, subsequently developed in some detail what such a Protocol might cover<sup>11</sup> and, recently, the Netherlands Institute of Human Rights sponsored a symposium on complaint procedures for economic and social rights attended by a number of human rights scholars and practitioners which resulted in the drafting of a proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.<sup>12</sup>

The idea of a complaints procedure for economic, social and cultural rights is thus gaining acceptance in the human rights community, but it may well be a considerable period of time before States are ready to accept such a procedure. Nevertheless, the initial ground work is being laid.

#### 4 *Making the Right to Health Justiciable*

Theoretical arguments against the justiciability of the right to health run up

against the reality that the right, or elements of the right, have been raised before international and national legal institutions. Although such cases are few, as yet, they illustrate the above-mentioned fluidity of the concept of justiciability. They demonstrate that given the willingness of judges and monitors of human rights to protect social rights, the right to health is not too vague to be applied in particular cases and that elements of standing need not bar justiciability of the right to health. This section reports on cases concerning the right to health that have arisen before courts and human rights commissions - both international and national.

#### *International Court of Justice: WHO Constitution*

To the surprise of many, the World Health Assembly, in 1993, requested an Advisory Opinion from the International Court of Justice concerning the legality of the use of nuclear weapons in view of their health and environmental effects.<sup>13</sup> The request is of interest in our consideration of the justiciability of the right to health since it presumes that a judicial organ might legitimately consider the implications of the "right to health" and

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- 10 Report of the Seventh Session of the Committee on Economic, Social and Cultural Rights, Official Record, Suppl. No. 2, UN Doc. E/1993/22, Annex IV.
  - 11 "Draft Optional Protocol providing for the consideration of communications", E/C.12/1994/12, 9 November 1994. This draft protocol was discussed by the Committee at its eleventh session. Other drafts of protocols for economic, social and cultural rights have been prepared by Scott Leckie and Rolf Kunneman.
  - 12 The Draft Optional Protocol prepared by the Netherlands Institute of Human Rights (SIM) may be obtained from SIM, Utrecht University, Janskerkhof 16, 3512 BM, Utrecht, The Netherlands.
  - 13 International Court of Justice (ICJ), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, (Request for Advisory Opinion) Order, 13 September 1993, General List, No. 93.

might interpret the right by finding that the use of nuclear weapons is a violation of the right.

The following question was addressed to the Court:

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"

Although no specific provision of the WHO Constitution is referred to in the request, the following Preamble provision of the WHO Constitution appears the most relevant:

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

The request purportedly resulted from the efforts of groups such as the International Physicians for the Prevention of Nuclear War, International Association of Lawyers Against Nuclear Arms and other organizations opposed to the use of nuclear weapons. The decision to focus on the health aspects of the issue through obligations under the WHO Constitution and to influence the World Health Assembly was an astute means of raising the issue of the use of nuclear weapons. The Assembly had previously adopted a

number of resolutions concerning the health effects of nuclear weapons, stressing the impossibility of any health system to deal adequately with the catastrophic results of the use of such weapons.

In December 1994, the UN General Assembly asked the International Court of Justice for an advisory opinion concerning the legality of the use of nuclear weapons. The two requests for advisory opinions have now been joined and, as of the date of writing, are being considered by the Court. The question of the health effects of the use of nuclear weapons as a violation of the rights to health in the WHO Constitution could appropriately be decided by the Court. It raises a clear cut question concerning the application of an internationally binding treaty. If the Court rendered an opinion, we would have - through the advisory opinion procedure - a clarification of one of the obligations arising from the right to health in international law. In view of the political sensitivity of the topic of the use of nuclear weapons, however, the Court may find a means of avoiding giving an opinion on the issue.

### *European Convention on Human Rights*

The European Convention on Human Rights does not include provisions on economic and social rights, although, of course, it includes a provision on the right to life. Under an expanded conceptualisation of the right to life (such as contained in the General Comment of the Human Rights



Committee on the Right to Life<sup>14</sup>), the European Court on Human Rights could consider issues relating to the right to health under the rubric "right to life" - as could the Human Rights Committee under the Optional Protocol.

Mr. Matti Pellonpaa has discussed a case before the European Commission on Human Rights raising issues that could as easily relate to the right to health as to the right to life:

"A public health system falling under a certain minimum standard of quality could equally be interpreted as a failure "to take appropriate steps to safeguard life" as required by Article 2 [of the European Convention]. In a recent Case<sup>15</sup> an applicant, whose wife had lost her life in a French hospital as a consequence of serious complications following the delivery of a child, in fact argued that France was in violation of Article 2 of the Convention. The Commission rejected that contention [on the grounds there had been no fail-

ure of care by the hospital but reiterated that Article 2 required positive measures to protect life].... The implication clearly is that certain regulatory measures, aimed at protecting life, concerning the hospital system were inherent in Article 2, although the Commission after being satisfied that this basic requirement was fulfilled by the relevant French regime, declined to go into the details of the functioning of the system in the instant case."<sup>16</sup>

*Feldbrugge v. the Netherlands*  
(1986)<sup>17</sup>

The Feldbrugge case before the European Court of Human Rights concerned an issue relating to health. It involved the complaint by a Dutch woman that her sickness allowance (provided for under the law of the Netherlands) had been denied without a fair trial, thus violating Article 6(1) of the European Convention on Human Rights which provides that "In the deter-

14 General Comment 6(16)d reads as follows: The Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." Official Records of the General Assembly, Thirty-seventh Session Supplement, No. 40, (A/37/40 (1982) at 93. See also B.G. Ramcharan (ed.) *The Right to Life in International Law*, Boston, Martinus Nijhoff, 1985.

15 Application no. 16593/90, *Taveres v. France* decision of 12 September 1991 (unpublished).

16 Matti Pellonpaa, "Economic, Social and Cultural Rights", in *The European System for the Protection of Human Rights*, Macdonald, Matscher, Petzold (eds.) Martinus Nijhoff, 1993, at 855.

17 For the text of the case, see *Human Rights Law Journal*, vol. 7, no. 2-4 (1986).

mination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Following its consistent liberal reading of that Article, the Court held that sickness allowances involved a civil right and that Article 6(1) had been violated in Mrs. Feldbrugge's case. The Court deferred any ruling concerning compensation under Article 50 of the Convention.

The case illustrates the inter-relationship of issues health to other rights. The Court determined that in the granting of sickness allowances there must be "due process" - a fair hearing, thus illustrating that health issues may be raised under traditional civil and political rights. (See reference to US cases below).

### *Human Rights Committee*

Similarly, decisions of the Human Rights Committee also demonstrate that issues relating to health may be raised under protection of civil and political rights - particularly the non-discrimination article (Article 26) of the Civil and Political Covenant. In 1986, the Committee adopted a view under the Optional Protocol to the Covenant that has implications regarding social rights, and, in particular, the right to health. In its decision on Communication No. 218/1986 brought by Hendrika S. Vos of the Netherlands, the Committee considered the issue of whether the complainants' right to equality before the law and equal protection of the law without discrimination [Article 26] had been violated by a decision denying her disability

benefits. The Committee concluded that there was no discrimination in this case in violation of Article 26, but demonstrated its willingness to consider Article 26 on discrimination as an autonomous provision which was not limited only to rights enumerated in the ICCPR, but could include discrimination in relation to social rights.

In a case also involving Article 26 and discrimination with regard to unemployment benefits (not health related issues), the Committee made the following remarks,

"The Committee has also examined the contention of the State party that article 26 of the International Covenant on Civil and Political Rights cannot be invoked in respect of a right which is specifically provided for under article 9 of the International Covenant on Economic, Social and Cultural Rights...The discussions, at the time of drafting, concerning the question whether the scope of article 26 extended to rights not otherwise guaranteed by the Covenant, were inconclusive and cannot alter the conclusion arrived at by the ordinary means of interpretation... Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when

such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.<sup>18</sup>

These decisions are relevant to consideration of the justiciability of the right to health since they demonstrate that under the Optional Protocol to the Civil and Political Covenant certain issues relating to health and discrimination may presently be raised.

*Inter-American Commission  
on Human Rights:  
American Declaration  
of the Rights and Duties of Man*

Article XI of the American Declaration of the Rights and Duties of Man provides that:

"Every person has the right to preservation of his health through sanitary and social measures relating... to medical care, to the extent permitted by public and community resources."

In 1980, several individuals connected with non-governmental organizations concerned with the rights of indigenous peoples petitioned the Inter-American Commission on Human Rights alleging violation by Brazil of the human rights of the Yanomani Indians, citing, *inter alia*, violations of Article XI of the American Declaration.<sup>19</sup> The Commission found that the construction of a highway through the territory occupied by the Yanomani Indians "for ages beyond memory" resulted in an invasion of highway construction workers, geologists, mining prospectors, and farm workers desiring to settle in the territory and that the invasions "were carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others."

The Commission found that from the facts set forth "a liability of the Brazilian Government arises for having failed to take timely and effective measures to protect the human rights of the Yanomamis" and declared that the Government of Brazil had violated, *inter alia*, Article XI of the American Declaration relating to the right to the

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18 Human Rights Committee, Communication No. 182/1984, submitted by F. H. Zwaan de Vries of the Netherlands. For a more extensive discussion of cases involving Article 26 as an autonomous right, see Scott, *infra*, note 23, 851-859. The finding that Article 26 is an autonomous right and can be invoked regarding rights not protected in the Civil and Political Covenant has been criticized by Professor Christian Tomuschat, a former member of the Committee. See Tomuschat, "Equality and Non-discrimination under the International Covenant on Civil and Political Rights" in von Munch, (ed.) *Staatsrecht-Völkerrecht - Europarecht, Festschrift für Hans-Jürgen Schlochbauer*, 1981, Walter de Gruyter, Berlin.

19 *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*. Resolution No. 12/85, Case No. 7615 (Brazil), 5 March 1985.

preservation of health and to well-being.<sup>20</sup> It recommended that the programs of education, medical protection and social integration of the Yanomanis begun by the Government "be carried out in consultation with the indigenous population affected and with the advisory service of competent scientific, medical and anthropological personnel."

### *Philippine Supreme Court: Philippine Constitutional Provisions*

In the 1993 case of *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (DENR)<sup>21</sup> the Philippine Supreme Court found that a *prima facie* case had been made by claimants of a violation of constitutional provisions on health and the environment. The Constitutional provisions at issue were the following:

"(Article II, sec. 15): The State shall protect and promote the right to health of the people and instill health consciousness among them.

(Article II, sec. 16): The State shall protect and advance the right of the people to a bal-

anced and healthful ecology in accord with the rhythm and harmony of nature."

The case involved an effort to have logging licenses revoked because of deforestation resulting from extensive logging which, it was contended, would cause irreparable injury to present and future generations and violate their right to a healthy environment. The Supreme Court reversed a trial court decision dismissing the claim. The decision was particularly interesting because the Court found that the claimants, a group of minors (represented by the Philippine Ecological Network) had standing to file a class suit of this nature on behalf of themselves and succeeding generations, on the basis of inter-generational responsibility. They also held that invocation of the constitutional provisions did not constitute a political question.

While concurring in the result, Judge Florentino Feliciano filed a concurring opinion in which he stated that the constitutional provisions were not sufficiently precise to constitute a legal right and were rather a matter of constitutional policy. He thus invoked a common argument against the application of provisions on social and economic rights - namely, that they are not susceptible to

20 Although the American Declaration, similarly to the Universal Declaration of Human Rights, was not considered legally binding at the time of its adoption, "it has over the years come to be viewed as a normative instrument of the inter-American system and the most authoritative catalogue of the human rights that the States' Parties to the OAS Charter are under a duty to promote," Thomas Buergenthal, "International Human Rights Law and Institutions" in *The Right to Health in the Americas*, Fuenzalida-Puelma and Scholle Connor, (eds.), PAHO, 1989, at 11.

21 *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* (DENR), 30 July 1993, 33 International Legal Materials 173 (1994). See also Ted Allen, "The Philippine Children's Case: Recognizing Legal Standing for Future Generations", 6 *Georgetown International Environmental Law Review* 713 (1994).

application in a court of law; they are not justiciable rights.

### *Indian Supreme Court: Constitutional Provisions and Directive Principles*

The progressive decisions of the Indian Supreme Court concerning economic and social issues are widely noted in the literature.<sup>22</sup> Economic and social rights are included among the Directive Principles of the Indian Constitution and are expressly stated to be non-justiciable. Nevertheless, "[T]he Indian Supreme Court used the explicitly non-justiciable Directive Principles to justify its broad interpretation of the right to life."<sup>23</sup> Issues concerning the right to health could be raised in the Indian Supreme Court under the rubric right to life.

In cases involving economic and social issues, the Court has constructed creative remedies and means of assisting the promotion of economic and social rights. Perhaps the most creative aspect of the Court's work under former Chief Justice P.N. Bhagwati has been the widening of the scope of standing to permit non-governmental organizations to represent disadvantaged persons before the Court, who would not normally themselves have the opportunity to appear as litigants. The Indian decisions are important since, similarly to the

Philippine Minors Oposa decision, they provide evidence that Courts judge on economic and social issues when they are willing to avoid narrow procedural issues which normally block such considerations.

### *Conclusions to be Drawn from the Cases*

The most obvious conclusion to be drawn from even this limited selection of cases is that the right to health is justiciable because it has been applied by both international and national courts. Speculation about whether the right to health is justiciable has given place to reality. While the number of cases cited above is quite limited, it is not exhaustive and additional cases can undoubtedly be found. Thus there is adequate proof that there is no logical or intrinsic reason to argue against justiciability of the right.

It appears from the cases, that the right to health is often violated in relation to a particular group of persons and that protection of the right involves examining health effects on that particular population. In the Inter-American Commission case of the Yanomani Indians, Brazil was held liable for violations of the right to health of the Yanomanis as a group. The persons suffering from the violation in the

22 See Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India", *The Review, International Commission of Jurists*; P.N. Bhagwati, "Human Rights as Evolved by the jurisprudence of the Supreme Court of India," 1987 *Commonwealth Law Bulletin* 238; Bertus de Villiers, "Directive Principles of State Policy and Fundamental Rights: The Indian Experience", 8 *South African Journal of Human Rights* 29, 1992.

23 Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights," 27 *Osgoode Hall L.J.* 769 (1980).

Philippine case were the present generation and future generations. In both cases, non-governmental organizations were permitted to represent the groups.

Thus, it is important to find a means of providing the opportunity for groups to be represented if the right to health is to be made operational.

Traditional concepts of standing should be made more flexible in order to promote justiciability of economic and social rights. If an Additional Protocol to the Covenant on Economic and Social Rights is to be adopted, it should permit organizations representing groups - and not only individual victims - to raise violations of the right.

The cases also illustrate that particular allegations of violations lead to a clarification of the concept of the right to health. The effort to find a "common core" of the right to health is enhanced through the adoption of a complaints procedure. The type of violations which arose in the cases cited would probably not be raised in a reporting procedure. It is doubtful that the harm to environmental health though excessive logging would have been noted in a reporting procedure, but, through the ingenuity of non-governmental environmental and health organizations, the issue was raised in a court setting and based on the violation of the right to health. Similarly, the issue of the effect of use of nuclear weapons on health has been raised before the International Court of Justice and, it is certainly doubtful whether it could or would be raised in a reporting procedure.

## 5 *Further Reflections on Justiciability: Non-Discrimination*

One of the most likely aspects of the right to health to be dealt with through a justiciable procedure concerns non-discrimination. As mentioned earlier, discrimination is a frequent cause of the violation of the right to health of particular individuals or groups. Should an Optional Protocol to the ICESCR be adopted, it would make it possible to bring up in a concrete form the widespread discrimination against women in health issues. Discrimination against women, in various forms is nearly universal, although more severe in some countries than in others. This widespread societal discrimination has serious consequences for the health of women and children - and, therefore, for society as a whole. The role of women in society demonstrates that one of the most effective means of improving a nation's health is through educating women and contributing to their health.

WHO has provided an invaluable guide to women's right to health in its recent publication, *Human Rights in Relation to Women's Health: The Promotion and Protection of Women's Health Through International Human Rights Law*. Prepared by Professor Rebecca J. Cook, it surveys widespread discrimination against women and cites the resulting negative impact, not only on the health of women, but also on entire communities. Many health risks incurred by women are not incurred by men: e.g., domestic violence, female genital mutilation, lack of research on women's health issues, problems in reproductive health, lack of education for family planning, and special health risks for women at work.

Cook cites the Economic Covenant and the Women's Convention as setting general guidelines for the protection of women's right to health, but looks to WHO's women's health indicators and criteria to interpret obligations in the two treaties. Indicators of health status (such as statistics on longevity and provision of health services) may be used to determine whether a State is meeting its obligations to promote the right to health. But as Cook points out, most statistics are not disaggregated according to sex and regions, creating some difficulties in their use. Both WHO and UNICEF have stressed the need for disaggregation of health statistics

Cook also points out that a State's obligation to respect health may require both negative and positive action on its part. For instance, a State should not obstruct access to information regarding sources of HIV infection, but should undertake a public education program to provide that information. A number of suggestions are made in the WHO publication regarding the obligation to respect women's health: access to information on family planning, elimination of spousal authorisation for certain health services, prohibition of involuntary sterilisation, and emphasis on the importance of informed consent to therapeutic interventions are pointed out as being important means of protecting women's health.

Asbjorn Eide has noted that the obligation of States to protect and promote economic and social rights involves three aspects: 1) the obligation to *respect*: the State should not violate the integrity of the individual or infringe on his or her freedom to use material resources to satisfy basic needs; 2) the obligation to *protect* -

to prevent others from violating the right; 3) the obligation to *fulfil* - the necessity for the State to take measures to ensure the right. Clearly, the use of nuclear weapons would be a direct infringement on the health of the populations concerned and would violate the obligation to respect. The obligation to protect others from violating the right may require States to control the promotion of tobacco use. A particularly egregious threatened violation of the obligation to fulfil has occurred in the State of California in the United States. The people of the State of California recently voted in favour of Proposition 187 which would deny all public services, including public health services, to illegal aliens. Voters apparently regarded the public services as one of the incentives drawing illegal aliens to California. Following the adoption of the Proposition, the Governor of the State issued an executive order to State officials to cut off government services to pregnant women and nursing home patients who were illegal aliens. A number of lawsuits have been filed to block its implementation on the grounds of unconstitutionality. Orders enjoining its application have been entered in several courts. The US Constitution provides no guarantee of economic and social rights (other than the right to property); the alleged unconstitutionality is primarily made on the basis of the violation of the "equal protection" clause of the US Constitution. To deliberately deny health services to some residents of a State is evident of a clear violation of the right to health / unfortunately, a right not recognised in the United States.

## 6 *Beyond Justiciability*

This article has argued that the right to health can be made justiciable - indeed, has been in a number of cases. It has argued that complaints procedures permitting individuals and groups to raise allegations of violation of the right will be a valuable contribution to its implementation. Nevertheless, undue focus on the justiciability of the right should not detract from the fact that there are a number of means by which the right could be considerably enhanced which do not entail justiciability.

The International Labour Organization has been engaged for the last 75 years in protecting social rights - the right of workers and employers to organize, freedom from forced labour and child labour, prohibition of discrimination in employment. The ILO has elaborated an extensive panoply of means to promote these rights. Their reporting system has consistently been improved and made more effective over the years and the effort to adopt a protocol to the Economic Covenant should not distract attention from necessary improvements of the reporting system for the Covenant. The ILO has utilised technical assistance, direct contacts with governments, increased "mobilisation of shame," and a number of other implementing measures to promote workers' rights.

This essay, then, ends with a precautionary note. We must promote justiciability of economic and social rights, but those of us interested in promoting these rights should also focus our energies on a variety of other means of great importance in implementation. Attention

should be paid to the experience of the ILO in this regard.



# ***Economic, Social and Cultural Rights and the Role of Lawyers: North American Perspectives***

**David Matas\***

Canada has signed and ratified the International Covenant on Economic, Social and Cultural Rights but not entrenched any of its provisions in the Canadian constitution. The United States has signed the Covenant, but not ratified it. Mexico has signed and ratified the Covenant, entrenched many of the rights in its constitution, but has not passed implementing legislation.

For Canada, the legal debate about economic, social and cultural rights revolves around whether economic, social and cultural rights should be entrenched in the Canadian constitution, in the Charter of Rights and Freedoms. In the United States, the legal debate revolves around whether the International Covenant on Economic, Social and Cultural Rights should be ratified. In Mexico, the debate revolves around whether the economic, social and cultural rights in the constitution should be implemented through legislation.

In form, the debates in the three countries are different. In substance,

they are the same. The concern about entrenchment, in Canada, like the concern about ratification in the United States, and the concern about legislation in Mexico is a concern about the justiciability of economic, social and cultural rights. The role of lawyers in this debate is to dispel the myths that have grown up around these rights that purport to show that the rights are not justiciable. In what follows, I attempt to do just that, to set out the prevalent North American myths that have prevented the legalisation of economic, social and cultural rights, and why the myths are wrong.<sup>1</sup>

**Myth Number One** - Economic, social and cultural rights are not really rights. According to this view, the use of the word rights in an economic, social and cultural contexts is a moral or hortatory one. It is a political statement rather than the assertion of a legal right.<sup>2</sup>

**The Reality** - We are capable of making economic, social and cultural rights legal rights, if we wish to do so. There is nothing inherent in economic, social and

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1 See David Matas, *No More: The Battle against Human Rights Violations* (Dundurn Press: Toronto) 1994, Chapter 14.

2 Vierdag "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights," *Netherlands Yearbook of International Law* 1978, 69- 105.

cultural rights that prevents them from being legal rights. At the international level, economic, social and cultural rights are rights every bit as much as political and civil rights. Both are subject to international covenants. In form there is nothing to distinguish between the two covenants that leads us to believe that one, the Political and Civil Covenant, deals with legal rights, and the other, the Economic, Social and Cultural Covenant does not. Both covenants are treaties and treaties are considered a source of international law, no matter what the content of the treaty.<sup>3</sup>

**Myth Number Two** - Political and civil rights are legal rights because they come with a specific reference to how they may be attained. Economic, social and cultural rights are not legal rights because they come with no specific reference to how they may be attained, except for very general guidelines.

**The Reality** - The notion that we have more specific standards about how political and civil rights should be attained than economic social and cultural rights ignores the nature and content of political and civil rights. The International Covenant on Civil and Political Rights states that each State Party to the Covenant undertakes to take the necessary steps to adopt such mea-

asures as may be necessary to give effect to the rights recognised in the Covenant.<sup>4</sup> The Covenant states the rights. It does not state how the rights are to be attained. That is left to each State Party.

**Myth Number Three** - We do not need to legalise economic, social and cultural rights in the constitution, because there is no obligation, internationally, to implement these rights. Economic, social and cultural rights are merely aims or goals which should be achieved progressively, rather than immediate obligations to be met.

This myth, put another way, is that economic, social and cultural rights are obligations of result, not obligations of conduct. As long as the State is taking steps to achieve the result, it does not matter if the result is achieved. Political and civil rights are, on the other hand, obligations of conduct pointing to a certain measure that a State must adopt.<sup>5</sup>

**The Reality** - The Covenant on Economic, Social and Cultural Rights commits each State party "to achieving the full realisation of the rights recognised in the present Covenant to the maximum of its available resources."<sup>6</sup> That provision might excuse a poor country realising the obligations immediately. It does not excuse a country like

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3 See G.J.H Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views," in P. Alston and K. Tomasevski, *The Right to Food*, Martinus Nijhoff, 1984, page 97, at 99.

4 Article 2(1).

5 See Manfred Nowak "The Rights to Education" in Asbjorn Eide, Catarina Krause, and Allan Rosas *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff: Dordrecht/Boston/London: 1995) 189 at 198 to 201.

6 Article 2(1).

Canada or the United States, two of the wealthiest in the world. If any States, when devoting their maximum available resources to the realisation of economic, social and cultural rights, can realise those rights, then Canada and the US can.

Put in terms of the distinction between obligations and conduct and obligations of result, the notion that economic, social and cultural rights are always and only obligations of result, and that political and civil rights are always and only obligations of conduct is false. For countries like Canada and the US all economic and social rights are obligations of conduct and not just obligations of result. For countries like Canada and the US, if an economic, social or cultural right is not being realised, the reason is unwillingness and not incapacity.

As well, there are many provisions of the Covenant, no matter what the level of resources available, which must be realised immediately by all. Limitation of resources can never excuse violation of the rights to equality in the enjoyment of

economic, social and cultural rights;<sup>7</sup> the right to form trade unions;<sup>8</sup> the liberty of parents to choose private education for their children;<sup>9</sup> freedom for scientific research and creative activities;<sup>10</sup> prohibition of employment of children in harmful work;<sup>11</sup> the rule<sup>12</sup> that marriage must be entered into with the free consent of the intending spouses.<sup>13</sup>

The International Covenant on Economic, Social and Cultural Rights does not talk about satisfactory levels of standard of living, health care or public education. It talks, instead of an adequate level of standard of living, health care or public education.<sup>14</sup> The notion of adequacy, in a rights context, is no more vague than the political and civil rights notions of fairness or equality, both of which have definite legal content.

Economic social and cultural rights are plagued with confusion between rights and goals. While respect for rights is always a goal, not every goal is a right, even a goal that deals with the same subject matter as the right. There is a difference between respect for the right to food and no one starving, respect for the

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7 Article 2(2) and Article 3.

8 Article 8.

9 Article 13(3).

10 Article 15(3).

11 Article 10(3).

12 Article 10(1).

13 See P. Alston and B. Simma "First Session of the U.N. Committee on Economic, Social and Cultural Rights" 1987 (81) A.J.I.L. 747.

Theodore Van Boven "Distinguishing Criteria of Human Rights in Vasak," *The International Dimension of Human Rights*, at 52.

14 Article 11(1).

right to shelter and no one homeless, and so on.

Respect for a right means that no one is thwarting realisation of the right, and everyone is doing what s/he can for realisation of the right. If no one is thwarting realisation of the right, and everyone is doing what s/he can for realisation of the right then the right is respected, even if the goal is not achieved. If no one is thwarting realisation of the right to food, and everyone is doing what s/he can for realisation of the right to food then the right to food is respected, even if people are still starving.

If, for economic social and cultural rights, rights and goals were the same, then for political and civil rights, they would also be the same. If respect for the right to food meant achievement of the ultimate goal of no one starving, then respect for the right to vote would mean achievement of the ultimate goal of everyone voting. Respect for the right to life would mean achievement of the ultimate goal of no one dying. But, clearly, respect for the right to vote does not mean everyone voting. Respect for the right to life does not mean no one dying.

The equation of economic social and cultural rights with their related goals is more than just harmless confusion. The equation makes the achievement of respect for the rights seem unrealistic, a pious hope rather than something that can actually be accomplished. Equation of rights with goals ends up undermining efforts to respect the rights.

Distinctions between goals and rights are real. But, distinctions made between political and civil rights and economic social and cultural rights are artificial. They serve to undercut an appreciation of the unity of all rights and should be avoided.

**Myth Number Four** - Economic, social and cultural rights are variable in content. What they mean differs over time, and differs from one place to another. They depend on the level of economic development, the resources available to realise the right. Political and civil rights, on the other hand, are constant in their content. They mean the same everywhere all the time. It makes more sense to legalise rights which are constant in content than rights which are variable in content. Legalising rights which are variable will cause unending problems for the courts.

**The Reality** - The mythological part of this objection is the notion that political and civil rights are constant. In the US, there have been wild variations in court interpretations of the Bill of Rights over the years. Perhaps the most well known instance was the case of *Brown v. The Board of Education*.<sup>15</sup> The US constitution states that no State shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>16</sup> Until 1954, and the case of *Brown v. Board of Education*, the courts had held that segregation was compatible with the US Bill of Rights as long as the facilities offered, though separate, were equal in nature. In 1954, the US Supreme Court reversed that

<sup>15</sup> 347 U.S. 483 (1954).

<sup>16</sup> 14th amendment.

jurisprudence and held that segregation itself was a denial of the right to equal protection of the law.

In Canada, the notion of variability in civil or political rights is imported into section one of the Charter, the reasonable limits clause. The Supreme Court of Canada has divided rights violations into two categories. There are those rights where the State is the singular antagonist of the person whose rights have been violated. Secondly there are those rights where the violation involves the reconciliation of claims of competing individuals or groups. When the violation is of the second sort, the Supreme Court of Canada has said that all courts must show considerable flexibility. As long as the government has a reasonable basis for the second type of violation, the impugned legislation will stand.<sup>17</sup>

**Myth Number Five** - Political and civil rights instruments apply all their rights to everyone. Economic, social and cultural rights instruments, on the other hand, allow for only certain rights to apply and allow for rights to apply only to certain aspects of the population. Rights that can be applied in so elastic a fashion do not properly belong in the law.

**The Reality** - The Economic, Social and Cultural Covenant has a provision that allows developing countries to "determine to what extent they would guarantee the economic rights recog-

nised in the present Covenant to non nationals."<sup>18</sup> There is no comparable provision in the Civil and Political Covenant.

However, the Civil and Political Covenant allows for derogation, which the Economic, Social and Cultural Covenant does not. Some rights, such as the right to life are non-derogable. But other rights, such as the right to liberty and security of the person, are derogable in time of public emergency and which threatens the life of the nation and the existence of which is officially proclaimed.<sup>19</sup> None of the economic, social and cultural rights is derogable, even in times of emergency which threaten the life of the nation.

Secondly, despite the unqualified appearance of the rights in the International Covenant on Civil and Political Rights, State parties can sign the Covenant with reservations, as they can with any treaty. Canada has not attached any reservations to its signature. But many other countries, including the US, have.

Thirdly, in Canada, the Charter of Rights and Freedoms allows for legislative limitations of the existing civil and political rights. The limitation must be reasonable and demonstrably justified in a free and democratic society. But it remains a limitation all the same. Political and civil rights cannot be considered absolute rights.

17 See *McKinney v. University of Guelph* (1991) 76 D.L.R. (4th) 545 at 651-2.

18 Article 2(3).

19 Article 4.

Fourthly, again in Canada, the Charter has been interpreted in such a way as not to apply to classes of people. In the case of *Ruparel*,<sup>20</sup> Mr. Justice Muldoon, in the Federal Court Trial Division, relying on the judgment of the Federal Court of Appeal in the *Canadian Council of Churches*<sup>21</sup> case held the Charter does not apply to non citizens outside of Canada. So an applicant for immigration applying through a Canadian visa office abroad could be a victim of discrimination on the basis of age, and the Charter could not help him.

The point is that it is simply wrong to think of political and civil rights as absolute and economic, social and cultural rights as qualified. Political and civil rights are subject themselves to too many qualifications to make the distinction tenable.

**Myth Number Six** - At the international level, economic, social and cultural rights are treated in a different fashion than are political and civil rights. Because the two sets of rights are treated differently internationally, it makes sense to have the two sets of rights treated differently domestically.

**The Reality** - There historically was a difference in the mechanisms established for implementing civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand. But the difference over time has diminished. The remedies for the two sets of rights have converged.

The Civil and Political Covenant establishes a Human Rights Committee of independent experts. States parties are supposed to file periodic reports with the Committee on their compliance with the Covenant. The Committee is supposed to study these reports and make general comments on them. As well, there are optional provisions for inter-State complaints and individual complaints to the Committee.

The Economic, Social and Cultural Covenant, on the other hand, establishes no such committee. Compliance reports are to be furnished directly to the Economic and Social Council of the United Nations, a State representative body, and not an expert independent body. There is no inter-State complaints option, nor an individual complaints option.

Even at the beginning, the difference in structure of implementation between the two sets of rights was more apparent than real. The main reason there was no expert committee for economic, social and cultural rights as that there were a number of technical agencies reporting to the Economic and Social Council, such as the World Health Organization or the Food and Agricultural Organization, that already dealt with these rights. There was a concern that an economic, social and cultural committee would be a duplication.<sup>22</sup>

Nevertheless, over time, as the compliance reports started to come in, it

20 (1991) 10 Imm.L.R. (2d) 81.

21 (1991) 11 Imm. L.R. (2d) 190.

22 P. Alston and B. Simma "First Session of the UN Committee on Economic, Social and Cultural Rights" 1987 (81) A.J.I.L. 747.

became apparent that an expert committee was needed. The Sessional Working Group of the Economic and Social Council established to consider State parties compliance reports went about its work in a manner that was, in the words of the International Commission of Jurists, "cursory, superficial, and politicised."<sup>23</sup> It neither established standards for examining reports nor reached any conclusion on the reports.

Specialised agencies of the Economic and Social Council were impeded from participation in the Working Group. The Group sat too little. Its membership kept on changing. Members of the Group attended irregularly. The lack of expertise of Group members meant they showed little understanding of the issues or the reports themselves.

In consequence, the direct reporting to the Economic and Social Council was abandoned and replaced by reporting to an expert committee. The Committee was established by a 1985 Economic and Social Council resolution. It held its first session in March 1987. It now functions very much like the Human Rights Committee established under the Civil and Political Covenant.<sup>24</sup>

Using differing forms of mechanisms domestically for implementing political and civil rights, on the one hand, and economic and cultural rights, on the other hand, would be repeating domestically the errors made internationally. Canada, the US and Mexico should

learn from the international experience and not repeat its mistakes. The lesson the international experience gives us is that economic, social and cultural rights, if they are to be treated seriously, have to be handled in much the same way as civil and political rights.

**Myth Number Seven** - Economic, social and cultural rights are not as important as political and civil rights. First priority should be given to the realisation of political and civil rights. If we legalise economic and social rights then we put them on the same level as political and civil rights. We end up confusing our priorities. We will dissipate our energies on the less important, the economic, social and cultural rights. Political and civil rights will suffer.

**The Reality** - At international law, there is no ranking of economic, social and cultural rights, on the one hand, and political and civil rights, on the other. Each is viewed as equally important. Pursuit of civil and political rights does not justify violation of economic, social and cultural rights. Indeed, the two sets of rights are generally considered interdependent and indivisible. It is impossible to realise one set of rights while ignoring the other. The Universal Declaration of Human Rights contains both sets of rights and does not differentiate between them.

Legislation of economic, social and cultural rights on the same level as political and civil rights works to promote the

23 "Implementation of International Covenant on Economic, Social and Cultural Rights. ECOSOC Working Group" *ICJ Review*, December 1981, page 26 at page 28.

24 See P. Alston and B. Simma "Second Session of the UN Committee on Economic, Social and Cultural Rights" (1988) 82 A.J.I.L. 603.

indivisibility of human rights. If rights are truly indivisible, then how can a division be made amongst them? If rights are truly indivisible, then division is impossible, in any form whatsoever. In particular, there can be no justifiable division between the legalisation of economic, social and cultural rights on the one hand, and the legalisation of civil and political rights on the other.

Achieving the ideal of indivisibility of human rights means getting everyone to accept that all human rights are indivisible. That can only be done if no artificial division is made in the way that various human rights are legislated. The legislation of economic, social and cultural rights must be done on exactly the same footing as the legislation of political and civil rights.

Much the same can be said of interdependence. If we truly accept the interdependence of all human rights, we must legalise economic, social and cultural rights. Interdependence means that we cannot have one without the other. It is impossible at one and the same time to maintain respect for political and civil rights and to tolerate violations of economic, social and cultural rights. Respect for one set of rights is dependent on respect for the other set of rights. If we want respect for political and civil rights, we cannot focus on political and civil rights alone. We must also focus on economic, social and cultural rights.

**Myth Number Eight** - The pursuit of economic, social and cultural rights is used in many countries as a justification for violation of political and civil rights. By elevating the status of economic, social and cultural rights through

entrenchment or ratification or implementing legislation, we give credence to that justification.

**The Reality** - It is true that the argument is often raised that economic, social and cultural rights must come first. We often hear that you cannot have democracy if you do not have food. However, the argument that violation of political and civil rights leads to respect for economic, social and cultural rights is specious. Tyranny does not lead to respect for economic, social and cultural rights. Tyrannical governments are less able to deliver economic, social and cultural rights than democratic governments. The answer to this objection is the same as the answer to the last one - that all rights are interdependent, indivisible, and equal in status.

**Myth Number Nine** - Economic, social and cultural rights are Marxist in inspiration. They involve a commitment to government interference in the economy and a rejection of *laissez-faire* ideology.

**The Reality** - This objection is bad philosophy, bad history, and bad economics. Virtually every Western country has ratified the Covenant on Economic, Social and Cultural Rights. The articulation of these rights has been a Western and Judeo-Christian tradition. Economic, social and cultural rights resemble more the programs of Mackenzie King in Canada or Franklin Delano Roosevelt in the US than they do the programs of Marx or Lenin. The champions of these rights in the international scene have been Western Europe, Australia and New Zealand.



As well, when we look round the world at the Marxist economies or their remnants, the reality is that they have been a good deal less effective in realising economic, social and cultural rights than the free enterprise economies. Marxism is neither an ideology of nor a prescription for the realisation of economic, social and cultural rights.

**Myth Number Ten** - Whatever the mythical foundation for economic, social and cultural rights, legally, the acceptance of those rights must mean the interference of government in the economy. There is a difference between respect for a right and delivery of a service. The duty to respect human rights is a duty that falls only on governments. Individuals and non-governmental organizations can supply a service, but they cannot respect the rights. Only governments can respect the rights. Legalisation of economic, social and cultural rights means governments must respect those rights.

**The Reality** - Treaties, including human rights treaties, made on behalf of the State bind the State as a whole and not just the government. The State as a whole includes its citizenry, governmental officials and non-governmental civilians as well.<sup>25</sup>

Nigel Rodley has argued that international human rights instruments bind only governments and not individuals,

because the instruments are directed to governments.<sup>26</sup> That position either misrepresents the international instruments or confuses governments with States.

International human rights instruments do not say governments should do this, and governments should not do that. They contain generalized assertions of rights and freedoms. For instance, the prohibition against torture in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights does not state that public officials shall not commit torture. Instead those instruments state no one shall be subjected to torture. To restrict these obligations just to government officials is to narrow the scope of their literal meaning and the purpose of the constraints which is, after all, not to regulate governments, but to assert the human rights of individuals.

In some cases, the instruments are quite specific about their reach beyond the government to all citizens. The International Covenant on Civil and Political Rights has each State party undertaking to ensure that any person whose rights or freedoms recognised by the Covenant are violated shall have an effective remedy "notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>27</sup> The implication is that persons who do not act in an official capacity can violate rights and freedoms recognised by the

25 McNair, *The Law of Treaties*, 1961, 676; Lysaght "Protocol II and Common Article 3" 1983 *Amer. U.L.R.* 9; ICRC *Commentary on the Additional Protocols*, page 1345.

26 "Can Armed Opposition Groups Violate Human Rights?" in *Human Rights in the Twenty-First Century: A Global Challenge*, edited by Kathleen E. Mahoney and Paul Mahoney, published by Martinus Nijhoff in 1993, at 297.

27 Article 3(a).

Covenant. The obligation includes providing an effective remedy when a non-official violates rights and freedoms.

The Covenant elsewhere states that nothing in the Covenant may be interpreted as implying for "any state, group or person" any right to perform any act aimed at the destruction of rights and freedoms.<sup>28</sup> Again, the implication is that the Covenant applies to groups and persons directly. Otherwise the caution would have been pointless.

Both the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights have in their preamble this phrase: "Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant." Individuals have a duty to strive for the observance of rights. It would make little sense for the Covenants to say that if the observance of the rights was legally beyond the power of individuals.

Governments represent States, but they are not States. When a government undertakes an obligation on behalf of the State, the obligation is undertaken on behalf the whole State, governmental and non-governmental people alike, and not just on behalf of the government.

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28 Article 5.

29 Article 1(1).

30 Article 1(2).

31 Article 3.

It becomes a matter of interpretation of the particular obligation to determine whether or not it is restricted to government officials. To be sure, there are some international obligations and instruments including some international human rights obligations which are addressed specifically and only to public officials.

For instance, the Convention Against Torture defines torture to be an act by which severe pain or suffering is intentionally inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>29</sup> The Code of Conduct for Law Enforcement Officials, as its very name indicates, applies only to officials. However, the more specific instruments must not be used to read down the more general instruments. The specific does not limit the general. Indeed, the Convention Against Torture states that its definition of torture is "without prejudice" to any international instrument which contains provisions of wider application.<sup>30</sup>

When the Universal Declaration of Human Rights, for instance, says everyone has the right to life, it does not say nor mean to say that everyone has the right to have public officials respect the right to life. The Declaration means that everyone has the right to have his/her State, that is the government and all the citizens of the State, respect the right to life.<sup>31</sup>

For economic social and cultural rights, the suggestion that the duty to respect the rights rests only on governments is a prescription for State socialism. If the duty falls on governments alone to respect the right to work, then governments would have a duty to employ every unemployed person. But the drafting history and the very universal acceptance of the Universal Declaration on Human Rights and the International Covenant on Economic Social and Cultural Rights shows that these instruments were meant to be ideologically neutral, as compatible with free enterprise as with socialism.

A duty that falls specifically on individuals is the duty to rescue. One of the sources of international law is the general principles of law recognised by the community of nations.<sup>32</sup> The "general principles of law" refers to the general principles of domestic law.<sup>33</sup> One of the general principles of domestic law recognised by the community of nations is the duty to rescue.

In Canada, the Québec Charter of Rights and Freedoms provides: "Every human being whose life is in peril has a right to assistance. Every person must come to the aid of anyone whose life is in peril either personally or by calling for aid, by giving him the necessary and immediate physical assistance, unless it

involves danger to himself or a third person, or he has other valid reasons."

In the United States, the States of Vermont<sup>34</sup> and Minnesota<sup>35</sup> penal codes make it an offence to refuse to aid those exposed to grave physical harm. The California Court of Appeals has held the duty of rescue is part of the common law, and that a person can be found liable to damages for failing to give aid.<sup>36</sup>

The duty to rescue may not apply to every violation of economic, social and cultural rights, but it applies to many violations. The duty to rescue applies, for instance, to the right to food when denial of the right to food puts the victim's life in peril. Where a person's life is in peril, because of denial of the right to food, the duty to rescue is a duty to provide necessary and immediate physical assistance, i.e. food, and not merely a duty to exhort acceptance of the right to food.

**Myth Number Eleven** - It is inappropriate to have economic, social and cultural rights in the law because the realisation of economic, social and cultural rights involves the expenditure of money, which is better left to governments and not the courts. The realisation of political and civil rights do not, on the other hand, involve the expenditure of money.<sup>37</sup>

32 Statute of the International Court of Justice, Article 38(1)(c).

33 *In re Section 55 of the Supreme Court Act* (1984) 1 S.C.R. 86 at 114.

34 VT. STAT. ANN. tit.12, para. 519 (Equity 1973 & 1983 Supp.)

35 MINN. STAT. ANN. para. 604.05 (West 983 Supp.)

36 *Soldano v. Daniels* (1983) 190 Cal. Rptr. 310; 141 Cal. App. (3d) 443.

37 See Bossuyt, *La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels*, 8 H.R.J. (1975) 783-813.

**The Reality** - There are a number of political and civil rights that cost the State money to implement. There are a number of economic, social and cultural rights that are cost free. It is impossible to distinguish between political and civil rights, on the one hand, and economic, social and cultural rights, on the other, on the basis of expenditure.

For instance both the right to a fair trial and the right to free elections, both political and civil rights, involve substantial State expenditure. In the area of law in which I practice, refugee law, the right to life, liberty and security of the person in the Canadian Charter of Rights and Freedoms has required the Government of Canada to spend substantial sums of money on refugee determination procedures.<sup>38</sup>

To take examples from the economic, social and cultural side, recognizing the right to form trade unions,<sup>39</sup> or equal opportunity for promotion subject to no consideration other than seniority or competence<sup>40</sup> involves no substantial commitment of State expenditures. Indeed, if promotion on the basis of competence was furthered, the result would be a saving rather than an expenditure of funds.

**Myth Number Twelve** - What is important for the realisation of economic, social and cultural rights is the delivery of services. Putting economic, social and cultural rights in the law is an empty for-

malism that accomplishes little or nothing.

**The Reality** - There is a connection between legislation of a right and respect for the right. We legislate human rights in order to get everyone to respect them. It may be possible to have respect for a right in practice without acceptance of the right in principle. Yet, acceptance of the right must surely help.

Legislation of the right empowers the victims of the violation of the right. If you want to help a starving person, the best way is not to give the person food, but to give the person the means to get food. Give a person food, and the person eats once. Give a person the means to get food and the person will never be hungry again. The right to food is not food, but once the right to food is accepted, assertion of the right is a means the starving can use to get food.

Human rights are sometimes thought of as lists of specific rights. The evolution of human rights standards and mechanisms has been an evolution to greater and greater detail, with ever more specific declarations, conventions, rapporteurs and working groups. There is a danger that the central meaning and purpose of human rights, to promote the dignity and self worth of the individual human being, gets lost in a welter of detail. The only way we can see the whole forest is if we keep in our range of view all the trees. Legislation of economic, social and cul-

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38 See Van Hoof, 103.

39 Article 7(1).

40 Article 8(1).

tural rights, in addition to political and civil rights, means that we focus on human rights as a conceptual whole.

Not every economic, social and cultural right corresponds to a need that can be met by provision of services. Take for instance the right to strike.<sup>41</sup> The only way that there will be freedom to strike is if the right to strike is accepted and respected in law.

This observation is true not just for some economic, social and cultural rights, but, as well, for some violations of all economic, social and cultural rights. For some violations of all economic, social and cultural rights, a direct delivery of services to counter the violation is impossible. The only recourse is legislation and enforcement of the right.

It is true that we do not have to legalise many rights in order to respect them. For instance, Canada was a democratic tolerant country before it had the Canadian Charter of Rights and Freedoms. Nonetheless, the Charter has given Canadians a powerful tool to perfect the realisation of rights they had before. Legislation cannot be the be all and end all for realising these rights. But legislation can be an important aid.

Legislation has a symbolic value. It articulates aspirations. It is a statement of the values of society. As well, it is a practical everyday instrument that can be used to assist in the realisation of rights.

**Myth Number Thirteen** - Economic, social and cultural rights create positive obligations on the part of the State. They create a duty to act. Political and civil rights on the other hand create only negative obligations on the part of the State. They create only a duty to refrain from acting. It makes more sense to put in the law negative State obligations than positive State obligations.

**The Reality** - Several political and civil rights impose a positive obligation. The right to a fair trial would not be realised without the State being actively involved. The administration of justice is a State activity. The State can administer justice fairly or unfairly. It cannot administer justice by doing nothing at all.

Conversely there are economic, social and cultural rights that impose only negative obligations. Respecting the right to form trade unions does not require the State to do anything. All it does is require the State to recognise the right. The same can be said for freedom for scientific research, freedom for creative activity; and the right of parents to send their children to private schools.

**Myth Number Fourteen** - Even if legislators are prepared to put economic, social and cultural rights in the constitution, they should not put all such rights in the constitution. They should limit themselves only to the negative prohibitions. Although a few positive political and civil rights are in the Canadian Charter of Rights and Freedoms, by and large, the positive civil and political rights have been omitted from the

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41 International Covenant on Economic Social and Cultural Rights, Article 8(1)(d).

Charter. The same restraint should be shown for economic, social and cultural rights.

**The Reality** - It is true that the positive political and civil obligations, such as the obligation to prohibit hate propaganda or the obligation to promote racial equality, have been omitted from the Canadian Charter of Rights and Freedoms. However, that creates an unhealthy situation that needs curing, even in the political and civil domain. It is not a situation that should be duplicated in the economic, social and cultural domain.

The problem is that with the negative prohibitions inserted in the Charter and the positive obligations omitted, the negative prohibitions sit in judgment on the positive obligations. The positive obligations must pass Charter scrutiny of the negative prohibitions. Negative prohibitions and positive obligations are meant to coexist, to be read together. They are all part and parcel of the same human rights package. By placing one set of rights in the Charter and omitting another, those rights inserted are artificially given an importance they should not have in relation to those omitted.<sup>42</sup>

So for instance, there have been challenges to the hate propaganda laws based on the Charter guarantee of freedom of expression. For a time, in Alberta, in the *Keegstra* case,<sup>43</sup> the challenge succeeded, though the decision was eventually overturned by the Supreme Court of Canada. Only because

the positive duty to prohibit hate propaganda is given a lower status in Canada than the negative duty to allow freedom of expression was the Alberta judgment possible. In order to avoid distortions such as these, once legislators start putting human rights in the Charter, all human rights have to be there. Picking and choosing amongst them may well end up defeating the ones omitted.

**Myth Number Fifteen** - In Canada, the Charter of Rights and Freedoms controls governments. It does not control the private sector. The realisation of economic, social and cultural rights depends on more than just governments. It depends on what the private sector does and does not do. Putting economic, social and cultural rights in the Charter will not help all that much in the realisation of those rights, because the entrenchment would leave the private sector unaffected.

**The Reality** - The Supreme Court has indeed held that the Charter does not control private activity.<sup>44</sup> But there are several important limitations placed on that general principle. All legislation is subject to the Charter, even legislation that is invoked only in a private context, between two individual litigants. Because the Charter binds legislatures, any infringement of Charter principles in legislation is a violation of the Charter itself, even where the person or entity relying on the legislation is non-governmental.

42 See D. Matas "The Charter and Racism" 1991 *Constitutional Forum*, Volume 2, Number 3.

43 (1991) 51 C.C.C. (3d) 1.

44 *RWDSU v. Dolphin Delivery Ltd.* (1987) 33 D.L.R. (4th) 174.

So the only area of law where the Charter does not apply is the common law (judge made law). Even for the common law, the Charter applies when it is the government that is relying on it to justify its own actions. It is only where a private actor relies on the common law that the Charter has no effect.

Mr. Justice McIntyre, on behalf of the Supreme Court of Canada said, about this area of Charter immunity: "I should make it clear, however, that this (Charter immunity) is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law."<sup>45</sup>

As previously mentioned, economic, social and cultural rights include in their number many rights which are positive in character. They require government action to realise the rights, even if it should intrude into the private sector. It is no defence to the denial of, say, the right to food, that the starvation is the result of the workings of the private sector. If the private sector fails to supply adequate food to all, the government must step in to meet the needs the private sector fails to meet.

Finally, the private/public distinction, although part of the present Charter, is not engraved in stone. There is no reason

why it has to be part of a revised Charter, or a limitation on economic, social and cultural rights even if it remains a limitation on civil and political rights, there is no justification for the private/public distinction in the Covenants themselves.

**Myth Number Sixteen** - Promoting respect for economic, social and cultural rights is better left to experts than human rights systems and the courts. The courts have little or no experience with the protection of economic, social and cultural rights. They are ill placed to be the defenders of these rights.

**The Reality** - That is an objection that could be raised equally to political and civil rights. If economic rights should be left to economists, then one could also say that political rights should be left to political scientists and rights in criminal proceedings to criminologists. The knowledge of what economic, social and cultural rights means is something different from the knowledge of economics, social services or culture. It is a knowledge of what rights mean. That is essentially a legal task, properly the domain of human rights institutions and the courts.

**Myth Number Seventeen** - Judges are ideologically opposed to economic, social and cultural rights. Putting economic, social and cultural rights in the constitution will mean nothing because judges will just restrict them or ignore them.

**The Reality** - There is a long standing jurisprudential debate on what

<sup>45</sup> At page 198.

judges do, and why they do it. It would take altogether too long and take me well out of the scope of this paper to go through that debate here. In brief, my own position is that judges take rights seriously. Their decisions are based on the law in front of them and a desire to achieve justice, rather than by what they ate for breakfast or a knee jerk self defence of their class interest.<sup>46</sup>

Perhaps the best answer to this argument is the legalisation of civil and political rights. The legalisation of political and civil rights has had a substantial impact on North American law, an impact in many ways that was not anticipated when the laws were introduced. The judges have not ignored or restricted legalised civil and political rights, although there was concern that they might. There is no reason to believe that legalised economic, social and cultural rights would be treated with any less respect.

**Myth Number Eighteen** - There is a myth that is the converse to the myth that judges will do nothing to promote economic, social and cultural rights. This myth is that judges will do too much to promote economic, social and cultural rights. They will use the power given to them by legalised economic, social and cultural rights to usurp the role of the government.

**The Reality** - Courts and the government, even when dealing with the same subject matter, do two very different things. The government executes policies, reflecting the will of the majority or

the powerful. Courts, when interpreting human rights instruments, elaborate the meaning of rights protecting the position of the minority or the powerless.

Economic, social and cultural rights cannot be left to governments any more than political and civil rights can. If economic, social and cultural rights are left to governments, then the majority or the powerful decide what rights the minority or the powerless will have. The realisation of economic, social and cultural rights becomes a matter of convenience for the majority or the powerful. The notion that rights are inherent in the individual is denied.

Giving courts the power to interpret economic, social and cultural rights does not mean that courts can do whatever they please. They are limited to enforcing respect for legalised rights. It does mean that governments can no longer do, or neglect to do, whatever they please. But that is what the legalisation of rights is all about.

**Myth Number Nineteen** - Putting economic, social and cultural rights in the law will create only an illusion of protection of these rights. The reality will be that those who are denied economic, social and cultural rights will be financially unable to go to court to assert them. Legalisation of the rights will be legalisation of a mirage.

**The Reality** - The problem with this objection is it makes an obstacle seem insuperable when it can, in a number of different ways, be overcome. It is, of

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46 See D. Matas "The Working of the Charter" (1986-7) *Man.L.J.* 111 at 116 following.



course, true that the disadvantaged will have less money for lawyers than the advantaged and therefore less ability to litigate to assert rights of any sort.

However, to compensate for that, there are legal aid funds that have funded litigation on behalf of the indigent, and presumably would continue to do so with an expanded law covering economic, social and cultural rights. Indeed, many of the claims now asserted by legal aid litigants would be buttressed by legalised economic, social and cultural rights.

Litigants are now in court or have been in court asserting economic, social and cultural rights without the benefit of legalisation of these rights. These litigants would not disappear once States legalised economic, social and cultural rights.

There are a host of non-governmental organizations that are willing to undertake human rights litigation as principle litigants or who fund the cases of those who wish to assert legalised human rights. According to the common law of Canada, maintenance, providing financial support for another to bring or defend an action, is a tort, a legal wrong. Maintenance is considered wrongful unless privileged on some ground.<sup>47</sup>

It is clear now that one of the grounds of privilege is funding of Charter of Rights and Freedoms litigation. One Canadian High Court Judge has said:

"In my view, it is desirable that Charter litigation not be beyond the reach of citizens of ordinary means. The citizen of ordinary means is a term that covers, of course, the vast bulk of Canadians. There are few individuals, regardless of their walk of life, who could afford Charter litigation of the type experienced in this application. I accept the validity of the applicants proposition that, of necessity, the individual must seek assistance from third party organizations at times to assist in asserting his or her constitutional rights. Otherwise, the individual unaided by a third party organization, such as the NCC, would be a David pitted against Goliath."<sup>48</sup>

**Myth Number Twenty** - Legalising economic, social and cultural rights in the constitution will generate false expectations and divert energies into unproductive channels. The realisation of economic, social and cultural rights will come through political struggle, not legal interpretation. Legalising economic, social and cultural rights will lead economic, social and cultural rights advocates to charge off in the wrong direction, into the courts, instead of into the political arena where they need to be for economic, social and cultural rights to be realised.

47 G.H.L. Fridman "The Law of Torts" in *Canada* Volume 2, page 258.

48 *Re Lavigne and OPSEU* (No. 2) (1988) 41 D.L.R. (4th) 86 at 126 per White J.(Ont.H.Ct.)

**The Reality** - It is never a wise strategy in assertion of rights to rely on litigation alone. Litigation is a dispute resolution mechanism that is available when other recourses fail. But the availability of a legal recourse does not cut off other avenues of recourse. Economic, social and cultural rights advocates cannot possibly be worse off by having an additional recourse for assertion of those rights.

Litigation is more than just an add on, an extra option. It reinforces the assertion in the political arena of economic, social and cultural rights. The political assertion of a right that has a sound legal foundation is going to be a good deal easier than the assertion of the same right without legal basis.<sup>49</sup> As long as economic, social and cultural rights advocates do not abandon political recourses for legal recourses alone they will be far better off with legalised economic, social and cultural rights than without them.

### *Conclusion*

In North America, there just are not any good reasons why we should keep economic, social and cultural rights out of the law. And there is every reason why those rights should be in the law. For Canada, that means that economic, social and cultural rights should be entrenched in the Canadian constitution, in the Charter of Rights and Freedoms. For the United States, it means that the International Covenant on Economic, Social and

Cultural Rights should be ratified. For Mexico, it means that the economic, social and cultural rights in the constitution should be implemented through legislation.

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49 See Stephen Wexler "Practicing Law for Poor People" (1969-70) 79 *Yale Law Journal* 1049 at 1059.

# **Economic, Social and Cultural Rights and the Role of Lawyers**

**Fali S. Nariman\***

## **I The Lawyer**

The principal criticism of the modern Lawyer is that his system and methods have not kept pace with the fast changing world.

Many decades ago, when the Chief Justice of Australia, Sir Owen Dixon was asked whether it was any part of the duty of a lawyer to contribute towards the progress of society, he answered that it was not. The duty of a lawyer, he said, was to keep a hand on and to hold steady "the framework and foundations of the law." But that was long ago. The world has been totally transformed since Justice Dixon retired in the 1960s.

The quickening pace of technological advance and a new sense of service and duty to society have now claimed the attention of the ideal lawyer; but we still have a long way to go.

A book published in the late 1970s by Professor Weeramantry, now a judge of the International Court of Justice, raised disturbing questions about lawyers and their role in society in the wake of technological changes. The book - *The*

*Slumbering Sentinels* - depicts on its cover, Bench and Bar alike in varying postures of slumber against a backdrop of a computer readout! A passage that has relevance for us all reads:

"science and technology have burgeoned in the post-war years into instruments of power, control and manipulation. But the legal means of controlling them have not kept pace. Out-moded and out-manoeuvred by the headlong progress of technology, the legal principles that should control it are unresponsive and irrelevant. Legal structures and concepts and people who work the system are proving unequal to the task of protection, in the midst of a set of problems without precedent in the law. Assumptions long regarded as fundamental no longer hold true. Values once held unquestionable no longer command acceptance.

Procedures once adequate no longer yield results. Lawyers

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are out of their depths, their concepts out of touch, their techniques ineffectual. Sociologists, philosophers, economists, environmentalists, ecologists and politicians have sensed some of these dangers and have prepared for them. Lawyers have been slow to do so, hampered by outdated concepts and methods."

The transition from the role of slumbering Sentinels to that of Sentinels on the *qui vive* has been difficult and arduous. But if the profession as we know it is to survive, we all must awaken to the realisation that those who need our help and tap our competence must not find us wanting.

In the 1980s, in a message to a Conference of lawyers from South and South-East Asia, held in New Delhi, Sir Shridath Ramphal (then Secretary-General of the Commonwealth), reminded the participants that they were "heirs to a noble tradition of intellectual inventiveness;" a nice, well-rounded phrase of great relevance to the practising lawyer poised for being catapulted into the pressing demands of the next century.

The lawyer of today then has to meet and contend with challenges beyond the law, challenges also to his traditional role as an intermediary between his client and courts of justice.

## II The Judge

The judge too cannot afford to be ignorant of what is going on around the

world. In his Paul Sieghart Memorial Lecture, recently reproduced in edited form in Public Law (Autumn issue of 1995, p. 386), Mr. Justice Sedley recalls the tale - probably apocryphal - of a judge of the Supreme Court of a Commonwealth country who was worried about a human rights charter case - the hearing of which had just concluded. The judge was told by his clerk that Dworkin had written something on the point. "Who's Dworkin?" asked the judge innocently.

In this day and age "judicial innocence" is almost unforgivable. Construing written constitutions and modern statutes without being informed of relevant international instruments is like embarking on a long sea voyage without modern navigational aids. After all, our daily lives are affected more often than we know, or care to admit, by parliament's incompetence at performing its central role. Courts all around the world are therefore moving onto the centre stage, giving an interpretation of what they believe their parliament - if it had the time - would have intended and said. As a consequence Lord Acton's hackneyed dictum gets transformed in the mind of the modern role-conscious judge: "Power... Judicial power [he says as he wields it] is delightful, and absolute judicial power is absolutely delightful!"

## III The Lawyer and Judge in India

### a Generally

In the post war years (the fast changing period after World War II) many lawyers around the world and in India

were in the vanguard of progress and in the frontline of freedom movements. Some of them helped to write our Constitution.

Lawyers (especially in the 1980s and 1990s) have been the catalysts; for innovative judicial interpretation, for transmitting new ideas and getting them accepted by the Courts. The Courts too (after 1978 - the post-Emergency period in India) have been receptive. In particular, whilst interpreting the Constitution and Indian Statute law they have looked beyond territorial frontiers - to International Covenants and Conventions.

### *b The influence of International Covenants and Conventions on the Indian Courts*

In 1974, Lord Denning likened the influence of European law on domestic law to "an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back." We have still far to go before we can say that International Covenants and Conventions have seeped into Indian domestic law.

But some of our Judges have made a start - a refreshing start. They have read and interpreted municipal law harmoniously with the UDHR, and with other International Covenants and Conventions - some of which have not even been ratified by India.

A list of decisions of courts invoking international covenants and conventions

whilst interpreting Indian Municipal law - and in harmony with them - is appended to this paper (Appendix I).

In the field of economic, social and cultural rights some of these rights are already embodied in Part-IV of India's Constitution (Directive Principles of State Policies). They are summarised in Appendix II.<sup>1</sup>

In at least two decisions (viz. AIR 1987 S.C. 2342 and 1992(1) S.C.C. 441), articles 7 and 7(b) of the International Covenant on Economic, Social and Cultural Rights are specifically referred to, though not as part of Indian Municipal law (even though India is a party to the ICESCR). This is because under our law, as under English law, treaties and conventions, though ratified or acceded to, are not directly enforceable in Municipal Courts. They have only evocative significance. In fact where enacting legislation has misfired contrary to the terms of a particular Covenant or Convention (which has been ratified) courts have held that it is the enacting law that prevails, not the Convention. An instance in point is the Foreign Awards (Recognition and Enforcement) Act, 1961, enacted to implement the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. As enacted it provided for a "submission to arbitration" in addition to an "Arbitration Agreement" though the latter was the only condition requisite for applicability of the New York Convention of 1958, (ratified by the Government of India in 1961). The

1 Appendix I and II have been compiled by my junior Mr. Subhash Sharma, Advocate to whom I am indebted for the research it involved.

enacting legislation (the Foreign Awards Recognition and Enforcement Act 1961) went beyond the Convention by requiring also "a submission to Arbitration;" it was held (in *Tractor Export vs. Taraporte* AIR 1971 S.C. 1 by a majority of 2:1) that the implementing legislation prevailed, though it went beyond the requirements of the New York Convention. A year later, Parliament had to step in by an Amendment - the additional requirement of a written submission to arbitration (which had been at one time the practice in India in domestic arbitrations) was deleted.

### *c Recent Trends*

*Teob's case* (1995) decided by the Federal Court (and High Court) of Australia<sup>2</sup> has recently prompted a direct petition to the Indian Supreme Court by a women's rights group; it arose out of the gang-rape of a social worker. The petition prays for a declaration that the Government of India's ratification in 1994 of the UN Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), be implemented (despite the absence of enacting legislation) by judicial guidelines to be formulated by the Supreme Court - in particular in relation to sexual harassment of women in the workplace. The Right to Equality - Articles 14 and 15 - is guaranteed in our Constitution's Bill of Rights (Part-III), but there is a proviso to Article 15, (Prohibition of Discrimination on

grounds of religion, race, caste, sex or place of birth) which says: that nothing in the Article shall prevent the State from making any special provision, for the protection of women and children (Article 15(3)). Both *Teob's case* and Article 15(3), have been invoked to request the Supreme Court to formulate appropriate guidelines by judgment and order in relation to sexual harassment. Under our Constitution, judgments of the Supreme Court of India are binding on all persons and authorities in the territory of India, (Articles 141 and 144), and the guidelines would become enforceable both against public employers and private employers as well even though there has been no legislation implementing Government's ratification of CEDAW. The case is now listed for final hearing before a Bench of the Supreme Court.

### *Conclusion*

Mr. Justice Sedley - the same Sedley whom Lord Hailsham would not appoint as a High Court Judge because of his communist past, and who his successor (Lord Mackay) promptly did - is listed in the *Who's Who* as having "Changing the World!" as his hobby. For the lawyer of the 21st century there can be no better motto: "Changing the World."

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2 *Teob's case* has for the first time in Anglo-Saxon jurisprudence transplanted the doctrine of "legitimate expectation" (so far invoked in the field of *locus standi* - also in administrative law) into the arena of substantive municipal law.

## Appendix I

### *International Instruments Referred to in Judgments of the Supreme Court<sup>3</sup>*

1 *Maneka Gandhi vs. Union of India*  
1978 (1) SCC 248 (para 45); AIR  
1978 SC 597.

A Case where Mrs. Gandhi's daughter-in-law's passport was impounded. She petitioned the Court pleading a fundamental right to go abroad under the life and liberty Clause of the Constitution (Article 21). In the judgment of the Court the right to travel abroad was held to be consistent with Art. 21 of Constitution.

Art. 13, of the Universal Declaration of Human Rights 1948 was cited at para 45.

2 *Hussainara Khatoon vs. Union of India* 1980 (1) SCC 81 at page 88 A.  
1979 SC 1390.

Rights of under-trials for speedy trial was held as part of Art. 21 of the Constitution.

Art. 3 of ECHR cited at page 88.

3 Index:

- 1 ECHR-European Convention on Human Rights.
- 2 ICCPR-International Covenant on Civil and Political Rights, 1966.
- 3 ICESCR-International Covenant on Economic, Social and Cultural Rights, 1966.
- 4 UDHR-Universal Declaration of Human Rights.

3 *Prem Shankar Shukla vs. Delhi Admn.* 1980 (3) SCC 526

Handcuffing of under-trials whilst on their way to and from the prison to the Court - Art. 19 and 21 invoked.

Art. 5, UDHR, and Art. 10 ICCPR referred to at para 3.

4 *Francis Coralie Mullin vs. Admn., Union Territory of Delhi* 1981 (1) SCC 608 (Para 8).

Right to protection against cruel inhuman and degrading treatment held violative of Art. 21 of the Constitution.

Art. 7 of ICCPR, 1966 and Art. 5 of UDHR cited (Para 8).

5 *P.U.D.R. vs. Union of India* 1982 (3) SCC 235; 1982 SC 1473  
(Asian Games Case) Paras 2 and 6.

Employment of children prohibited in every type of Construction work. Held that it would be in consonance with ILO Convention No. 59 ratified by India, and consonant with Directive Principles of State Policy in Art. 24 of the Indian Constitution

**6 *Laxmikant Pandey vs. Union of India***  
**1984 (2) 244 at page 251,**  
**A. 1984 SC 469**

Malpractices and trafficking in children in connection with adoption of Indian children by foreigners living abroad. Art. 15(3) and 39(e) (f) of the Constitution invoked: guiding principle laid down by the Court since there was no legislation on this topic.

Declaration of the Rights of Child adopted by UN in 1959 was cited (para 7) by the Judges.

**7 *Kadra Pabadiya vs. State of Bihar***  
**1981 (3) SCC 671; A. 1981 SC**

Under trials (not convicted) made to await trial-kept in Leg Irons and made to work outside jail: held to be contrary to prison regulations and also contrary to ILO Convention against forced labour (para 3).

**8 *Jolly George Varghese vs. Bank of Cichin*** 1980 (2) SCC 360-362.

No one should be imprisoned merely on ground of genuine inability to fulfil contractual obligation: the Court held this would be violative of Art. 21 of the Constitution, as well as the Spirit of Art. 11 of the ICCPR, 1966 (para 2).

**9 *Daily Rated Casual Labour vs. Union of India*** 1988 (1) SCC 122, A. 1987/ SC 2342 (*Daily Casual Worker - "Equal Pay for Equal*

*Work"* - Art. 14 Art. 16, 38(2), 39(2), of the Constitution.

Art. 7, International Covenant on Economic, Social and Cultural Rights, 1966 (ICES), cited at para 7.

**10 *Kubic Darusz vs. Union of India***  
**1990(1) SCC 568, para 20.**

Preventive detention in India of a Polish foreign national - the petition invoked Art. 21 and 22 of the Constitution: held that detention was not justified, having regard to the object of preventive detention as also international law and human rights. It sought harmonisation of national law with international law and human rights. ICCPR and ICES was also referred to (at para 20):

"Preventive detention of a foreign national who is not resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard. The Universal Declaration of Human Rights include the right to life, liberty and security of a person, freedom from arbitrary arrest and detention; the right to fair trial by an independent and impartial tribunal, and the right to presume to be an innocent man until proved guilty. When an act of preventive detention involves a foreign national, though from the national point of view the



municipal law alone counts in its application interpreted in accordance with the State's international obligations as was pointed out by Krishna Iyer, J. in *Jolly George Verghese vs. Bank of Cochin*. There is need for harmonisation whenever possible bearing in mind the spirit of the Covenants. In this context it may not be out of place to bear in mind that the fundamental rights guaranteed under our Constitution are in conforming line with those in the Declaration and the Covenant on Civil Rights to which India has become a party by ratifying them."

**11 *Charan Lal Sabu vs. Union of India*  
1990 (1) SCC 687. (*Bhopal Gas Disaster case*).**

The Court held that the Right to Life and liberty included pollution-free-air and water: guaranteed under Art. 21 Fundamental Duties; Article 48A and 51(g) referred to. The Court further said that these rights must be integrated and illumined by the evolving international standards as highlighted by Clause 9 and 13 of UN Code of Conduct on Transnational Corporations (para 137).

**12 *Kishore Chand vs. State of H.P.* 1991  
(1) SCC 286 (para 12)**

Accused has a right of free legal aid, Legal defence and fair trial - under Art. 21, 14 and 19 and 21 of the Constitution read with the Art. 39A.

Art. 3 UDHR; and Art. 10 UDHR - referred to (at para 12).

**13 *C.E.S.C. Limited vs. Subhash Chandra Bose* 1992 (1) SCC 441; A.  
1992 SC 573.**

Employees are entitled to sickness benefits etc., - Right of Health comprehended in Constitution: Art. 39(e), 21 of the Constitution.

Art. 22-25 UDHR; and Art. 7(b), International Covenant on Economic, Social and Cultural Rights 1966 (ICES) - cited (at: para 30 & 32).

**14 *Nilabati Behera vs. State of Orissa*  
1993 (2) SCC 746 (para 21),**

Award of Monetary Compensation for State's violation of the fundamental right under Art. 21 of Constitution; wrongful arrest and then disappearance of the person.

Art. 9 ( 5 ) of ICCPR cited and referred to ( para 21 ); despite the express reservation of the Government of India to Article 9(5) on the basis that damages for tortuous acts of the government are not contemplated by Indian law.

**15 *Unnikrishnan, K.P. vs. State of A.P.*  
1993 (1) SCC 645, para 45.**

Admission professional Colleges - Citizens have fundamental right to education: held to be a part of Art. 21 41, 45

and 46 of the Constitution. The Court also held - that the contents and parameters have to be determined in light of Art. 45 and 41 of the Constitution.

Art. 26 (1) of UDHR cited in support (at para 45).

***16 C.E.R.C. vs. Union of India 1995 (1)***  
***Scale 354.***

Right to health of workers engaged in mines and asbestos industries was held to be a fundamental right under Art. 21 read with 39(e), 41, 43, 48 of the Constitution.

International Labour Conference, 1986, (Asbestos Convention) was cited in support (paras 3 and 4).

## Appendix II<sup>4</sup>

### A Comparative Statement of Relevant Articles of ICES, 1966 and the Indian Constitution

Indian Constitution	ICES, 1966
1. Art. 39	Art. 3; 6(1); 7
2. Art. 41	Art. 6; 7
3. Art. 42	Art. 7; 10.2
4. Art. 43	Art. 11(1)&(2); Art.15
5. Art.45	Art.13(1), 2(a), (3), (4) and Art. 14
6. Art.47	Art. 12(1), (2)(a), (b), (c), (d)
7. Art. 51	Art. 1.3; Art. 2(1)

The cases are legion:

Article 39: A.58 SC 578; A. 78 SC 215; A.79 SC 233 A.86 SC 1571 (1619); 1466 (1475); 584; 1773; A.91 SC 1173; A.88 SC 1782 (1783); 1291 (1297); A. 90 SC 123; 153 (165, 166); 883, 334; 371 (373); A. 87 SC 1518 (1525); 2342; A. 87 SC 165 (166); 2049; 656; 1773; 232; 989 (3) SCC 616, A. 78 SC 215; A.70 SC 169; A. 91 SC 1420; 1367; A. 89 SC 1737; 1287 (1289); 1215 (1217); 29 (30); 1256; A. 82 SC 879; A. 84 SC 541; A. 90 SC 2295 (2299); 2178; A. 88 SC 1970; 1663; 1504; A. 89

SC 19; 1308; 88; 1990 (1) SCC 441; 1995 (1) Scale 354.

Article 41: A. 91 sc 855; A. 90 SC 2228; 1923; A. 86 1571; 1993 (1) SCC 645; 1995 (1) Scale 354,

Article 42: A. 79 SC 65; A. 74 SC 2092; A. 84 SC 802; A. 88 SC 1863.

Article 43: A. 79 SC 65 (69); 233 (234); A. 82 SC 1107; A. 58 SC 578, A. 66 SC 305, A. 63 SC 98; A. 83 SC 130; 1995 (1) Scale 354 .

Article 45: A. 58 SC 956 (986 ); A. 88 SC 1663 (1665); 1993 (1) SCC 645.

Article 47: 1990 (2) JT 34(SC); A.51 SC 318 (329); A. 78 SC 386 (391); A. 88 SC 520 (522), A. 75 SC 360; 1989 (4) JT 267 (305) SC; A. 54 SC 220 (223).

Article 51: A, 69 SC 783 (712); A, 70 SC 329 ( 332 ); A. 88 SC 24 (28); A. 80 SC 470, A. 75 SC 105 (108, 115); A.87 SC 674 (686); 1990 (1) SCC 687.

#### 4 Index:

A:	A.I.R.
SCC:	Supreme Court Cases
SC:	Supreme Court
JT:	Judgment Today

**B** *Despite Art. 37, of the Constitution that Directive Principles cannot be enforced in courts of law, courts have interpreted fundamental Rights and Statutes inspired and influenced by the Directive Principles of State Policy.*

**1** *P.U.D.R. vs. Union of India 1982 (3) SCC 235; 1982 SC 1473 (Asian Games Case) Paras 2 and 6.*

Employment of children prohibited in every type of Construction work. Held that it would be in consonance with the ILO Convention No. 59 ratified by India, and consonant with Directive Principles of State Policy in Art. 24 of the Indian Constitution.

**2** *Kadra Pabdiya vs. State of Bihar 1981 (3) SCC 671; A. 1981 SC 939.*

Under-trials (not convicted) made to await trial kept in leg irons and made to work outside jail was held to be contrary to prison regulations and also contrary to ILO against forced labour (para 3).

**3** *Jolly George Varghese vs. Bank of Cochin 1980 (2) SCC 360-362.*

No one to be imprisoned merely on ground of genuine inability to fulfil contractual obligation: the Court held this would violative of Art. 21 of the Constitution, as well as the Spirit of Art. 11 of the ICCPR, 1966 (para 2).

**4** *Kubic Darusz vs. Union of India 1990 (1) SCC 568, para 20.*

Preventive Detention in India of a Polish foreign national - the petitioner invoked Art. 21 and 22 of the Constitution: held that detention was not justified, having regard to the object of Preventive Detention as also International Law and human rights. It sought harmonisation of national law with International law and human Rights. ICCPR and ICES was also referred to (at para 20):

“Preventive detention of a foreign national who is not resident of the country involves an element of international law and human rights and the appropriate authorities ought not to be seen to have been oblivious of its international obligations in this regard. The Universal Declaration of Human Rights include the rights to life, Liberty and security of a person, freedom from arbitrary arrest and detention; the right to fair trial by an independent and impartial tribunal, and the right to presume to be an innocent man until proved guilty. When an act of preventive detention involves a foreign national, though from the national point of view the municipal law alone counts in its application and interpretation, it is generally a recognised principle in national Legal systems that in the State’s international obligations as Jolly George Varghese vs. Bank of Cochin. There is need for har-

monisation whenever possible bearing in mind the spirit of the Covenants. In this context it may not be out of place to bear in mind that the fundamental rights guaranteed under our Constitution are in conforming line with those in the Declaration and the Covenant on Civil Rights to which India has become a party by ratifying them."

**5 *Charan Lal Sabu vs. Union of India 1990 (1)***

SCC 687. (Bhopal Gas Disaster Case). The Court held that the Right to life and Liberty included pollution-free air and water; guaranteed under Art. 21 - Fundamental Duties: Article 48A and 51(g) referred to.

The Court further said that these rights must be integrated and illuminated by the evolving international standards as highlighted by Clause 9 and 13 of UN Code of Conduct on Transitional Corporations (para 137).

**6 *C.E.R.C. vs. Union of India 1995 (1) Scale 354.***

Right to health of workers engaged in mines and asbestos industries was held to be a fundamental right under Art. 21 read with 39(e), 41, 43, 48 of the Constitution.

International Labour Conference, 1986, (Asbestos Convention) was cited in support (paras 3 and 4).



# ***The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights***

**Manfred Nowak\***

## ***1 Historical Background***

The origins of an individual complaints procedure relating to human rights violations in the framework of the United Nations date back to the years 1949 and 1950 and, therefore, coincide with similar deliberations in the Council of Europe. Already in 1950 - i.e. one year before the ideologically motivated decision was taken to divide human rights into two categories laid down in two separate Covenants with different sets of implementation instruments - the General Assembly called upon the Human Rights Commission "to proceed with the consideration of provisions, to be inserted in the draft covenant or in separate protocols, for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the covenant."<sup>1</sup> As is well known, the ensuing Cold War did not

only result in the development of two separate Covenants, but it also prevented the Human Rights Commission to include any reference to individual complaints even in its final draft on the Covenant on Civil and Political Rights (CCPR) of 1954.<sup>2</sup> This situation continued until the final year of drafting both Covenants in the General Assembly. On the initiative of the Netherlands a number of States from all regions except Eastern Europe who were in favour of individual complaints, with highly diplomatic skills and a good portion of luck because time was running out finally succeeded in 1966 with the adoption of the first OP to the CCPR. The whole idea of individual complaints, even in the context of civil and political rights, at that time was so controversial that two States voted against the OP (Niger and Togo) and 38 States abstained (in addition to all Socialist States also countries like

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1 GA Res. 421 (V) F.

2 UN.Doc. E/2573, 65 *et seq.* (1954).

Japan, Spain, Greece, Senegal, Tanzania and India).<sup>3</sup> Consequently, no government was willing to take the initiative of proposing an individual complaints procedure with respect to economic, social and cultural rights.

It is, therefore, surprising that only two years later the first World Conference on Human Rights held 1968 in Teheran called upon "all governments to focus their attention ... on developing and perfecting legal procedures for prevention of violations and defence of" economic, social and cultural rights.<sup>4</sup> This plea in 1969 resulted in the preparation by the Secretary-General of a detailed "preliminary study of issues relating to the realisation of economic and social rights" which at least on the domestic level emphasised on the need for judicial remedies against violations of economic, social and cultural rights.<sup>5</sup> This approach has, however, not been further pursued by the relevant UN bodies during the 70s and 80s. UN efforts rather focused

on alternative approaches such as a New International Economic Order and a universal right to development.<sup>6</sup> The international monitoring of States' compliance with their obligations under the Covenant on Economic, Social and Cultural Rights (CESCR) was, however, left to a totally ineffective system of State reports being examined by one of the principal political UN organs, ECOSOC.

This unsatisfactory situation gradually started to change in the second half of the 1980s, mainly because of two developments: the more cooperative attitude of Socialist States in the age of President Gorbachev's *Glasnost* policy<sup>7</sup> and the 1985 decision of ECOSOC to entrust the monitoring of the CESCR to an independent Committee on Economic, Social and Cultural Rights which held its first session in March 1987.<sup>8</sup> On the initiative of Mr. Philip Alston, Mr. Bruno Simma and others this new expert committee adopted a very innovative approach to

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- 3 For the historical background to the OP cf. Manfred Nowak, CCPR Commentary, Kehl/Strasbourg/Arlington 1993, at pp. 649 *seq.* with further references.
- 4 Res. XXI, para. 6, Final act of the International Conference on Human Rights, UN.Doc. A/CONF. 32/41 (1968). Cf. for this and the following Philip Alston, "No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant", in Asbjorn Eide/Jan Helgesen (eds.), *The Future of Human Rights Protection in a Changing World - Essays in Honour of Torkel Opsahl*, Oslo 1991, p. 79 at pp. 83 *et seq.*
- 5 UN Doc. E/CN. 4/988 (1969).
- 6 Cf., e.g., the Declaration on Social Progress and Development (GA Res. 2542 (XXIV) of 11 December 1969); the Universal Declaration on the Eradication of Hunger and Malnutrition (GA Res. 3348 (XXIX) of 17 December 1974); GA Res. 3201 and 3202 (S-VI) on the New International Economic Order; the report of Manouchehr Ganji on "The realisation of economic, social and cultural rights: problems, policies, progress", UN Sales No. E.75.XIV.2 (1975); and the Declaration on the Right to Development (GA Res. 41/128 of 4 December 1986).
- 7 Cf. for this time, e.g., Manfred Nowak, "The Attitude of Socialist States towards the Implementation of UN Human Rights Conventions", *SIM Newsletter* 1/1988, p. 85.
- 8 ECOSOC-Res. 1985/17; cf. Philip Alston, "Out of the Abyss: The Challenge Confronting the New UN Committee on Economic, Social and Cultural Rights", 1987 HRQ 332.



the reporting procedure by actively including NGOs in its deliberations, conducting a much more adversarial type of dialogue with representatives of governments and by issuing country-specific comments. In a recent review Mr. Matthew Craven even argued that "the Committee is only a short step away from operating an 'unofficial petition system' within the context of the reporting system itself."<sup>9</sup> But the Committee did not restrict its activities only to changing its working methods under an implementation procedure established by the Covenant, it also became the driving force behind a new initiative to draft an Optional Protocol to the CESCRC aimed at establishing an individual complaints procedure. This initiative prompted the second World Conference on Human Rights held in June 1993 in Vienna to encourage "the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights."<sup>10</sup> The development of this initiative will be the subject of the following analysis.

## 2 *Progress in Drafting an Optional Protocol*

After some preliminary discussions the Committee on Economic, Social and Cultural Rights in 1990 requested its then Rapporteur Mr. Philip Alston to prepare a discussion note outlining the principal issues that would appear to arise in connection with the drafting of an Optional Protocol (OP) to the CESCRC "which would permit the submission of communications pertaining to some or all of the rights recognized in the Covenant."<sup>11</sup> On 25 October 1991 Mr. Alston submitted a first discussion note to the Committee<sup>12</sup> which was also published in a more comprehensive form in the "Festschrift" dedicated to Mr. Torkel Opsahl.<sup>13</sup> In this discussion note the principal arguments in favour of and against an OP as well as the various functions of complaints procedures were discussed. Mr. Alston arrived at the conclusion that the overriding argument in favour of developing an OP to the CESCRC is that a system for the examination of individual cases offers the only real hope that the international community will be able to move towards the development of a significant body of jurisprudence which is absolutely indis-

9 Matthew Craven, "Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights", in Krzysztof Drzewicki/Catarina Krause/Allan Rosas (eds.), *Social Rights as Human Rights - A European Challenge*, Turku/Abo 1994, p. 91.

10 Para. 75 of the Vienna Programme of Action of 25 June 1993; for the text of the Vienna Declaration and Programme of Action see UN Doc. A/Conf. 157/22, reproduced e.g. in Manfred Nowak (ed.), *World Conference on Human Rights - The Contribution of NGOs*, Vienna 1994, p. 168. The plural in "protocols" seems to be a drafting error.

11 UN Doc. E/1991/23, para. 285.

12 UN Doc. E/C.12/1991/WP.2.

13 Alston, *supra* note 4.

pensable if economic, social and cultural rights are ever to be taken seriously.<sup>14</sup> With respect to the precise shape of such a procedure he recommended a fairly pragmatic and cautious approach of restricting its application, at least in the beginning, to a limited range of rights, of stressing the broad margin of discretion of States and of restricting the *locus standi* on the lines of class action suits.

The Committee discussed this paper during its sixth session in December 1991.<sup>15</sup> Opinions of Committee members differed as to who should be authorized to exercise the right of complaint (States, individuals and/or NGOs) and which economic, social and cultural rights should be covered by the complaints procedure. Some members felt that the possibility of complaints should also be directed against the lending policy of international financial institutions. In general, the Committee's response to the idea of drafting an OP was very positive since this would focus the attention of public opinion to a greater extent on economic, social and cultural rights and would thereby underline the doctrine of interdependence and indivisibility of all

human rights.<sup>16</sup> The Committee requested Mr. Alston who had been elected chairman to further elaborate on the details of such complaints procedure.

On the basis of specific research carried out by Mrs. Theresia Degener on these issues Mr. Alston presented a supplementary working paper on 27 November 1992.<sup>17</sup> This paper dealt with four issues and was much less cautious than his original proposal. On the controversial question of the possible subject of the complaints procedure he left no doubt that "it would seem far preferable for the procedure to be open to any individuals or groups."<sup>18</sup> In other words, he considered an inter-State procedure only as additional measure, and he also clearly departed from the system of class action or purely collective complaints as, e.g., recommended by the Council of Europe Ministerial Meeting on the European Social Charter which had been held in Turin in October 1991.<sup>19</sup> On the question of what rights should be covered by the procedure he outlined four options including the restrictive approach taken by the 1988 Protocol of San Salvador to the American Convention on Human

14 UN Doc. E/C.12/1991/WP. 2, para. 36; Alston, *supra* note 4 at p. 98.

15 UN Doc. E/C.12/1991/SR. 13 and 14.

16 UN Doc. E/1992/23, para. 362.

17 UN Doc. E/C.12/1992/WP.9.

18 *Ibid.*, para. 27.

19 On the draft protocol to the European Social Charter providing for a collective complaint system see David Harris, "A Fresh Impetus for the European Social Charter," 1992 ICLQ 659; Klaus Fuchs, *The European Social Charter: Its Role in Present-Day Europe and its Reform*, in Drzewicki/Krause/Rosas, *supra* note 9 at p. 151 (165 et seq.); Theo Öhlinger, *Die Europäische Sozialcharta und der Schutz wirtschaftlicher und sozialer Rechte durch den Europarat*, in Manfred Nowak (ed.), *Europarat und Menschenrechte*, Vienna 1994, p. 119 at p. 130; Fons Coomans, *Economic Social and Cultural Rights*, *SIM Special* No.16, Utrecht 1995, p.3 and 25.

Rights<sup>20</sup> but again left no doubt now that he favours a comprehensive approach, i.e. the application of the complaints procedure to the entire Covenant.<sup>21</sup> This would, however, in no way preclude the operation of various procedural safeguards (admissibility requirements on the lines of those enlisted in the first OP to the CCPR) "which would help to ensure that the procedure did not lead to the consideration of matters which do not belong in such a setting."<sup>22</sup> Finally, with respect to the possible outcome of the complaints procedure he proposed final views of the Committee on the lines of those published by the Human Rights Committee together with the possibility of seeking a friendly settlement as is the case with the procedure before the European Commission of Human Rights.<sup>23</sup>

On 1 December 1992 the Committee again discussed Mr. Alston's proposals.<sup>24</sup> As Mr. Danilo Türk, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, had done in his

final report on the realization of economic, social and cultural rights,<sup>25</sup> also the Committee now supported the idea of an OP in much stronger terms than before. On most questions the maximalist approach of Mr. Alston was followed by other Committee members. In particular, they agreed that the procedure should be open to all individuals and groups, and that it should cover all the rights recognized in the Covenant. Only Mr. Konate (Senegal), Mr. Wimer Zambrano (Mexico) and Mr. Kouznetsov (Russian Federation) expressed some minor reservations as to the realistic chances of such an approach.<sup>26</sup> The Committee requested Mr. Alston to prepare a revised and consolidated document which would combine his two working papers and reflect the main points made during the debate. This analytical paper was formally adopted by the Committee on 11 December 1992, published as Annex IV to its annual report<sup>27</sup> and submitted to the 1993 World Conference on Human Rights.<sup>28</sup> As stated above, the World Conference supported the idea of an OP without any reservation.<sup>29</sup>

20 Article 19 (6) of the Protocol of San Salvador extended the system of individual petitions under the American Convention on Human Rights only to the right to organize trade unions and the right to education. Cf the text in Felix Ermacora/Manfred Nowak/Hannes Treter, *International Human Rights*, Vienna 1993, p. 318 at p. 322.

21 UN Doc. E/C.12/1992/WP. 9, para. 37.

22 *Ibid*, para. 38.

23 *Ibid*, paras. 49 and 50.

24 UN Doc. E/C.12/1992/SR. 11 and UN Doc. E/1993/22, paras. 233 and 234.

25 UN Doc. E/CN.4/Sub. 2/1992/16, para. 211.

26 UN Doc. E/C.12/1992/SR.22, paras. 19, 35 and 36.

27 UN Doc. E/1993/22, p. 87.

28 See para. 18 of the Committee's Statement to the World Conference on Human Rights in *ibid*, p. 82 at p. 85 *et seq*.

29 See *supra* note 10.

As a first step in implementing the recommendation of the World Conference, the Committee in November 1993 requested Mr. Alston to actually prepare a draft OP. The Commission on Human Rights supported this proposal and invited the Committee to report thereon to the Commission at its 51st session.<sup>30</sup> On 9 November 1994, Mr. Alston presented a consolidated text of a draft OP in which he made use, *inter alia*, of a draft OP to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>31</sup> which had been prepared by an independent expert meeting from 29 September to 1 October 1994 at the University of Limburg in the Netherlands.<sup>32</sup> He also drew heavily on the model of the first OP to the Covenant on Civil and Political Rights (CCPR) as interpreted by the Human Rights Committee,<sup>33</sup> but on a number of issues his proposal goes beyond the text of the first OP and the Rules of Procedure of the Human Rights Committee.

Notwithstanding the fact that most controversial issues had already been

solved by the Committee and that both the World Conference and the Commission on Human Rights had clearly supported the drafting of an OP to the Social Covenant, the discussions in the Committee during its 11th and 12th sessions proved to be fairly slow and difficult. Some members including Mr. Texier (France) and Mr. Grissa (Tunisia) expressed doubts at the justiciability of all rights of the Covenant; Mr. Wimer Zambrano (Mexico) and Ms. Taya (Japan) tried to introduce a distinction between "active" and "passive" violations of economic, social and cultural rights; Ms. Taya proceeded to draft an own counter-proposal to the one prepared by Mr. Alston but it finally turned out that a large part of her paper had little to do with the draft OP; Mr. Ceausu (Romania) proposed to return to the model of the European Social Charter, i.e. offering States parties the possibility to select only a number of rights to which the individual complaints system would apply. Much of the discussion centred around the question whether the Committee, which is strictly speaking not a treaty monitoring body,<sup>34</sup> could be entrusted by an OP with treaty monitor-

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30 CHR-Res. 1994/20 of 1 March 1994.

31 UN Doc. E/C.12/1994/12, paras. 5 and 7.

32 The expert meeting was organized by the Maastricht Centre for Human Rights and the Women in the Law Project of the International Human Rights Law Group. The draft OP to CEDAW is based on a first draft prepared by Jane Connors and Andrew Byrnes.

33 For the jurisprudence of the Human Rights Committee under the first OP to the CCPR cf. Dominic Mc Goldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford 1991; Nowak, *supra* note 3 at p. 647 *et seq.*

34 In contrast to other treaty monitoring bodies the Committee on Economic, Social and Cultural Rights was established by ECOSOC Res. 1985/17 and not by the Covenant itself. Cf. Alston, *supra* note 8.

ing functions, and on the desirability of complaints submitted by NGOs.<sup>35</sup> Although these discussions revealed much less consensus than earlier ones within the Committee, Mr. Alston was finally again requested to submit a revised report until November 1995 which "should provide the basis upon which the Committee could complete its consideration of the matter, with a view to forwarding a final report to the Commission on Human Rights at its fifty-second session," i.e. at the latest in March 1996.

In preparing his revised and, hopefully, final report Mr. Alston will also be able to draw upon the outcome of an expert meeting convened by the Netherlands Institute of Human Rights (SIM) in Utrecht from 25 - 28 January 1995. The experts based their deliberations on the consolidated draft of Mr. Alston, discussed a number of issues that had also been of concern to members of the Committee and finally agreed upon a revised text of an OP.<sup>36</sup> Although the Netherlands Ministry of Foreign Affairs was represented at the Utrecht expert meeting and promised support for the revised text, the actual statement of the

Dutch representative in the Commission on Human Rights seemed to be highly critical.<sup>37</sup>

### 3. *Analysis of the Draft Optional Protocol Prepared by the Committee on Economic, Social and Cultural Rights*

Since the final draft by Mr. Alston is not yet available, the following analysis is based on his consolidated text of November 1994 ("Alston draft").<sup>38</sup> The analysis endeavours to compare this text with the draft OP of the Utrecht expert meeting of January 1995 ("Utrecht draft"),<sup>39</sup> the draft OP to CEDAW prepared by the Maastricht expert meeting of September/October 1994 ("Maastricht draft")<sup>40</sup> as well as the first OP to the CCPR as applied by the rules of procedure and the jurisprudence of the Human Rights Committee ("first OP").

#### 3.1 *Monitoring Body*

Reflecting the fact that ECOSOC and not the Committee remains the formally designated monitoring body under

35 For the discussion on 29 November, 1 and 9 December 1994 and 3 May 1995 see UN Doc. E/C.12/1994/SR.42, 45 and 56 as well as E/C.12/1995/SR.5.

36 For the background papers, discussions and the text of the Interim and Final Utrecht Draft Optional Protocol see Fons Coomans/Fried van Hoof (eds.), "The Right to Complain about Economic, Social and Cultural Rights," *SIM Special* No. 18, Utrecht 1995. See also Rochus Pronk, "Toward an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights," in *Human Rights Brief* (published by the Center for Human Rights and Humanitarian Law of the American University in Washington, D.C.), Vol. 2 No. 3/1995, 6.

37 UN Doc E/CN.4/1995/SR.

38 UN Doc E/C.12/1994/12.

39 See *supra* note 36 at p. 233.

40 See *supra* note 32.

the terms of the Covenant the Alston draft contains a provision (article 1 (2)) according to which ECOSOC may, after full consultation with the States parties to the OP, designate also another body than the Committee to consider individual communications. This proposal met with criticism by Committee members including Mr. Simma (Germany).<sup>41</sup> The Committee agreed that it could not be placed in the hands of a politicised body such as ECOSOC to decide which body was to examine individual complaints. In accordance with these considerations the Utrecht draft developed the solution of a "Protocol Committee" to be established by the OP. Unless decided otherwise by the States parties to the OP (rather than ECOSOC) the Committee on Economic, Social and Cultural Rights shall function as the Protocol Committee. Should ECOSOC decide to dissolve the Committee the States parties would have to find a new solution. Apart from the rather difficult procedure to amend the Covenant this seems to be the best solution.

### 3.2 Standing

According to articles 1 and 2 of the first OP only individuals have the right to submit a communication. This formulation proved to be a serious shortcoming not only in relation to the right of peoples to self-determination. It in fact deprives all groups and legal entities

such as political parties, trade unions, religious associations, business companies and other organizations to submit a complaint against a violation of their rights.<sup>42</sup> The Alston draft accords standing to "any individual or group claiming to be a victim of a violation" (articles 2 (1) and 1 (1)). This prompted a discussion in the Committee initiated by Mr. Alvarez Vita (Peru) as to whether NGOs should not be explicitly mentioned.<sup>43</sup> This, on the other hand, provoked fears of popular complaints by NGOs which would diminish the chance of ratification by many States. The Utrecht draft proposes as a solution that "any individual, group or organization, claiming to be a victim of a violation" may submit a communication.

In my opinion, this discussion in the Committee was based on the same misunderstanding as the discussion in the General Assembly which led to the restrictive formulation of the first OP in 1966.<sup>44</sup> The only effective protection against a popular action is a strict victim requirement which is contained in all relevant texts with the exception of the Maastricht draft.<sup>45</sup> If only victims are permitted to submit a communication (and I am convinced this is a necessary precondition for an effective complaints procedure apart from inter-State procedures) I see no reason why NGOs such as the International Commission of Jurists or Amnesty International should not also be entitled, as much as other

41 Cf. UN-Doc. E/C.12/1994/SR.45, para. 32.

42 Cf. Nowak, *supra* note 3 at p. 659.

43 Cf. UN-Doc. E/C.12/1994/SR.45, paras. 46 *et seq.*

44 Cf. Nowak, *supra* note 3, at p. 658.

45 Article 2(1)b of the Maastricht draft, *supra* note 32.

legal entities, to submit a complaint against a violation of their human rights. With respect to the Social Covenant this question has only rather limited significance since only few economic, social and cultural rights by their very nature apply to legal entities.<sup>46</sup> In addition, NGOs should, of course, have the right to act as legal representatives and they should also be entitled to act on behalf of alleged victims (without being duly authorised) in cases where victims are not able or are effectively prevented by a government to submit complaints themselves.

### *3.3 Obligation not to Hinder the Submission of Complaints*

In accordance with Commission on Human Rights Resolution 1994/70 the Alston draft provides in article 2 (2) for an explicit obligation of States, which has no equivalent in the first OP, not to hinder the effective exercise of the right to submit a communication. The Utrecht draft goes one step further and also obliges States to assist the Committee in the examination of communications. If governments in fact prevent victims from submitting complaints, NGOs should have the right, as stated above (3.2), to act on their behalf. This is, in my opinion, the best solution to ensure the effective exercise of the right to submit a complaint without having to resort to the controversial alternative of popular complaints or public interest litigation.

### *3.4 Competence of the Committee*

Similar to the first OP the Alston draft speaks of the competence of the Committee to examine communications of victims who claim a violation of any of the rights recognized in the Covenant. In other words: The Committee shall examine alleged violations of all the rights stipulated in articles 1 to 15 of the Covenant (including the right of self-determination which, according to the case-law of the Human Rights Committee, cannot be the subject of an individual complaint under the first OP), but it has no competence to examine the States parties' failure to give effect to other (e.g. procedural) obligations under the Covenant.<sup>47</sup> The formulation "violation of a right" can be found in various provisions of the Alston draft such as articles 1 (1), 2 (1), 3 (2) a and c. In contrast, the Utrecht draft is somewhat ambiguous by also referring to "a failure by a State Party to give effect to its obligations under the Covenant" in articles III (2) a, III (2) c (i) and (ii) and VIII (1). In my opinion, the future OP should stick to the term "violation" in order to underline that this concept is not restricted to civil and political rights but can be equally applied to economic, social and cultural rights as has been shown, e.g., by the practice of the Committee on Economic, Social and Cultural Rights when adopting country-specific comments in the State reporting procedure.

46 Examples would be the right of trade unions in article 8(1)b to establish national federations or international organizations, the liberty of "bodies" to establish and direct educational institutions in article 13 (4) or the rights in article 15 to take part in cultural life and to enjoy the benefits of scientific progress and copyright.

47 Cf. UN Doc E/C.12/1994/12, para. 13.

### 3.5 Admissibility Requirements

The Alston draft in principle follows the model of articles 2 to 4 of the first OP by enumerating in one article (3), often with identical formulation, the following grounds for declaring a communication inadmissible: anonymity, abuse of the right to submit a communication, incompatibility *ratione temporis, personae, loci et materiae*, non-exhaustion of domestic remedies and examination of the same matter pending before another international organ. In certain areas the Alston draft goes beyond the text of the first OP by including developments in the jurisprudence of the Human Rights Committee. With respect to incompatibility *ratione temporis*, e.g., Alston in article 3 (2) c explicitly states that only acts or omissions which occurred before the entry into force of this Protocol<sup>48</sup> unless they constitute a continuing violation or have continuing effects which themselves constitute a violation. Alston also affirms that a communication may be submitted on behalf of the author. Furthermore, he follows the Human Rights Committee's jurisprudence to the effect that allegations must be sufficiently substantiated for the communication to be declared admissible.<sup>49</sup> In accordance with rule 92 (2) of the Human Rights Committee's Rules of Procedure the Alston draft in article 4 (2) introduces the possibility to recommence examination of a communication which had already been declared inadmissible. The

Utrecht draft did not propose major changes to the Alston draft.

### 3.6 Interim Measures

Although the first OP does not contain a specific provision dealing with interim measures, rule 86 of the Human Rights Committee's Rules of Procedure authorizes the Committee to request interim measures to avoid irreparable damage to the victim. In urgent cases involving, e.g., expulsion or capital punishment the Committee regularly applies this provision.<sup>50</sup> Alston followed the Committee's practice and drafted a specific provision (article 5) which goes beyond rule 86 as it authorises interim measures also for the mere preservation of the *status quo* and obliges States parties to take all necessary steps to comply with a respective request of the Committee.

### 3.7 Friendly Settlement

Following the model of articles 28 (1) b and 28 (2) of the European Convention on Human Rights and similar provisions in other treaties (not, however, in the first OP and the Human Rights Committee's Rules of Procedure) article 6 (3) and (4) of the Alston draft provides for a friendly settlement on the basis of respect for the rights and obligations set forth in the Covenant.

48 In other words: not the Covenant itself. For a critique of the respective jurisprudence of the Human Rights Committee cf. Nowak, *supra* note 3 at p. 679 *et seq.*

49 Articles 3 (2) a and 4 (1) of the Alston draft. For a critique of the respective jurisprudence of the Human Rights Committee cf. Nowak, *supra* note 3 at p. 666 *et seq.*

50 Cf. Nowak, *supra* note 3 at p. 674.



### 3.8 Taking of Evidence

Article 5 (1) of the first OP grants to the Human Rights Committee only limited powers to take evidence and ascertain the facts of a case. It shall consider communications exclusively in the light of written information submitted by the parties. This led in practice to considerable problems and fairly strict rules on the burden of proof.<sup>51</sup> Article 7 of the Alston draft attempts to remedy this situation by deleting the word "written" before information,<sup>52</sup> by permitting also information obtained from other sources and by authorising visits to the territory of the State party concerned, provided that the government agrees.<sup>53</sup>

### 3.9 Decision on the Merits

Article 5 (4) of the first OP is extremely weak as it only speaks of (legally non-binding) views which the Committee shall forward to the parties. In practice, the Human Rights Committee interpreted this provision in a fairly broad sense and issued from the very beginning quasi-judicial decisions which contain not only a clear statement on the violation of Covenant articles as well as which remedies States parties have to take (restitution, compensation, rehabilitation, measures to prevent similar violations in the future) in order to provide justice to the victim.<sup>54</sup> Article 8 of the Alston draft follows this approach by explicitly stating that the Committee may

recommend specific measures and that State parties shall take all necessary steps to remedy any violation and inform the Committee within three months of all measures taken. With respect to the controversial issue of confidentiality, article IX (4) of the Utrecht draft goes beyond the Alston draft and provides, in accordance with the practice of the Human Rights Committee (not explicitly authorized in the first OP), for the full publication of all decisions on (in)admissibility and on the merits.

### 3.10 Follow-up Procedures

Despite the fact that the first OP is silent on any follow-up to the Human Rights Committee's views the Committee developed a comprehensive follow-up procedure.<sup>55</sup> Article 9 of the Alston draft draws on this model and provides for the competence of the Committee to discuss with governments, particularly in the framework of the State reporting procedure, the follow-up measures taken by States parties to give effect to the views and recommendations of the Committee. The follow-up measures, if any, and the discussion thereon, shall be reflected in the Committee's annual report.

### 3.11 Rules of Procedure and Final Articles

In view of the fact that the Social Covenant does not contain provisions on

51 *Ibid* at p. 691 *et seq.*

52 Cf. also article 22 (4) of the Convention against Torture (CAT).

53 Cf. also article 20 (3) of CAT.

54 Cf. Nowak, *supra* not 3 at p. 708 *et seq.*

55 *Ibid* at p. 711 *et seq.*

rules of procedure, the meetings of the Committee and the responsibility of the Secretary-General for servicing the Committee, the Alston draft rightly proposes such provisions in articles 10 and 11. The final articles 12 to 18 closely follow those in the first OP.

#### 4 *Evaluation and Conclusions*

As the conclusions of the Vienna World Conference made clear the time is now ripe to overcome the shortcomings of the ideological debates of the 1960s and to adopt an individual complaints system for the international monitoring of the Covenant on Economic, Social and Cultural Rights, similar to the procedure established by the first OP to the Covenant on Civil and Political Rights. If all human rights are indivisible, inter-related and interdependent, as has been stressed time and again in numerous UN resolutions, then there is no more convincing reason why the monitoring procedures under both Covenants should remain different. That economic, social and cultural rights are less justiciable than civil and political rights has proven to be a mainly ideological argument which does not even hold true any more at the domestic level.<sup>56</sup> At the international level, treaty monitoring bodies have no other function than to determine in individual cases whether States parties are in violation of their respective treaty obligations. In arriving at these conclusions

they must, of course, take into account how these treaty obligations are in fact formulated. In case of the Social Covenant article 2(1) is phrased in extremely cautious terms: "Each State Party to the present Covenant undertakes 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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Taken together with the fact that most economic, social and cultural rights are formulated as obligations of conduct rather than as obligations of result (as in most cases of civil and political rights)<sup>57</sup> it will in fact be only in extreme cases of obvious non-compliance that the Committee on Economic, Social and Cultural Rights will actually find States parties to violate a specific right. On the other hand, an individual complaints procedure will definitely be the best opportunity, by means of developing case-law, to define the precise meaning and the limits of economic, social and cultural rights. Furthermore, since international complaints may only be submitted after the exhaustion of all available domestic remedies, such a procedure will actually become one of the most effective means to put pressure on States to develop relevant domestic remedies and thereby make economic,

56 Cf. various contributions in Asbjorn Eide/Caterina Krause/Allan Rosas (eds.), *Economic, Social and Cultural Rights*, Dordrecht 1995; in Coomans/van Hoof, *supra* note 36, and in various papers presented to the ICJ Conference in Bangalore, October 1995.

57 Cf. for this distinction, e.g., Manred Nowak, *The right to Education*, in Eide/Krause/Rosas, *supra* note 56, 189 at p. 199.

social and cultural rights justiciable or at least enforceable by quasi-judicial remedies such as complaints to national human rights commissions, Ombudspersons, parliamentary commissions or similar institutions established by domestic law.

The draft of Philip Alston as revised after various consultations with experts and lengthy discussions in the Committee on Economic, Social and Cultural Rights, provides an excellent basis for the final drafting in the Commission on Human Rights. It follows closely the procedure established by the first OP to the CCPR with certain modifications deriving from the practice of the Human Rights Committee, it adopts a comprehensive approach with respect to the rights to be covered, it provides for certain useful new elements taken from other procedures (e.g. friendly settlement, interim measures, follow-up procedure), and it avoids an *actio popularis* by strictly adhering to the victim requirement.

Let me, therefore, conclude by expressing my sincere hope that this draft will be speedily adopted by the Committee on Economic, Social and Cultural Rights during its forthcoming session in November 1995 and submitted, without further delay, to the Commission on Human Rights. In view of the excellent preparatory work the Commission should not have too many problems to adopt this draft without major revisions and to forward it in the near future to the General Assembly for adoption.



# Some Reflections on the Framework of Economic, Social and Cultural Rights in Africa

Joe Oloka-Onyango\*

## I Introduction

There is little need to restate the fact that economic, social and cultural human rights suffered as badly in the colonial epoch as did rights of a civil and political nature.<sup>1</sup> To the extent that any attention was paid to issues such as health and sanitation, shelter, working conditions, and the protection of indigenous cultures, these were largely deemed to flow from the largesse of the colonial master, rather than as rights of the colonial subject. As an extractive system, colonialism was primarily concerned with how much it could remove and transport to metropolitan industry in terms of material (and initially) human resources. Figures relating to expenditure on defence and other coercive aspects of the State far outstripped those on any social service.<sup>2</sup> Discriminatory and *apartheid*-like policies

in virtually every colonial enclave ensured that the indigenous populace benefited only partially from any of the developments of the time. Based on a system of extra-economic coercion, colonialism would obviously have little time for the recognition of rights that would threaten or undermine this objective.

Against such a background, the policies of independent African countries have in general been rather puzzling, even for those countries that were on the face of it more committed to the realisation of this category of rights, and were not simply paying lip-service to the notion. The puzzle is lessened if one considers the fact that even for the most ardent proponents of economic development, this was largely viewed as a right of the State, abstracted from the individuals who constituted it, and epitomised in the slogan:

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N.B. The full article from which this paper is extracted appears in volume 26, number 1 of the *California Western International Law Journal* at page 1.

1 For a critical examination of this aspect of colonialism, see, Jan Breman, "The Civilization of Racism: Colonial and Post-colonial Development Policies", in *Imperial Monkey Business: Racial Supremacy in Social Darwinist Theory and Colonial Practice*, Jan Breman, Peit de Rooy, Amy Stoler & Wim F. Wertheim, eds., 123-152 (1990).

2 See for example, Ramkrishna Mukherjee, *The Problem of Uganda: A Study in Acculturation*, (1985).

"One nation; one party; one people."<sup>3</sup> This was the veneer assumed by most African polities following the honeymoon of independence, and widely shared irrespective of ideological outlook.<sup>4</sup> Thus according to Harry Scoble:

"Whether the development scheme is formally State capitalism or socialism, the socialised investment function is controlled by the single party (or the "apolitical" military). Top-down planning is the rule. The individual has a right only to be "developed" at a pace and in a manner determined by the political elite; the individual has no right to participate in or to influence this development process — only a distant future right to contingent benefits."<sup>5</sup>

In this sense, the State equated the 'people.' Both the individual as well as communities within the post-colonial State were subsumed in this artificial and

unyielding geopolitical construct, a point sanctified in the OAU's rigid position on the question of national boundaries.<sup>6</sup> In this perverse way, independence constituted the second and more deadly 'partition' of Africa as what had hitherto been relatively autonomous communities were forcefully amalgamated and frozen within the sovereign nation-State.<sup>7</sup> A look at the operation of the premier institution for African liberation and solidarity — the Organization of African Unity (OAU) — will illustrate this and several other points relevant to the present inquiry.

## II *The Organization of African Unity (OAU) and Human Rights*

### A. *A Background Note*

Despite the socio-economic and cultural legacy bequeathed by colonialism, the OAU focused primarily at the political conditions of the newly-independent States of the continent.<sup>8</sup> Following

- 3 Sakah Mahmud asserts: "Although claimed in the name of African ideals, collective rights serve State interests as well as the few who control State resources. Indeed, most violations of human rights are often against those who speak out against the corrupt use of State resources. Those in power resist democracy for similar reasons." S. S. Mahmud, "The State and Human Rights in Africa in the 1990s: Perspectives and Prospects," *15 Hum. Rts. Q.* 485-498, 493 (1993).
- 4 The most striking illustration of this can be found in the contrasting examples of Kenya and Tanzania. While both professed adherence to the notion of "African socialism," the latter pursued avowedly socialist programs, while the former was for long an exemplar of the capitalist system on the African continent. See, K. Ong'wamuhana, "Party Supremacy and the State Constitution in Africa's One-party States: The Kenya/Tanzania Experience," *Th. Wor. L. Stud.*, 77 (1988).
- 5 Harry Scoble, "Human Rights Non Governmental Organizations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter," in *Human Rights and Development in Africa*, (Claude E. Welch and R. Meltzer eds.)
- 6 See Article III, *Charter of the Organization of African Unity (OAU)*, reprinted in *58 Am. J.I.L.*, 873 (1964).
- 7 See, Mahmood Mamdani, "The Social Basis of Constitutionalism in Africa", *28 Jnl. of Mod. Afr. Stud.* 359-374, 367 (1990).
- 8 Gino Naldi, *The Organization of African Unity: An Analysis of its Role*, 3-14 (1989).

Kwame Nkrumah's famous dictum, "seek ye first the political kingdom," a two-pronged thrust was developed.<sup>9</sup> This was concerned on the one hand, with the fragility of the new States and on the other, with the emancipation of the continent's unliberated colonies.<sup>10</sup> As a consequence, the *Charter of the Organization of African Unity* makes only scant reference to the "welfare and well-being" of the African peoples.<sup>11</sup> There is not however, any detailed elaboration of any rights save for those of member States. The Charter places a particular emphasis on sovereign integrity and non-interference in the domestic affairs of member States.<sup>12</sup> The main concern of the time was the eradication of imperial domination and the complete liberation of the continent.<sup>13</sup> The primary focus, solidarity and cooperation.<sup>14</sup> While reference was made to the *Universal Declaration*,<sup>15</sup> there

was scant attention to human rights principles as such, although general OAU policies were to be directed towards a variety of activities that could be said to have human rights implications.<sup>16</sup> Thus on creation, the OAU established five specialised Commissions,<sup>17</sup> of which two, the Economic and Social Commission and the Educational, Scientific, Cultural and Health Commission had the brief for economic and social issues.<sup>18</sup>

Needless to say, the emphasis of the OAU over the first twenty years of its existence was political liberation, inter-State conflict resolution and State-oriented economic cooperation and development.<sup>19</sup> The principal right to which the OAU directed attention was the right to self-determination of colonial States.<sup>20</sup> In the third decade of its existence in the early 1980s and 1990s, this focus nar-

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- 9 For the background to the establishment of the OAU, see, F.C. Okoye, *International Law and the New African States*, 121-125 (1972).
- 10 See, C.O.C Amate, *Inside the OAU: Pan-Africanism in Practice*, (1986).
- 11 See, Preamble to the OAU Charter, especially paras. 3 and 10.
- 12 *Ibid.* Art.IV.
- 13 See, Zdenek Cervenka, *The OAU and its Charter*, 22-45 (1968).
- 14 Edward Kannyo, "The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background", in Welch and Meltzer, *supra*. note 5, 128-151.
- 15 *Ibid.* cf. Preamble and Art.II.
- 16 *Ibid.* Art.II.2.
- 17 For a general discussion of the OAU's Specialized Commissions, see, T.O. Elias, *Africa and the Development of International Law*, 144-146 (1988).
- 18 See, Arts. XX, XXI and XXII.
- 19 An exception could be said to be the OAU's response to the refugee question, the normative expression of which is found in the 1969 OAU *Convention on the Specific Problems of Refugees in Africa*, 1001 *U.N.T.S* 45 (1969). However, despite the extremely broad and liberal definition of the term "refugee" in this document, it clearly leaned towards the principles of non-interference and the maintenance of the fragile security of the new States.
- 20 S. Kwaw Nyameke Blay, "Changing African Perspectives on the Right of Self-determination in the Wake of the Banjul Charter on Human and Peoples Rights", 29 *Jnl. of Afr. L.*, 147-159, 149-153 (1985).

rowed to the twin phenomena of Namibian independence and the liberation of *apartheid* South Africa.<sup>21</sup> Individuals or communities did not feature in this paradigm of self-determination,<sup>22</sup> which explains the OAU's underlying hostility to movements such as those in Biafra<sup>23</sup> and Eritrea<sup>24</sup> that sought to challenge the notion of the inviolability of inherited borders.<sup>25</sup> In this context, it is not surprising that military dictatorships and single-party governments abounded, allowing for only a limited degree of recognition and respect for human rights on the domestic front. This produced the paradoxical situation in which the 1960s through the 1980s were simultaneously the period of Africa's greatest liberation, as well as of its most brutal suppression. Thus the lament of the organization's newest member — Eritrea's Isias Afeworki — at the 30th anniversary summit meeting in June, 1993, is quite understandable,

“Although the OAU has often championed the lofty ideals of unity, cooperation, economic development, human rights and other worthy objectives, it has failed seriously to work towards their realisation.... Thirty years after the foundation of this organization our continent remains affected by growing poverty and backwardness.... The African continent is today a marginalized actor in global politics and the world economic order. Africa is not a place where its citizens can walk with raised heads, but a continent scorned by all its partners.”<sup>26</sup>

To the extent that there were any achievements on the front of economic development, these were largely spatial and limited to individual countries.

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- 21 The contribution of the OAU and the Frontline States to the eventual liberation of the continent cannot be gainsaid. However, as the organization itself admitted, such attention to liberation overshadowed other questions such as the observation of human rights.
  - 22 See, R. McCorquodale, “Self-determination beyond the colonial context and its potential impact on Africa,” 5 *Af. Jnl. of Intl & Comp. L.* 592 (1992).
  - 23 S. Kwaw Nyameke Blay, “Changing African Perspectives on the Right to Self-Determination in the Wake of the Banjul Charter on Human and Peoples, Rights,” 29 *Jnl. of Afr. L.*, 151 (1985).
  - 24 Minasse Haile, “Legality of Secession: The Case of Eritrea,” 8 *Emory Int'l L.R.*, 479 (1994).
  - 25 See, Malcolm Shaw, “International Law and Intervention in Africa,” 8 *Intl Rel.* 341-367 (1985).
  - 26 From speech by Isias Afeworki at the OAU Annual Summit of Heads of State and Government, quoted in Bernard Levin, “Heart of Darkness,” *The Times* (London), 24 August 1993. Afeworki was not the first (and probably not the last) African leader to criticize the organization. He was preceded by two Ugandan leaders — Godfrey Binaisa and Yoweri Museveni, the former following the ouster of Idi Amin in 1979, the latter following his own ascension to power on the back of a guerilla uprising which witnessed significant bloodshed and turmoil. Interestingly, it was Museveni who counseled Afeworki not to be too critical of the organization.



Nowhere, however, not even in the most affluent of States, was there a concerted effort to establish a regimen that sought to view such issues as rights.<sup>27</sup>

### B. *The Question of Refugees*

In the sphere of refugees, the OAU fared somewhat better, recognizing early on that the plight of this vulnerable category of people was in need of urgent protection.<sup>28</sup> Hence, in 1969 the organization promulgated the *Convention on the Specific Aspects of Refugees in Africa*,<sup>29</sup> albeit over some initial resistance and prevarication.<sup>30</sup> While the intention of the 1969 Convention was to complement its international counterpart — the earlier 1951 United Nations Convention<sup>31</sup> — it is especially renowned for its definition of the term “refugee”<sup>32</sup> which is significantly

more expansive than the definition adopted in the earlier instrument.<sup>33</sup> Many commentators have asserted that this is on account of traditional “African hospitality.”<sup>34</sup> The situation on the ground however, does not quite conform to such a description,<sup>35</sup> and some observers describe this attitude towards the African refugee situation as ethnocentric and playing directly into Western desires and current designs in the field of immigration policy.<sup>36</sup>

With respect to human rights, the 1969 Convention was equivocal. Thus, while Article IV prohibits discrimination against all refugees on the grounds of race, religion, nationality, membership of a particular social group or political opinion, it did not go as far as providing a catalogue of specific rights for refugees.<sup>37</sup> Most sensitivity was reserved to the

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- 27 See, Sakah Mahmud, “The State and Human Rights in Africa in the 1990s: Perspectives and Prospects,” 15 *Hum Rts. Q.* 494 (1993).
- 28 See, Sam. A. Aiboni, *Protection of Refugees in Africa*, 1-5 (1978).
- 29 For an analysis of the background to the promulgation of the Convention, see, J. Oloka-Onyango, *Plugging the Gaps: Refugees and OAU Policy*, (1986).
- 30 See, C.O.C Amate, *Inside the OAU: Pan Africanism in Practice* (1986), 460-465.
- 31 *UN Convention Relating to the Status of Refugees*, 1951: 189 UNTS 137 (entered into force on 22 April 1954).
- 32 J. Oloka-Onyango, “Human Rights, the OAU Convention and the Refugee Crisis in Africa: Forty Years After Geneva,” 3 *Intl. Jnl of Ref. L.* 453-460 (1991).
- 33 See, Eduardo Arboleda, “Refugee Definition in Africa and Latin America: The Lesson of Pragmatism,” 3 *Intl. Jnl. of Ref. L.*, 185-207, 194-195 (1991).
- 34 See, Art Hansen, “African Refugees: Defining and defending their human rights”, in *Human Rights and Governance in Africa*, Cohen, Nagan & Hyden eds., 139-167, 153 (1994).
- 35 See, Gaim Kibreab, *African Refugees: Reflections On the African Refugee Problem*, (1985), especially chapter 4.
- 36 Chris Bakwesegha, “Forced Migration and the OAU Convention,” in *African Refugees: Development Aid and Repatriation*, Adelman & Sorenson, eds., 3-18, 13 (1994).
- 37 cf. chapters II, III, IV and V of the 1951 Convention.

maintenance of harmonious relationships between African States, than it was with the rights of refugees as such.<sup>38</sup> Hence, it could be asserted that the OAU Convention was protective of refugees *qua* refugees by default, rather than by design.<sup>39</sup> It remains a fact that discrimination against refugees has been one of the enduring problems of the African refugee scene.<sup>40</sup> Furthermore, one of the most contentious issues with regard to the African refugee question has been the recognition that they too have rights,<sup>41</sup> a fact that is vividly demonstrated in the refugee crises afflicting Africa today, and the nature of the OAU response to them.<sup>42</sup>

It was not until 1981 and the promulgation of the *African Charter* that the OAU gave normative recognition to the individual and to 'peoples' as the subject of rights.<sup>43</sup> Nineteen eighty-one also coincided with the publication of the OAU's most elaborate program on social and economic development — the *Lagos Plan of Action* (LPA).<sup>44</sup> The Plan was designed to propel the continent into the 21st century with the establishment of an African Economic Community (AEC) by the year 2000.<sup>45</sup> In 1989, the Economic Commission for Africa (ECA) released the *African Alternative Framework to Structural Adjustment Programmes* (AAF-SAP)<sup>46</sup> — intended as the African reply

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- 38 The UNHCR makes the same point in a rather more subtle and diplomatic fashion, pointing out that beyond filling the gaps left by the 1951 Convention, the OAU was more concerned about several other matters, including the issue of "subversion." See, UNHCR, *Issues and Challenges in International Protection in Africa*, (unpublished paper presented at the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa — Ethiopia, September 8-10, 1994, at 4-5; papers on file with author).
- 39 Needless to say, several individual States enacted legislation that affirmed the equality of refugees and proceeded to confer on them a variety of rights which go beyond the Convention. cf. Peter Nobel, "National Law and Model Legislation on the Rights and Protection of Refugees in Africa", in *African Refugees and the Law*, Goran Melander & Peter Nobel, eds., 58-76, 73 (1978).
- 40 Aiboni, *supra.*, note 28, 76-81 and 83-107, and Roger Winter, "Ending Exile: Promoting Successful Reintegration of African Refugees and Displaced People", in Adelman, *supra.*, note 36, 159-171.
- 41 This is especially the case with respect to economic and social rights. See, Gaim Kibreab, "Refugees in the Sudan: Unsolved Issues", in Adelman & Sorenson, *ibid.*, 62-63.
- 42 This is most acutely reflected in the woeful status of the Bureau for Refugees at the OAU Secretariat, which is supposed to be the principle agency for refugee issues on the continent. In particular, it is manifest in the greatly diminished attention to protection issues. See further, J. Oloka-Onyango, "The Place and Role of the OAU Bureau for Refugees in the African Refugee Crisis", 6 *Intl. Jnl. of Ref. L.* 34-52, 47-49 (1994).
- 43 For a detailed discussion of the various meanings of the term 'peoples' as used in the African Charter, see, R.N. Kiwanuka, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights," 82 *Am. J.I.L.*, 80-101 (1988).
- 44 Organization of African Unity, *Lagos Plan of Action for the Economic Development of Africa: 1980-2000* (1981).
- 45 See generally, *African Economic Community: Issues, Problems and Prospects*, M.A. Ajomo & A. Adewale, eds., (1993).
- 46 United Nations Economic Commission for Africa, *African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation* (AAF-SAP) E/ECA/CM.5/6/Rev.3 (Addis Ababa, 1989).

to the stringent austerity measures imposed by the IMF, commencing in the early 1980s. Together, the three documents provide a basis from which to arrive at a more complete picture of the approach to economic and social rights from the continental perspective. We begin with an examination of the first — the African Charter.

### *III Economic and Social Rights in the African Charter on Human e Peoples Rights*

#### *A. The Normative Framework*

The African Charter, which has often been extolled as a unique conceptualisation

of the notion of human rights,<sup>47</sup> contains several provisions on economic and social rights.<sup>48</sup> It also has a number of newly-codified rights, such as the right to development,<sup>49</sup> the right to peace,<sup>50</sup> and the right to a healthy environment,<sup>51</sup> marking itself out as the first international instrument to enshrine such rights.<sup>52</sup> The preamble to the Charter clearly demonstrates where the emphasis of the document lies, stipulating that it was henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in conception as well as universality.<sup>53</sup> While some observers have argued that this statement is merely an assertion of the necessity to consider development as a right and of the inter-

47 Rose M. D'Sa, "Human and Peoples' Rights: Distinctive Features of the African Charter", 29 *Jnl. of Afr. L.*, 72-81 (1985).

48 See articles, 14, 15, 16 and 17. Article 18 concerns the family and contains the only affirmative provision in an international instrument compelling the state to ensure the elimination of all discrimination against women, thereby collapsing the artificial dichotomy (retained even in CEDAW) between the private and public spheres.

49 Article 22 of the African Charter.

50 *Ibid.* Article 23.

51 *Ibid.* Article 24.

52 Julia Swanson, "The Emergence of New Rights in the African Charter," 12 *N. Y. L. S. Jnl. of Intl e Comp. L.* 307-333, 315-324 (1991). But see, Mutua:

"The addition of peoples' rights, the right to development, and social and economic rights, to civil and political rights is seen as a major breakthrough. It is not realized, though, that the pious inclusion of these rights is negated by the power arrogated to the State to deny civil and political rights in the name of national unity, morality, security, development and solidarity. How can these rights be realized without free political mobilization and participation by the masses of the people? How, under repressive conditions, can a people exercise both internal and external self-determination? Seen in this light, these "aspirational" rights amount to mere slogans."

Makau wa Mutua, "The African Human Rights System in a Comparative Perspective", in *Regional Systems of Human Rights Protection in Africa, America and Europe*, Wolfgang Benedek, ed. 58 (1992).

53 See, Preamble to the African Charter.

connectedness of the two categories of rights,<sup>54</sup> it is interesting to note that the preamble goes on to state that "the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights...."<sup>55</sup>

Examined in light of the extensive claw-back clauses attending the recognition of civil and political rights in the document,<sup>56</sup> such an emphasis was clearly not accidental. Indeed, the bias in the Charter led some early commentators to believe that in the process of implementation of the Charter, the African Commission would, "...undoubtedly grant a State great(er) latitude if economic and social rights are promoted at the expense of civil and political rights...."<sup>57</sup> The record of the Commission to date, manifests no such bias, raising questions once again, about the extent of the commitment manifested in the Preamble to the Charter.<sup>58</sup>

Given that emphasis, as well as in light of the post-colonial history of the continent, one would expect that the substantive aspects of the instrument would amplify the focus on economic

and social rights. However, a critical examination of the specific rights in the Charter raises questions about the manner in which they were couched, and about the extent of the commitment of the OAU to their realization. Such ambivalence can be retraced to the preparatory discussions over the Charter, and found in the rapporteur's account of the debate over the issue.<sup>59</sup> In addition, a systematic consideration of the articles will reveal something else, namely a lukewarm commitment to the application of critical and genuinely progressive standards in the area. Thus, the Charter is silent on the right to create trade unions — a fundamental aspect of the right to work, and the freedom of association and organization of labour. Mention need not be made, for the moment, of the question of the right to strike, of which there is only silence.<sup>60</sup> The absence of such a right must be considered in view of the claw-back clause enshrined in Article 10, which provides for freedom of association. Article 10 stipulates that the right is exercisable provided that the individual "...abides by the law;" this when numerous domestic legal regimes around the continent outlaw or severely proscribe trade union

54 See, D'Sa, *supra.*, note 47.

55 Emphasis added. See para. 8, of the *African Charter*.

56 See, Evelyn Ankomah, "Towards an Effective Implementation of the African Charter," 8 *Int. Bull.* (1994): 60.

57 Richard Gittelman, "The African Charter on Human and Peoples' Rights: A Legal Analysis", 22 *Vir. Jnl. of Intl Law* 667-714, 687 (1982).

58 This is clear, for example, from the reports of the Commission, and, as we shall later see, from commentary by Commission members. For an example of the former, see, International Commission of Jurists, "Report on the 10th ordinary session of the African Commission," in 47 *The Review of the ICJ*, 51-60 (1991).

59 See, Scoble, *supra.*, note 5, 194.

60 *Ibid.*

formation and activity.<sup>61</sup> The problem is compounded by Article 29, concerning the duty to preserve and strengthen "national solidarity," which could be (and has been) interpreted to mean any oppositional activity, whether in the political or economic sphere.

The Charter also produced a number of surprises, the first being the guarantee of the right to property,<sup>62</sup> a right which does not appear in the international Covenants, and is clearly of questionable facility in the African context for a number of reasons.<sup>63</sup> First, is its association with individual privilege, and vested (largely colonial and neo-colonial) interests in a context which has been plagued by exploitative relations deriving from property ownership and unequal exchange. Secondly it raises questions about the issue of tenurial rights, land reform and equality in access to land — serious questions for both the rural and urban poor in independent Africa and directly related to a series of other rights. Given both these issues, one would imagine that such a provision should have

attempted to render a dynamic and qualitatively different conceptualisation of the right. However, the Charter made no creative attempt to re-interpret the right as a mechanism of empowerment of Africa's dispossessed masses and to foster conditions of equality in the exercise of property rights.<sup>64</sup> Thus, for example, it has been pointed out that feminist analysis can take note of and progressively utilise the right to the acquisition and inheritance of property in such a way as to defeat customary practices that inordinately deprive women of their property rights,<sup>65</sup> but the African Charter gives no indication that this is the direction in which it intended to move with respect to this right.<sup>66</sup>

Article 15 stipulates that every individual has the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work. Economic conditions and the fact that the majority of the population are self-employed subsistence farmers place limitations on the extent to which this right can in fact be realised. There are nonetheless several dimensions from

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61 The exercise of trade union rights in African countries, is still a problem irrespective of the so-called wave of democratization that has been blowing since the late 1980s, and illustrated by the response of the Nigerian military government to strike action by petroleum workers, and the refusal of the Kenyan government to recognize the formation of an association for University personnel. See, for example, Doyin Iyiola, "Nigeria: Abacha's Bloody Crisis," *African Topics* (London), October/November, 1994: 14-15.

62 See Article 14.

63 Article 17 of the Universal Declaration refers to the right to own property, but neither Covenants do so.

64 See, Issa Shivji, *The Concept of Human Rights in Africa*, 102-103 (1990).

65 See, Rebecca Cook, "State Responsibility for Violations of Women's Human Rights," *7 Harv. H.R. Jnl.*, 139-140.

66 For an excellent treatment of this issue, see Florence Butegwa, "Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa," in *Human Rights of Women: National and International Perspectives*, 495-514 (Rebecca Cook, ed., 1994).

which the article could be approached in order to achieve its positive recognition and progressive realisation, with particular regard to working conditions and the principle of equality. Article 16 covers the best attainable state of mental and physical health, and the obligation to take the necessary measures to protect the health of the people and to give medical attention to the sick. Finally, Article 17 covers the right to education. Unlike the ICESCR equivalent, the article does not mention free primary education, despite the guarantee of such being a staple — usually by the year 2000! — of African politics.

Missing from the Charter are the rights to social security, the right to an adequate standard of living, and freedom from hunger, all of which are contained in the ICESCR.<sup>67</sup> Of these, the absence of the last — the right to food — is perhaps the most striking.<sup>68</sup> The omission can nevertheless be retraced to the fact that while ecology and environment provide some explanation for the food crises that have afflicted the continent, the dominant problems are political and socio-economic, *viz.*: the lack of adequate food security policies, and the extra-economic coercion of the peasantry.<sup>69</sup> Both are a product of and facilitated by the inordinate concentration on export-crop production, which characterises the majority of African economies.<sup>70</sup> Compounding

the problem is the failure to devise amicable means for the resolution of conflicts, frequently resulting in war and famine.

What, in the final analysis can be said of the African Charter's position on economic and social rights? The first point is that the content of the articles are a significant let down from the promise of the Preamble, and belie what could have been an altogether novel and radical approach to the interconnectedness of the two categories of rights. The focus of these rights is thus primarily the external dynamic — the elements of historical exploitation and contemporary maldevelopment — without a parallel approach to the inequities of the domestic arena. Apart from what the Charter contains, what it omits to mention speaks even louder of the actual position of African leaders on these rights. Finally, the extensive restrictions in the recognition of civil and political rights, redound negatively on the possibilities of the progressive realization of the few economic and social rights contained in the document.

### B. *The Question of Implementation*

Having been ratified by the requisite number of African States, the African Charter came into force of law only five

67 See, Articles 9, 11 and 11.2 of the ICESCR.

68 See, Clarence Dias, "Food Security and the right to food: Legal Resources and Grassroots Action", Working Paper No.3 (Series 8), *MacArthur Interdisciplinary Program on Peace & Intl Coopn*, March 1993.

69 Mahmood Mamdani, "Disaster Prevention: Defining the Problem", *37 Mon Rev.*, 35-41, 36-37 (1985).

70 See, George Shepherd, "The Denial of the Right to Food: Development and Intervention in Africa", *15 Calif. Wn. Intl L. J.* 528-541, 530 ff. (1985).

years after promulgation.<sup>71</sup> While the fairly speedy ratification of the instrument was welcome, the fact remains that the mechanisms providing for the enforcement of the rights in the Charter are weak.<sup>72</sup> Furthermore, both the publicity about the Charter and the creation of the Commission have thus far done little to encourage petitions relating to economic and social rights. Indeed, the past Commission Chairman (in a rather pointed reversal of the explicit philosophy of the Charter), stated that the Commission would concentrate on civil and political matters,<sup>73</sup> because, he argued, any attempt to deal with economic and social rights would result in too many cases and too many countries reporting to cope with.<sup>74</sup> Such an attitude may partially explain why of the more than 140 communications received to

date under the complaints mechanism of the Charter,<sup>75</sup> none have related to articles 14 to 17 — the provisions in the Charter relating to economic and social rights.<sup>76</sup>

The evolution of the African Commission has been steady, but unremarkable,<sup>77</sup> with significant resolutions being recently adopted on issues such as the right to a fair trial and freedom of association.<sup>78</sup> However, in performing the functions stipulated under Article 45(1)(b) of the Charter,<sup>79</sup> there has been no attempt to marry the focus on civil and political rights to the progressive achievement and realization of economic and social rights. Thus, for example, the resolution on fair trial could conceivably have been extended to cover the status and rights of indigent defendants, public-

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71 See, Ojo & Sesay, "The OAU and Human Rights: Prospects for the 1980s and Beyond," 8 *Hum. Rts. Q.* 89, 101 (1986). The Charter came into force on 21 October 1986 after ratification by a simple majority of African States in accordance with Art.63(3).

72 E. Bello, "The Mandate of the African Commission on Human and Peoples Rights", 1 *Afr. Jnl. of Int'l L.* 31-64 (1988).

73 O. Umzorike "The protection of human rights under the Banjul (African) Charter on Human and People's Rights", 1 *Afr. Jnl. of Int'l L.* 82-83 (1988).

74 *Ibid.*

75 See, Articles 47-59.

76 See Nana Busia and Bibiane Ndiaye, "Towards a Framework for Filing Communications about Economic, Social and Cultural Rights under the African Charter," forthcoming in 3 *E. Afr. Jnl of P. & H.R.* (1995). Article 45 mandates the Commission established under the Charter to "Ensure the protection of the human and peoples' rights under conditions laid down by the present Charter," and Art.55 allows communications from entities or persons other than States parties.

77 See, International Commission of Jurists, *The Participation of nongovernmental organizations in the work of the African Commission of Human & Peoples Rights (ACPHR): A Compilation of Basic Documents* (October, 1991 - April, 1994), Geneva, 1994.

78 Wolfgang Benedek, "The African Charter and Commission on Human and Peoples' Rights: How to make it more effective", *Netb. Q.* H. R. 25-40, 26 (1993).

79 This provision in the Charter stipulates that the Commission will formulate and lay down rules aimed at solving legal problems relating to human and peoples rights, as a basis for the construction of domestic legislation by governments.

aided legal assistance, or the critical issue of "popular" justice.<sup>80</sup>

With respect to the issue of associational rights, the Commission could have taken the opportunity to make observations on trade union rights, as well as on rights linked to such activity, in much the same way as the Committee on Economic and Social Rights does on a regular basis.<sup>81</sup> Although in its general commentary the Commission has made mention of issues such as poverty, development and SAPs, this is yet to evolve into a systematic and programmatic approach to the issue, which is directly linked to the realization of economic, social and cultural rights. The application of political conditionality to the extension of development finance demands that the Commission adopt a more activist and prominent role in ensuring that such conditions do not adversely affect the realization and protection of human rights on the African continent. In this respect, it is a welcome development that the most recent session of the Commission (held between 2-11 October 1995 in Praia, Cape Verde), as well as the NGO Forum meeting which preceded it (from 29 September-1 October 1995), devoted a substantial amount of time to the discussion of the

role the Commission could play in the protection of economic, social and cultural rights. It is also a welcome development that the OAU appointed Mrs. Julienne Ondziel in 1995 as the second woman Commissioner, to join the first who was appointed in 1992.

With the recent application of political conditionality to the extension of development finance, the Commission could have played a role in seeking a more comprehensive and relevant interpretation of the notion than the negative conditionality that has hitherto been applied.<sup>82</sup>

While the substantive content of the African Charter came up far short of the pledge it makes in the Preamble, the guidelines for the submission of States parties periodic reports drafted in 1988 provide a wider framework for the implementation of those unfulfilled aspirations.<sup>83</sup> The guidelines devote considerably more attention to economic and social rights, than they do to civil and political rights. Only three pages are devoted to the latter, while those on the former extend to 21. Furthermore, while the Charter is silent on a number of rights, the guidelines require reportage, *inter alia*, on equal opportunity for pro-

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80 See, J. Oloka-Onyango, "Popular Justice', Resistance Committee Courts and the Judicial Process in Uganda, 1988-92," *Bey. L.: Mas Allá Del Derecho*: 39-59, (1993).

81 See, for example, Report of the Committee on Economic, Social and Cultural Rights — 3rd session E/1989/L.9, March 21, 1989: paras.170-181; considering the report on Rwanda.

82 See Wolfgang Benedek, "The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective," *Netb. Q. H. R.* 36 (1993).

83 See, "Promotion, Protection and Restoration of Human and Peoples' Rights," *Guidelines for National Periodic Reports*, ACHPR Doc. AFR/COM/HRP.5 (IV) (Oct. 1988). See further, Claude Welch, "The African Commission on Human and Peoples' Rights: A Five-year Report and Assessment," 14 *Hum. Rts. Q.*, 43-61, 53 (1993).



motion (p.10), rest, leisure and holiday with pay (p.10), the free operation of trade unions (p.11) and the right to strike (p.12).<sup>84</sup> A basis thus exists for much more vigorous action on economic and social rights by the Commission than is laid out in the Charter. Some tentative steps would have to be taken to remedy the general inertia in this area, which could begin with the African Commission commencing a process of imaginative translation of the bare rights in the Charter into appropriate frameworks for implementation.<sup>85</sup>

The Commission can begin to approach this issue in a different fashion, taking a leaf from both its regional counterparts — the Inter American Commission on Human Rights and the European system — and translating them within the context of existent conditions on the continent. While neither of the two have devoted as extensive attention

to economic and social rights as they have to civil and political rights, a look at what they have done in the area would be instructive. With respect to the latter, the adoption of the European Social Charter<sup>86</sup> in 1961 as the counterpart to the ICESCR, never led to any significant action primarily on account of a lack of political will.<sup>87</sup> Nonetheless, recent efforts at the resuscitation of the Charter and the establishment of an enforcement mechanism have led to the formation of an expert group to seriously examine the issue, and should thus provide some guidelines for the Commission in formulating an appropriate approach to the issue.

A number of interesting developments have taken place within the American system too.<sup>88</sup> First, an Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural

84 A comparison between the African Commission Guidelines and those of the ICESCR Committee would be useful, particularly given the extensive experience of the latter. Of course, this is not to say that the Committee's guidelines are free from problems. See, Thomas Jabine & Denis F. Johnston, "Socio-Economic Indicators and Human Rights," (Paper presented at the 1992 Annual Meeting of the American Statistical Association, Boston, MA, 12 August 1992), 17-18.

85 See, Nana Busia and Bibiane Mbaye, "Towards a Framework for Filing Communications about Economic, Social and Cultural Rights Under the African Charter," forthcoming in *3 E. Afr. Jnl. of P. and H.R.* (1995).

86 Opened for signature on 18 October 1961; (529 U.N.T.S. 89; Europ.T.S. No. 35; U.K.T.S 38 (1965), Cmnd. 2643 (entered into force on February 26, 1965).

87 See, D.J. Harris, "A Fresh Impetus for the European Social Charter," 41 *ICLQ* 659-676 (1992).

88 In 1980, for example, the IACHR stated:

"The general and well-founded belief is that in some countries, the extreme poverty of the masses — the result in part of less-equitable distribution of the resources of production — has been the fundamental cause of the terror that afflicted and continues to afflict those countries.... The essence of the legal obligation incurred by any government in this area is to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education."

*Annual Report of the Inter-American Commission on Human Rights*, 151-152 (OEA/Ser.L/VII.50, 1979-80), quoted in Asbjørn Eide, "Realization of Social and Economic Rights and the Minimum Threshold Approach," 10 *Hum. Rts. L.J.*, 35-51, 42 (1989).

Rights ("the Protocol of San Salvador") was promulgated in 1988.<sup>89</sup> In distinction to the ICESCR it contains a petition mechanism on the right to education and on trade union rights.<sup>90</sup> Although it is yet to come into force, it has provided a basis for which the Inter-American Court of Human Rights (IACHR) has recommended the adoption of local legislation based on the Protocol.<sup>91</sup> In addition, the Inter-American Court has considered the effect that the provisions on the equivalent of "exhaustion of local remedies" would have on an indigent person, and whether such requirement could be waived. Advisory Opinion OC-11/90 of the Court ruled that an indigent person does not have to exhaust legal domestic remedies if s/he can demonstrate that her/his economic condition prevents her/him from obtaining legal counsel.<sup>92</sup> While the other regions of the world are still in the process of developing a more concise application of economic and social rights, there is still much to be gleaned from the formulations in the establishing instruments, as well as the modes of implementation that have been adopted.

The failure of the African Commission to pursue the articulation of economic and social rights in a more aggressive fashion is clearly an expression of a political problem, which only gains in magnitude in light of the acute nature of the economic and social crisis being faced by African States today. The inclusion of new rights in the African Charter was instrumental in the struggle to elevate them to the international arena,<sup>93</sup> and boosted attention to economic and social rights globally. Unfortunately, the performance of African States and of the Commission in the progressive development and realization of these rights has not been exemplary. At the same time, African human rights organizations have only recently woken to the necessity to deploy the mechanisms of the African Charter to productive domestic use.<sup>94</sup> The establishment of the NGO Forum to meet at the same time as the Commission meeting, was an extremely innovative idea, and can be credited with many of the reforms introduced by the Commission. At the same time, the pressure on the Commission tapers off immediately after the sessions have ended.

89 Opened for signature 17 November 1988, O.A.S.T.S., No. 69, reprinted in 28 *ILM* 161 (1989).

90 See Article 19.6.

91 See, Inter-American Commission on Human Rights, *Annual Report* (1993), OEA/Ser.L/V/II.85, Doc. 9 Rev., 11 February 1994, 519-539.

92 Inter-American Court of Human Rights, Advisory Opinion OC-11/90 of 10 August 1990. Para. 22 thereof stated, "If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds his economic status (in this case, his indigence) prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceeds, that person is being discriminated against by reason of his economic status, and, hence, is not receiving equal protection of the law."

93 See, for example, Lynn Berat, "Defending the Right to a Healthy Environment: Toward a Crime of Genocide in International Law," in 11 *B.U. Int'l L. Jnl.*, 327-348, 346 (1993).

94 See, J. Oloka-Onyango, "Human Rights Activism in Africa: A Frog's Eye View," *Cod. Bull.* (1995).

Imaginative strategies for the activation of the Commission demonstrate that the success of the mechanism depends as much on popular forces and activists, as it does on the members of the body.<sup>95</sup>

#### IV. *The Lagos Plan and the AAF-SAP*

At the beginning of the 1980s, African Heads of State and government came together to consider the approach of the OAU to the issue of social and economic development. From these deliberations emerged the Lagos Plan of Action (LPA), aimed at the self-reliance of African countries, self-sustaining development and economic growth.<sup>96</sup> The LPA noted that of the 31 countries designated by the United Nations as Least Developed Countries (LDCs), 21 of them came from Africa.<sup>97</sup> There was thus a need to reverse this situation. The Plan was thus intended to "... promote the development of the nations and peoples of Africa [and] their progressive integration over greater regional areas; and ... to set up an African Economic Community

by the end of the century."<sup>98</sup> The Plan comprised 5 action areas, *viz.*: environment, the least developed countries, energy, women and planning, statistics and population.

The LPA was heavily biased towards macro-economic factors, and still shared the passion for the large infrastructural projects that had been the typical emphasis of development planning in the early years of independence. One notable exception was the focus on women<sup>99</sup> — presaging the attention that followed the Nairobi Conference and the Women in Development schema of the donor agencies. The LPA recognized the fact that traditional discriminatory practices were inhibiting the involvement of a significant section of the population, as well as being counter-productive to the development process. Jane Parpart compared the Plan to another simultaneously issued by the World Bank,<sup>100</sup> and found that the latter was woefully inadequate in considering the interests of women.<sup>101</sup> According to her, the LPA also spurred "heartening improvements" for women in Africa.<sup>102</sup>

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95 In this respect, the strategies employed by the Nigerian Constitutional Rights Project (CRP) are extremely instructive in attempting to get the African Charter to function positively in the domestic context. See, "Does Municipal Law Prevail over International Human Rights Law in Africa?" (Case Note), 2 *E. Af. Jnl. of P. & Hum. Rts.*, 97 (1995).

96 Organization of African Unity, *Lagos Plan of Action for the Economic Development of Africa: 1980-2000* (1981).

97 *Ibid.*, iii.

98 See Lagos Plan, *supra.*, note 96, iv.

99 *Ibid.*, 109-118.

100 World Bank, *Accelerated Development in Sub-Saharan Africa: An Agenda for Action* (1981).

101 See, Jane Parpart, "Women's Rights and the Lagos Plan of Action," 15 *Hum. Rts. Q.* 180-198, 190 (1986).

102 *Ibid.*, 192.

By including women as a specific point of focus, the LPA represented the first tentative forays away from State-centred to people-based foci in the field of African policy formulation. The bridge was eventually crossed with the Khartoum Conference on the *Human Dimension of Africa's Economic Recovery and Development*, that was convened in the Sudanese capital in 1988, and witnessed a concerted effort to shift the focus from the State to the people.<sup>103</sup> The apex of this movement was the AAF-SAP in 1989,<sup>104</sup> which was a direct critique of the debilitating IMF policies that had operated in Africa since the early 1980s. The Critique argued that these programs had frustrated both the African peoples upon whom they had been imposed, as well as the institutions that had designed them. Even though they had begun to respond to such failure and frustration, the response was slow and evasive.<sup>105</sup> The critique went on to state, "Most proposals seem to stick to the core of the old types of SAPs and to merely add some aspects of a human face." It then proceeded to give a point-by-point appraisal and recommendation of what should be done. To date, the main recommendations of the AAF-SAP remain largely valid, but the movement by IFDIs on the issue has been

slow. The preference remains for the SAPs applied in the 1980s with some amelioration thereof through poverty-alleviation programs, targeting the most "vulnerable" members of society, and even these have had questionable results.<sup>106</sup> Seeing that SAPs are the most debilitating economic reform policies currently in place in Africa, IFDIs would do well to accord more attention to the critique.

At the annual Summit meeting of OAU Heads of State and Government in Abuja in 1991, the OAU adopted the treaty establishing the African Economic Community representing the pinnacle of the Lagos Plan.<sup>107</sup> The key elements in the treaty are spelt out in Article 4, and include, *inter alia*, the promotion of economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and indigenous and self-sustaining development. However, as a number of commentators have pointed out, it is clear that African heads of State remain addicted to the notion of State sovereignty, and are also unlikely to actively foster some of the key elements in the treaty, such as those concerning the free movement of peoples.<sup>108</sup> Moreover, even

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103 UN Economic Commission for Africa, *The Human Dimension of Africa's Persistent Economic Crisis*, (Adebayo Adedeji, Sadig Rasheed & Melody Morrison, eds., 1990).

104 United Nations Economic Commission for Africa, *African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation (AAF-SAP)*, E/ECN/CM.5/6/Rev.3 (Addis Ababa, 1989).

105 para.45, 17 — all quotes from the "Popular Version."

106 F.W. Jjuuko, "The State, Democracy and Constitutionalism in Africa", 2 *E.A. Jnl. of P. & Hum. Rts.* 1-40, 3-4 (1995).

107 OAU, Treaty Establishing the AEC, adopted at Abuja, Nigeria, on 3 June 1991.

108 See Muna Ndulo, "Harmonization of Trade Laws in the African Economic Community," 42 *ICLQ* 101-118, 103-106.

though the Treaty establishes an African Court of Justice,<sup>109</sup> Chris Peter points out that the deficiencies in the Court's enabling statute do not make for an optimistic reading of the institution.<sup>110</sup>

Meanwhile, at the other end of the spectrum — the people's corner — significant developments have been taking place in the bid by individuals and communities to seize the initiative and transform the debate over economic and social questions on the continent. The most prominent of these was the unanimous adoption of the *African Charter for Popular Participation in Development and Transformation*,<sup>111</sup> which stemmed from a frustration with the failure in traditional development paradigms to appreciate the role of "popular participation." Consequently, the Charter called for the encouragement of increased participation by governments, community groups, individuals and the international sector in the design and evaluation of development projects. The extent to which the Charter will actually affect the operations of these groups remains to be examined.

At the end of the day, the continental movement on the issue of socio-economic development has been sporadic, and uninspiring. The high-sounding promises of the LPA and AAF-SAP and more

popular participation have been overshadowed (nay drowned) in the battles of the warlords in countries like Somalia and Liberia. As internal friction and conflict has caused the OAU to turn its attention all the more to issues concerning security, displacement and conflict resolution,<sup>112</sup> economic and social rights have been relegated even further down the scale. Paradoxically, all this is occurring against the backdrop of a terrifying social and economic crisis that has placed most African countries on the brink of bankruptcy and held in continuing and ever more extensive ransom to the dictates of the IMF and the World Bank. In such a situation, it becomes imperative to consider how proactive measures can be pursued in order to reduce, and eventually eliminate these problems. Such preventive action must include not only a greater emphasis on internal democratic structures, but on the economic and social frameworks on which these are constructed. For a consideration of some of the ways to approach these issues, we turn, by way of conclusion, to the domestic context.

## V. *Back to Basics: The Imperatives of Domestic Action*

Despite the fairly progressive developments in the realisation and protection

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109 See, Articles 7(1)(e), and 18.

110 Chris M. Peter, "The Proposed African Court of Justice: Jurisprudential, Procedural, Enforcement Problems and Beyond," *1 E. A. Jnl of P & Hum. Rts.*: 117-136, 119-121, and 131-134 (1993).

111 *Note Verbale*, U.N. GAOR, 45th Sess., Agenda Items 12, 82, UN Doc. A/45/427 (1990).

112 Recognizing this trend, in 1993 the OAU established a new mechanism for conflict resolution, See, OAU, *Resolving Conflicts in Africa: Implementation Options*, OAU Information Services Publication — Series (II) 1993, Addis Ababa, 1993.

of human rights at the international level and the existence of an evolving framework on the regional front, the essential point of such activity must be to influence and transform the domestic context. In the words of Theo van Boven, international procedures:

"... can never be considered as substitutes for national mechanisms and national measures with the aim to give effect to human rights standards. Human rights have to be implemented first and foremost at national and local levels. The primary responsibility of States to realize human rights is *vis-à-vis* the people who live under the jurisdiction of these States."<sup>113</sup>

How is this to be done? The vast disparity and number of African countries and the sheer complexity of a host of domestic variables preclude a microscopic scrutiny and analysis of country situations in a study of this size. Such an exer-

cise must nevertheless be carried out, not only to bring the international and regional dimensions to bear within the domestic context, but also for a more complete appreciation of the possibilities and of the limitations presented by the individual struggles to reinvigorate attention to economic and social rights.<sup>114</sup> This part of the paper confines itself to an overview of the most critical issues involved in that struggle.

Top on the list is the process of democratisation and the intricacies of constitutional reform, or to employ Albie Sachs's eloquent phrase, the "right to be naïve."<sup>115</sup> Following in close succession are the related questions of popular participation and extra-governmental activism within the context of a "structurally-adjusting" framework. Because "the local is global" — to borrow from and paraphrase feminism — such an examination must consider the need for the re-articulation of standards and mechanisms for the progressive enforcement of economic and social rights in the

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113 Theo van Boven, "The International System of Human Rights: An Overview", in United Nations, *Manual on Human Rights Reporting*, 10 (1991).

114 Alston points out that it is essential to remember the genuine differences between the two categories of rights, and consequently the "different benchmarks" that would be established for individual countries. See Alston, "Institutionalizing Economic and Social Rights," in *Economic and Social Rights and the Right to Health*, 37 (Harvard Human Rights Program/Francois-Xavier Bagnoud Centre for Health and Human Rights, eds., 1995). While this is a valid point, at the same time, it is essential not to lose sight of the structural and other conditions that enhance those differences, and thus force the adoption of lower benchmarks. In sum, the element of global redistribution and obligation must not be lost sight of.

115 Sachs employs the phrase in the Harvard debate on the Right to Health by way of buttressing his argument for the need to approach economic and social issues within a rights framework. See Sachs in *The Right to Health*, *supra.*, note 114.

African context.<sup>116</sup> This must be done by looking at the dynamic link between international political economy and domestic structures of exclusion and domination.<sup>117</sup> It must also extend the parameters of participation beyond local and regional boundaries. In the process it must confront traditional orthodoxies about sovereignty, the accountability of international actors, and the obligations of truly popular and participatory government.

**A. *Reconsidering the Structural and Normative Framework: Or the 'Right to Be Naïve'***

As Africa approaches the end of the 20th century, a number of factors relevant to a consideration of the domestic context in which human rights are to be realised are immediately manifest. These can be examined at two levels — the macro and the micro — although the demarcation between the two is by no means so succinct. In relation to the former, the most apparent is the process of

democratic reform, ignited in many countries by the tremors of the late-1980s and continuing to find expression on a variety of different fronts, from that in countries like Nigeria and Algeria, to less volatile contexts such as Benin and Malawi. A lesson common to all is that without a strategy that combines both the aspirations for political liberation with the imperatives of economic sustenance and empowerment, any gains will quickly disintegrate. Put another way, the exercise of the right to vote is no guarantee of freedom from want or hunger.<sup>118</sup> Central to this process must be the re-conceptualisation of the State power, even as the examples of Somalia and Liberia test the very notion of the post-colonial African State.<sup>119</sup> The fact is that whether by omission or commission, the State still has a significant role to play in African politics and society. Consequently, the first objective of the struggle must be to positively influence the processes of constitutional reform that are underway in a variety of different countries; here finding expression as the *Conférences nationales* (CNs); there as

116 The basic tenets are contained in the Covenants, and the various elaborations in other international instruments. Hence the starting point should be the issue of self-determination, non-discrimination and equality. Additionally, there is the need to review and consider the applicability of the *Limburg Principles* on the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4 1987/17 Annex (1987) reprinted in Symposium, "The Implementation of the International Covenant on Economic, Social and Cultural Rights," 9 *Hum Rts. Q.* 121 (1987).

117 See, Susan George, "The Structure of Dominance in the International Geo-Economic System and the Prospects for Human Rights Realization," in *Human Rights in Perspective: A Global Assessment*, 268-313, Asbjørn Eide and Bernt Hagtvet, eds., (1988).

118 Zehra Arat points out that, "Elected governments do not hesitate to employ government sanctions in the face of persistent social unrest, and such actions not only reduce the level of democraticness in the country but also pave the way for further coercion and military intervention. In fact such sanctions can justify and legitimize subsequent military takeovers. For example, in many countries that experience high levels of social unrest, we see martial law put into effect by civilian governments." See, Zehra F. Arat, *Democracy and Human Rights in Developing Countries*, 105 (1991)

119 For a consideration of the present state of the State in Africa, see, Julius Ihonvbere, "The 'irrelevant' State, Ethnicity and the Quest for Nationhood in Africa," 17 *Eth. & Rac. Stud.*, 42-60 (1994).

a Constitutional Reform Commissions, elsewhere, in the activities of non-governmental actors.<sup>120</sup> If the promise of independence constitutionalism was lost on the rocks of demagoguery and "imperial presidentialism,"<sup>121</sup> then the "second wave" should not be similarly undermined by the failure to incorporate economic and social rights in constitutional frameworks in a comprehensive and dynamic fashion.<sup>122</sup>

While the fact of a democratic and progressive Constitution does not constitute the linchpin to greater human rights observation, the absence of one, clearly does not enhance it. Scott and Macklen provide the most articulate reasoning for the need to begin with the Constitution,

"Whereas the constitutionalization of social rights would be a recognition of the fact that adequate nutrition, housing, health

and education are critical components of social existence, the exclusion of social rights from a South African constitution necessarily would result in the suppression of certain societal voices. Perhaps the strongest reason for including a certain number of economic and social rights is that by constitutionalizing half of the human rights equation, South Africans would be constitutionalizing only part of what it is to be a full person. A Constitution containing only civil and political rights projects an image of truncated humanity. Symbolically, but still brutally, it excludes those segments of society for whom autonomy means little without the necessities of life."<sup>123</sup>

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120 The most interesting example of nongovernmental action with respect to the constitutional debate comes from Kenya, where a number of groups have come together to draft a "model" constitution and place it in the public domain for debate. Needless to say, the Moi government has not been amused by such antics. See, *The Kenya We Want: Proposals for a Model Constitution*, (Law Society of Kenya, Kenya Human Rights Commission, and the International Commission of Jurists (Kenya Section), eds., 1994).

121 On the causes of the collapse of post-independence constitutionalism, see, *State and Constitutionalism: An African Debate on Democracy*, (I.G., Shivji, ed., 1991).

122 A look at two instruments in this struggle will illustrate the point. The draft Uganda Constitution (1993) contains provisions on women, the disabled and children, but summarizes economic rights in one article, which states: "Article 67(1) Every person has right to work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without discrimination; (2) Every worker shall be accorded rest, and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays." The interim South African Constitution according to Steenkamp is "...heavily biased towards traditional, liberal, civil and political rights," which was "... probably the result of objections to the inclusion of second generation rights from the government negotiators...." See *Draft Constitution of the Republic of Uganda*; Anton. J. Steenkamp, "The South African Constitution of 1993 and the Bill of Rights: An Evaluation of International Norms," in *17 Hum. Rts. Q.* 106 (1995).

123 See Craig Scott & Patrick Macklen, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," 144 *U. Pa. L. Rev.* 1-148, 28-29 (1992).



In the process of such constitutional struggle, a number of core rights can be extrapolated from the international and regional instruments, but such is the process of concrete reality and political negotiation. The scale, number and content of economic and social rights can be the subject of contestation; the fact of their inclusion should not.<sup>124</sup> The stronger elements of the African Charter, such as those contained in Article 18, can form the basis for articulating a firm State duty to eliminate discrimination and to protect disadvantaged social and political minorities.<sup>125</sup> In addition, however, there is a need to develop new instrumentalities for the control of governmental excess, and to protect the essential parameters of a decent human existence. In this respect, the need to cultivate a receptive and dynamic Judiciary becomes paramount.<sup>126</sup> Elaborating on tenurial, autonomy and protection matters within the Constitution would contribute to the achievement of this objective.<sup>127</sup>

Simultaneously, more attention should be paid to the potential for the development of alternative methods of economic and social empowerment, that remove the burden from the State, while assuring that human rights standards are not undermined.<sup>128</sup> Francis Regan considers this issue in relation to the Ugandan context and contests the need to focus on traditional legal aid, when there are a variety of different methods that should be attempted, both for the greater involvement of the people as well as for the economies involved.<sup>129</sup> He argues that such a view of legal resources would greatly enhance the way in which we consider human development in the terms defined by the UNDP.<sup>130</sup>

The constitutional framework can also begin to address the question of priorities. This would provide a constitutional basis on which to monitor the debt, and also to apply the doctrine of "noxious" or "odious" debts in the

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124 cf. Herman Schwartz, "Economic and Social Rights," 8 *Am. U. Intl. L. & Pol'y.*, 551-565 (1993).

125 Article 18, as Florence Butegwa points out, is a basis for action, although there are a number of contradictions in its thrust. Butegwa, "Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa," in *Human Rights of Women: National and International Perspectives*, (Rebecca Cook ed., 1994).

126 An enduring problem, particularly in Anglophone Africa is the conservatism of judges. This has however not stopped a few from issuing maverick and enlightened judgments with respect to human rights. Thus in the Tanzanian case of *Masatu v. Mwanza* (Civ. Case No. 3 of 1986 — unreported, High Court at Mwanza), the judge upheld a "right to work," even before the Tanzanian Bill of Rights had become justiciable! See, Issa Shivji, "Contradictory Developments in the Teaching and Practice of Human Rights Law in Tanzania," *Jnl. of Afr. L.* 116-134 (1991).

127 For an examination of the various issues relating to the creation of an independent Judiciary in an anglophone African context, see, J. Oloka-Onyango, *Judicial Power and Constitutionalism in Uganda* (1993).

128 See, J.J. Barya & J. Oloka-Onyango, *Popular Justice and Resistance Committee Courts in Uganda* (1994).

129 See Francis Regan, "Legal Resources in Uganda," *Int'l Jnl. of Soc. L.*, 203-221 (1994).

130 *Ibid.*, 204-206.

instance that State resources are expended on the purchase of arms or other non-essential goods.<sup>131</sup> Patricia Adams has spoken of the need for a constitutional provision on a balanced budget, which would bring the issue of prioritisation within the context of a constitutionally adjudicatory process.<sup>132</sup> Critical to such an endeavour would be the localisation of what is currently carried out beyond the pale of domestic action, viz., structural adjustment policies. Consequently the practice of writing budgets at World Bank headquarters (and imposing unreasonable conditions and unjustifiable social sacrifices) can be challenged from a constitutional foundation. In the context of large populations of illiterate and marginalized people however, and the continuing influence of Elysée and Westminster systems of government, such a provision needs to be buttressed with local grassroots frameworks. To do so entails not simply the decentralisation of State power, but the corresponding destruction of local autocracy — often epitomised in the successor to the colonial chief. In this way, the debate on economic policy becomes as much an issue of national concern, as it is a question of local involvement and action.

The few examples given above illustrate the macro - and microscopic levels at which action in the area of economic and social rights is necessary. But it is at the local level — the level of extra-governmental activity — that the struggle to effect a progressive policy for the realization of these rights should primarily focus.

### ***B. The Local Is Global: Linking Participation, Cooperation and Activism***

If among international NGOs the notion of economic and social rights has only recently been adopted as a focus of action (and even then in sporadic fashion), the African context is even less encouraging. Despite operating within a context of severe social and economic strife and turmoil,<sup>133</sup> the vast majority of local groups are involved in traditional human rights work. At the other end of the spectrum, there is an equally great number of groups involved in development and humanitarian work. Unfortunately, the twain barely meet. It is only of recent, to cite one example drawn from Uganda, that groups working in support of People with AIDS

131 See, "The Doctrine of Odious Debts," interview of Patricia Adams by Juliette Majot, in *Fifty Years Is Enough: The Case Against the World Bank and the IMF*, 35-38 (K. Danaher, ed., 1994), defining it as, "Any debt that has been incurred by a government without the informed consent of its people, and one that is not used in the legitimate interest of the State...." See also, Günther Frankenburg & Rolf Knieper, "Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts," 12 *Intl Jnl of Soc. of L.*, 415-438 (1984).

132 Patricia Adams, "The World Bank and the IMF in Sub-saharan Africa: Undermining Development and Environmental Sustainability," 46 *Jnl. of Int'l Affs.* 97-118, 117 (1992).

133 See, International Human Rights Internship Program/Swedish NGO Foundation, *The Status of Human Rights Organizations in Africa*, 5. Hereafter the *Status Report*.

(PWAs) have begun to liaise with groups working on legal and human rights.<sup>134</sup> Only the women's human rights movement has developed a cogent and holistic approach to the concatenation between the two categories of rights, linking the struggle for rights to land to the political framework, to the structure of the family and the related socio-economic issues that pervade such questions.<sup>135</sup> Similarly, at the regional level, women's groups operate in closer tandem than do groups working in the broader human rights field.<sup>136</sup> Such 'networking' has greatly boosted the strategic and conceptual development of the movement on the continent.

It is also essential to consider a vast array of different mechanisms that can be established (and supported at minimal cost) to both decentralise and popularise the exercise of political power, and its links to socio-economic domination. Institutions ranging from Socio-economic Commissions<sup>137</sup> to Ombudspersons,<sup>138</sup> would help in the realisation of such an objective. However to the extent possible, there should be an emphasis away from the governmental element. Thus, rather than relying solely on a government agency to track the issue of equality

in education, such function can also be executed by an NGO involved in issues of non-discrimination. In other words, the compilation of socio-economic indices and statistical data for each area of activity in which an NGO is involved (from prisons to children to refugees etc.) should become standard practice for all NGOs.

Human rights groups should join with groups working in development to track real incomes, the effectiveness of World Bank/IMF social "safety nets" and poverty-adjustment schemes, as part of the process of monitoring the impact of SAPs on economic and social rights, particularly access to health, education and social services. Given the premium placed on privatization and de-indigenisation, what impact is this process having on access to shelter, property rights and rights of non-discrimination? Much more should be done to encourage the erection of individual ECOSOC Chapters, as Albie Sachs suggests, in trade unions, schools and other public and private institutions simply to monitor the impact of adjustment on their daily lives.<sup>139</sup> More specialized groups devoted to the compilation of timely,

134 See, J. Oloka-Onyango, "The HIV/AIDS Crisis, Human Rights and Legal Aid in Uganda," *LAP News* (November, 1993).

135 See, Adetoun Ilumoka, "African Women's Economic, Social, and Cultural Rights — Toward a Relevant Theory and Practice," in Rebecca Cook, *supra.*, note 125, at 307-325.

136 See Status Report, *supra.*, note 133, 5.

137 See, Mario Gomez, "Socioeconomic Rights and Human Rights Commissions," 17 *Hum. Rts. Q.* 155-169, 162-168 (1995).

138 In this respect, the operations of Uganda's equivalent to an Ombudsperson provides an interesting study in the tackling of economic and social rights. See, J. Oloka-Onyango, "The Dynamics of Corruption Control and Human Rights Enforcement in Uganda: The Case of the Inspector General of Government (IGG)," 1 *E.A. Jnl. of P. & Hum. Rts.*, 23-51 (1993).

139 See Sachs, *supra.*, note 115.

multi-disciplinary and relevant data, need to address themselves to the social and economic rights-implications of their work.<sup>140</sup>

To say that such action is necessary for human rights groups is to state the obvious.<sup>141</sup> What is really critical however, is to begin the process of both encouraging a transformation in focus and a linkage to the broader context of their operations. Such activity could be commenced through the establishment of Country Committees on economic and social rights,<sup>142</sup> and a regional or sub-regional Coordinating Committee that operates as a clearing-house for both information and strategies employed in different parts of the region.<sup>143</sup> A study on the

impact of SAPs in a country like Tanzania that has been under the program for several years, would provide significant support to activists working in a country just about to embark on one. This would be of particular utility with respect to Bank/IMF programs on poverty-reduction and social welfare "nets," to cite just one example.<sup>144</sup> This is especially important in the face of growing regional initiatives in which governments are coordinating not only economic policy, but also exchanging ideas on the control of opposition movements and the destabilisation of dissent.<sup>145</sup>

But SAPs are not only confined to Africa — they are truly global in ambit

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140 See, Bård-Anders Andreassen, Alan G. Smith & Hugo Stokke, "Compliance with Economic and Social Rights: Realistic Evaluations and Monitoring in the Light of Immediate Obligations," in *Human Rights in Perspective: A Global Assessment*, Asbjorn Eide and Berndt Hagtvet, eds., (1988).

141 The Status Report points to the significant expertise available among South African human rights organizations, stressing that they "... have enormous and perhaps incomparable expertise in pursuing issues of social and economic deprivation from a rights perspective. The historical reason for this, clearly, is the institutionalized racism which denied access to social and economic rights on the basis of skin colour. It continues to be reflected in the large amount of time which human rights organizations spend advising on issues such as pensions, labour rights and housing." *Status Report, supra.*, note 133, at 80.

142 See Sachs, *supra.*, note 115

143 In the African context, such bodies could follow the traditional geopolitical and linguistic divides at the initial level, but a mechanism should exist for their ultimate linkage beyond such lines.

144 In this respect, the study on health in Zimbabwe for example, questioned the "... seriousness with which the World Bank has attempted to integrate poverty-reduction mechanisms into structural adjustment. It also illustrates the grave dangers associated with the imposition of ideologically motivated prescriptions for financing health systems." See, for example, Jean Lennox, *Paying for Health: Poverty and Structural Adjustment in Zimbabwe* (1994), 35.

145 Consequently, it is important to understand the regional underpinnings of practices like "ethnic cleansing" and the support given to different oppressive regimes by their neighbours. Although governments are loath to admit it, consultations at this level, or at a minimum, the grafting and exchange of such strategies amongst African governments is widely practiced. See, *Status Report, supra.*, note 133, 3.

and application.<sup>146</sup> African human rights groups need to develop strategies of coordination and support with groups working in the Latin American and Asian contexts,<sup>147</sup> as well as to begin a more active liaison with those in Western capitals concerned with the ramifications of development assistance and its impact on human rights. Many of the methods employed in litigation, advocacy and promotion can be borrowed from and usefully translated into the African contexts, even from a country like the United States, despite official apathy for this category of rights.<sup>148</sup> Strategies such as the suing of arms dealers in respect of injury done by assault rifles, should at the very least be considered for application in the international context.<sup>149</sup> As conservatism gains sway and lays waste to the welfare State, many more in the developed countries will come round to the realisation of the need to consider human rights work in integrated fashion. The experience of activists in a country like India, where Social Action Litigation (SAL) dramatically radicalised the Judiciary and the conceptualisation of human rights is one that can be

positively translated into the African context, and applied even in the absence of an enabling constitutional framework.<sup>150</sup>

The issue of the local operation of movements is, of course, critical to the success of any strategy for the reinvigoration of economic and social rights in Africa. Akwasi Aidoo brings together the most essential tenets of a grassroots strategy for human rights groups that is simultaneously linked in its focus and sustainable in its ambit:

"... work at the level of basic needs must itself be done with an eye to human rights issues. In the end, development activities must be entry points for enhancing human rights; specifically, human rights work must incorporate development action. For example, working to protect and defend the civil and political rights of refugees ought also to include activities that would enhance their food security. Working with rural dwellers to enhance their food

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146 The Bank and the IMF are fond of quoting the "phenomenal performance" of the so-called Asian "tigers", ascribing to that success many of the policies now being applied in the African context. It should not be forgotten however, that there are human rights problems (even economic and social) in these countries too. See, Suk Tae Lee, "South Korea: Implementation and Application of Human Rights Covenants," 14 *Mich. J. Intl. L.* 705, 720-723 (1993).

147 Groups such as the Free Legal Assistance Group (FLAG) in the Philippines, the Law & Society Trust in Sri Lanka, and the Asian Forum for Human Rights and Development (Forum Asia) in Thailand are especially active in this field. See in particular, FLAG, *Economic, Social and Cultural Rights Program* (on file with author, 1994).

148 See, Barbara Stark, "Economic Rights in the United States and International Human Rights Law: Toward an 'Entirely New Strategy,'" 44 *Hast. L. Jnl.*, 79-129 (1992) and Louis Henkin, "Economic Rights under the United States Constitution," 32 *Colum. J. Transnat'l L.*, 97 (1994).

149 See, Barry Meier, "Guns Don't Kill, Gun Makers Do?," *N.Y. Times*, Sunday April 16, E3.

150 For an interesting treatment of SAL, see Upendra Baxi, "Law, Democracy and Human Rights Activism," in Upendra Baxi, *Inhuman Wrongs and Human Rights: Unconventional Essays*, 140-157 (1994).

security also ought to include addressing issues such as land rights, security of tenure and their capacity to defend their rights through existing legal means. Similarly, a project to improve maternal health among the poor would also need to address questions of reproductive health...."<sup>151</sup>

There is obviously a need to go beyond what Aidoo refers to as the "commando" campaign approach to human rights work.<sup>152</sup> According to him the process of the grassroots defence of human rights must be executed through promotional and empowering social action. While this is true, what is more important is to develop approaches that cover all fronts. We should not therefore shift to "promotion and empowerment" without ensuring that there are groups involved in advocacy, in litigation and with the other tenets of "traditional" human rights work.<sup>153</sup> Work on economic and social rights must be truly interdisciplinary, covering those involved with development, humanitarian work and discrete political and social minorities.

In conclusion, the possibilities of undertaking collaborative work with governments, in for example, tackling

the deleterious IMF/World Bank policy-formulation should not be ruled out *ab initio*. This is especially relevant in contexts where governments lack the material resources to gather information, or to take any positive action,<sup>154</sup> and where such action assists in meeting reporting and other obligations under the international framework, or in making governments more responsive to them. It should be remembered that economic and social rights are to be "progressively achieved," manifesting the evolution of strategies that may not necessarily map those in work on civil and political rights. In sum, the approach to economic and social rights in Africa requires a wholly *novel* approach, which must commence by building on what is already in place, and designing appropriate structures and strategies to face what lies ahead.

## VI. A Word in Conclusion

This study can only be considered as the first tentative steps in a long journey yet to be made. It has principally sought to clarify the situation with respect to the conceptual and practical issues involved in the struggle to promote economic and social rights activism in Africa. Such an approach was necessitated both by the rhetorical posture of the leadership on

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151 See, Akwasi Aidoo, "Africa: Democracy without Human Rights," 15 *Hum Rts. Q.*, 712 (1993)

152 *Ibid.*

153 Connie de la Vega illustrates the various ways in which these rights can be promoted, from bringing them to bear on judicial proceedings to employing them in administrative and legislative advocacy. See, Connie de la Vega, "Protecting Economic, Social and Cultural Rights," 15 *Whit. L. Rev.*, 471-488, 474-487 (1994).

154 This point is made by Jhabvala, in discussing the socioeconomic context of human rights violations. See Farrokh Jhabvala, "On Human Rights and Socio-economic Context," in Synder & Sathirathai, eds., 293-319, 305ff.

the issue, as well as by the lack of critical intellectual treatment of the area. In this way, it brought together previously unexplored dimensions of the international, regional and national contexts in which economic and social rights in Africa must necessarily be explored. The next stage must be an articulation of appropriate strategies within specific domestic contexts, while at the same time drawing upon linkages of solidarity and cooperation in order to place economic and social rights activism firmly on the agenda of future human rights work.





# **Towards Global Endorsement of the International Covenant on Economic, Social and Cultural Rights**

**Mervat Rishmawi\***

Historically, work in the field of human rights focused much on the area of civil and political rights. Many of the UN mechanisms, the work of the UN Centre for Human Rights, and several of the declarations and thematic conventions deal mainly with civil and political rights. On the other hand, there is recently an increasing interest and discussion on economic, social and cultural rights, and an elaborate practice through the work of NGOs, particularly on the national level is developing. In relation to that, concrete examples on the indivisibility of human rights and the relations between the different "generations" of rights have evolved.

This paper aims at suggesting some practical points that hopefully will help to advance the work on the endorsement of economic, social and cultural rights. The paper avoids the theoretical discussion on this set of rights. It aims at building on some indicators of the current state and NGO practice.

## **1 General Background Information**

The discussion of the status of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and finding ways for its global endorsement should be based on an examination of certain facts. The following figures on the status of ratification are relevant to this context:<sup>1</sup>

- 57 States have not ratified ICESCR;
- 5 States ratified ICESCR but not the International Covenant on Civil and Political Rights (ICCPR). These are: Greece, Guinea-Bissau, Honduras, Solomon Islands and Uganda;
- among the 57 States mentioned above, 3 ratified ICCPR but not ICESCR. These are: Chad, Haiti and Mozambique;
- total number of ratifications of ICESCR: 131 States;

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1 The figures cover up to 31 May 1995. For more details, see: *Human Rights: Major International Instruments, status as at 31 May 1995*, UNESCO, 1995.

- total number of ratifications of ICCPR: 129 States;
- total number of ratifications of the Convention on the Rights of the Child (CRC): 174 States;
- total number of ratifications of the Convention on Elimination of all Forms of Discrimination against Women (CEDAW): 139 States.

In addition to the figures above, the following are some notes on the patterns of ratification:

- most of the 57 countries that have not ratified ICESCR, also have not ratified most of the other human rights treaties, except for CRC<sup>2</sup>. Many of these countries have ratified only one or two treaties;
- the countries that have ratified the ICCPR but not ICESCR have also ratified either CRC, or CEDAW, or both;
- there is a very small number of countries that have ratified one of the Covenants but not the other.

## 2. *Issues to Be Considered*

On the basis of the above, it is clear that the global endorsement of ICESCR does not only require more ratification. In fact, the main problem does not seem to be related to ratification. Rather, it is on the level of implementation. Therefore, the

following issues should be addressed to enhance the global endorsement of the Covenant:

- a) global endorsement through wider ratification;
- b) advancement of the actual implementation of ICESCR by the States that have already ratified it; and
- c) implementation of provisions of ICESCR even when there is no ratification.

The role of lawyers, NGOs, and national community-based organizations seems to be essential in three directions:

- a) pressuring and lobbying national governments to ratify ICESCR;
- b) monitoring the implementation of ICESCR by States, in accordance with their obligations under ICESCR; and
- c) endorsement of ICESCR and the implementation of its standards and provisions through programs conducted by these NGOs and groups.

The examination of the level of endorsement of ICESCR should be carried out within the context of a comprehensive vision of the indivisibility, universality, and interrelatedness of all human rights. Economic, social and cultural rights can not be fully realised in an atmosphere of dictatorship, or of repression of the civil and political rights.

<sup>2</sup> The vast majority of the 57 countries ratified the CRC, and many ratified CEDAW.

Further, the realisation of many of the economic, social and cultural rights depends on basic guarantees of civil and political rights, like democracy, participation, and appropriate judicial procedures. Finally, many of the economic, social and cultural rights depend much on international cooperation. Therefore, their realisation should be pursued globally.<sup>3</sup>

Further, obviously economic, social and cultural rights are not guaranteed in ICESCR alone. Other human rights treaties also deal with these rights, including CRC, CEDAW and the Convention on Elimination of All Forms of Racial Discrimination (CERD). Several States have ratified one of these treaties but not the others. This proves that these States showed a certain degree of willingness to accept adherence to socio-economic rights, even through treaties. What is needed, therefore, is more work to make that willingness expand to include ICESCR, which is the main treaty that relates to this set of rights.

Lastly, the discussion of economic, social and cultural rights should be linked with development. The right to development, and the various group rights are gaining increasing interest in the work of the UN and NGOs. This interest should be grasped in order to highlight the need for further realisation of economic, social and cultural rights. Development can be seen as the process of realising civil, political, economic, social and cultural rights for all, but also with a

special focus on certain disadvantaged groups like women and the poor. In fact, the first report of the Working Group on the Right to Development emphasises the link between development and all civil political, economic, social and cultural rights.<sup>4</sup>

### 3 *Global Endorsement through Ratification*

As the note above shows, most of the countries that have not ratified ICESCR also have not ratified most of the other basic human rights instruments, including ICCPR, CEDAW, CERD, and CAT. This is important to note because it shows that the problem is not lack of States' willingness to commit themselves to economic, social and cultural rights. Rather, it is a lack of willingness to commit themselves to human rights treaties in general. Therefore, discussion concerning these countries should be situated in the context of promoting all human rights instruments and not only ICESCR.

Human rights NGOs, lawyers, and community based organizations, like trade unions, have a major role to play in securing ratification. Direct lobbying and exerting pressure on governments is an essential step. However, a popular dimension to pressuring governments has also to be created. Various programs and projects, including litigation work, can play an essential role in creating

<sup>3</sup> Thorough discussion of the subject of indivisibility, universality and interrelatedness of human rights is beyond the scope of this paper.

<sup>4</sup> See UN doc. E/CN.4/1994/21

awareness of the importance and relevance of international human rights instruments to advancing the human rights situation at the national level. Through these programs, NGOs can create a human rights consciousness in their societies. Therefore, communities at large, rather than selected NGOs only, can be the agents for demanding ratification of human rights treaties.

Palestine is a perfect example in this context. Due to the work of human rights organizations, particularly *al-Haq*, and other *grass-roots organizations* like the women's movement and the trade union movement, there is a high level of awareness in the community of the importance of future ratification of human rights treaties by the Government of the State of Palestine, as soon as it exists and has the capacity to do this. These groups see that ratification of human rights treaties is important for protection and promotion of human rights, and for advancing the building of civil society. As a result of the pressure on the Palestinian National Authority and the PLO, President Arafat has declared on many occasions that the Palestinian Authority is committed to ratifying human rights instruments as soon as that is possible. The draft Basic Law states that Palestine recognises and respects the fundamental human rights and freedoms prescribed in the UDHR, ICCPR, ICESCR, and CERD. It further declares that the Palestinian Authority shall adhere to the said international agreements.

Additionally, the issue of reservations made upon ratification of ICESCR should be noted. A quick examination of the reasons used in many of the reservations will show that they are related to the extent of availability of resources.<sup>5</sup> This was, for example, used in the context of compulsory education and labour rights. One can argue that because of the progressive nature of economic, social and cultural rights (see article 2 of ICESCR), many of the reservations that were made in the past should not be valid anymore, or at least not to the same extent. These reservations, therefore, should be withdrawn. Additionally, the availability of resources is not a static thing, but should change with the progress of time. The lack of availability of resources at a certain point in time to fully or partially implement a certain right may not necessarily be the case some years later, or affect that same right. States are required to ensure progressively the availability of resources that should enable them to implement more rights, and in a better way, than in the past.

In the light of lack of mechanism in ICESCR for a continuous examination and review of ratifications and reservations NGOs can play a major role. For example, NGOs should continuously lobby States to withdraw their reservations. Further, a professional examination of governments' policies of financial expenditure can help NGOs in assessing whether governments have adopted policies and programs that correlate with

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5 For examples of these reservations, see *Human Rights: Status of International Instruments*, United Nations, New York (1987).

their obligations under human rights treaties.

#### 4 *Monitoring Implementation*

The implementation of ICESCR should not be seen as the responsibility of the States only. It is also the responsibility of NGOs and community based organizations. It is the nature of many of the economic, social, and cultural rights that they are widely implemented by the organizations of the community. Policies on health, education, and vocational training are perfect examples. Historically, trade unions, for example, have played a major role in implementing socio-economic rights, their advancement, and even further elaboration of standards.

Records show that one of the main problems of monitoring implementation relies on a failure by States to submit reports due in accordance with ICESCR. Even when reports are submitted, often they are not comprehensive and do not comply with the reporting guidelines of the Committee on Economic, Social and Cultural Rights. In many other cases State reports are not a true reflection of the actual situation.

The monitoring of States' reports should not be the responsibility of the Committee on Economic Social and Cultural Rights only. NGOs can play a role in that by submitting alternative reports to the Committee, and by pushing their governments to submit their reports in due time and in the correct

fashion. NGOs should also monitor parts of States' reports that pertain to socio-economic rights of other treaty bodies. This should include monitoring reports to CRC, CERD and CEDAW. NGOs should also work on producing alternative NGO reports to these committees as well.

An additional issue that needs to be looked into in relation to implementation is the constitutional relationship between local law and international law. And which has supremacy over the other in the case of ratification of international treaties. One of the problems that seems to be facing many countries is the lack of translation of commitment under international treaty law into commitments at the national level of laws and policies. The discussion of the justiciability of socio-economic rights is also relevant here. Additionally, many constitutions fail to guarantee socio-economic rights in the first place. Other constitutions declare that the State should follow certain policies to enhance socio-economic rights, and do not deal with these as rights.

Lastly, in this regard, a proposed optional protocol to ICESCR can be a very important tool towards better enforcement of the Covenant.<sup>6</sup> An individual complaint procedure will provide individuals and groups with a very good way of challenging the actual implementation of ICESCR by States that ratified it and accepted that procedure. The experience of the Optional Protocol to ICCPR is an important precedent. In

<sup>6</sup> A discussion of the idea of an optional protocol to ICESCR is beyond the scope of this paper. It is being addressed at length by other papers here.

addition to the importance of the mechanism itself, the opinion of the relevant committee on various cases constitutes an important source for an authoritative interpretation related to these rights. This interpretation obviously helps in achieving better monitoring and implementation of the Covenants.

## 5 *Endorsement without Ratification*

Clearly, endorsement of economic, social and cultural rights is not limited to the ratification of the Covenant. Enhancing these rights can be carried out through national programs and policies that are implemented by the non-governmental sector as well as by governments. This is a notion that is very common to NGOs. Work of human rights NGOs, development NGOs, trade unions, women's rights groups, and other grass-roots organizations are good examples. A particular example worthy of mention here is the work of *al-Haq* during the last eight years on its women's rights project, labour rights project, and the human rights education program. Through these, *al-Haq* worked on introducing international legal standards to the community, as well as promotion and awareness-raising of these standards, and monitoring the status of the relevant rights. *Al-Haq* also trained a large number of individuals in the society on the content of these standards through holding workshops and seminars.

Endorsement of socio-economic rights can also be carried out by strengthening their implementation through other human rights treaties that have been ratified by the State con-

cerned. ILO conventions, as well as the treaties mentioned earlier, are just examples. The bilateral or multilateral programs of States with the different specialised agencies of the UN, including UNICEF, WHO, UNESCO and Habitat are also very important tools that should be used to enhance adherence with standards related to economic, social and cultural rights.

## 6 *Conclusion*

Many of the national sections and affiliated organizations of the ICJ have done a lot of work in the direction of global endorsement of ICESCR. The ICJ is possibly one of the first major international human rights organizations, if not the first, that is looking into this issue in a professional and fundamental way.

The development agenda of the world is being shaped at a very fast pace. This agenda will have a tremendous impact on the realisation of the rights contained in ICESCR. There is a responsibility on human rights organizations and activists to study this adequately. More work has to be done on promoting the indivisibility of human rights and in linking human rights discourse with development. What is development after all but the process of realising civil, political, economic, social and cultural rights together in a sustainable and environmentally-safe way.

A new and creative way of working in this field is needed. The traditional human rights work of documenting violations, intervention, academic discourse,

and traditional training and workshops, is not helpful anymore. There should be more focus on involving the persons affected and relevant partners in the society in our human rights work. Human rights work should take a more grassroots dimension. Stronger advocacy, rather than defence, is also needed. Finally, more case-work and litigation on emphasising the justiciability of economic, social and cultural rights is urgently needed. This kind of work not only moves the discussion on socio-economic rights forward, but also helps achieving better realisation of these rights at the national level.

Finally, strengthening international mechanisms related to the ICESCR is essential. Adopting an optional protocol is a very important tool that requires adequate efforts and attention by those concerned, including, lawyers and human rights NGOs.





## **Justiciability of Economic, Social and Cultural Rights**

**Katarina Tomasevski**

It is common in the human rights literature to point out that civil and political rights are justiciable, while economic, social and cultural rights are not. This is usually followed by recalling the old saying *ubi jus, ibi remedium* so as to question whether economic, social and cultural rights are indeed human rights. This text follows neither that track nor a related one which argues for justiciability of economic, social and cultural rights as a category. Rather, it argues that *some* civil and political rights are justiciable as are *some* economic, social and cultural rights. It points out that the current intergovernmental environment is hostile towards efforts to institutionalise the justiciability of economic, social and cultural rights as a category. This reinforces the need to build upon the existing accomplishments rather than to pursue a path which does not promise to become fruitful in the near future.

The development of jurisprudence concerning economic, social and cultural rights was made possible because human rights are indivisible and interrelated. Core governmental human rights obligations apply regardless of the issue at hand. The common denominator has been the emergence of access to remedy in the case of governmental breach of its

core human rights obligations to respect individual integrity, liberty, and equality (in the sense of the right to protection against discrimination). Rather than specific rights, the focus has been the nature of governmental obligations. This text, therefore, follows this integrated approach and discusses current developments relating to the justiciability of economic, social and cultural rights.

The widespread assertion that economic, social and cultural rights are not justiciable is belied by the existing jurisprudence relating to gender discrimination or environmental protection, which is reviewed below. Moreover, the World Bank set up a complaints body, thus explicitly recognizing access to remedy for human rights violations. This is illustrative of the need to refocus the discussion of justiciability. With regard to the right to development, for example, much effort has gone into defining what this should be, with little consensus emerging at the inter- or non-governmental level. When the approach is changed to define freedom from 'development' (in the sense of actions violative of human rights), access to remedy has been demanded and granted, and is likely to create an understanding of development-related violations.

Such an approach can be inferred from successful attempts to hold governments accountable for violations of economic, social or cultural rights. There is a broad range of cases where innovative forms of defining violations have emerged. Suffice it here to mention a few illustrative examples. Although there is no such thing as a right to water in international human rights treaties, it was possible to contest the denial of access to water for unrecognised villages in Israel before the International Water Tribunal and to remedy it.<sup>1</sup> It was also possible to obtain a series of findings by the Committee on Economic, Social and Cultural Rights that forced evictions constituted a violation of the Covenant,<sup>2</sup> and to challenge the legality of nuclear weapons because of their inevitable detrimental effects on human health.<sup>3</sup>

Such diverse examples share the integrated human rights approach, where governmental obligation to refrain from violative action has been deduced from international human rights law as a whole. Further exploration of possibilities opened up by such an approach becomes a particularly attractive avenue today, when the relevant inter-govern-

mental fora seem unwilling to consider institutionalising justiciability of economic, social and cultural rights as a category.

### *Hostile Inter-Governmental Environment*

Efforts to draft an optional protocol to the International Covenant on Economic, Social and Cultural Rights intensified following the 1993 World Conference on Human Rights.<sup>4</sup> They have generated interest and support among academic institutions and non-governmental organizations, but have stumbled into the obstacle of the proverbial lack of political will of governments - acting collectively - against such an innovation.<sup>5</sup>

Evidence of that collective unwillingness of governments can be traced to the very 1993 Conference, which seemed to have opened an avenue for an optional protocol to the Covenant on Economic, Social and Cultural Rights. The Vienna Conference did not advance the case for litigating violations of economic, social and

- 1 Kanaaneh, H., McKay, F., and Sims, E. - "A human rights approach for access to clean drinking water: A case study," *Health and Human Rights*, vol. 1, 1995, No. 2, pp. 191-204.
- 2 Leckie, S. - *When Push Comes to Shove. Forced Evictions and Human Rights*, Habitat International Coalition, Utrecht, 1995, pp. 62-64.
- 3 International Court of Justice - Legality of the use by a State of nuclear weapons in armed conflict, (Request for advisory opinion) Order, 13 September 1993.
- 4 Committee on Economic, Social and Cultural Rights - Draft optional protocol providing for the consideration of communications. Report submitted by Mr. Philip Alston, UN Doc. E/C.12/1994/12 of 9 November 1994.
- 5 At the time of writing, records of the 51st session of the United Nations Commission on Human Rights were not yet available, but commentators noted that the proposal for an optional protocol did not receive support. *Report on the 1995 UN Commission on Human Rights*, Quaker United Nations Office Geneva, April 1995, p. 3.

cultural rights by creating a conceptual confusion: it merged violations of human rights and obstacles to their realisation in a convoluted list of "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights," including "poverty, hunger and other denials of economic, social and cultural rights."<sup>6</sup> One can speculate whether the final wording resulted from an attempt to blur differences between obstacles and violations, or from the inevitable necessity to accommodate mutually opposed views of participating governmental delegations, but such speculation would not be fruitful because there does not seem to exist a constituency arguing for justiciability of economic, social and cultural rights within intergovernmental fora.

The World Summit for Social Development, which took place two years after the Vienna Conference on Human Rights, had been seen as another opportunity, because "a large proportion of the issues on the Social Summit's agenda falls squarely within the domain of eco-

nomic, social and cultural rights," and so the Committee on Economic, Social and Cultural Rights had therefore warned that their "neglect will have significant adverse consequences from the viewpoint of the international human rights regime."<sup>7</sup> The Social Summit did not heed such warnings, and contributed to the retrogression of economic, social and cultural rights by refraining from mentioning them. The human rights language was used sparingly, and only with regard to workers, women and children;<sup>8</sup> the language of human rights and corresponding governmental obligations is absent from the bulk of the final document. The Programme of Action of the Social Summit stressed, nevertheless, the importance of human rights for social development, and included "the provision of effective mechanisms and remedies for enforcement" among methods for their implementation. Moreover, it mentioned "independent, fair and effective system of justice" and "ensuring access by all to competent sources of advice about legal rights and obligations."<sup>9</sup>

6 United Nations - *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 of 12 July 1993, para. 30.

7 The World Summit for Social Development and the International Covenant on Economic, Social and Cultural Rights. Statement of the Committee on Economic, Social and Cultural Rights (tenth session), Committee on Economic, Social and Cultural Rights. Report on the Tenth and Eleventh Sessions, UN Doc. E/1995/22 and E/C.12/1994/20, paras. 2-3, p. 110.

8 The Declaration included the commitment of participating governments to "safeguard the basic rights and interests of workers" [Section 3, para. (i)], to "remove the remaining restrictions on women's rights to own land, inherit property or borrow money, and ensure women's equal right to work" [section 5, para. (e)], and to "ensure that children, particularly girls, enjoy their rights and promote the exercise of those rights by making education, adequate nutrition and health care accessible to them" [section 6, para. (c)]. Copenhagen Declaration adopted by the World Summit for Social Development, 6-12 March 1995, advance unedited text, United Nations Information Centre for the Nordic Countries, Copenhagen, 20 March 1995.

9 Copenhagen Programme of Action adopted by the World Summit for Social Development, 6-12 March 1995, section B., advance unedited text, United Nations Information Centre for the Nordic Countries, Copenhagen, 20 March 1995, paras. 15 (b) and (h).

This all indicates that no advancement of economic, social and cultural rights, least of all the institutionalisation of their justiciability, can be expected at the international level in the near future. Justiciability will develop, much as everything else in the field of human rights, bottom-up, through fragmentary incursions into the areas cloaked behind the proverbial unwillingness of governments to concede ways and means for holding them accountable. It is thus fortunate that examples of holding governments accountable for violations of economic, social and cultural rights exist and can be used as a basis for further development of justiciability.

### *What Before How*

The proliferation of international human rights standard-setting has created an illusion that whatever has been called a right in some inter-governmental document indeed constitutes a human right. Human rights cannot exist unless there are corresponding governmental obligations. Where obligations are impossible to define, rights can be claimed, but have yet to be fought for and conquered. It is worthwhile to recall what Albie Sachs said: "No one gives us rights. We win them in struggle. They exist in our hearts before they exist on paper. Yet intellectual struggle is one of the most important areas of the battle for rights. It is through concepts that we link our dreams to the

acts of daily life."<sup>10</sup> A careful and tedious analysis of what is - and what is not - a human right is an inherent part of this intellectual struggle. This analysis is not necessary only for the multitude of non-legal inter-governmental documents, but also for international treaties.

A procedure whereby complaints can be channelled to the United Nations and dealt with as alleged violations, envisaged by an optional protocol to the International Covenant on Economic, Social and Cultural Rights, was designed on an implicit assumption that governmental obligations could be inferred from the spirit of the Covenant, because this cannot be done from its wording. The obstacle of defining governmental obligations, before one can proceed to designing how to make governments accountable for their breach, could not be wished away, however.

A screening process is necessary to reach beyond the human rights language and identify which 'rights' meet the criteria of human rights. The plea for 'the continuous improvement of living conditions'<sup>11</sup> would obviously not meet such criteria, nor would the right to work, as determined by the International Labour Organization. Once human rights are identified, it is only the breach of core governmental obligations stemming from these rights which can be deemed justiciable.

10 Sachs, A. - *Protecting Human Rights in a New South Africa*, Oxford University Press, Capetown, 1990, p. vi.

11 Article 11 of the International Covenant on Economic, Social and Cultural Rights includes, *inter alia*, the right of everyone to an adequate standard of living, and "to the continuous improvement of living conditions."

This process has already started through the use of the *integrated approach* in human rights litigation. Its advantage is that it reaches beyond the text of the International Covenant on Economic, Social and Cultural Rights. Governmental obligations cut across specific individual rights, as is well known from principles of indivisibility and inter-relatedness. The need to move beyond specific individual rights in designing a procedure for complaints is reinforced by looking at the real-life issues which justiciability is meant to tackle. Poverty does not divide itself neatly into food, health, housing, or other explicitly recognised rights and can only be tackled through an integrated approach. Moreover, it is not immediately apparent whether poverty is an obstacle to the realisation of human rights, which both governments and individuals should be assisted to diminish, or has resulted from an abuse of power and could therefore be addressed as a human rights violation.

This line of reasoning can be taken one step further. An obstacle to litigating violations of economic and social rights has been the paucity of concrete proposals to distinguish between governmental *inability* to implement its human rights obligations and its *unwillingness* to do so.

Litigation is absurd in the case of inability because nobody can be forced by law to perform the impossible. Poverty as an obstacle *versus* poverty as a violation necessitates looking beyond assertions that the realisation of economic and social rights *equals* availability of resources. That assertion has diverted attention from the role of the government in distribution and redistribution, and from the fact that governments of poor countries can be successful in putting into practice human-rights-friendly policies even if resources at their disposal are limited.<sup>12</sup> The purpose of human rights is to prevent abuses of power. Hence, the main targets of any and every litigation are abuses of power which can be defined as human rights violations, such as deaths by starvation, for example.<sup>13</sup>

The integrated approach focuses on the rights which people *do* have and which are seen to be denied or violated. It thereby avoids an inevitable conceptual confusion which results from the different usage of human rights language. The right to development is often seen as a claim for something new; it can be used instead in the process of screening out what development should not be by arguing when, where and how 'develop-

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12 An illustrative example is the ranking of countries by differences in income between men and women in public employment, where El Salvador ranks higher than Australia or France, China has performed better than the Netherlands or the USA, while Sri Lanka ranks higher than Switzerland. United Nations Development Programme - *Human Development Report 1994*, Oxford University Press, p. 106.

13 The 1982 United Nations Report on the World Social Situation included in its section on civil and political rights deaths by starvation, alongside executions and forced resettlement, amongst political killings. UN Doc. E/CN.5/1983/3 and ST/ESA/125, p. 202.

ment' apparently violates human rights. This can slowly bring what Osita Eze calls 'nonjusticiable violations'<sup>14</sup> into the realm of the Rule of Law.<sup>15</sup>

### *Defining Core Governmental Obligations*

Despite endless controversies relating to the nature and scope of governmental obligations corresponding to economic, social and cultural rights, the core obligations are fairly clear: these are human rights obligations, defined by international human rights law and thus not dependent on one of its many sources alone, namely the International Covenant on Economic, Social and Cultural Rights. Governments have a general obligation to enable people to provide for themselves and, exceptionally, to provide a last resort. This can be described by taking the right to food as an example.

The International Covenant on Economic, Social and Cultural Rights posits the fundamental right of everyone to be free from hunger and thus identifies the minimum global human rights standard. International formulations of the right to food revolve around freedom

from hunger as the level which should be secured for all. This minimum is derived from the primacy attached to the right to life. The corollary governmental obligations are, firstly, not to purposefully starve people, and, secondly, to provide food to those who are in danger of starving.

The right to food appears as the most obvious weapon in arguing the human rights case against denials of access to food necessary to prevent starvation. Nevertheless, this weapon is blunt because neither individual entitlements nor corresponding governmental obligations have been specified in the Covenant on Economic, Social and Cultural Rights. The integrated human rights approach helps to overcome this obstacle. The Human Rights Committee, the supervisory body for the International Covenant on Civil and Political Rights, interpreted the obligations of governments emanating from the right to life to include measures to eliminate malnutrition,<sup>16</sup> which emanate from the right to life. Other parts of international human rights and humanitarian law complement this line of argument. The primacy of the right to life, and the numerous safeguards against abuses of power, particularly those that cut across human rights and humanitarian law,

14 Eze, O. - "Human rights issues and violations: The African Experience," in: Shepherd, G.W and Anikpo, M.O.C. (eds.) - *Emerging Human Rights. The African Political Economy Context*, Greenwood Press, Westport, 1990, p. 102.

15 An indication of the approach to be followed is provided in the summary of the general discussion on the right to food before the Committee on Economic, Social and Cultural Rights, which identified as possible targets for litigation cases of systematic deprivation of access to food, and governmental behaviour which constitutes an offence to human dignity. Committee on Economic, Social and Cultural Rights - Report on the Third Session, 6-24 February 1989, UN Doc. E/C.12/1989/5, para. 321.

16 Human Rights Committee - General Comment 6 (16) to Article 6, UN Doc. A137140, 1982.

embody safeguards against arbitrary deprivation of life. When denial of access to food jeopardises life, the status of the right to food becomes irrelevant because the right to life is at stake. This is reinforced by norms of humanitarian and refugee law where the obligation to provide food - and the prohibition of purposeful starvation - figures prominently. International humanitarian law prohibits the starvation of civilians as a means of warfare and destruction of objects indispensable for the civilian population, including food, agricultural area for food production, crops, and livestock.<sup>17</sup> The protection of the civilian population requires the occupying power to secure food supplies for the civilians, and "bring in necessary foodstuffs ... if the resources of the occupied territory are inadequate."<sup>18</sup>

### *Breaches of the Prohibition of Discrimination*

Human rights litigation has reached the furthest into economic, social and cultural rights by positing the right to protection against discrimination, particularly for women. The initial steps towards the operationalisation of non-

discrimination relating to economic, social and cultural rights<sup>19</sup> were undertaken in the Limburg Principles by drawing attention to three clusters of measures: 1) elimination of *de jure* discrimination; 2) tackling *de facto* discrimination, which occurs "as a result of the unequal enjoyment of economic, social and cultural rights on account of a lack of resources or otherwise;" and 3) adopting "special measures for the sole purpose of securing adequate advancement of certain groups and individuals requiring such protection as may be necessary in order to ensure to such groups and individuals equal enjoyment of economic, social and cultural rights."<sup>20</sup>

Following this scheme, the broadening of justiciability can be depicted in concentric circles: starting with the equal right to protection of individual integrity and liberty against governmental abuses of power, human rights obligations have been extended to require governments to interfere in 'private' economic and social relations so as to make equal enjoyment of human rights possible. Achieving equal rights means removing obstacles hindering their enjoyment, and these obstacles are many. Governmental obligations are therefore not only negative but also positive. The elimination of multiple

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17 Protocol Additional to the Geneva Conventions Relating to International Armed Conflicts, Article 54, and Protocol Additional to the Geneva Conventions Relating to Non-international Armed Conflicts, Articles 69 and 70.

18 The Geneva Convention of 12 August 1949, relative to the protection of the civilian population in times of war, Article 55.

19 It is important to recall that the International Covenant on Economic, Social and Cultural Rights obliges governments to *guarantee* that recognized rights are *exercised* without discrimination of any kind.

20 Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17 of 8 January 1987, paras. 37-39.

obstacles to equal rights for women, which has generated most jurisprudence, were effectively extended to 'private' economic and social relations.

Cases decided by the Human Rights Committee in this area are widely known and need not be described here. It may be interesting to point instead to the human rights protection in Europe, which is less known. It has emerged because of the coexistence of two supra-national systems, where the Council of Europe offers enforceable protection of civil and political rights, while the European Union has extended safeguards against gender discrimination to the conventionally exempt economic and social rights. The European jurisprudence has advanced a great deal in outlawing multiple grounds of discrimination against women, starting obviously with sex, but carrying on to tackle marriage, pregnancy and potential pregnancy, motherhood, family responsibilities, and gone further to challenge the stereotyping of gender roles.

A review of relevant jurisprudence would exceed the scope of this text, but two illustrative examples convey the

increasing reach of justiciability in this subject-matter. One pertinent issue has been labour protection for part-time work. Women constitute the bulk of part-time workers, mostly because they need to reconcile labour participation and family responsibilities. Part-time workers are often excluded from labour protection. The Court of Justice of the European Communities has therefore undertaken steps towards remedying this lack of protection by extending labour rights to part-time workers, specifically with the aim of eliminating gender discrimination.<sup>21</sup> It is worth recalling that the ILO found that "the avoidance of interference by the public authorities in wage fixing in the private sector" constituted the first obstacle towards equal labour rights of women.<sup>22</sup> The second example is gender stereotyping, which national courts may refrain from challenging, but regional human rights bodies do not. Thus in the *Schuler-Zgraggen* case, the European Court of Human Rights found the assumption that married women give up their jobs when their first child is born, which had been declared by the Swiss Federal Insurance Court to constitute an 'assumption based on experience in everyday life,' untenable.<sup>23</sup>

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21 In six judgments of 28 September 1994, the European Court of Justice reinforced its insistence on equal treatment of women by extending their equal rights to occupational pensions. It recognised the standing of female full-time employees to challenge breaches of equal pension rights even when these have been 'contracted out,' and affirmed the right of (female) part-time workers to enforceable access to occupational pension schemes. These cases were: *Coloroll* (No. C-200/91), *Avdel Systems* (C-408/92), *Beune* (No. C-7/93), *Shell* (No. C-28/93), *Vroege* (No. C-57/93), and *Fischer* (No. C-128-93). An illustrative newspaper report was entitled 'Equal pensions could cost firms dear,' *The European*, 30 September - 6 October 1994.

22 International Labour Conference - *Equal Remuneration. General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, 72nd session, 1986, ILO, Geneva, 1986, p. 186, para. 247.

23 European Court of Human Rights - *Schuler-Zgraggen v. Switzerland*, Appl. No. 171199213621436, Judgment of 24 June 1993.



Although law is perceived as the main method of securing human rights, a review of national jurisprudence relating to gender discrimination in economic and social rights shows that a national mechanism to secure access to justice has yet to be established in many countries. International jurisprudence thus serves to trigger off national changes. Indeed it appears that law often legalises discrimination through the reluctance of legislators to recognise the need to change *explicitly* unequal economic and social rights of women. The best example are property rights, which cut across divisions of rights into civil and political, or economic and social, but suffer from their exclusion from both Covenants. Property rights are, however, included in the international human rights treaties against racial and gender discrimination, and thus *are* justiciable by invoking governmental obligation to eliminate *de jure* discrimination.

The UN Special Rapporteur on property rights emphasised the priority which should be attached to implementing the prohibition of racial and gender discrimination in property rights: "The Committee on the Elimination of Racial Discrimination should pay particular

attention to the measures aimed at inadmissibility of discrimination in the matter of the right to own property. In this respect, due regard should be given to consider seriously the communications alleging violations of [equal property] rights. The Committee on the Elimination of Discrimination against Women should consider adopting a concise statement or assessment concerning the discrimination faced by women in many countries concerning the exercise of their right to own property. Special attention should be paid to methods aimed at eradicating such discrimination."<sup>24</sup>

The need to implement the principle of non-discrimination relating to property rights is reinforced by the current trend within the United Nations towards the protection of private property in the name of human rights.<sup>25</sup> This is a departure from the previous view that human rights necessitate a reconsideration of property rights, which can be limited by invoking basic human rights.<sup>26</sup> This changed approach increasingly results in treating land as a commodity to be bought and sold rather than as an essential resource to which access is necessary for those whose livelihood depends on it. If one looks, however, at environmental

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24 United Nations - The right of everyone to own property alone as well as in association with others, Final report submitted by Mr. Luis Valencia Rodriguez, independent expert, UN Doc. E/CN.4/1993/15 of 18 December 1992, paras. 497 and 498.

25 Cf. United Nations Commission on Human Rights - Respect for the right of everyone to own property alone as well as in association with others, resolution 1991/19 of 1 March 1991.

26 A decade ago Erica-Irene Daes in her study of limitations upon human rights made a distinction between individual, that is, legal rights, which include property rights, and human rights, and stated: "In cases where purely property rights are involved, the resulting conflict between such rights and the 'general welfare' could well be resolved in the community's interest." E.-I. Daes, Special Rapporteur, *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, United Nations, New York, E.82.XIV.1, paras. 264-267 and 1021.

protection, the commoditization of natural resources has been successfully challenged by using the human rights approach.

### *Environmental Rights*

Much progress has been achieved in environmental rights by applying the traditional human rights approach: arguing for the individual's access to information and standing to challenge perceived violations. Again, the focus has been to use those rights which people do have in demanding and obtaining access to remedy. Both national and international jurisprudence have affirmed individual standing in seeking injunction-type remedies to impede environmental degradation and, specifically, its negative effects on human lives and health.

Despite the lack of an operative definition of substantive environmental rights, their contents have been clarified through jurisprudence. Much as in other areas, this has been accomplished by pointing to acts violative of basic human rights. The contents of environmental rights has been derived from the existing universally recognised rights, both substantive (notably, the right to life and health) and procedural (namely access to information and due process of law). Numerous national and international court cases show that environmental rights are increasingly the subject of litigation.

While the right of the individual who suffered injury or harm due to environmental degradation was recognised in law a long time ago, the recent usage of environmental rights has affirmed the rights of individuals and/or non-governmental organizations to act in public interest, not only to redress environmental degradation but also to prevent it. Such a justiciability-orientated approach to human rights standard-setting was adopted by the Council of Europe through one of its early drafts, which based environmental rights on safeguards against the impairment of human health: "No one should be exposed to intolerable damage or threats to his health or to intolerable impairment of his well-being as a result of adverse changes in the natural conditions of life."<sup>27</sup>

This has been reinforced in the jurisprudence of the Human Rights Committee, which held that an individual seeking remedy "must show either that an act or omission of a State party has already adversely affected his or her enjoyment of [a] right, or that such an effect is imminent."<sup>28</sup> The Committee has thus broadened access to remedy from the conventional retroactive approach (granting individuals standing only after a violation has taken place), to a pro-active approach; namely, it broadened standing to the prevention of violations. Indeed, injunction-type remedies have been used in quite a few countries and, in some, the obligation of public authorities has been extended even further to environmental

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27 Gormley, W.P. - *Human Rights and Environment: The Need for International Cooperation*, 1976, p. 206.

28 Human Rights Committee - Communication No. 429/1990, *E.W. and Others v. the Netherlands*, decision on admissibility of 8 April 1993.

impact assessment of potentially hazardous activities. An overview of national jurisprudence is included in the 1993 report of the UN Special Rapporteur on human rights and the environment, which led her to conclude that "the procedural bases for enforcing the right to a satisfactory environment are becoming more firmly established and the validity of complaints of human rights violations based on ecological considerations is being recognised."<sup>29</sup>

Access to information is, alongside standing, the key to environmental rights. International human rights law is relatively underdeveloped in this area, but regional developments, notably the 1990 EC Directive on the freedom of access to information on the environment,<sup>30</sup> may foster international standard-setting in this area. The adoption of the 1990 Directive has prompted inquiries into the application of the European Convention on Human Rights, with a conclusion that "it can be interpreted as containing such a right," and suggesting that this could be tested by bringing up cases.<sup>31</sup> Recent years have seen such jurisprudence, national, transnational and international, in all regions. Moreover, the notion of envi-

ronmental impact assessment has opened the way to legal remedies aimed at preventing environmental degradation.<sup>32</sup>

The 1992 Rio Conference stressed the need to ensure access to information, so as to enable participation in decision-making: "At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making process."<sup>33</sup> This provision falls short of standards set in the 1990 EC Directive because it addresses only information held by public authorities and thus refrains from positing a duty - or an obligation - for public authorities to secure *public* availability of information relating to environmental hazards held by private companies. The Rio Conference, however, asserted the duty of public authorities to prevent environmental degradation, including by carrying out environmental impact assessments "for proposed activities that are likely to have a significant adverse impact on the environment," and urged governments to "develop national law regarding liability and compensation for

29 United Nations - Human rights and the environment. Second progress report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/7 of 26 July 1993, para. 123.

30 Directive 90/313/EEC, *Official Journal of the European Communities*, No. L 158, 23 June 1990, p. 56.

31 Weber, S. - Environmental information and the European Convention on Human Rights, *Human Rights Law Journal*, vol. 12, No. 5, 31 May 1991, p. 185.

32 A review of national and international jurisprudence is included in: Human rights and the environment. Second progress report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/7 of 26 July 1993, paras. 15-19 and 58-70.

33 United Nations - Rio Declaration on Environment and Development, Principle 10, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, vol. 1: Resolutions adopted by the Conference, UN Doc. A/CONF.151/26/Rev.1, p. 5.

the victims of pollution and other environmental damage."<sup>34</sup>

### *Beyond Individualised Violations*

The rule that only individuals may submit complaints for violations of rights, because rights are conferred on individuals, precludes the recognition of victims as a collective entity. One of the stumbling blocks to developing remedies for widespread and institutionalised violations is that victims have standing only as individuals, even in conditions of mass victimisation. The procedure developed for gross and systematic human rights violations enables individuals to bring cases to the attention of the United Nations, but the complainant is only an informant, not a party to the procedure.

The rigidity of human rights complaints procedures in this regard has often been singled out as an obstacle to justiciability of economic, social and cultural rights. Indeed, an implicit recogni-

tion that this may constitute an obstacle comes from the World Bank, whose rule on standing is the opposite, namely it is not individuals, but organizations that have been given standing before the World Bank's inspection panel,<sup>35</sup> and have regularly resorted to it.<sup>36</sup>

The World Bank's response to documented human rights violations that took place within Bank-funded projects shows that, much as in any other area of human rights, exposing human rights violations has been an effective method of opposing them. With regard to indigenous rights and involuntary resettlement, the Bank adopted guidance, thus affirming the need for safeguards, although without mentioning human rights.<sup>37</sup> The necessity to prevent violations has been expressed as the Bank's decision "not to finance projects which cause severe or irreversible environmental or natural resource deterioration or unduly compromise public health and safety and that displace people or seriously disadvantage certain vulnerable groups without

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34 *Ibid.*, principles 15, 17 and 13.

35 The Inspection Panel was established by resolution 93-10 of the Executive Board of 22 September 1993 to consider 'requests for inspection' by an affected party whose "rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures." The 'affected party' is not a single individual, but 'a community of persons, such as an organization, association, society or other grouping of individuals.'

36 The first case was filed from Nepal, and it argued that the high costs of the Arun II hydroelectric dam project in Nepal could, *inter alia*, "result in cuts in health and social services programmes," thus addressing resource allocation as the key to implementation of governmental obligations corresponding to economic and social rights. Complaint filed on Nepal dam, *Financial Times*, 3 October 1994.

37 The term 'involuntary' is used as a functional equivalent to forced resettlement, while international protection of freedom of residence is not mentioned and 'ethical grounds' argued instead. The Bank's support to project involving resettlement is conditioned by "legal frameworks that are conducive to resettlement with income restoration." *The World Bank Annual Report 1994*, Washington, D.C., August 1994, p. 45.

undertaking mitigatory measures acceptable to the Bank.<sup>38</sup>

Victims of discrimination are not immediately visible from official documentation nor are they represented in the decision-making and professional bodies. The World Bank thus stated that: "special attention is required where Bank investments affect indigenous peoples, tribes, ethnic minorities, or other groups whose social and economic status restricts their capacity to assert their interests and rights in land and other productive resources."<sup>39</sup>

The obvious difference between the established rules of international human rights complaints procedures, and the World Bank's approach to redressing human rights denials and violations, necessitates rethinking justiciability. One should move beyond the focus on the existing human rights bodies (and their rules of procedure) and also consider access to non-human-rights bodies, which could be seen as perhaps closer to what justiciability is meant to achieve.

Another reason for broadening discussions of justiciability to include non-human-rights bodies is another obstacle to justiciability of economic, social and

cultural rights which is typical of human rights bodies. This obstacle is inherent in the division of powers between legislature, executive and the judiciary, which has been transposed from national to international level. In an illustrative statement, the Human Rights Committee stated that "the procedure laid down in the Optional Protocol was not designed for conducting public debate over matters of public policy,"<sup>40</sup> thus reinforcing its previous view that "no individual can in the abstract, by way of *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant."<sup>41</sup> Because the governmental obligations emanating from economic, social and cultural rights have been defined to revolve around deciding on the allocation of resources, they remain beyond the reach of all existing international complaints procedures. Judicial bodies cannot take over issues traditionally allocated to the legislature. The Committee on Economic, Social and Cultural Rights has recognised the necessity to eliminate "matters which are appropriately determined only by the domestic political process" from a future complaints procedure.<sup>42</sup>

It therefore seems necessary to broaden the debate relating to justiciability from the exclusive focus on the existing

38 Shihata, I.F.I. - *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, Third World Legal Studies Association: Panel on the World Bank, Development Projects and Human Rights, Miami, 8 January 1988, mimeographed, p. 30.

39 Information received from United Nations organs, specialised agencies and intergovernmental organizations, UN Doc. E/CN.4/Sub.2/AC.4/1992/2 of 11 May 1992, p. 6.

40 Human Rights Committee - *E.W. et al. v. the Netherlands*, Communication No. 429/1990, UN Doc. CCPR/C/47/D/429/1990, para. 6.2.

41 Communication No. 35/1978.

42 World Conference on Human Rights - Contribution submitted by the Committee on Economic, Social and Cultural Rights, UN Doc. A/CONF.157/PC/62/Add.5 of 26 March 1993, para. 71.

human rights bodies to the exploration of other possible avenues. Precedents at the national level have shown that judicial bodies can broaden their terms of reference. The jurisprudence of the Indian Supreme Court is sufficiently well-known not to need description here. The recent developments in access to justice in South Africa may, however, be less known, while the influence of Indian jurisprudence is acknowledged.<sup>43</sup> The interim Constitution recognises the importance of justiciability of fundamental rights by providing access to justice for victims, persons acting on their behalf, those acting on behalf of a class of persons, and also those acting in public interest. Possibilities of copying such models at the international level have not yet been sufficiently explored. It is paradoxical that the World Bank, rather than human rights bodies, has developed one such model.

### *Structural Issues and Macro-Policies*

Profound changes in the perception of human rights violations have emerged in the area of development, in defining acts violative of human rights undertaken in the name of 'development.' It is interesting to note that, in trying to come to grips with development-induced violations, more progress has been made by 'development' organizations, which delved into human rights, than by 'human rights'

organizations. One possible reason is the obsession with individual entitlements, which is not an appropriate conceptual basis for tackling structural issues because of the simple fact that structural problems require structural remedies. Individual entitlements - or individual remedies, for that matter - are insufficient.

This is evident in the emerging human rights approaches to tackle poverty. The focus on poverty requires a move away from the emphasis on legislative measures as the key method for implementing human rights obligations. Attention is focusing instead on economic policies and measures. The negative effects on human rights of structural adjustment and foreign debt were placed on the human rights agenda, and many proposals have been made to use international human rights law to challenge their detrimental impact. One has been to seek an advisory opinion of the International Court of Justice regarding the compatibility of World Bank/IMF policies with the UN Charter.<sup>44</sup> The United Nations Commission on Human Rights expressed its concern about "the adverse effects of the debt burden on the development process in developing countries," and pleaded for priority consideration to be given "to human conditions, including standards of living, health, food, education and employment of the population, especially among the most vulnerable and low-income

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43 Loots, C. - "Standing to enforce fundamental rights," *South African Journal on Human Rights*, vol. 10, 1994, part 1, pp. 49-59.

44 Cf. Teitelbaum, A. - *Criminalization of violations of the right to development and economic, social and cultural rights*, UN Doc. A/CONF.157/PC/63/Add.8 of 25 March 1993, p. 17.

groups."<sup>45</sup> Moreover, it affirmed "that debt payments should not take precedence over the basic rights of the people of debtor countries to food, shelter, clothing, employment, health services and a healthy environment."<sup>46</sup>

Discussions about justiciability of such issues, which are routinely condemned as human rights violations, usually revolve around individual standing before some established human rights body. The subject-matter indicates, however, that neither could a standing for an individual be envisaged, nor could a human rights body be deemed to constitute an appropriate forum. Because structural adjustment and debt repayment are negotiated at the inter-governmental level, the obvious venue for adjudicating problems should be sought at that level. The establishment of the World Bank's inspection panel has opened one possible forum, alongside the International Court of Justice. The latter has been much debated by non-governmental organizations, but governments, including those who claim to be victimised, do not seem to be keen on seeking redress before it.

### *Summing Up*

Economic and social rights entail governmental obligation to create conditions for their realisation, namely an enabling environment. Norms which require governments to undertake specific policies and measures, rather than merely refraining from a prohibited action, were and remain more difficult to interpret and monitor. However, if it remains difficult to design optimal criteria, wrong criteria can be identified, as happened with the initial design of structural adjustment programmes. Although their original aim was "to eliminate uneconomic, ineffective and wasteful programs,"<sup>47</sup> the main targets were initially social programmes, thus depleting of any real meaning the corresponding human rights. The IMF argued that "because of the unfortunate tendency to equate the adequacy of expenditures on health and education, for example, with their weight in total expenditures, a general reduction of such expenditures is often taken to suggest a decline in standards. However, the opposite may be true due to more efficient utilisation of the more limited resources."<sup>48</sup> Such reductions were, nevertheless, challenged as a wrong target, and successfully so, lead-

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45 United Nations Commission on Human Rights - resolution 1993/12. This resolution was adopted by a vote of 36 in favour, 2 against (Japan and United States) and 12 abstentions (Argentina, Austria, Canada, Czech Republic, Finland, Germany, Netherlands, Peru, Poland, Russia, United Kingdom, Uruguay).

46 *Ibid.*, para 3.

47 *Protecting the Poor during Periods of Adjustment*, The World Bank/IMF Development Committee, August 1987, p. 31.

48 Written statement submitted by the International Monetary Fund on the realisation of economic, social and cultural rights, UN Doc. E/CN.4/Sub.2/1992/57 of 14 September 1992.

ing to a reversal of conditionality.<sup>49</sup> Military expenditures, which fit well into the definition of 'uneconomic, ineffective and wasteful' and regularly exceed social investment, were added to reductions in the 1990s within the general aim of "ensuring that social and economic priorities are not crowded out by other budgetary items."<sup>50</sup>

The governmental obligation to accord priority to human rights in resource allocation is regularly quoted as the key to economic and social rights, but remains unspecified. Proposals that governments should invest in human rights are seldom costed because human rights standards do not determine how much should be spent on specific items, but define instead the process of decision-making. Therefore substantive standards, in the form of individual entitlements, which could be invoked in constructing a case for litigating their breach, do not exist. A feasible method of overcoming this deficiency is a reorientation of the approach to justiciability: *procedural standards* can become the object of litigation. Such a development can be discerned in some current proposals, such as demands for a human rights impact assessment as an optimal means to introduce basic human rights standards in the work of international development finance agencies or in the protection of indigenous rights.

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49 The World Bank's Operational Directive 8.60 on adjustment lending policy of 21 December 1992 provides that "explicit conditionality may be appropriate to enhance the effectiveness and poverty orientation of social expenditures, and to sustain their levels."

50 The World Bank Group - *Learning from the Past, Embracing the Future*, Washington, D.C., July 1994, p. 26.



## Bangalore Declaration and Plan of Action

### I Bangalore Declaration

#### Conference in Bangalore

- 1 Between 23-25 October 1995, the International Commission of Jurists (ICJ), in conjunction with the Commission's triennial meeting, convened in Bangalore, India, a conference on economic, social and cultural rights and the role of lawyers.
- 2 The Conference was inaugurated by the Chief Justice of India (The Honourable A.M. Ahmadi) and the Minister of State for External Affairs (The Honourable S. Kurseed, MP).
- 3 The Conference recalled the long-standing commitment of the ICJ to the indivisibility of human rights - economic, social, cultural, civil and political. That commitment has been evidenced over the years by the *Declaration of Delhi* 1959, the *Law of Lagos* 1961, the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* 1986, and the paper for the *World Summit on Social Development* 1995, amongst many other ICJ activities concerned with the promotion and protection of human rights for the attainment of the Rule of Law.

#### Reaffirming the Limburg Principles

- 4 The Conference reaffirmed the *Limburg Principles*. It considered regional perspectives on the realisation of economic, social and cultural rights. It examined the means of monitoring the attainment of such rights, including the observance of States' obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). It considered the issues relating to the implementation and justiciability of those rights. It reviewed the steps which might be taken to achieve global endorsement of ICESCR in a way which promoted, at once, universal ratification of the *Covenant* and its genuine application as an influence upon the conduct of States and others.

The Conference reflected upon the need for an *Optional Protocol* to the ICESCR, to provide an individual and group complaint procedure similar to the *First Optional Protocol* to the *International Covenant on Civil and Political Rights* (ICCPR). This would provide a complaints mechanism to permit international monitoring of complaints of departures from the rights expressed in the ICESCR. In this regard, the Conference considered the several drafts for such a *Protocol*, including the 1994 draft prepared by the Chairperson of the

Committee on Economic, Social and Cultural Rights, the 1994 draft for CEDAW prepared in Maastricht and the 1995 draft prepared by a group of experts in Utrecht. The advantages of the several drafts were studied.

The role and responsibility of international financial institutions, in the promotion and protection of economic, social, and cultural rights were recognised. The recent concern about issues of economic, social and cultural rights on the part of the World Bank was welcomed.

5 The participants in the Conference reminded themselves that, in the words of the *Limburg Principles*:

- Economic, social and cultural rights are an integral part of international human rights law;
- The ICESCR is part of the *International Bill of Rights*;
- As human rights and fundamental freedoms are indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of economic, social and cultural rights as well as civil and political rights;
- The achievement of economic, social and cultural rights may be realised in a variety of political settings. There is no single road to their full attainment;

- Non-Governmental Organizations (NGOs), all sectors of society, Specialised Agencies and officers of the United Nations and individuals have an important part to play, in addition to the role of governments in attaining economic, social and cultural rights to their full measure.

- Trends in international and economic relations should be taken into account in assessing the efforts of the international community, to achieve the objectives of the ICESCR.

6 In particular, the participants noted that since the *Limburg Principles* were adopted, the centrally planned economies in a number of countries of Central and Eastern Europe and of Asia have collapsed. The economic arrangements of many countries had altered in ways which were then unpredictable.

7 The Conference recalled that the 1993 World Conference on Human Rights in Vienna had reaffirmed the universality, interdependence and indivisibility of economic, social, cultural, civil and political rights and stressed the need for elaborating an *Optional Protocol* to the ICESCR aimed at establishing an international complaints system to monitor States' compliance with their obligations in this field. By stressing both the human Right to Development and the importance of all human rights in achieving the goal of sustainable development, the *Vienna Declaration and Programme of Action* made an

important contribution to linking the human rights discourse with development.

- 8 The Conference recalled the reaffirmation by the United Nations World Summit on Social Development Copenhagen, 1995, of the universality, indivisibility, interdependence, and interrelation of all human rights, including the right to development of people such that human rights, whether economic, social and cultural or civil and political, are a legitimate concern of the international community. The participants also recalled that the Copenhagen Summit's *Final Declaration* encouraged the ratification and implementation by States of the ICESCR.
- 9 The Conference called attention to the acute disadvantages of women in the areas of economic, social and cultural rights and to the need for taking steps to overcome obstacles facing women's full realisation of those rights. Jurists should cooperate with women and grass-roots organizations to formulate concrete measures to protect and promote economic, social and cultural rights of women, bearing in mind the *Platform for Action* adopted by the 1995 United Nations World Conference on Women held in Beijing.
- 10 Consideration was given to the extent, variety, and sometimes apparent incompatibility of reservations entered by States' at the time of ratifying the ICESCR and other relevant treaties. The need for the development of a procedure for

reviewing reservations or limiting their duration was discussed and supported. The Conference was reminded of the general principles of the law of treaties limiting the operation of incompatible reservations and of a recent general comment of the Committee on Human Rights that such reservations would be disregarded as inconsistent with the act of ratification.

### *Jurists' Doubts and Neglect*

- 11 Much time was devoted, as befitted a Conference of jurists, to examining the extent to which and means by which, in domestic jurisdiction the human rights recognised in ICESCR and other relevant international instruments are, or may become, justiciable. The Conference sought to analyse the reasons, often myths, why jurists had been less involved in the pursuit of the attainment of economic, social and cultural rights. Amongst other reasons, the participants identified and considered, the beliefs of some jurists that:
  - Economic, social and cultural rights are not really rights of a legally enforceable kind;
  - Such rights are variable in content, altering over time and resistant to precise legal enforcement;
  - Such rights, however important, are not really the specific domain of lawyers;

- Such rights, for their attainment typically involve large expenditures of money and other resources the determination of which should better be left to the government which is, or should be, accountable to the people rather than to the courts whose members may have neither expertise nor the information with which to make decisions having a large economic or social significance;
- Whilst realisation of civil and political rights have clear economic costs, the attainment of the "right to work," "right to housing" and other economic, social and cultural rights is much more likely to involve large issues of social and political policy in which lawyers have a role to play as politicians and citizens but much lesser role to play as legal professionals. Several participants warned against the tendency of the law, its institutions and professionals, to overstretch their proper function and expertise and to "legalise" issues which are more properly decided in a context, and according to considerations, larger than typically found in courts of law.

12 The Conference acknowledged the foregoing concerns and opinions which, amongst others, help to explain the reluctance of jurists to become directly concerned in the realisation of economic, social and cultural rights by means of the techniques of the law and using the courts and other instruments of legal

practice. The widespread ignorance of the ICESCR, not only amongst judges and lawyers but also amongst governments and in the community was a matter of concern.

The Conference however,

- reaffirmed the fact that economic, social and cultural rights are an essential part of the global mosaic of human rights;
- noted the important role of lawyers and judges in countries, such as India, in applying and judicially enforcing economic, social and cultural rights in the context of the right to life, fair trial, equality before the law, equal protection of the law and other civil and political rights;
- resolved that jurists in the future should play a greater part in the realisation of such rights, than they have in the past, without in any way diminishing the vital work of lawyers in the attainment of civil and political rights;
- affirmed that the realisation of economic, social and cultural rights is often of wider application and more pressing urgency, affecting every day, as such rights do, all members of society. For lawyers to exclude themselves from a proper and constructive role in the realisation of such rights would be to deny themselves a function in a vital area of human rights.

The task of the Conference was, therefore, one of defining those activities in support of the realisation of these rights in which lawyers *qua* lawyers might have a legitimate and constructive function and to promote within the judiciary and the legal profession, in every land, a realisation of the opportunities and obligations which fall to lawyers in this regard.

### *Follow-up to the Conference*

13 The Conference affirmed that impunity of perpetrators of grave and systematic violations of economic, social and cultural rights, including corruption by State officials is an obstacle to the enjoyment of economic, social and cultural rights which must be combated.

14 An independent Judiciary is indispensable to the effective implementation of economic, social and cultural rights. Whilst the judiciary is not the only means of securing the realisation of such rights, the existence of an independent judiciary is an essential requirement for the effective involvement of jurists in the enforcement, by law, of such rights, given that they are often sensitive, controversial and such as to require the balancing of competing and conflicting interests and values. The Conference accordingly recalled existing principles such as the *Bangalore Principles on the Domestic Application of International Human Rights Norms* and urged that it be promoted at a universal level, with particular emphasis on economic, social and cultural rights.

15 The participants resolved to request the ICJ to publish and disseminate the proceedings of the Conference and to ensure that the papers and the record of the reflections of the participants be widely distributed and publicised. The aim should be to enlarge awareness amongst jurists throughout the world of their proper and legitimate functions in promoting and securing the attainment of the economic, social and cultural rights which belong to humanity. The record of the Conference will reflect the sense of urgency and sometimes of professional failure and indifference, which has often marked, in the past, the response of lawyers to this area of human rights.

16. The Conference also recommended that the ICJ publish and disseminate for widespread discussion and action, some of the suggestions which were made during the Conference. Other such suggestions appear in the papers and record of the Conference. Together, such proposals constitute the *Bangalore Plan of Action* for the better attainment of economic, social and cultural rights in every land. To that end, all agreed that the *Plan of Action* which follows should be placed before jurists everywhere as a contribution to further reflection upon the role which they can play in the attainment of such rights. Jurists have a vital role in such attainment as stated in the United Nations *Basic Principles on the Role of Lawyers*. Lack of involvement of jurists in the realisation of more than half of the field of human rights,

vital to humanity, is no longer acceptable.

## II *Plan of Action*

### *At the International Level*

- 17 The following actions for the full realisation of economic, social and cultural rights at an international level should be adopted:
- 17.1 The ICJ and other international and national human rights NGOs, should embark upon fresh action to attain universal ratification of the ICESCR;
- 17.2 Specific pressure should be applied to obtain more ratifications by countries in the Asia Pacific and other regions where ratifications of treaties are few. It should be supplemented by renewed consideration of the establishment of effective regional or sub-regional mechanisms for dealing with complaints about derogation from fundamental human rights (including economic, social and cultural rights);
- 17.3 Renewed efforts should be directed towards the adoption of an *Optional Protocol* to the ICESCR. The ICJ should take a leading role and ensure that such a *Protocol* is adopted without further delay;
- 17.4 The ICJ and other international human rights organizations should redouble their efforts to monitor and report upon departures in the realisation of economic, social and cultural rights. Where necessary, such NGOs should consider issuing alternative reports, to supplement the reports of Members States under the ICESCR. They should also create awareness in the communities affected about the Governments' reports to the Committee so as to stimulate the political, legal and other action necessary to redress wrongs;
- 17.5 Treaty bodies of the United Nations need to develop mechanisms to allow NGOs to contribute and assist in their work. Pending such institutional reforms, NGOs should be imaginative and innovative to assist Treaty bodies even where not granted consultative or observer status;
- 17.6 NGOs should develop a strategy for drawing attention to defaults in reporting under the relevant treaties including by use of the national and international media;
- 17.7 The Inspection panel created by the World Bank should be supported to carry out its mandate effectively. Complaints and suggestions for the better attainment of the principles of the ICESCR should be made to the Panel by NGOs and jurists.

17.8 The attainment of economic, social and cultural rights in the international context in relation to other international initiatives requires a number of steps. Accordingly the ICJ and the NGO community should urgently develop steps to:

- (i) monitor progressive compliance of State obligations under the ICESCR, and examine critically the spending of resources devoted to arms purchases and debt repayment;
- (ii) ensure control of the international trade in arms and the huge burden of military expenditures;
- (iii) control and redress corruption and offshore placement of corruptly obtained funds;
- (iv) achieve an increase in the empowerment of women, including by general education and in particular by promoting the reproductive rights of women;
- (v) bring about the reform of agricultural policies of certain developed countries arising from the uneconomic subsidisation of local agricultural production to the exclusion of markets for agricultural producers in developing countries; and

(vi) improve and make more efficient the functioning of the regional systems and bodies with respect to the attainment of economic, social and cultural rights.

#### *At the National Level*

18. The following action, amongst others should be taken at a national level:

18.1 An increase in the sensitisation of judges, lawyers, government officials and all those concerned with legal institutions as to the terms and objectives of the ICESCR, its mechanism, other relevant treaties and the vital importance for individuals of these aspects of human rights as well as the legitimate role of jurists in attaining them. Universities, law colleges, judicial training courses and the general media also have a responsibility to promote greater awareness of such rights and their legal content; they should therefore be encouraged to assume this responsibility.

18.2 Specifying those aspects of economic, social and cultural rights which are more readily susceptible to legal enforcement requires legal skills and imagination. It is necessary to define legal obligations with precision, to define clearly what constitutes a violation; to specify the conditions to be taken as to complaints; to develop strate-

gies for dealing with abuses or failures and to provide legal vehicles, in appropriate cases, for securing the attainment of the objectives deemed desirable;

18.3 Amongst specific actions to be taken where appropriate, the following were endorsed:

3.1 Reform of constitutional provisions, where necessary, to incorporate references to economic, social and cultural rights;

3.2 Revision of other municipal law to state in precise and justiciable terms, economic, social and cultural rights in a way susceptible to legal enforcement;

3.3 Reform of the law of standing and encouragement of public interest litigation (such as has occurred in India) by test cases, to further and stimulate the political process into attention to economic, social and cultural rights and to afford priority to the hearing of such cases;

3.4 Establishment and enhancement of the functions and powers of the Ombudsman or of specialised Ombudsmen, to provide accessible and independent agencies for receiving complaints

against government and others concerning departures from the obligations to ensure the attainment of economic, social and cultural rights.

18.4 The growth and sustenance of an independent judiciary should be encouraged. Steps should be taken to ensure the continuous sensitisation of the judiciary on their role in promoting and protecting these rights.

18.5 Other steps necessary to ensure real progress in the attainment of these ends, include:

5.1 The adoption of effective means of independent public legal aid and like assistance in appropriate cases;

5.2 The provision by Bar Associations and Law Societies of *pro bono* services and the enlargement of their agendas in the field of human rights to involve the services of their members in this regard;

5.3 Empowerment of disadvantaged groups, including women, minorities, indigenous peoples and others lacking legal experience and confidence in the legal system, to encourage them to come forward to claim and secure their rights and the need for court proce-



dure, to adapt to these ends;

5.4 Judges should apply domestically international human rights norms in the field of economic, social, and cultural rights. Where there is ambiguity in a local constitution or statute or an apparent gap in the law, or inconsistency with international standards, judges, should resolve the ambiguity or inconsistency or fill the gap by reference to the jurisprudence of international human rights bodies. Renewed efforts should be made, including by the ICJ, to promote the existing principles such as the Bangalore Principles, on the universal level with particular emphasis on economic, social and cultural rights.

### *Action by Individuals*

19. Jurists as individuals should take the following action:

19.1 Action within Bar Associations and Law Societies to add a focus upon economic, social and cultural rights to their agenda for the attainment of human rights in full measure;

19.2 As legislators, community leaders and as citizens to enlarge governmental and community knowledge about, and under-

standing of, social, economic and cultural rights, so that the obligations of the ICESCR and other relevant treaties will become better known; and

19.3 Use by jurists, in addition to the courts and tribunals, of other independent organs such as the Ombudsman, independent Human Rights Commissions, as well as national, regional and international bodies to promote the attainment of the standards of relevant treaties. In States in which such institutions have not been established, jurists should promote their establishment. Jurists should work closely with the institutions of civil society to help promote and attain the objectives of the ICESCR and other relevant treaties in full measure.

*Adopted in Bangalore,  
India, 25 October 1995.*

## ***Resolution on Bosnia-Herzegovina***

*The Meeting of the Members of the International Commission of Jurists and its National Sections and Affiliated Organizations*

**meeting** in its Triennial Session in Bangalore, India, 25 - 27 October 1995;

**welcoming** the intensified process of negotiations towards the resolution of the armed conflict in Bosnia;

**concerned** that a settlement of the Bosnian conflict may involve the granting of impunity and amnesty to accused perpetrators of genocide, war crimes and crimes against humanity;

**recalling** the significant efforts of the United Nations and the international community in recent years to establish the Rule of Law as an effective principle of international as well as of national conduct;

**reaffirming** the efforts of the International Commission of Jurists in recent years to counteract the pernicious enlargement of the use of impunity and amnesty in the case of those accused, and reasonably suspected, of genocide, war crimes and crimes against humanity;

**equally affirming** the efforts of the International Commission of Jurists and other bodies towards the establishment of a Permanent International Criminal Court with power to deal effectively with genocide, war crimes and crimes against humanity;

**recalling** the establishment by the United Nations of the International Criminal Tribunal for the Former Yugoslavia, with jurisdiction to bring to justice persons accused of genocide, war crimes and crimes against humanity in the former Yugoslavia;

### ***Resolves***

1. to call upon all those involved in the peace process in the Bosnian conflict not to purport to grant impunity and amnesty to perpetrators of such crimes;
2. to remind all concerned that lasting peace in Bosnia will only be secured upon the basis of adherence to truth and justice and in conformity with the Rule of Law in the due exercise of the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia established by the United Nations;
3. that any terms of agreement which purport to derogate from the lawful jurisdiction of the International Tribunal will be contrary to international law; and
4. to request the Secretary-General of the United Nations to call this resolution to the attention of the parties concerned, the United Nations, the President of the Tribunal and all other relevant persons and bodies.

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## **Recent ICJ/CIJL Publications**

### **Clash In Egypt The Government and the Bar**

*Published by the CIJL in English and Arabic  
111 pp. CHF 12.- plus postage.*

On 26 April 1994, Egyptian lawyer Abdel Harith Madani, aged 32, was arrested at his office and subsequently died in questionable circumstances while in police custody. Soon after, a serious confrontation between hundreds of protesting lawyers and the police resulted in injuries and detentions. The CIJL sent a Mission to Egypt in August 1994 to look at the causes of this serious friction between the Government and the Bar. This Report contains the Mission's findings, its Conclusions and Recommendations, and comments by the Egyptian Government.

### **Legal Services for Rural and Urban Poor and the Legal Status of Rural Women in Anglophone West Africa**

*Published by the ICJ in English. 85 pp. CHF 12.- plus postage.*

In July 1993, a Seminar on Legal Services for Rural and Urban Poor focusing on the legal status of rural women was organized by the ICJ in collaboration with FIDA/WILDAF-Ghana. This publication contains the papers presented by both the resource persons and participants, the Conclusions and Recommendations adopted at the end of the meeting and the follow up activities to be carried out at the country level.

### **Women and the Law in the Pacific**

*Published by the ICJ in English.  
239 pp. CHF 17.- plus postage.*

The ICJ and the Fiji Women's Rights Movement (FWRM) jointly organized a seminar on "Women and the Law in the Pacific" in April 1994 in Fiji. The objective was to examine relevant laws and issues affecting women in the Pacific Island States. The efforts undertaken in different countries in providing legal literacy and developing legal aid and paralegal training programmes are discussed. UN Conventions and fora in the domain of women's rights, as well as the work of the International Labour Organization (ILO) and the UN Educational, Scientific and Cultural Organization (UNESCO) are examined. This Report contains the papers of both participants and resource persons and the Conclusions and Recommendations which are to serve as the basis for future action in the Pacific.