# Economic, Social, and Cultural Rights In International Law

*Contemporary Issues and Challenges*

Edited by
EIBE RIEDEL, GILLES GIACCA,
and
CHRISTOPHE GOLAY



OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries



First Edition published in 2014

Impression: 1



Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013952014

ISBN 978–0–19–968597–4

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

# 1

# The Development of Economic, Social, and Cultural Rights in International Law

*Eibe Riedel, Gilles Giacca, and Christophe Golay*



## 1. Introduction

The field of economic, social, and cultural (ESC) rights is growing at a fast pace. Scholars and advocates around the world are increasingly focusing their energy and attention on poverty eradication, sustainable development, dignity, and their realization through the implementation of the rights to housing, education, food, water, health, social security, work, and culture. Over the last 20 years, this movement has gained great strength, leading to an impressive development of tools and resources at national, regional, and international level, as well as consolidation of doctrine on ESC rights.[1]

[1] These include P. Alston and K. Tomasevski (eds.), *The Right to Food* (The Hague: Martinus Nijhoff Publishers, 1984); A. Eide, *Food as a Human Right* (Tokyo: The United Nations University, 1984); K. Tomasevski (ed.), *The Right to Food: Guide through Applicable International Law* (Dordrecht: Martinus Nijhoff, 1987); A. Eide, W. Barth Eide, S. Goonatilake, and J. Gussow, Omale (eds.), *Food as a Human Right*, 2nd printing (Singapore: United Nations University, 1988) (1st printing 1984); R. Bedard, and D.M. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement* (New York: St.Martin's Press, 1992); M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995); P. Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Dartmouth: Ashgate, 1996); K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Antwerp: Intersentia, 1999); I. Merali, and V. Oosterveld (eds.), *Giving Meaning to Economic, Social and Cultural Rights* (Philadelphia: University of Pennsylvania Press, 2001); A. Eide, C. Krause, and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2nd rev. edn (The Hague: Kluwer Law International, 2001); A. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002); B.K. Goldewijk, A.C. Baspineiro, and P.C. Carbonari (eds.), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (Antwerp, Oxford, New York: Intersentia, 2002); M. Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research Series, Vol. 18 (Antwerp: Intersentia, 2003); Y. Ghai and J. Cottrell (eds.), *Economic, Social and Cultural Rights in Practice* (London: Interights, 2004); J. Squires, M. Langford, and B. Thiele, *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Sydney: Australia Human Rights Centre, 2005); P. Alston, *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005); R.E Howard-Hassmann and C.E. Jr. Welch (eds.), *Economic Rights in Canada and the United States*

At the United Nations (UN) and in regional and national human rights systems, new mechanisms have been established to monitor implementation of these rights. As judges and lawyers are being asked to address more legal claims related to these rights, and as non-governmental organizations (NGOs) and UN agencies expand their programmes in these areas, universities and professional trainers are responding to the demand by introducing courses to train lawyers, development workers, policymakers, and diplomats in these areas.

These activities have culminated in the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR or Covenant) in December 2008 and its entry into force in May 2013. For the first time, individuals and groups can bring complaints about violations of ESC rights before the treaty monitoring body of the Covenant, namely the UN Committee on Economic, Social and Cultural Rights (CESCR). This significant development also forges an optimistic view about the future clarification and development of aspects of the ESC rights that hitherto were controversial.

From the review of progress achieved, it follows that, on the one hand, the broad normative framework of ESC rights has attained a high degree of specificity in terms of content as well as efficacy of implementation mechanisms, most importantly at the national level. On the other hand, the project of ESC rights is saddled with serious, sometimes persistent and emerging challenges that first relate to its structural approach to human rights realization, hinged largely but not exclusively upon economic issues. Legal theory, as is known, always faces constraints when it is 'entangled with the shifting and unruly facts of international politics, economics and social justice'.[2]



(Philadelphia: University of Pennsylvania Press, 2006); S. Leckie and A. Gallagher (eds.), *Economic, Social and Cultural Rights: A Legal Resource Guide* (Philadelphia: University of Pennsylvania Press, 2006); M. Langford and A. Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier*, 2nd edn (Geneva: COHRE, 2006); E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Portland: Hart Publishing, 2007); M.E. Salomon, *Global Responsibility for Human Rights: World Poverty and Development of International Law* (Oxford: Oxford University Press, 2007); D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007); D. Barak-Erez and A.M. Gross, *Exploring Social Rights: Between Theory and Practice* (Oxford: Hart, 2007); M. Foster, *International Refugee Law and Socio- Economic Rights* (Cambridge: Cambridge University Press, 2007); S. Hertel and L. Minkler, *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge: Cambridge University Press, 2007); V. Gauri and D.M. Brinks, *Courting Social Justice: Judicial enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008); M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008); C. Mbazira, *Litigating Socio-Economic Rights in South Africa* (Pretoria: Pretoria University Law Press, 2009); S. Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Cape Town: Juta Press, 2010); M. Langford, W. Vandenhole, M. Scheinin, and W. van Genugten (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013); M. Langford, A. Sumner, and A. Ely Yamin (eds.), *Millennium Development Goals and Human Rights: Past, Present, and Future* (New York: Cambridge University Press, 2013); A Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, forthcoming 2014).

[2] O. Schachter, 'The Evolving International Law of Development', 15 *Columbia Journal of Transnational Law* 1 (1976), 1–16, at 1.

Second, armed conflict, environment, gender issues, social development, and security are among a range of other dimensions that clearly have to be factored into an assessment of the realization of ESC rights, but their relationship with those rights is not yet precisely articulated. Debates on these topics have occurred in a fragmented manner within respective disciplinary fields with little attempt being made to bridge them with ESC rights and particularly how these diverse contexts affect implementation of these rights. In recognition of these challenges, it is important to continue to be innovative in our thinking about ESC rights and their operationalization in practice. International law provides a rich framework through which human dignity can be upheld based on improvements in education, health, and standards of living.

But prior to more in-depth discussion of these topics, this introductory chapter will chart the development of ESC rights in international law. This will provide the appropriate backdrop for the issues engaged in this work. It begins with the historical setting in which the protection of ESC rights developed since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. The focus is on the work of its main driver, the CESCR. The aim is to define ESC rights and the nature of states' obligations under the ICESCR, before analysing the future role of the Optional Protocol to the ICESCR. The concluding part of this introductory chapter provides an outline of the present volume, structured around the main issues and challenges confronting ESC rights today.

## 2. Historical Setting

In 1945, shattered by the cruelties, brutality, and inhumanity of two World Wars, and feeling the repercussions of devastating economic and social crises like the Great Depression of the 1930s, world leaders united in the newly created United Nations and decided to lay the foundation for the universal protection of a set of rights fundamental to the life of every individual.[3] It was, however, not possible at that time to reach agreement on the details of that UN purpose.[4] Instead, only

[3] A. Clapham, *Brierly's Law of Nations*, 7th edn (Oxford: Oxford University Press, 2012), 235–242; P. Alston and R. Goodman, *International Human Rights* (Oxford: Oxford University Press, 2013), 3 and 58; E. Riedel and J. Arend, 'Art. 55(c)', in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds.), *The Charter of the United Nations, A Commentary*, Vol. II, 3rd edn (Oxford: Oxford University Press, 2012), 1565–1602; C. Tomuschat, *Human Rights. Between Idealism and Realism*, 2nd edn (Oxford: Oxford University Press, 2008), 7; W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2009), 3–26; E. Bates, 'History', in D. Moeckli, S. Shah, and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), 17–37; M.A. Baderin and M. Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Farnham: Ashgate, 2010), 3–27; H. Hannum, 'United Nations and Human Rights Law', in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook*, 2nd edn (Turku: Abo Akademi University, 2012), 61–78; O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge: Cambridge University Press, 2010), 48–58.

[4] See R.B. Russell and J.E. Muther, *A History of the United Nations Charter* (Washington: The Brookings Institution, 1958), 303.

the preamble and a few general Articles mentioned in the text of the Charter took note of this function and it was decided to leave the elaboration of a Universal Bill of Rights to the newly created Commission on Human Rights. By 1948, however, it became clear that agreement on such a treaty was not possible. The beginning of the Cold War and East–West ideological disputes prevented that. As a compromise, it was decided in 1948 to first formulate a legally non-binding, but standard-setting UDHR, to be supplemented by a subsequent treaty that would translate the UDHR standards into legally binding obligations.

The UDHR contained civil and political (CP), and ESC rights in a single instrument, and in remarkably concise terminology. Apart from rights of the first generation—or, better, first dimension[5]—(understood as freedom rights) it also includes rights of the second dimension that belong to the catalogue of inalienable human rights, ultimately flowing from human dignity. Without minimum claim rights in working life, health protection, and education systems, and without the guarantee of an adequate standard of living, flowing from human dignity, guaranteeing a 'survival kit' that sets a minimum existence protection standard, the overall picture of human rights would be incomplete, missing out crucial dimensions of protection for the most needy, in particular marginalized and disadvantaged persons and groups of persons.[6] Thus, freedom of opinion alone makes no sense to a starving person. The preamble of the UN Charter had made this abundantly clear when naming the core main purposes and functions of the UN, namely: peacekeeping, guaranteeing the rule of law (including human rights), and furthering social progress, and achieving better standards of life in a larger freedom. This third function has often been overlooked. But member states of the UN could not, as yet, agree on how to implement those rights in a binding treaty. The Commission on Human Rights was, however, empowered to elaborate such a human rights treaty.[7] By 1952, however, it became evident that growing ideological disputes in the wake of the Cold War between East and West prevented the adoption of a unified treaty, comprising all UDHR rights. By the so-called Separation Resolution of 1952,[8] the Commission on Human Rights split the UDHR guarantees into two separate draft treaties. Negotiations over these two drafts continued until 1966.

This fundamental rift between categories of rights took more than 40 years to overcome. Western States, led by the United States of America—in contradiction

[5] See E. Riedel, 'Menschenrechte der dritten Dimension' (1989) 16 *Europäische Grundrechte Zeitschrift*, 9–21, on the need to replace 'generations' by 'dimensions'.

[6] See generally E. Riedel, 'Monitoring the 1966 ICESCR', in G.P. Politakis (ed.), *Protecting Labour Rights: Present and Future of International Supervision* (Geneva: International Labour Organization, 2007), 3–13, at 10; on poverty and the right to food, see J. Ziegler, C. Golay, C. Mahon, and S.-A. Way, *The Fight for the Right to Food: Lessons Learned* (London: Palgrave Macmillan, 2011).

[7] UN General Assembly Resolution, Draft International Covenant on Human Rights and Measures to Implementation: Future Work of the Commission of Human Rights, 4 December 1950, UN Doc. A/RES/421 (V). See generally E. Riedel and G. Giacca, 'Article 68', in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, Vol. II, 3rd edn (Oxford: Oxford University Press, 2012), 1753–1761.

[8] UN General Assembly Resolution, Preparation of Two Drafts International Covenants on Human Rights, 5 February 1952, UN Doc. A/RES/543 (VI). See also E. Riedel, *Theorie der Menschenrechtsstandards* (Berlin: Duncker & Humblot, 1986), 25–64.

with the Four Freedoms Speech of Franklin D. Roosevelt of 1941 and with his Economic Bill of Rights Speech of 1944[9]—favoured the concept of two separate treaties maintaining that CP rights and ESC rights were and are inherently of a different legal nature, insofar as the latter would lack judicial enforceability. Contrary to this position, the so-called Eastern bloc as well as many non-aligned states supported and demanded equal treatment for ESC rights.[10] At the final count, the supporters of one comprehensive treaty had to compromise and accept two separate treaties, adopted simultaneously on 16 December 1966, both entering into force in 1976.[11]

At the level of implementation, the two Covenants displayed marked differences, still reflecting the ideological divide of the 1950s and 1960s: while the International Covenant on Civil and Political Rights (ICCPR) provided for three monitoring devices at global level, namely state reporting, individual communications, and state complaint procedures, the ICESCR merely foresaw a state reporting obligation. Furthermore, to underline the different treatment of these categories of rights, the ICESCR did not establish a separate supervisory committee in the text, but entrusted that task to the Economic and Social Council (ECOSOC). The CESCR was only set up later by a resolution of ECOSOC,[12] and started its work with independent experts in 1987.[13] Since then, CESCR receives in principle one comprehensive state report per member state every five years, with sectorial reporting having been tried but found to be less effective in the early 1990s.

Nearly thirty years after the adoption of the two Covenants, at the Vienna World Conference on Human Rights of 1993, states emphasized in the Vienna Declaration and Plan of Action that ESCR form one of the two pillars of international human rights law and stressed the universality, indivisibility, inter-dependence, and inter-relatedness of all human rights. The Conference concluded that '[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.[14] This objective has been at least

[9] See President R.D. Roosevelt, *State of the Union Address*, 6 January 1941, available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=70&page=transcript> (last accessed 24 November 2013) and President R.D. Roosevelt, *State of the Union Address*, 11 January 1944, available at <http://www.gutenberg.org/dirs/etext04/sufdr11.txt> (last accessed 24 November 2013).

[10] See I. Cismas, 'The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights', ch. 16 in this book.

[11] UN General Assembly Resolution, 16 December 1966, UN Doc. A/RES/2200 (XXI).

[12] Originally, ECOSOC set up a Sessional Working Group on the Implementation of the ICESCR, through the adoption of ECOSOC Decision 1978/10 on 3 May 1978. This Sessional Working Group was later renamed CESCR with the adoption of ECOSOC Decision 1985/17 on 28 May 1985.

[13] In the monitoring practice of the treaty bodies, however, this procedural difference has not played a significant role. In fact, the Commission on Human Rights and its successor, the Human Rights Council, have treated all treaty bodies alike, and states parties have similarly treated the reporting mechanisms of all treaty bodies alike. One could even say that difference in the establishment of the treaty body has given the CESCR quite a degree of independence, which has led to introducing new methodologies where other committees remained more hesitant, such as allowing contributions from non-governmental organizations (NGOs). This has helped to focus and prioritize discussions with states parties, and the other treaty bodies soon followed suit.

[14] UN World Conference on Human Rights, Vienna Declaration and Plan of Action, 12 July 1993, UN Doc. A/CONF.157/23, Part I, para. 5. The Vienna declaration and plan of action was adopted by 173 states.

partially reached today if we look at the number of ratifications, as by December 2013, 161 states had ratified the ICESCR and 167 the ICCPR. However, original ideological positions did not totally disappear, and the United States of America has still not ratified the ICESCR.

The CESCR had also propagated from the early 1990s the adoption of an Optional Protocol (OP), similar to the OP to the ICCPR, to introduce individual communications alongside the state reporting procedure, and to emphasize the equal importance of CP and ESC rights. But that venture took another two decades to be realized.

## 3. The Practice of the Committee on Economic, Social and Cultural Rights

Since the beginning of its work in 1987, the CESCR has been by far the main driver of the development of ESCR in international law.[15] It has been particularly effective in defining the notion of ESC rights and in monitoring ESC rights in states parties to the ICESCR.

### A. The notion of ESC rights

In defining ESC rights, it seems logical to distinguish three main categories. The first category, economic rights, embraces the guarantees and claims to participation in the economic life of the community.[16] Within this category of ESC rights is to be found the right to property, which is contained in Article 17 of the UDHR, but dropped from the ICESCR Draft in 1954.[17] Other examples are elements of the right to housing (Article 11 (1)),[18] and the right to freely chosen or accepted work (Article 6 (1)).[19] The second category, social rights, by contrast, usually relates to

[15] For a detailed presentation on the impact of other international monitoring mechanisms on the development of ESC rights, with a particular focus on UN Special Procedures, see C. Golay, C. Mahon, and I. Cismas, 'The impact of the UN Special Procedures on the development and implementation of economic, social and cultural rights' (2010), 15 *The International Journal of Human Rights*, 299–318.

[16] See F. Coomans, *Economic, Social and Cultural Rights* (Utrecht: Netherlands Institute of Human Rights, 1995), 3.

[17] E. Riedel, *Theorie der Menschenrechtsstandards (Theory of Human Rights Standards)* (Berlin: Duncker & Humblot, 1986), ch. 2, 25–147; E. Riedel, 'Farewell to the Sources Triad in International Law?' (1991) 2 *European Journal of International Law*, 58–84. For a recent study on the right to property see C. Golay and I. Cismas, *The Right to Property From a Human Rights Perspective* (Montreal, Geneva: Rights and Democracy, Geneva Academy of International Humanitarian Law and Human Rights, 2010).

[18] CESCR, General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant), 1 January 1992, UN Doc. E/1992/23 ('General Comment No. 4'); CESCR, General Comment No. 7: The Right to Adequate Housing (art. 11, para. 1, of the Covenant): Forced Evictions, adopted on 14 May 1997, UN Doc. E/1998/22, E/C.12/1997/10, Annex IV ('General Comment No. 7').

[19] CESCR, General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, UN Doc. E/C.12/GC/18 ('General Comment No. 18').

aspects of employment and, in particular, to the conditions under which people live.[20] Thus, Articles 6 to 9 of the ICESCR cover specific rights of employment, or rather rights in employment, including technical and vocational guidance and training programmes (Article 6 (2)), just and favourable conditions of work, including equal remuneration for work of equal value (Article 7 (a)), safe and healthy working conditions (Article 7 (b)), limitation of working hours, etc. (Article 7 (d)), trade union rights (Article 8), and the right to social security, including social insurance, usually related to employment conditions,[21] and social assistance (Article 9). Yet a large part of social rights is not specifically employment-related, and instead refers to actual living conditions of people, irrespective of their being employed. Such social rights comprise family rights, the rights to food, housing, clothing, and health, and are to be found in Articles 10 to 12 ICESCR. The third category of ESC rights embraces cultural rights, usually those embodied in Articles 13 to 15, ICESCR, such as the right to education (Articles 13 and 14), to one's cultural identity, to be able to participate freely in cultural life, to enjoy the benefits of scientific progress and its applications, authors' rights, and to conduct scientific research (Article 15). While Part III of the Covenant—Articles 6 to 15 ICESCR—points towards certain obligations a state party has to honour with particular relevance to the respective rights, Part II (Articles 2 to 5 ICESCR) outlines cross-cutting state obligations of a general nature applicable to all individual rights, such as issues of non-discrimination and equality. These general obligations have been elucidated over the years by the CESCR in its monitoring practice, complemented by a variety of international expert opinions, and by workshops and conferences.

To date, the CESCR has adopted 21 General Comments in which it defined ESC rights and correlative states' obligations,[22] and principles and standards proposed by expert conferences, such as the Limburg Principles on the Implementation of the ICESCR of 1987 and the Maastricht Guidelines on Violations of ESC rights of 1997, have been adopted outside the work of the CESCR.[23] And yet, it does not

[20] Classification examples abound. For an overview see E. Riedel, 'The examination of State reports', in E. Klein (ed.), *The Monitoring System of Human Rights Treaty Obligations* (Berlin: Verlag Spitz, 1998), 95–105.

[21] CESCR, General Comment No. 19: The Right to Social Security (Art. 9 of the Covenant), 4 February 2008, UN Doc. E/C.12/GC/19 ('General Comment No. 19'). See also E. Riedel, 'The Human Right to Social Security: Some Challenges', in E. Riedel (ed.), *Social Security as a Human Right* (Berlin/Heidelberg/New York: Springer, 2007), 17–28.

[22] Like the other United Nations treaty bodies, the CESCR adopts General Comments—also called 'General Recommendations' by the Committee on the Elimination of all Forms of Discrimination of Women (CEDAW). The General Comments of the CESCR are authoritative interpretations of the rights enshrined in the ICESCR. Their purpose is to assist states parties in the carrying out of their obligations and to give greater clarity to the object, the purpose and the content of the ICESCR. See P. Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law', in L. Boisson De Chazournes and V. Gowland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (The Hague: Martinus Nijhof, 2001), 763–776. Regarding the CESCR's interpretation in its general comments as being generally accepted by states parties as authoritative, see M. Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research Series, Vol. 18 (Antwerp, Oxford, New York: Intersentia, 2003), 40–42.

[23] Limburg Principles on the Implementation of the ICESCR ('Limburg Principles'). The Limburg Principles were drafted during a meeting of experts on ESC rights in Limburg (Maastricht,

seem adequate to differentiate strictly among these interrelated rights. Economic and social rights are different sides of the same coin. In the practice of the CESCR, no strict division of rights has been followed, apart from the fact that the textual order of rights has been adhered to in the monitoring practice, by clustering rights monitoring topics into general issues, Articles 6 to 9, Articles 10 to 12, and Article 13 to 15 ICESCR.[24]

## B. Nature of ESC rights monitoring

While at regional level in Europe, Africa, and the Americas a judicial approach has been developed for human rights implementation, at the universal level this has not been possible. In international law, three modalities of implementation are possible: the judicial, quasi-judicial, and political. The judicial avenue leads to a court or tribunal decision in the form of a declaratory judgment, imposing on states parties to human rights treaties an obligation to execute the judgments at national level. At the Council of Europe level with 47 member states the judgments of the European Court of Human Rights have generally been followed, with few exceptions, and this has meant that complainants have often found redress for their grievances for the alleged human rights violation. While under the African system the range of rights subject to judicial review is larger because it embraces ESC rights, the European Convention on Human Rights (ECHR) merely deals with CP rights, with few exceptions, such as Protocol 1 to the ECHR, which deals with the rights to property and education.[25] It was felt in 1950/51 that other ESC rights ought to be dealt with under a different monitoring system, as developed in the European Social Charter 1960, and the Revised Social Charter of 1996 which precluded judicial review and instead merely opted for quasi-judicial and political monitoring devices.[26]



Netherlands) in June 1986. They were published in *Human Rights Quarterly*, Vol. 9, 1987, 122–135. They have also been submitted to the CESCR, Background paper submitted by the International Commission of Jurists, 2 October 2000, UN Doc. E/C.12/2000/13, 3–15. The Maastricht Guidelines on Violations of ESC Rights ('Maastricht Guidelines') were drafted during a meeting of experts on ESC rights in Maastricht, Netherlands, in January 1997. Like the Limburg Principles, they appeared in *Human Rights Quarterly*, Vol. 20, 1998, 691–704, and have been submitted to CESCR, Background paper submitted by the International Commission of Jurists, 2 October 2000, UN Doc. E/C.12/2000/13, 16–25.

[24] This tendency of the CESCR is likely to be maintained, considering the recent reduction of dialogue time with state party delegations from nine to six hours, reserving nine hours only for initial reports. With the reduction of dialogue time, and the increase in the number of reports to be covered during one session, and further time constraints in relation to dealing with communications under the new Optional Protocol which are likely to be forthcoming relatively soon, the whole monitoring procedure in the state reporting process will have to be changed. It may involve stricter prioritizing in periodic reports, thus limiting the issues to be covered, and/or developing smaller Committee working groups dealing with a particular state report, the plenary only endorsing concluding observations *en bloc* without discussion, unless the working group wishes a plenary discussion or cannot agree on issues.

[25] On the justiciability question see M. Langford, 'Judicial Review in National Courts: Recognition and Responsiveness', ch. 15 in this book.

[26] See R. Brillat, 'The European Social Charter', in G. Alfredsson et al. (eds.), *International Human Rights Monitoring Mechanisms: Essays in honour of Jackob Th. Möller* (The Hague: Martinus Nijhoff

The quasi-judicial approach foresees monitoring by the treaty body of individual communications or complaints, leading to a recommendation in the form of opinions. Individuals and groups of individuals can thus allege violations of their individual rights, but the treaty body does not hand down decisions in the form of judgments, but merely 'views', which only have recommendatory force. The practice under the Human Rights Committee over the last 40 years has shown, however, that member states of the ICCPR normally treat these legally non-binding views as if they were judgments. The advantages of such individual communications procedures are obvious: it is much easier to understand the scope and extent of a particular right when measured against a specific case. Such cases contribute best to the definitional and interpretation function of the treaty body concerned and will influence future application of the Covenant guarantees in a convincing manner. Thus, the generally phrased provisions of the treaties will gradually, on a case-by-case method, be concretized and the proper meaning of a particular right will be made clearer progressively.

## C. The political monitoring procedure

The political approach of monitoring was one that all human rights treaties at the international level have adopted, namely the state reporting procedure, whereby in the case of the ICESCR each state party provides a report on the domestic realization of ESC rights over the five-year reporting period. That report is then examined by a pre-session working group of CESCR which formulates additional questions to the state, the so-called 'list of issues', to which the government concerned has to provide specific answers. Subsequently, a dialogue between the CESCR and a state party delegation takes place, where the report and the answers to the list of issues are discussed in public session. At the end, CESCR adopts concluding observations in private session, containing suggestions and recommendations, and during the monitoring of the next periodic report the dialogue begins with follow-up questions on the previous report, before dealing with the current one. This ensures that there is some degree of assessing implementation of recommendations. That follow-up process is gradually being expanded and increasingly states parties are aware that they will face difficult questions on the application of the previous recommendations made.

However, it must be stressed that the conclusions of the CESCR and of all other treaty bodies in this procedure merely represent legally non-binding recommendations to the state party, not judicial pronouncements. The value of such concluding observations—if well drawn—lies in elucidating the meaning and content of particular rights under the Covenant, but also in shaping discussion at the national level as to how such recommendations and suggestions can be implemented in domestic law. This may be by influencing the legislative process, bringing in policy changes and administrative practices, and, above all, influencing judges in changing the domestic case law along the lines of the human rights guarantees that the state has accepted in international law.

## 4. The Nature of Obligations under the ICESCR

States' obligations under the ICESCR are articulated in Part II—Articles 2 to 5—of the Covenant and in particular in its Articles 2 and 3. Since the adoption of the ICESCR, they have been further defined through the work of the CESCR.[27]

### A. Article 2(1), ICESCR

From the beginning of its work the CESCR has taken great pains to explain to states parties in concluding observations that Article 2(1) of the Covenant is of prime importance to a full understanding of the ICESCR and is to be seen as having a dynamic relationship with all of the other provisions of the Covenant. Article 2(1), on a superficial reading, seems to suggest that the whole Covenant merely lays down programmatic statements as to how ESC rights are to be implemented, leaving it entirely up to the states parties how they will implement these guarantees.[28] Article 2(1) states:

> 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 realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

While the ICCPR refers to 'every human being', 'no one', 'everyone', 'all persons', indicating that the rights enunciated in that Covenant are directly applicable to everyone, ESC rights were couched in much more indirect language, speaking of 'States parties recognizing' and 'undertake to ensure'. On a narrow reading the use of the formulations 'undertakes to take steps', 'to the maximum of its available resources', and 'with a view to achieving progressively the full realization of the rights' in Article 2(1)—language not found in the ICCPR—supports the view that ESC rights guarantees are merely programmatic statements whose realization rests entirely in the hands of states parties. For this reason, commentators mainly from Western states for a long time concluded—and a few still support that view—that



Publishers, 2001), 601–606; N. Prouvez, 'The European Social Charter, an Instrument for the Protection of Human Rights in the 21st Century?' (1997) 58/59 *The Review*, International Commission of Jurists, 30–44; E. Riedel, 'Der Einfluss internationaler und europäischer Menschenrechte auf das deutsche Kündigungsrecht' (the Influence of International and European Human Rights on the German Law of Termination of Employment) in F. Maschmann (ed.) *Kündigungsrecht: alte und neue Fragen* (Baden-Baden: Nomos, 2013), 13–35.

[27] On the contribution of UN Special Procedures in the definition of states' obligations in relation to ESC rights, see C. Golay, C. Mahon, and I. Cismas, 'The impact of the UN Special Procedures on the development and implementation of economic, social and cultural rights' (2010), 15 *The International Journal of Human Rights*, 299–318.

[28] The original state position and probably the prevalent one is that the progressive implementation standard entailed a mere promotional type of commitment to enhance certain objectives set by the Covenant without requiring the attainment of specific results.

only the ICCPR imposes direct legal obligations on states parties, while the ICESCR merely lays down indirect legal obligations, needing implementation steps at the national level, before becoming fully operative.

To support this view, stemming from the ideology divide of the 1950s and 1960s, the literature frequently used the notion of self-executing and non-self-executing treaty obligations. While this is perfectly correct in relation to typical international treaty law, where the reciprocity element of obligations is responsible for the distinction of directly and indirectly applicable norms, thus requiring further national steps before becoming directly applicable, this treaty law notion should not be applied strictly to human rights treaties where the obligations of each member state primarily refers not to the treaty partners. It should rather refer to the general population inside state parties themselves. The reciprocity notion of traditional treaty law cannot operate in the same way: human rights treaties form a separate treaty category, as representing integral treaties[29] or regime treaties[30] that, once ratified and set in motion, take on a life of their own, operating against even those states that ratified them.

The CESCR has maintained that while there are undoubtedly some aspects of the individual rights enshrined in the Covenant which realistically cannot be fully realized in a short period of time, thus leaving room for governmental discretion, every single Covenant right does, however, contain elements lending themselves to immediate implementation that must be honoured by the states parties without delay or restrictions.

Although discussion persists as to whether a set of minimum core obligations under the ICESCR should be identified, as the CESCR has done since its General Comment No. 13 on the right to education,[31] or whether that cuts down the progressive development dimension of rights realization, the view that in each Covenant right certain elements exist which lend themselves to immediate implementation, such as in relation to the right to food and the freedom from hunger, seems more convincing. This notion has been adopted by CESCR in its constant practice since it adopted General Comment No. 3 on the nature of states parties' obligations (Article 2, paragraph 1 of the Covenant) in 1990.[32]

The most important example in this regard, inherent in each of the rights, is the principle of non-discrimination under Article 2(2), ICESCR, which each

[29] Integal treaties are also called treaties with integral fulfilment structure. See E. Klein, *Statusverträge im Völkerrecht* (Berlin, Heidelberg, New York: Springer-Verlag, 1980), 234.

[30] See R. Wolfrum, *Die Internationalisierung staatsfreier Räume* (Berlin, Heidelberg, New York, Tokyo: Springer-Verlag, 1984), 688; E. Riedel, 'The progressive development of international law at the universal and regional level', in R. Wolfrum (ed.), *Strengthening the World Order: Universalism v Regionalism* (Berlin: Duncker & Humblot, 1990), 115–144, at 128; E. Riedel, 'Global Human Rights Protection at the Crossroads: Strengthening or Reforming the System', in M. Breuer A. Epiney, A. Haratsch. S. Stahl, and N. Weiss (eds.), *Der Staat im Recht: Festschrift für Eckart Klein zum 70. Geburtstag* (Berlin: Duncker & Humblot, 2013), 1289–1306.

[31] CESCR, General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, UN Doc. E/C.12/1999/10 ('General Comment No. 13').

[32] CESCR, General Comment No. 3: The Nature of States Parties Obligations (Art. 2, para.1), 1 January 1991, UN Doc. E/1991/23(SUPP) ('General Comment No. 3').

state party is capable of implementing without further ado because it is not essentially resource-dependent, but rather requires making policy choices in line with internationally agreed obligations.[33] As the CESCR has consistently held since the adoption of General Comments Nos. 3 and 20,[34] and more recently still in the CESCR Statement No. 16 on resource allocation,[35] that states parties, in order not to render the Covenant provisions devoid of any meaning, must at all times guarantee the minimum core obligation as a matter of priority, that is, ensuring essential foodstuffs, equal access to primary health care, basic shelter and housing, access to potable water, work and social security, basic education, and access to culture.

Any failure by a state to guarantee these essential prerequisites for leading an adequate and dignified life, ensuring the 'survival kit' as a minimum, automatically amounts to a violation of the Covenant, unless the state party can show that it was practically impossible to guarantee even these minimal rights, due to resource constraints, armed conflict, tsunamis, earthquakes, or other catastrophes. It means essentially that the state party has the burden of proof to demonstrate that it was unable to fulfil even the minimum basic survival rights requirements.[36] Thus, even in a situation of armed conflict where vulnerable groups can find themselves in urgent need of food and medical care, states are required to take immediate action, including the duty to accept humanitarian assistance offered by the international community. The CESCR in its Concluding Observations to state reports by Israel remarked that:

> The Committee repeats its position that even in a situation of armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights, as part of the minimum standards of human rights, are guaranteed under customary international law and are also prescribed by international humanitarian law.[37]

It should be noted that in looking at the state party's obligations, the CESCR from the beginning has taken a country-by-country approach, avoiding misleading comparisons with other states. As the state reporting procedure foreseen by the Covenant and ECOSOC resolution setting up the CESCR closely envisage, this approach follows the philosophy of constructive dialogue, believing that more can be achieved by this softer approach than by a violations approach, focusing more

[33] See generally section 4.B that follows. See also M. Langford and J.A. King, 'Committee on Economic, Social and Cultural Rights, Past, Present and Future', in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2009), 477–516, at 492–495.

[34] CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2 of the Covenant), 2 July 2009, UN Doc. E/C.12/GC/20 ('General Comment No. 20').

[35] CESCR, Statement No. 16.

[36] On this issue, Limburg Principle No. 25 refers to the obligation 'to guarantee respect for the minimum rights of survival for all', independent of available resources.

[37] CESCR, Concluding Observations: Israel, 26 June 2003, UN Doc. E/C.12/1/Add.90, para. 31. See further G. Giacca, 'The Relationship between Economic, Social, and Cultural Rights and International Humanitarian Law', ch. 11 in this book.

on states' failures to guarantee the rights recognized under the Covenant.[38] Over the years, the Committee has refined this method, and in its concluding observations details concerns and recommendations which reflect the degree to which the state party in the opinion of the CESCR has met its obligations or not. Sometimes, however, when gross and massive violations of ESC rights have occurred and been reliably attested, the Committee has called a spade a spade, particularly when the state has done nothing on previous CESCR recommendations, then stated that particular Covenant obligations were and still are being violated. But these are relatively rare occasions. Usually the constructive dialogue approach has yielded measurable results, reflected in the following periodic report of that state party.

Another overarching feature that is considered to be essential in the context of 'progressive realization' of Covenant obligations is the principle of non-retrogression which prohibits any deliberate step backwards that cannot be justified with severe economic difficulties, *force majeure*, or the like.[39] Aware of the economic realities prevalent in today's world, the CESCR nevertheless regards the principle of 'progressive realization' as a legally binding flexibility device, necessary and useful for the implementation of human rights at the national level. Accordingly, the Article 2(1) reference to the 'maximum available resources' weighs heavily in this context, on the one hand leaving room for different economic and financial capacity and budgetary discretion for member states, and, on the other requiring them to 'strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.[40]

As Article 2(1) ICESCR clearly stipulates, these maximum available resources may be obtained through requesting international cooperation and assistance.[41] Thus, in order to reach the goal of the highest possible standard in terms of ESC rights, every state that cannot meet its obligations owing to resources constraints, by virtue of the Covenant, remains under the concurrent obligation to seek technical assistance from other, more developed states that are in a position to help, or from the international community as such. Conversely, Article 2(1) imposes a legal obligation to render such assistance on the developed states parties, who thus have a dual obligation: to fulfil the Covenant obligations at home, and to render assistance to other states needing such assistance. In this regard, Article 2(1) ICESCR is closely linked to Articles 22 and 23 ICESCR, which encourage the involvement of all relevant UN organs, their subsidiary organs, and the specialized agencies in the implementation of the Covenant.[42]

[38] See A. Chapman and S. Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp/Oxford/New York: Intersentia, 2002), 18. See also C. Courtis, *Courts and the Legal Enforcement of ESC rights* (Geneva: International Commission of Jurists, 2008), 23–28.

[39] See generally A. Nolan, 'Budget Analysis and Economic and Social Rights', ch. 13 in this book.

[40] CESCR, General Comment No. 3, para. 11; CESCR, Statement No. 16.

[41] See generally T. Karimova, 'The Nature and Meaning of "International Assistance and Cooperation" under the International Covenant on Economic, Social, and Cultural Rights', ch. 6 in this book.

[42] For details, see E. Riedel and G. Giacca, 'Article 68', in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds.), *The Charter of the United Nations. A Commentary*, vol. II, 3rd edn (Oxford: Oxford University Press, 2012), marginal notes 104–106.

## B. Non-discrimination (Articles 2(2) and 3 ICESCR)

Of equal importance for the implementation of the Covenant as a whole is Article 2(2) that incorporates the principle of non-discrimination found in most international human rights instruments.[43] This principle, in conjunction with Article 3 on equal rights for men and women, belongs to the very core elements of the Covenant, and calls for immediate and unconditional implementation. Unlike other specific ESC rights guarantees whose implementation to some extent depends on availability of resources, non-discrimination issues are less resource-related and usually only require governmental will to apply the obligations undertaken by ratifying the Covenant. Even the least developed countries do not need to discriminate against the most marginalized and disadvantaged individuals and groups of society when legislating new norms, or applying and interpreting existing legislation.

All it requires is the political will to implement obligations undertaken at the international legal level. That does not mean that the state party has no scope of action, apart from one particular action, but the standard of evaluation is one of reasonableness and proportionality of aims sought to be achieved by legislative or administrative acts, measured against the effects and means undertaken. In its General Comment No. 20 of 2009, the CESCR has dealt with these issues extensively. Read together with General Comment No. 16 on Equality,[44] it entails that these Covenant provisions are cross-cutting and overarching principles that are to be applied in conjunction with these rights.[45]

These provisions are not stand-alone rights like Article 26 ICCPR. General Comment No. 20 is quite explicit on the issue of differential treatment based on prohibited grounds.[46] This will be viewed by the CESCR as discriminatory, unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights, and applied solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.[47]

The CESCR has summarized in General Comment No. 20 its previous approach in nearly all other General Comments on specific rights. It has also dealt extensively with questions of discrimination in practically all its concluding observations addressed to states parties.

When addressing the prohibited grounds of discrimination mentioned in Article 2(2), ('race, colour, sex, language, religion, political or other opinion, national or

[43] See E. Riedel and J. Arend, 'Art. 55(c)', in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds.), *The Charter of the United Nations, A Commentary*, Volume II, 3rd edn (Oxford: Oxford University Press, 2012), marginal notes 17–19.

[44] CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), 11 August 2005, UN Doc. E/C.12/2005/4 ('General Comment No. 16').

[45] See in this regard S. Ratjen and M. Satija 'Realizing Economic, Social, and Cultural Rights for All', ch. 4 in this book.

[46] CESCR, General Comment No. 20.

[47] CESCR, General Comment No. 20, para. 13.

social origin, property, birth or other status'), General Comment No. 20 devotes nine extensive paragraphs to interpretation of 'other status' and begins its analysis by stating that discrimination 'varies according to context and evolves over time',[48] thus needing a flexible approach to the ground of 'other status'. The list of newer categories of 'other status' that have been developed over the years include disability, age, nationality, marital and family status, health status, place of residence, economic and social situation, and after extensive discussion in the CESCR, also the category of sexual orientation and gender identity.[49] While some commentators have criticized this particular category, it reflects changed societal attitudes towards these sexual orientation issues all over the world, albeit rejected by some states and religious denominations. Same-sex marriages or partnerships, adoption rights, social security benefits, and other status questions are now regularly discussed under this heading in dialogue with states parties, and there are marked tendencies towards changing national legislation in that respect. It is an example of human rights treaties representing living instruments of evolving practice, not merely reflecting static normative settings at the time of adoption of the text. Positivists, of course, will query this position taken by CESCR and other treaty bodies, by civil society organizations and by increasing numbers of states parties. However, even those states that object to this dynamic and evolving interpretation method will fully engage in discussions with the CESCR during the constructive dialogue and will present the resulting concluding observations at the domestic level, and may thus prepare the way for new policies, strategies, legislation, and administrative practices, and may, moreover, influence the reasoning of the judicial dicta as persuasive authority.

The realities of disadvantaged and marginalized individuals and groups of society provide one exception to the principle of non-discrimination, namely the concepts of reverse discrimination, affirmative action, or temporary special measures, as found, for example, in CEDAW.[50] In 1986, the Limburg Principles acknowledged that temporary special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection 'shall not be deemed discrimination, provided that such measures do not, as a consequence, lead to the maintenance of separate rights for different groups',[51] and that such measures will be discontinued once their objectives have been achieved. All this shows that the principles laid down in Articles 2(1), 2(2), and 3 of the Covenant in their cross-cutting effect neatly shape the content of specific ESC rights found in Part III of the Covenant, in Articles 6 to 15 ICESCR.



[48] CESCR, General Comment No. 20, para. 27.

[49] CESCR, General Comment No. 20, para. 32. See generally C. Chinkin, 'Gender and Economic, Social, and Cultural Rights', ch. 5 in this book.

[50] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 4. CEDAW was adopted through UN General Assembly Resolution 34/180 of 18 December 1979. It entered into force on 3 September 1981.

[51] Limburg Principle No. 39.

## C. The obligations to respect, protect, and fulfil ESC rights

In parallel with the definition of obligations contained in Articles 2 and 3 ICESCR by the CESCR, philosophical and legal reflections led to the creation of a new framework describing states' obligations—both negative and positive—in relation to ESC rights.[52] According to this framework, states have obligations to respect, protect, and fulfil ESC rights.[53]

While this typology has been widely acclaimed in the literature,[54] followed by the CESCR in its consistent practice, and by many NGOs and national human rights institutions (NHRIs), it does not form part of the text of the Covenant.[55] There are voices in the literature that are sceptical and prefer a different typology, just differentiating between obligations of result and obligations of conduct,[56] to capture the notions of immediate obligations and obligations only to be realized progressively over a longer period of time. The commentators suggest that this should be left to the Committee practice, or even to state practice. The CESCR, at any rate, has used the triad of respect, protect, and fulfil in all its General Comments since General Comment No. 12 on the right to food and regards it as a useful analytical tool.

The obligation to respect prohibits infringements by state authorities of the enjoyment of ESC rights of citizens under the state's jurisdiction. For instance, if a state party passes legislation discriminating certain groups of society, this violates the obligation to respect, unless justifications can be mustered that do not infringe Covenant rights. The CESCR will point out in its concluding observations that such legislation contravenes Covenant obligations and will recommend action

[52] The same typology in the ambit of civil and political rights is equally valid and is treated as such in the literature. See M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd rev. edn (Kehl am Rhein: Engel, 2005), 37–41.

[53] Maastricht Guidelines No. 6.B. Originally espoused by H. Shue where he distinguished between the duties to avoid depriving; duties to protect from deprivation; and duties to aid the deprived, H. Shue, *Basic Rights. Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980). This typology was further developed within the framework of a study on the normative content of the right to adequate food by the former member of the Sub-Commission on Human Rights, A. Eide. See Report of Asbjorn Eide, The Right to Adequate Food as a Human Right, 7 July 1987, UN Doc. C/CN.4/Sub.2/1987/23. It was then systematically applied to ESC rights by the CESCR. See CESCR, General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, UN Doc. E/C.12/1999/5 ('General Comment No. 12'); CESCR, General Comment No. 13; CESCR, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, UN Doc. E/C.12/2002/11 ('General Comment No. 15').

[54] See M. Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, School of Human Rights Research Series, Vol. 18 (Antwerp, Oxford, New York: Intersentia, 2003), 13–14, 115–156.

[55] See the comparison to Article 2(1), ICCPR which reads that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction'. M. Nowak interprets the verb 'to ensure' in Article 2(1) ICCPR as incorporating the positive obligations to protect and to fulfil. M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd rev. edn (Kehl am Rhein: Engel, 2005), 37.

[56] On a critical note, see M. Langford and J.A. King, 'Committee on Economic, Social and Cultural Rights, Past, Present and Future', in M. Langford (ed.), *Social Rights Jurisprudence* (New York: Cambridge University Press, 2008), 484–489.

to be taken by the state party to bring its legislation in line with the Covenant obligations.

The obligation to protect requires states parties to protect their citizens against infringements of rights by private third parties, such as, for example, employers. A state thus acts in violation of the Covenant, if it fails to ensure that private employers comply with basic labour standards as detailed in the Covenant articles, particularly Articles 6 and 7 ICESCR. In fact, while the obligation to respect mirrors a state's direct obligation to meet its own Covenant duties, in the case of the obligation to protect, the responsibility of the state changes to an indirect one, seeing to it that others do not violate human rights obligations to which the state party has agreed internationally. Here the state may redress the violation by legislation enjoining private firms to respect basic human rights parameters, and omission to provide remedies for individuals and groups of society affected by the activities of such private persons represents a clear violation of Covenant obligations resting on the state party.[57]

More than the other two obligations, the obligation to fulfil demands an active role by the state, be it in the form of legislation, administrative, budgetary, judicial, or other measures. Here a state does not meet its obligation if, for example, it fails to provide the population with an adequate, appropriate, and efficient primary health care system or primary schooling. That obligation to fulfil can be subdivided into obligations to facilitate, promote and provide that the CESCR has elaborated fully from General Comment No. 12 onwards.

Under the obligation to promote, public information campaigns or other means of informing the general population can be seen as fulfilment obligations, where the state party retains quite a large margin of discretion as to how it implements this obligation. In General Comment No. 14 on the right to health the CESCR has described this obligation in some detail, requiring for example states parties:

> to undertake actions that create, maintain and restore the health of the population. Such obligations include (1) fostering recognition of factors favouring positive health results, e.g. research and provision of information; (2) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (3) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (4) supporting people in making informed choices about their health.[58]

Under the obligation to facilitate, the state party is required, for example, 'to take positive measures that enable and assist individuals and communities to enjoy the right to health'.[59] The CESCR devoted much time and space to detailing such

[57] On the application of human rights law to non-state actors see O. De Schutter, 'Corporations and Economic, Social, and Cultural Rights', ch. 7 in this book.

[58] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, UN Doc. E/C.12/2000/4 ('General Comment No. 14'), para. 37: See also E. Riedel, 'The Human Right to Health: Conceptual Foundations', in A. Clapham, M. Robinson, C. Mahon, and S. Jerbi (eds.), *Realizing the Right to Health* (Zürich: Rüffer and Rub, 2009), 21–39.

[59] CESCR, General Comment No. 14, para. 37.

facilitation and promotion measures as subcategories of the obligation to fulfil, and it did so in order to rebut the criticism that the obligation to fulfil is generally cost-intensive. In fact, cost-intensive measures only arise to a greater extent with the obligation to provide.

Under the obligation to provide, the state party is bound to fulfil a specific right contained in the Covenant when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. Providing access to essential medicines, to schools, and sufficient teaching staff for elementary schooling are relevant examples. Another example would be to establish non-contributory schemes or provide social assistance for those unable to cope with the issues involved themselves. This the CESCR elaborated in detail in its General Comment No. 19 on the right to social security.[60] Under this obligation the state party has to allocate adequate funds with the available resources and, as shown, to seek international assistance and cooperation where even that minimum fulfilment obligation cannot be met.[61]

Some of the criticism levelled against the triad respect-protect-fulfil is based on the assumption that no clear delineations between the categories are possible, and that consequently it remains doubtful whether the respect, protect, or fulfilment level is addressed. The CESCR has refuted this criticism by stating that all three types of violations can occur individually or in combination, which the following example illustrates: if housing legislation is changed regarding the execution of forced eviction orders without provision of minimal alternative housing, this involves a violation of the 'respect' obligation. If private actors such as owners of houses obtain eviction orders ultimately rendering the tenants homeless, the obligation to 'protect' of the state authorities (administrators or judges) are involved, and the CESCR will argue that the state party, despite privatization, remains responsible to provide alternative housing, either by itself or via the private owners of the property, or to enact restricting housing control legislation. The obligation to fulfil may therefore exist, for instance, involving the set-up of social housing programmes for homeless people. In that case, the provision of alternative housing involves either direct provision of tenements or the development of new housing policies, strategies, and plans of action to be realized progressively. Overall, this illustrates that the state party's obligations to respect, protect, and fulfil may well exist side by side, but usually only one of the three obligation types will be used.

## 5. Sources of ESC Rights other than Treaties

Since the initial phases of CESCR practice in 1987, most of the emphasis has been placed on diligently interpreting the provisions of the treaty law, the ICESCR. Under the traditional sources of international law, as applied by the International

[60] CESCR, General Comment No. 19, para. 51.

[61] See generally T. Karimova, 'The Nature and Meaning of "International Assistance and Cooperation" under the International Covenant on Economic, Social, and Cultural Rights', ch. 6 in this book.

Court of Justice (ICJ), laid down in Article 38 (1) ICJ Statute, the ICESCR is regarded as an international treaty to which the VCLT applies.[62] But as mentioned, the international treaty modality does not easily fit the human rights treaties that represent regime treaties or integral treaties rather than normal treaties where the state interests are exchanged on a reciprocal basis.[63] In regime treaties the obligations are set in motion by ratification and then take on their own life, usually with implementation mechanisms that are directed against the states themselves that have ratified the human rights treaty, with the object of protecting the rights of individuals under their jurisdiction. Therefore, the traditional treaty approach has to be supplemented.

In recent decades, following extensive literature debates, the treaty category has been supplemented by *ius cogens* and erga omnes obligations, and has gradually been introduced into the reasoning of textual treaty interpretation in the human rights sphere. As Alston and Simma have convincingly shown,[64] some of the core obligations contained in the ICESCR by now can be regarded as part of customary international law, or as general principles of law that apply universally, even for states not party to the Covenant. These principles can be deduced from extensive state practice, such as adoption of the UDHR or parts of it in national constitutions, which many states have done on gaining independence in the post-colonial period. The human rights minimum standards of protection[65] that have evolved under the UN Charter system can also be counted in this category of customary law.[66]

In relation to Covenant rights, further general principles of law have evolved in the past half-century. These include the so-called PANTHER principles, that is, participation, accountability, non-discrimination, transparency, human dignity, empowerment, and the rule of law.[67] These principles partially go beyond the actual wording of the Covenant text, but help to shape further developments of the treaty

[62] E. Riedel, 'Standards and Sources: Farewell to the Exclusivity of the Sources Triad in International Law?' (1991), 2 *European Journal of International Law*, 58–84; E. Riedel, *Theorie der Menschenrechtsstandards* (Berlin: Duncker & Humblot, 1986) ch. VII, 260; A. Clapham, *Brierly's Law of Nations*, 7th edn (Oxford: Oxford University Press, 2012), 74–77.

[63] See E. Klein, *Statusverträge im Völkerrecht* (Berlin, Heidelberg, New York: Springer-Verlag, 1980), 234.

[64] B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1992), 12 *Australian Yearbook of International Law*, 82.

[65] The minimum standards of human rights protection comprise, inter alia, acquired rights of aliens, protection against expropriation and nationalization which is only permissible under certain conditions, access to justice for foreigners, protection of *habeas corpus* rights, in particular legal hearing, and protection of life, liberty, property, and dignity of aliens. It is only a small step to extend these customary rules to all citizens, see E. Riedel, 'Der internationale Menschenrechtsschutz. Eine Einführung', in E. Riedel (ed.), *Menschenrechte. Dokumente und Deklarationen* (Bonn: Bundeszentrale für politische Bildung, 2004), 13–14.

[66] E. Riedel, 'Der internationale Menschenrechtsschutz. Eine Einführung', in E. Riedel (ed.), *Menschenrechte. Dokumente und Deklarationen* (Bonn: Bundeszentrale für politische Bildung, 2004), 13.

[67] See for example O. De Schutter, *Countries tackling hunger with a right to food approach. Significant progress in implementing the right to food at national scale in Africa, Latin America and South Asia*, Briefing Note No.1 of the UN Special Rapporteur on the Right to Food, May 2010, available at <http://www.srfood.org/images/stories/pdf/otherdocuments/20100514_briefing-note-01_en.pdf>

text in a progressive manner. To pick out just one example, to guarantee conditions of work under Article 7, ICESCR depends heavily on participatory processes of employers and employees alike. The danger, of course, is that the monitoring body exceeds its treaty powers and legislates or creates new obligations that the treaty text did not foresee. The line to be drawn between legitimate interpretation and illegitimate legislation by treaty bodies is thin, and states parties will stress that legislation remains their own exclusive domain. So the CESCR, like other treaty bodies, has to steer a careful course in its interpretation task that it has done with its General Comments.

In the practice of the CESCR under the Covenant, increasing use has been made of legal standards which may be applied, but do not have to be applied. They serve as interpretation aids, just like non-binding persuasive authority utilized in court decisions. The decisions themselves rest on the often vague and generally phrased text of a Covenant provision, but in the judges' reasoning these standards can help to convincingly support the arguments chosen by the judges. Such standards and also combination standards or 'zebras'—bringing together binding but abstractly formulated norms and non-binding concrete standards, such as for example, codes of conduct—have also influenced the interpretation of the ICESCR.

The classical positivist position of literal treaty text interpretation, that will only accept the actual wording of a norm, even if it produces defective solutions to problems, can be contrasted with the 'zebra' approach containing binding and non-binding 'soft law' standards. It may include declarations of the General Assembly adopted with near universal acceptance, like the UDHR, or legally non-binding conference documents like the Vienna Declaration of Human Rights of 1993 which read together with particular human rights treaty provisions produce convincing reasoning for dynamic treaty interpretation.

For instance, the strictly speaking non-binding 'Anti-Apartheid Code of Conduct' that European ministers developed to control European firms operating in South Africa at the time of the apartheid regime effectively led to a liberalization of employment of coloured people in those firms.[68] The reason why those firms ultimately complied with the strictly speaking non-binding code of conduct was the following: if they contravened to this code, they would no longer be entitled to receive discretionary export risk guarantees. This shows that these legally non-binding norms can have great relevance on their own in some cases. In others, if read together with existing, but rather vaguely formulated binding human rights norms, the combination standards or 'zebras' play an increasing role to take on board newer developments, particularly when many decades have passed since the adoption of the treaty provisions.



(last accessed 24 November 2013). See also FAO, *Right to Food: Making it Happen: Progress and Lessons Learned through Implementation* (Rome: FAO, 2011) 6–7.

[68] See C. Smith, *The Impact of the EEC Code of Conduct on the Behavior of European Corporations in South Africa*, Paper presented at the International Conference on South Africa in Transition, New York, 29 September to 2 October 1987, available at <https://dspace.lib.cranfield.ac.uk/retrieve/753/SWP0894.pdf> (last accessed 24 November 2013).

With the establishment of the Human Rights Council and particularly the Universal Periodic Review inter-governmental monitoring, the discussion on human rights non-treaty sources has increased.[69] The policy orientation of inter-governmental processes increasingly makes use of combination standards, blending UN Charter-based and treaty-based arguments in defining human rights positions. Sometimes, the development of such standards is very progressive, and then calls for new human rights treaties or amendments to existing ones are made. Considering, however, that it takes many years and provision of substantial financial means, states now are quite reluctant to create new human rights treaties, also because the existing system is already suffering from overburdening, overlaps, and unwieldiness. In this context, careful progressive realization through human rights standards and combination standards applied in the interpretation practice of monitoring bodies would appear to be the best approach.

## 6. Using Indicators in Monitoring ESC Rights

The development of indicators to monitor the progressive realization of ESC rights can be seen as a response to the relative vagueness of Article 2(1) of the Covenant. And in that field too, the CESCR has been one of the main actors. For a number of years the CESCR has attempted to use indicators and benchmarks in its monitoring practice when reviewing state party reports on the realization of Covenant rights. It soon emerged that many different ideas about the use of indicators and benchmarks were proposed. After having reviewed more than 200 state party reports, the time has come for the CESCR to systematically assess the value of indicators and benchmarks in the monitoring of state party obligations under the ICESCR.

Numerous expert workshops have been conducted, and scientific studies on indicators published, focusing on particular rights such as the rights to education, health, and food.[70] In that process it soon emerged that the existing method of monitoring was suffering from a series of flaws. In the reporting practice it transpired that some states presented qualitatively deficient reports which were either incomplete, or evaded direct answers to CESCR questions, or frequently only superficially addressed material issues, or only provided isolated data which did not explain how the human rights situation actually developed during the reporting cycle. Moreover, reports were often dated and did not take into account recent developments.

[69] See generally E. Riedel and G. Giacca, 'Article 68', in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, Vol. II, 3rd edn (Oxford: Oxford University Press, 2012), 1753–1761. On the contribution of UN Special Procedures to the creation of soft-law instruments, see C. Golay, C. Mahon, and I. Cismas, 'The impact of the UN Special Procedures on the development and implementation of economic, social and cultural rights', 15 *The International Journal of Human Rights* (2010), 299–318.

[70] For an overview, see E. Riedel, 'Measuring Human Rights Compliance. The IBSA Procedure as a Tool of Monitoring', in A. Auer, A. Flückiger, and M. Hottelier (eds.), *Les droits de l'homme et la constitution. Etudes en l'honneur du Professeur Giorgio Malinverni* (Geneva: Schulthess, 2007), 251–271.

This finding, in fact, regrettably describes the situation of all human rights treaty bodies, and also applies to the UN Charter-based procedures, such as the Universal Periodic Review of the Human Rights Council (HRC). Moreover, in monitoring the Millennium Development Goals, similar problems arise in using indicators.[71] The expert workshops on human rights indicators gradually overcame the inter-disciplinary difficulties of defining precisely what indicators mean. Economists, political scientists, and human rights lawyers each had their own tradition, and it took a number of years before substantial agreement on some basic common parameters was reached: to start with, quantitative and qualitative indicators had to be distinguished in the human rights context for which they are to be used. While many economists and statisticians initially insisted on operating only with data-based quantitative indicators that can be assessed objectively, political scientists and human rights lawyers stressed the need for finding suitable qualitative indicators in line with the normative frameworks for which indicators were to be used. Following protracted discussions agreement was finally reached to use both quantitative and qualitative data in the human rights context. Indicators are to be distinguished into structural, process, and outcome indicators. Structural indicators will measure the constitutional and other legal settings in relation to particular human rights, whether a particular right is actually legally guaranteed, or intended to be introduced in the foreseeable future, at the domestic law level.

Process indicators can both reflect (objective) quantitative data and qualitative data, flowing from the components of a particular human right, involving some (subjective) value judgments about the realization of a particular right, that is, measuring whether and to what extent action (plans, policies, programmes, laws, administrative, or judicial action) has been taken during the monitoring period, and for this purpose process indicators alongside structural indicators can be used.

Outcome indicators, by contrast, will simply address concrete results achieved, giving a 'yes' or 'no' answer to specific data, such as, for example, actual changes in the maternal death rate in right to health or occupational safety issues. Yet it must be remembered that these indicators can only represent tools for evaluating the performance of states in meeting their international human rights obligations. The agreed indicators help to find a common human rights language, and help to focus on measurable results, enabling a better and proper assessment of the fulfilment of human rights obligations resting on states.

Against this background the CESCR began to develop a monitoring tool that offers to overcome these challenges. The method to be applied embraces the idea of indicator-guided monitoring, where such indicators exist, and since General Comment No. 14 on the right to the highest attainable standard of physical and mental health has consistently proposed to engage in a four-step application of (i) human rights indicators, (ii) nationally set benchmarks on a voluntary basis, (iii)

[71] See C. Golay, I. Biglino, and I. Truscan, 'The Contribution of the UN Special Procedures to the Human Rights and Development Dialogue', 17 *SUR International Journal of Human Rights* (2013), 15–37.

scoping suggested benchmarks, and (iv) assessments of such agreed benchmarks by the CESCR (Indicator-Benchmarking-Scoping-Assessment (IBSA) process).

In relation to the first element—human rights indicators—the state party uses a list of relevant indicators for each right that the CESCR has already identified in close cooperation with UN specialized agencies and other actors from the UN system, such as special procedures.

The second element encourages states parties to identify country-specific problem areas or issues which may be reflected in specific indicators, and to set concrete targets or benchmarks for improving the human rights situation during the next reporting cycle, and to suggest such benchmarks to the CESCR.

The third element of this procedure—scoping—involves the state party and the CESCR discussing the state proposals and agreeing on final benchmarks that are reasonable, realistic, and sufficiently ambitious. When benchmarks are agreed, the state party will use them in its next periodic report, devoting more time on them than on other individual Covenant rights. If no agreement on a particular benchmark can be reached, the CESCR remains free to raise this issue during the dialogue on the state party's report.

During the fourth element of the IBSA procedure, the CESCR assessment, a close analysis of the state party report and the dialogue on the report will take place. The main advantage of this four-elements procedure lies in the truly voluntary, cooperative, and interactive spirit between states parties and the CESCR. It allows for more focused and more meaningful discussion of the relevant issues.

The CESCR consequently began to develop a list of indicators for one particular right, the right to food,[72] and lists of indicators for other rights are planned. Under the IBSA procedure, existing lists of indicators can be used, while the traditional procedure continues to be applied for all other rights. Meanwhile, the Office of the UN High Commissioner for Human Rights (OHCHR) proposed a table of indicators for 14 rights in 2008,[73] which may serve as the basis for the development of specific lists of indicators to be elaborated for each Covenant right. The OHCHR has since published a comprehensive guide on indicators for measurement and implementation of human rights that extends the application of indicators to a broader range of human rights, including the right to development and Millennium Development Goals. It bases its analysis on the normative setting of the UDHR rather than merely focusing on treaty-based monitoring.[74] It thus extends the indicators methodology to Charter-based monitoring, such as the Universal Periodic Review of the HRC.



[72] See E. Riedel, A.M. Suarez Franco, and J.M. Arend (eds.), *The IBSA Procedure: A new mechanism for measuring international compliance with economic, social and cultural rights* (Mannheim: 2014), forthcoming; E. Riedel, 'New Bearings to the State Reporting Procedure: Practical Ways to Operationalize Economic, Social and Cultural Rights—the Example of the Right to Health', in S. von Schorlemer, *Praxishandbuch UNO* (Heidelberg: Springer, 2003), 345–358.

[73] UN International Human Rights Instruments, Report on Indicators for Promoting and Monitoring the Implementation of Human Rights, 6 June 2008, UN Doc. HRI/MC/2008/3.

[74] UN OHCHR, *Human Rights Indicators. A Guide to Measurement and Implementation* (New York and Geneva: OHCHR, 2012).

The benchmarking by states parties for a particular right for which a list of indicators exist, or for which no such list exists so far, highlights issues which the state party considers to be of immediate importance at the domestic level and for which it intends to set concrete targets. In submitting its next periodic report, the state party assesses its own targets to be achieved during the reporting cycle, outlining whether those targets have been met, or the reasons for non-fulfilment. By describing the actual country situation in the state report, the state party may also analyse how improvement of existing conditions might be achieved, either by legislative, executive, or administrative measures. The benchmarking in practice, however, might entice the state party to set benchmarks too low, so as to avoid admitting at the end of the reporting cycle that the targets set have not been or could not be realized, or only to a limited and insufficient extent. Occasionally the benchmarks may be set too high, and this could lead to rather unnecessary apologies or explanations in the subsequent state report. Nevertheless, the main advantage of benchmarking lies in enabling the state party to address priority concerns that it itself considers to represent particularly important human rights problems.

The scoping process that ensures benchmarking may require that the country rapporteur who until now is mainly concerned with the elaboration of the list of issues and drafting concluding observations for the CESCR may, through the Secretariat of the Committee, inform specialized agencies and other relevant stakeholders about the state party proposals and request their comments. The country rapporteur will take up such comments, look at the selected problem areas and the corresponding benchmarks, and make his/her own proposals to the CESCR, suggesting that the proposals may be confirmed as acceptable, or that modifications should be suggested to the state party. At this stage of the procedure, both components of a state party proposal—the identified general problem area, as well as the target level contained in the benchmark—may be modified. The country rapporteur will then proceed to transmit the CESCR's position to the state party. In case the scoped benchmark is accepted, step three of the IBSA procedure would be complete, that is, the yardstick for the examination of the next state report is fixed. If the state party would not accept the newly identified or targeted benchmark, further consultation would have to take place. If no agreement can be reached, either on the problem area selected or on the specific targets set, the CESCR may, nevertheless, pick up the issue during the next dialogue with the state party. Obviously, this process will be subject to a certain time limit, so that sufficient time remains for the drafting of the state report. Ideally, the scoped benchmarks will be set within two years after the previous report was examined and discussed at the respective CESCR session.

In the assessment phase following the submission of the state report the scoped benchmarks, as reflected in that report and in the written answers to the list of issues, will be evaluated, prior to the actual dialogue with the state party delegation, by the CESCR which will take into account information received from specialized agencies and accredited NGOs. This process will also generate additional comments from country desk officers of the OHCHR and other UN actors. During the constructive dialogue with the state party CESCR members will look carefully

at the scoped benchmarks and may recommend different or more differentiated problem areas and/or benchmarks for the next periodic report. One advantage of this process lies in the possibility to involve specific governmental experts in the scoped benchmark issues.

The IBSA process thus has a Janus-type appearance: it looks back in order to assess the past reporting period, and it also looks forward in order to target future developments in the fuller realization of rights. By looking back, it may impress the state party to assess candidly the record for itself, why certain targets have not been met, or could not be met, and this will enable the state party to set realistic new benchmarks for the next reporting period.

At the same time, it must not be overlooked that while the four-step IBSA procedure represents an attempt to render the state party reporting mechanism more effective and easier to administer for states parties and for the relevant treaty body, this cooperative mechanism contains obvious limits. For instance, many developing countries already complain about copious reporting obligations surpassing their means. Such states should seek cooperation and assistance from the OHCHR or from other states prepared to render support. Furthermore, the necessary indicators sometimes are simply not practicable or are too expensive in their application, in which case the state party may have to resort to the traditional mode of reporting.

The advantages of employing indicators and benchmarks in relation to more effective monitoring and implementation of ESC rights are, however, self-evident: in using these tools, the role of state parties in relation to variable obligations of conduct and process would clearly be strengthened. The IBSA procedure is designed to simplify and streamline the task of state reporting by prioritizing a select few problem areas where in-depth indicator analysis is foreseen, while the remaining traditional article-by-article reporting may be substantially condensed. IBSA would also serve to show that varying circumstances, specific to each reporting state, prevail. By employing indicators and benchmarks, the CESCR as monitoring body may also enhance its own effectiveness. Moreover, it would provide a standardized procedure capable of being applied nationally, thus substantially contributing to better implementation of Covenant obligations at the domestic level.

Other actors involved in monitoring state compliance under the ICESCR may also have a keen interest in the application of the IBSA procedure: specialized agencies and other UN actors may get more involved in the assessment of state reports. The expertise of specialized agencies in their particular fields of specialization supplied to the CESCR could render the Committee's work easier. In return, cooperation with the CESCR may help the specialized agencies to further develop their expertise with regard to human rights dimensions of their policies, strategies, and programmes, in an attempt at 'mainstreaming human rights' in their work. Finally, for NGOs the use of indicators and benchmarks opens up the possibility to participate in a more focused manner in the discussion of the state reports under review.

The IBSA procedure should begin with a closer analysis of elaborated indicators on the right to food, for which substantial information from country piloting

already exists, while the examination of other ESC rights would still follow the traditional monitoring methodology. However, it should not be forgotten that IBSA is based on a voluntary mechanism to which states parties have agreed. If not, the traditional monitoring practice will continue. The voluntary character of the IBSA process also entails that no new legislative steps or treaty amendments are required. Whether rules of procedure would have to be changed can be decided by the CESCR, once sufficient piloting practice with IBSA has evolved.

## 7. International Adjudication of ESC Rights: the OP-ICESCR

As we have seen, the CESCR has for a long time advocated the establishment of a communications procedure similar to the one that exists for decades for other treaties, including the ICCPR. Since the Vienna World Conference on Human Rights in 1993, calls for an OP allowing individual and/or collective complaints analogous to the OP-ICCPR increased. CESCR itself produced a draft OP in 1996, largely based on the OP-ICCPR,[75] but this draft was shelved until a working group of the Commission on Human Rights/Human Rights Council eventually produced a draft OP, adopted by consensus in April 2008, which was then approved by the HRC and finally adopted by the General Assembly (GA) on 10 December 2008, on the 60th anniversary of the UDHR.[76] On 5 May 2013 that OP entered into force three months after the deposit of the 10th ratification. With that step the aim of protecting all human rights as foreseen in the UDHR was eventually reached.[77]

During the negotiation of the OP-ICESCR, the CESCR strongly argued in favour of a fully comprehensive approach to such a new procedure, meaning that all Covenant rights can be raised in a communications procedure under the OP, while a number of states, mostly from Common Law jurisdictions and Switzerland, had favoured an 'à la carte', 'opt-in', or 'opt-out' procedure,[78] whereby states might pick those rights which they would subject to the individual complaints/communication

[75] CESCR, Contributions Submitted by the Committee on Economic, Social and Cultural Rights, 26 March 1993, UN Doc. A/CONF.157/PC/62/Add.5.

[76] For an account of the *travaux péparatoires*, see the careful analyses by I. Biglino and C. Golay, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Geneva Academy In-Brief No. 2 (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2013); C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the ICESCR' (2008), 8 *Human Rights Law Review*, 617–646; E. Riedel, 'New Bearings in Social Rights? The Communications Procedure under the ICESCR', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 574–589.

[77] With the exception of the right to property that was not recognized in the 1966 Covenants. See E. Riedel, *Theorie der Menschenrechtsstandards* (Berlin: Duncker & Humblot, 1986), 25–147; E. Riedel, 'Farewell to the Sources Triad in International Law?', 2 *European Journal of International Law* (1991), 58–84. See also C. Golay and I. Cismas, *The Right to Property From a Human Rights Perspective* (Montreal and Geneva: Rights and Democracy, Geneva Academy of International Humanitarian Law and Human Rights, 2010).

[78] E. Riedel, 'New Bearings in Social Rights? The Communications Procedure under the ICESCR', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 576.

procedure, and those they would prefer to exclude from such scrutiny. Experience gained in the European context shows, however, that the European Social Charter of 1961 that allowed such a selective approach has resulted in patchwork ratification practice, whereby states parties have tended to exclude important rights guarantees from review. At the introduction of that system it had been argued that states parties would, at a later stage, gradually opt for more rights under that European Social Charter, once domestic law had been changed accordingly. This, however, did not happen. Even the Revised European Social Charter of 1996 has only been ratified by about half of the European Union member states. Most states remained only at the level of their initial pledges. To the uninformed public the impression was given that economic and social rights would be adhered to, while in reality only some rights were accepted. It is submitted that the argument that it would be better to allow such selectivity, to get as many ratifications as possible, was too high a price to be paid. In reality, the status quo in relation to ESC rights was hardly ruffled by the European Social Charter. And even now, the Revised European Social Charter has not brought about substantial change. The OP-ICESCR eventually settled for the comprehensive and radical approach: states have the choice to 'take it or leave it'.

## A. Specificities of the OP-ICESCR

To a large extent the OP-ICESCR follows the examples given by the OP-ICCPR, like all other communications procedures, and particularly the parameters of OP-CEDAW.[79] The following remarks will be restricted to those issues that are specific to ESC rights.[80]

### *1. Individual or collective complaints*

Much discussion in the open-ended working group of the Human Rights Council had centred on the issue of whether only individuals or also groups and NGOs could bring cases themselves. After much dispute, a subtle compromise was reached, whereby individuals and groups of individuals could have locus standi, but not NGOs by themselves (Article 2). By allowing groups of individuals to bring cases, participation of NGOs was not excluded, but their participation requires the consent of individuals or groups of individuals, unless the author of the communication can justify acting on their behalf without such consent.[81] Thus NGOs may assist individuals and groups of individuals in cases of asylum seekers,

[79] The Optional Protocol to CEDAW was adopted through UN General Assembly Resolution 54/4, 15 October 1999, UN Doc. A/RES/54/4. It entered into force on 22 December 2000.

[80] For further details on the procedure, see in particular I. Biglino and C. Golay, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Geneva Academy In-Brief No. 2 (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2013).

[81] See CESCR, Rules of Procedure of the Optional Protocol to the ICESCR, 3 December 2012, UN Doc. E/C.12/49/3, Rules 1(3) and 4.

disabled persons, older persons, homeless people, and other marginalized or disadvantaged groups and minorities, as long as the linkage to particular individuals can be made out. The initial draft of the working group had contained a specific article on collective communications, but that provision was ultimately deleted.

Article 2 OP-ICESCR also provides that there must be a link of jurisdiction of the state party concerned. A specific restriction to the territory of states was not required. Thus, extraterritorial application of the OP-ICESCR is likely to be considered admissible, but if one hazards a guess, in the beginning of the CESCR practice under the OP, the cases examined will most likely concentrate on typical cases where the territorial link will be in the foreground.[82]

### *2. Admissibility criteria*

A number of states delegates at the working group sessions had feared that the CESCR might be swamped by cases, even though that had not occurred in the Human Rights Committee over the last decades. To prevent that from happening, Article 4 OP-ICESCR provides that communications may be declined where it 'does not reveal that the author has suffered a clear disadvantage'. While some warned that this might become a normal procedural step for denying admissibility, the CESCR most likely will only exceptionally rely on Article 4 OP, particularly as the text qualifies the utilization at the end. The provision was included as a safety valve, in case of the CESCR actually being overloaded, as happened in the European Convention on Human Rights system. But there, actual court decisions are at stake, while at the universal level only views are involved, and the danger of seeing the CESCR overburdening is far less likely. The idea that ultimately the deciding body should be able to prioritize cases, if a flood of complaints arose, seems a sensible idea, and reflects judicial practice in many constitutional courts (the iudex ad quem system).[83]

### *3. Resource allocation and the issue of reasonableness*

One of the most heatedly discussed issues was the question of resource allocation under Article 2(1) ICESCR and individual complaints, and whether such 'macro' questions could be raised in individual communications. Macro questions of poverty reduction, or alleviation, environment protection, or contributions of development assistance meeting the Gross Domestic Product (GDP) aim of 0.7 per cent, even though clearly very relevant causes of specific rights violations, in the view of many participants of the working group should not be part of individual cases brought under the OP-ICESCR, but should be reserved for the state reporting procedure.

[82] On this issue, see generally, M. Langford, W. Vandenhole, M. Scheinin, and W. van Genugten (eds.), *Global Justice. States Duties, The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013).

[83] Such as, for example, in the United States of America.

The CESCR also took this view and had been requested to draft a General Comment on how it might treat resource allocation questions under the OP- ICESCR. CESCR in response produced a Committee Statement on resource allocation.[84] It did not formulate a General Comment that always reflects actual Committee practice, and is intended as an interpretation aid for specific Covenant provisions, not answering moot questions of a hypothetical nature. So, the CESCR drafted its Statement by analogy to the actual state reporting practice instead, how it might view such issues in the context of an individual communications procedure.[85] In paragraph 11 of that Statement, CESCR emphasized that while each state party has a margin of appreciation to take steps and adopt measures more suited to its specific circumstances, the CESCR would look whether a transparent and participative decision-making process at the national level existed or not. CESCR would fully respect the separation of powers, meaning that major policy choices are left to parliaments and to the executive, reserving for the judicial power purely controlling functions, not making judicial policy choices. The Statement then goes on to outline the criteria to be applied in concluding observations, recommending, for example, remedial action such as compensation to a victim or victims; calling on the state party to remedy the circumstances leading to a violation of a right; suggesting low-cost and case-by-case measures; always leaving it up to the state party concerned to adopt its own alternative measures; and recommending a follow-up mechanism at the domestic level to ensure accountability, for instance, requiring that in its next periodic report the state party explain the steps taken to redress the violation.[86] On the question of reasonableness, the CESCR is likely to take into consideration, inter alia:

(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of ESC-rights; [87]

(b) whether the state party exercised its discretion in a non-discriminatory and non-arbitrary manner (para. 8);

(c) thus showing that many issues are not resource-dependent but matters of political will;

(d) where several policy options are available, whether the state party adopts the option that least restricts Covenant rights;[88]

(e) the time frame in which steps were taken; and

(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.[89]

[84] E. Riedel, 'New Bearings in Social Rights? The Communications Procedure under the ICESCR', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 581.

[85] CESCR, Statement No. 16, para. 2. [86] CESCR, Statement No. 16, para. 13.

[87] The Statement No.16 takes up many parameters of General Comment No. 3, but develops them in relation to communications.

[88] This, in fact, is the proportionality principle. [89] CESCR, Statement No. 16, para. 8.

To illustrate this issue by two examples in relation to the right to water and the right to housing, the CESCR will most likely not decide the actual policy choice of public, private, or public–private partnership water management models,[90] but if the public management model is chosen, the state will be directly responsible under the obligation to respect. If a private management model is preferred, then the state remains indirectly responsible under an obligation to protect, to regulate the water management so that the right to water remains guaranteed. If a mixed public–private partnership (PPP) model is chosen, the state party remains responsible directly for the public component of the PPP, and indirectly for the private management section of the model. The actual choice of management model will be left to the state parties. The CESCR might merely point out that the state party should select those models that least infringe individual rights. The standard of review will be a reasonableness test under Article 8(4), OP-ICESCR. In cases of forced evictions under the right to housing,[91] the state party might be asked to provide alternative housing following legal forced evictions, and that reasonable notice ought to be given prior to eviction, and that such measures should be carried out in stages. Here the experience of national jurisprudence ought to be taken into account.[92]

### 4. *The trust fund*

The OP-ICESCR also contains a provision on a trust fund (Article 14) that has no parallel in the OP-ICCPR. Since it depends on voluntary contributions, adoption of this provision met with little resistance. Sceptics had warned that on no account should states where massive human rights violations were alleged be allowed 'rewards' by receiving funds from the trust fund. Article 14(3) OP therefore specified a carefully drafted compromise that the fund would only be available 'for the enhanced implementation of the rights contained in the Covenant, thus contributing to building national capacities in the area of economic, social and cultural rights', for instance helping in the creation of a national human rights institution. Misuse of funds for the benefit of violators of human rights is thus excluded.

Article 14 (4) OP sets out that seeking international assistance and cooperation under Article 2(1) ICESCR is without prejudice to the primary obligations under the Covenant that each state party, whether rich or poor, must fulfil. While

[90] See CESCR, General Comment No. 15; E. Riedel, 'The Human Right to Water and General Comment No.15', in E. Riedel and P. Rothen (eds.), *The Human Right to Water* (Berlin: Berliner Wissenschaftsverlag, 2006), 19–36, 29–30.

[91] See CESCR, General Comment No. 4; CESCR, General Comment No. 7.

[92] S. Leckie, 'The Human Right to Housing', in A. Eide, C. Krause, and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, 2nd rev. edn (The Hague: Kluwer Law International, 2001), 149–168; S. Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (New York: Transnational Publishers, 2003); S. Marks and A. Clapham, 'Housing', in *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005), 209–221; see also the recent study of M. Krennerich, *Soziale Menschenrechte zwischen Recht und Politik* (Schwalbach:Wochenschau Verlag, 2013), 230–248.

such a provision is not found in any other human rights treaty, it emphasizes that each state has a dual obligation under Article 2(1) ICESCR: on the one hand doing everything possible 'within the available means' itself to meet its Covenant obligations, and on the other hand the obligation to seek international cooperation and assistance from other states when it lacks sufficient own resources to fulfil its human rights obligations under Article 2(1) ICESCR. The donor states thus have this additional obligation to render assistance beyond meeting their own internal human rights obligations. The ESC rights-specific text of Article 14(4) OP reflects the unique formulation of Article 2(1) ICESCR. The inclusion of Article 14 OP enhanced the acceptance of the whole Protocol by the African and Asian delegation groups, facilitating the acceptance of the entire OP by consensus in the end.

### *5. Reservations*

The final provisions of the OP-ICESCR are similar to other communications procedures. Unlike the OP-CEDAW, however, no express reservations clause was included. This issue has been left to be determined by general international treaty law. Under Articles 19 to 23 of the Vienna Convention on the Law of Treaties (VCLT) no reservation to a provision forming part of the object and purpose of the treaty would be valid, even though no procedure exists to determine when that is the case. Arguably, all human rights issues immediately fall under the category of 'object and purpose of the treaty', thus negating the possibility of a reservation. The Human Rights Committee in its General Comment No. 24 had assumed the role of deciding such an issue, but met with much criticism from states parties.[93]

The question of reservations to human rights treaty provisions can be problematized, because any exception immediately touches on the core substance of the treaty, and would thus be invalid. The usual treaty law escape hatch—lodging an interpretative declaration instead of a formal reservation—would appear to be possible only in exceptional circumstances, because under the VCLT each such declaration would have to be assessed as to its substance, and might turn out to be, in fact, just another mode of reservation, according to Article 2(d), VCLT. By 'declaring' an issue, the real nature of the declaration would not be changed, and if that were to be a reservation, it would be invalid. But it is submitted that this objective invalidity of these declarations could not be decided by the CESCR or other treaty body, nor by the state party concerned—for whom the 'declaration' would merely represent its subjective view—but would remain an open question, until objectively tested and decided by the International Court of Justice, or by another dispute settlement procedure.[94] In the meantime, it is submitted that the better view would be that

[93] Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, 11 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6 ('General Comment No. 24').

[94] E. Riedel, 'New Bearings in Social Rights? The Communications Procedure under the ICESCR', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 585.

CESCR can merely state in its concluding observations that the reservation is contrary to the ICESCR provisions, but that would only be a recommendation, although of course with considerable persuasive authority.

## B. Future role of the OP-ICESCR

The OP-ICESCR marks several achievements in the realization of ESC rights generally. After decades of leading a shadow or second-class life alongside civil and political rights, ESC rights now rank equally alongside CP rights. Until 2008 it was easy to maintain the ideological divides of the 1950s and 1960s that ESC rights, if rights at all, merely stood for political or programmatic statements, leaving it in the hands of states parties how and to what extent they would be put into effect at the domestic level.

While the CESCR state reporting practice during the last 20 years had already disproved this position to a large extent, the new OP-ICESCR now emphasizes that the community of states regards ESC rights as an inseparable part of the fundamental guarantees first spelled out fully in the UDHR, and that rights to work, social security, food, housing, health, water, education, and participation in culture have to be seen in conjunction with the freedom rights, of CP rights. Both Covenants' rights are interdependent, indivisible, interrelated and universally applicable. While up to now this mantra of human rights was merely reflected in declarations, conclusions of world human rights conferences, and in the overwhelming academic and civil society literature, it is now mirrored as part of treaty law in the OP-ICESCR, standing side by side to the OP-ICCPR and other Optional Protocols.

The preamble to the OP-ICESCR is explicit in that regard: it notes that all human beings are born free and equal in dignity and rights, and recalls that the UDHR and the two Covenants recognize that the 'ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy civil, cultural, economic, political and social rights'. At last, international human rights protection has come full circle from the beginnings of the UDHR of 1948.

The OP-ICESCR has also paved the way for greater publicity and greater public awareness, because it is easier to attract attention when dealing with individual cases, rather than having to cope with complex and interconnected structural rights issues generally, as in the state reporting procedure. There the concluding observations often remain abstract and general, on which it is difficult to report nationally in the media. Under the communications procedure NGOs and NHRIs can put much more immediate pressure on decision-makers at the national level, and may often encourage or plead for reconsideration of existing or projected legislation or administrative practices that are in violation of ESC rights guaranteed internationally, by pointing at glaring violations of an individual's right. This is what happened under the OP-ICCPR that greatly enhanced the visibility and credibility of the Human Rights Committee's work.

The OP-ICESCR procedure will undoubtedly also contribute to building up a kind of 'committee jurisprudence' or 'case law' which will help to crystallize the normative content and scope of each Covenant right at the universal level, and will assist in interpreting specific and vague or ambiguous provisions of the Covenant, if any, but will also serve as concrete interpretation aids in similar cases pending before courts of law.

Last, but not least, the case law under the OP-ICESCR will probably greatly influence the debates on proper implementation of all ESC rights at the national level. This will be done through civil society organizations, most particularly by NHRIs, as happened with the OP-ICCPR.[95] NHRIs have already begun to refocus their general work programme, by devoting more time to the views and concluding observations developed at the international level, in order to draw specific conclusions for implementation at the national law level, when the governments concerned have done little or nothing to implement those treaty body recommendations and views. CESCR in General Comment No. 10 on the role of NHRIs has highlighted that function.[96] At the present time, however, awareness of ESC rights is still not as visible as it should be, but the debate on the adoption of the OP-ICESCR and its entry into force in 2013 produced quite a new momentum to all ESC rights questions, and certainly the literature on the topic is quickly expanding.[97]

## 8. Outline of the Book: Contemporary Issues and Challenges

As noted at the outset of this chapter, the potential scope of an analysis dealing with ESC rights is almost boundless. The approach taken in this book is clearly of a legal character and centres on how the fundamental ESC rights that are enshrined in international law are defined, interpreted, understood, and implemented. The aim is to review critically their conceptual and practical applications. The analysis thus seeks to bring a fresh perspective to some of the main challenges facing the implementation of ESC rights by examining five cross-cutting themes.

### A. Challenges in the protection of ESC rights in times of crisis

That the enduring economic crisis can have adverse consequences on the protection and fulfilment of ESC rights is wholly unsurprising. Its relevance to these rights

[95] In this regard, see A. Corkery and D. Wilson, 'Building Bridges: National Human Rights Institutions and Economic, Social, and Cultural Rights', ch. 17 in this book.

[96] CESCR, General Comment No. 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights, 10 December 1998, UN Doc. E/C.12/1998/25 ('General Comment No. 10').

[97] I. Biglino and C. Golay, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Geneva Academy In-Brief No. 2 (Geneva: Geneva Academy of International Humanitarian Law and Human Rights, 2013); E. Riedel,'New Bearings in Social Rights? The Communications Procedure under the ICESCR', in U. Fastenrath et al. (eds.), From *Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 576.

can be understood in a number of ways, including harsh austerity measures, such as forced public budget cuts across health, education, housing, social protection, and unemployment benefits. The current debt problems and austerity programmes across Europe as well as the wider impact of the ongoing crisis in the financial markets and the debt situation of the United States of America have challenged in a significant manner not only the way we think about socio-economic rights but also how we go about implementing them.

The contributions in Part II of this book address some of these challenges, which have brought not only economic and social hardship in their wake, but also a further diminution of the role of the state in the protection of economic and social rights. As Saiz noted in 2009, 'despite the obvious human rights dimensions of the crisis, human rights have barely figured in the diagnoses or prescriptions proposed by the international community'.[98] As will become clear in the discussions throughout this book, the current financial crisis and financial assistance conditions imposed by the European Union on Greece, Portugal, and Spain, are cases in point.[99] In order to receive credits to avoid national bankruptcy and to be able to remain within the Euro area, the government of Greece, for instance, had to agree to make sizeable cuts in social spending and to dismiss large numbers of public servants as part of a comprehensive austerity programme.[100] The High Commissioner for Human Rights, Ms Navinathem Pillay, in her recent report on 'Social and Human Rights Questions' has stressed that when austerity measures have to be imposed, fundamental human rights compliance criteria have to be met. States, thus, should demonstrate the following:

(1) the existence of a compelling state interest;
(2) the necessity, reasonableness, temporariness, and proportionality of the austerity measures;
(3) the exhaustion of alternative and less restrictive measures;
(4) the non-discriminatory nature of the proposed measures;
(5) protection of a minimum core content of the rights; and
(6) genuine participation of affected groups and individuals in decision-making processes.[101]

These criteria should be taken into account before austerity measures are agreed and applied. Thus, for example, when austerity measures have led to cutbacks in employment in the state sector and state-sponsored projects, the state party is under

[98] I. Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009), 1 *Journal of Human Rights Practice*, 277–293, 280.

[99] Other member states of the European Monetary Union face similar problems, but to a lesser degree.

[100] See for instance, G. Giacca and T. Karimova, 'Implications for Arms Acquisitions of Economic, Social and Cultural Rights', in S. Casey-Maslen, *Weapons under International Human Rights Law* (Cambridge: Cambridge University Press, 2014), ch. 16.

[101] Report of Navinathem Pillay, High Commissioner for Human Rights, Social and Human Rights Questions: Human Rights ('HC Report'), 7 May 2013, UN Doc. E/2013/82, para. 15.

the obligation to formulate policies and to implement them, taking into account the six compliance criteria, in order to reduce the employment rate without discrimination, especially with regard to women and other disadvantaged and marginalized people.[102] All these human rights compliance criteria are based on the relevant General Comments and Statements of the CESCR, read together.[103]

States, accordingly, have a positive obligation to ensure adequate financial regulation that is necessary to guarantee human rights and, moreover, must justify austerity measures by showing that they actually protect Covenant rights, particularly the rights of the most vulnerable. States ultimately have to demonstrate that all other less incursive alternatives have been exhausted and that the measures taken are necessary, proportionate, and non-discriminatory.[104] The CESCR, therefore, will have to analyse carefully which measures it is to recommend to the states parties in order to improve the rights situation of all affected persons, even in such crisis situations.

In this context, Mary Dowell-Jones casts a critical eye on the scant progress that has been made in addressing the gap between international human rights law standards and the realities of macroeconomic, fiscal, and social policy.[105] In 2004, Dowell-Jones noted that only recently the doctrine of socio-economic rights has started to place the meaning of ESC rights obligations within the broader global economic context. For her:

> As economic conditions continually mutate it is imperative that the Covenant is conceptualised dynamically in light of evolving possibilities and needs, rather than statically as a linear progression of implementation according to the level of development of any particular economy. This is not to sacrifice core human rights to economic expediency, but rather to advocate a pragmatic approach to the Covenant which is responsive to its changing context.[106]

The author further points out that:

> Commentary on the Covenant has so far failed to address the Covenant holistically as an interlinked package of socio-economic measures, nor as part of a broader economic programme. The difficult economic policy choices involved in implementing the Covenant has so far not figured in theoretical analysis of the normative framework of the Covenant.[107]

Taking the view that the current sovereign debt and austerity crisis in the advanced economies represents one of the most serious contemporary challenges to the

[102] Report of Navinathem Pillay ('HC Report'), 7 May 2013, UN Doc. E/2013/82, para. 28.

[103] They were discussed at length during the May 2012 session of CESCR and contained in a Chairperson's letter to the High Commissioner for Human Rights. See CESCR, Report on the forty-eighth and forty-ninth sessions 30 April to 18 May 2012, 12–30 November 2012, ECOSOC Official Records 20113, Supp. No.2, E/2013/22, E/C.12/2012/3, 87–90.

[104] HC Report, paras. 69–71.

[105] M. Dowell-Jones 'The Sovereign Bond Markets and Socio-Economic Rights: Understanding the Challenge of Austerity', ch. 2 in this book.

[106] M. Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 8.

[107] M. Dowell Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Leiden/Boston: Martinus Nijhoff Publishers, 2004), 38.

effective implementation of socio-economic human rights, the author examines in chapter 2 the backdrop to austerity by scrutinizing its key contributory factors, including the over-reliance by states on using sovereign debt to fund the expansion of public services over the last two decades, and also considers the implications of austerity for international human rights law. The author explains that part of the crisis stems from 'the steady expansion of the state into public services that can be linked to human rights such as education, healthcare, and social welfare, coupled with the demands of an ageing population and the failure to fund existing services on a fully sustainable basis'.[108] The chapter investigates the dynamics of public debt, deficit financing, and socio-economic rights realization and discusses the role and responsibilities of private financial institutions in the current austerity crisis from the perspective of the Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council in 2011.[109]

Despite the obvious human rights dimensions of the crisis, little attention has been given to the extent to which human rights should guide policy responses at the national or international level. In this regard, chapter 3 by Sally-Anne Way, Nicholas Lusiani, and Ignacio Saiz provides an innovative antidote to this dearth of scholarship.[110] In examining the evidence of the impact on economic and social rights of the successive waves of financial and economic crisis, the authors consider the crisis as a historic opportunity to reshape the discourse of the role of the state in the economy. They point out ways of operationalizing a human rights-based approach to macroeconomic policymaking (in terms of both fiscal and monetary policy) to re-envision the regulatory and redistributive roles of the state in the economy, not merely to facilitate economic growth simply, but to guarantee economic and social rights for all. This chapter thus aims to contribute to the emerging scholarship on human rights and economics, particularly on the application of human rights standards to the design, implementation, monitoring, and review of economic policy more generally.[111]

As we have seen, from the perspective of the ICESCR, equal treatment and non-discrimination are critical components in securing ESC rights for all, especially in times of economic crisis. In chapter 4, 'Realizing Economic, Social, and Cultural Rights for All', Sandra Ratjen and Manav Satija reflect on the contribution to the normative advances in the area of ESC rights made by the struggle for non-discrimination and substantive equality. Faced with the socio-economic upheavals and growing inequalities prevailing in contemporary societies, this study appositely explores the challenges of a non-discrimination and equality approach to the general exercise of ESC rights. In particular, Ratjen and Satija confront the difficulties inherent in the adequacy of the judicial standards of review related

[108] M. Dowell Jones, 'The Sovereign Bond Markets and Socio-Economic Rights: Understanding the Challenge of Austerity', ch. 2 in this book.

[109] Human Rights Council Resolution 17/4, adopted on 16 June 2011.

[110] S.-A. Way, N. Lusiani, and I. Saiz, 'Economic and Social Rights in the "Great Recession": Towards a Human Rights-Centred Economic Policy in Times of Crisis', ch. 3 in this book.

[111] See for instance A. Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014).

to discrimination for the legal enforcement of ESC rights. Lastly, this chapter examines the possible tensions between the universality of human rights and their individual nature on the one hand, and the defence of specific groups' rights and aspirations for socio-economic equality and justice on the other.

In chapter 5, Christine Chinkin examines the impact and relevance of a gender perspective on ESC rights.[112] Challenging the assumption that gender analysis is only relevant to address issues relating to women, rather than to appraise relations between women and men, the author rightly argues that women's equal enjoyment of ESC rights with men is core to their relationships with the state, their community, private employers, and within their family. In this context, the author traces the evolution of the concept of 'gender' that began to enter the international agenda in the 1980s. She analyses how this development has taken place along with the important role played by UN human rights treaty bodies in seeking an appreciation of ESC rights that takes account of women's as well as men's live.

Chinkin then addresses a number of challenges and obstacles that arise in relation to women's enjoyment of ESC rights. She begins by considering how gender-based violence has been a particular obstacle. Reference here is made to a wide range of practices, including some that occur in all countries, such as domestic violence. Another set of challenges addressed is those of economic inequalities and the feminization of poverty, where the author emphasizes how the current international economic order and the economic crisis have contributed to gender inequality in the enjoyment of these rights. The final category considered relates to the gendered dimensions of armed conflict and the political economy of conflict as contributing to unequal enjoyment of economic and social rights.[113]

## B. International dimension of ESC rights obligations

Two central questions lie at the heart of the debates on the international dimension of human rights obligations in the area of economic, social, and cultural rights. The first flows directly from the wording of the Covenant, viz. the application of Article 2(1) and specifically its designation of international cooperation and assistance as the *means* to implement the ESC rights. In effect, while the international community has assigned a high priority to Millennium Development Goals as well as the broader poverty eradication agenda, the legal nature of international action, on which achievement of these objectives are largely based, has been very controversial.[114]

The second question addresses one of the most challenging questions of human rights law: how to ensure that factors and practices of external origins do not interfere with the enjoyment of human rights. It is, however, not clear how Article 2(1)

[112] C. Chinkin, 'Gender and Economic, Social, and Cultural Rights', ch. 5 in this book.

[113] See also G. Giacca, 'The Relationship between Economic, Social, and Cultural Rights and International Humanitarian Law', ch. 11 in this book.

[114] M. Langford, A. Sumner, and A. Ely Yamin (eds.), *Millennium Development Goals and Human Rights: Past, Present, and Future* (New York: Cambridge University Press, 2013).

resolves the issue of a state's capacity to fulfil the human rights of persons under its jurisdiction in view of the dramatic impact external economic processes have on national efforts, including but not limited to foreign economic policies, global financial institutions, and activities of transnational corporations.[115] These two questions have received considerable attention under different rubrics in the contemporary literature: extraterritorial obligations, transnational obligations, global responsibilities, third state obligations, and so on.[116] The two chapters that make up Part III seek to systematize these issues through the analysis of two distinct yet interrelated topics.

Takhmina Karimova's chapter examines the nature and meaning of concept of international cooperation and assistance under the ICESCR.[117] The highly disputed macro- and micro-parameters of the concept under the Covenant are carefully contrasted through the analysis of, first, the various forays that treaty bodies have made in this sphere and, second, state practice. The author concludes that while an obligation to cooperate on human rights issues exists, not all elements of the obligation to cooperate are equally recognized. The author also finds that international law in general as yet does not provide answers to some of the important questions raised in the context of international cooperation and assistance. Even in situations of severe distress, such as armed conflict or disaster situations, the rights that current rules of international law generate for the state in need of assistance are imperfect.

In the following chapter, the claim made by Adolf A. Berle and Gardiner C. Means in *The Modern Corporation and Private Property*[118] is the backdrop to a broader assessment by Olivier De Schutter on whether and how international human rights law applies to corporations.[119] The author raises a number of stimulating questions as to whether economic and social rights as stipulated in international human rights law can be fittingly applied to corporations: are rules set out for states in international human rights law too vague and indeterminate, or simply unsuitable for application to corporate actors, or is such a transposition possible?

The chapter builds on the considerable progress that was achieved in recent years in clarifying the human rights responsibilities of companies, notably through the endorsement by the UN Human Rights Council of the 2011 Guiding Principles

[115] See Chapter VI. Only recently, the doctrine of the socio-economic rights has started to read within the notion of 'maximum available resources' the question of economic capacity situated within the broader global economic context. M. Dowell Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Leiden/Boston: Martinus Nijhoff Publishers, 2004).

[116] M. Langford, W. Vandenhole, M. Scheinin, and W. van Genugten (eds.), *Global Justice. States Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013).

[117] T. Karimova, 'The Nature and Meaning of "International Assistance and Cooperation" under the International Covenant on Economic, Social, and Cultural Rights', ch. 6 in this book.

[118] A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (originally published in 1932 by Harcourt, Brace & World, reprinted in New York: Transaction Publishers, 1991), in particular ch. VI.

[119] O. De Schutter, 'Corporations and Economic, Social, and Cultural Rights', ch. 7 of this book.

on Business and Human Rights.[120] The chapter questions whether imposing positive duties on corporations poses any specific problems, and how these can be addressed. It then moves on to consider how such positive duties can be identified and defined. Finally, noting that courts have routinely imposed on corporations certain duties that correspond to economic and social rights, De Schutter traces the role of courts in enforcing such duties.

## C. The relationship between ESC rights and other legal regimes

One of the greatest complexities within international law is its fragmented character.[121] Indeed, the bulk of international law stems from bilateral or multilateral treaties between states covering a vast variety of different fields. In this context, Part IV of the book argues that with the increased fragmentation arising from the diversification and expansion of international law and legal disciplines, the protection of ESC rights should be examined in a broader sense and on the basis of the different but complementary branches of international law (for example, environmental law, economic law, trade and investment law, humanitarian law, UN Charter law, and criminal law).

The ICESCR and International economic law are instances of this fragmented system. In this regard, Hans Morten Haugen examines how these rights are actually taken into account when arbitration or adjudicating bodies (panels or tribunals) seek to solve disputes arising under investments and trade law.[122] International economic law encompasses both the conduct of sovereign states in international economic relations, and the conduct of private parties involved in cross-border economic and business transactions. While it covers a wide range of fields, this chapter places emphasis on trade and investment. In this context, the author explains how currently there is stronger emphasis on states maintaining a proper policy space in order to meet their human rights obligations when entering into international investment treaties. He discusses new instruments that are being developed for this purpose, such as the Guiding principles on human rights impact assessments of trade and investment, formulated by the UN Special Rapporteur on the right to food.[123] Haugen shows how investment tribunals can receive submissions of non-disputing parties and can apply all relevant rules of international law, which is said to be more inclusive than the World Trade Organization (WTO) dispute settlement. He thus proposes an analysis of some of the prominent cases from international investment disputes in light of interpretative principles, including how to justify measures by their relationship to legitimate policy objectives, the

[120] Human Rights Council Resolution 17/4, adopted on 16 June 2011.

[121] International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682.

[122] H.M. Haugen, 'Trade and Investment Agreements: What Role for Economic, Social, and Cultural Rights in International Economic Law?' ch. 8 in this book.

[123] See also S. Walker, 'Human Rights Impact Assessments: Emerging Practice and Challenges', ch. 14 in this book.

essence of the proportionality test, and what is legitimately included in the fair and equitable treatment standard under international investment law. The chapter also identifies whether states have a duty to give more weight to their human rights obligations when agreements under International Economic Law (IEL) are negotiated, implemented, and enforced.

Holger P. Hestermeyer discusses how the distinct legal regimes of the WTO Agreements and of the ICESCR seem to drift apart and risk imposing contradictory obligations on states parties.[124] While the Covenant, with currently 161 states parties, relies on a quasi-judicial system for its enforcement, the WTO, an international organization with its roots in the 1947 General Agreement on Tariffs and Trade (GATT) and with 159 members as of March 2013,[125] represents in the view of the author a highly ambitious and successful dispute settlement mechanism for states, with proceedings that can ultimately allow trade retaliation for violations of the WTO Agreements. As pointed out by Hans Morten Haugen in chapter 9, the WTO Agreements do not contain explicit references to human rights, nor does the ICESCR make references to international trade law. The two regimes thus 'seemingly live entirely separate lives'. Hestermeyer highlights a 'factual hierarchy' of regimes:

> The strength of the WTO regime raises a haunting spectre for human rights: a country choosing which obligation to follow may, irrespective of the normative relationship between the two regimes, choose to follow WTO law, because a failure to implement WTO obligations entails more severe consequences than a failure to properly implement the ICESCR. I have referred to this phenomenon elsewhere as a 'factual hierarchy' of regimes.[126]

His contribution discusses the institutional aspects involved by first analysing the legal obligations of the WTO under the ICESCR as well as the possibility of applying the ICESCR in WTO dispute settlement, and second, by empirically examining how and when the ICESCR is referred to in the different bodies of the WTO. In this regard, his chapter shows that the impact of the Covenant has been rather limited, even though 84 per cent of all WTO members are parties to the ICESCR. Hestermeyer challenges the prevailing myth that the WTO as an organization is to blame for a culture hostile to human rights, noting that it is the representatives of the states that fail to bring up considerations based on the ICESCR. Despite this state of affairs, Hestermeyer examines some realistic approaches that can remedy this deficit.

Stéphanie Chuffart and Jorge E. Viñuales in chapter 10 discuss the intersection between ESC rights and the environment 'from the other shore', that is, from

[124] H.P. Hestermeyer, 'Economic, Social, and Cultural Rights in the World Trade Organization: Legal Aspects and Practice', ch. 9 in this book.

[125] Current membership data is available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (last accessed 4 August 2013).

[126] H. Hestermeyer, 'Economic, Social, and Cultural Rights in the World Trade Organization: Legal Aspects and Practice', ch. 9 in this book. See generally H. Hestermeyer, *Human Rights and the WTO* (Oxford: Oxford University Press, 2007).

an international environmental law perspective. The authors explain that this relationship between these legal regimes is usually approached from the perspective of human rights, which is still the prevailing standpoint: 'The "dependent variable" is thus international environmental law whereas human rights are the independent or "explanatory variable".'[127]

The authors note that although a number of legitimate reasons, including the significant contribution made by human rights' adjudicatory and quasi-adjudicatory bodies to environmental protection, are legitimate, it is important to understand what international environmental law as a mature branch of international law has to offer in this context. This chapter thus takes the reverse perspective on the relationship between human rights and international environmental law and shows how the impact of international environmental law, with its own approaches and mechanisms, can broaden the scope of human rights law in a variety of ways that, in turn, can suggest a new perspective for their implementation.

In chapter 11, Gilles Giacca reminds us that the general articulation between human rights law and international humanitarian law (IHL) has been a matter of controversy among scholars and governmental experts for quite some time.[128] Different strands of doctrine have claimed that these two legal regimes are concurrent, convergent, confluent, complementary, contradictory, or even in conflict. In turn, it is suggested that the rules belonging to both regimes can indeed be applied and interpreted in the light of one another when they provide rules in areas that are common to both. As a matter of cross-interpretation, not only could human rights law be construed in the light of IHL, as observed by the ICJ in the *Nuclear Weapons Advisory Opinion*,[129] but IHL could also be interpreted in light of human rights law. Alternatively, it has been suggested that one legal regime can displace, replace, or curtail the other.

Despite the rich vein of subject matter and the scholarly attention paid separately to both ESC rights and IHL we are still faced by a relatively underplayed hand when it comes to considering the two regimes together. This chapter by Giacca thus looks at the importance of this relationship and examines whether such a close interaction between human rights law and IHL impacts on their complementary protection when it comes to ESC rights.[130] The author seeks to

[127] S. Chuffart and J.E. Viñuales, 'From the Other Shore: Economic, Social, and Cultural Rights from an International Environmental Law Perspective', ch. 10 in this book.

[128] See also S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), 87.

[129] The oft-quoted famous passage of the Court is worthy of reproduction:

> [i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, para. 25.

[130] G. Giacca, 'The Relationship between Economic, Social, and Cultural Rights and International Humanitarian Law', ch. 11 in this book.

demonstrate that there is no one-size-fits-all answer to questions about the relationship between these legal regimes, or more specifically between some of the apparently conflicting norms within each branch.

Another area that is of particular relevance is the intersection between international criminal law and ESC rights, a topic that has not yet been fully addressed in the literature.[131] In this light, Larissa van den Herik seeks to revisit the theoretical explanation for the disconnect between international criminal law and ESC rights.[132] Taking into account the alleged limited normative substance of ESC rights, the author traces and revisits the theoretical explanation for this disconnect. A number of concrete examples and case scenarios in which international crimes prosecution could have a socio-economic or cultural dimension are examined. This allows the author to provide a number of critical thoughts on the instrumentality of international criminal justice as a means of protecting ESC rights.

## D. Concepts and tools to measure the progressive realization of ESC rights

Part V of this book encompasses new ways that have been developed in both theory and practice to measure the level of implementation of and compliance with ESC rights. As we have seen with regard to human rights indicators, the emphasis on new concepts and approaches is guided by the consideration to promote an objective assessment of the realization of ESC rights that can, importantly, be monitored. In this regard, the chapter on budget analysis and socio-economic rights by Aoife Nolan looks at macroeconomic and domestic economic policies.[133] In an effort to clarify the focus of the chapter, the author begins by defining the meaning and contours of 'ESR-based budget analysis'—a term that has been accorded multiple definitions in the literature. The author argues that the increased focus on, and employment of, rights-based budget analysis is merely one manifestation of a broader move towards the integration of human rights and economics discourse at the academic, advocacy, and policy levels. As noted by the author, the emergent interaction between these respective disciplines has accelerated as a result of the current economic crisis. This is explained by the role played in causing the crisis by certain macroeconomic and domestic economic policies as well as by the concern

[131] On the question of whether ESC rights abuses can give rise to individual criminal responsibility under the accepted definitions of international and transnational crimes, See E. Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) 71(3) *Heidelberg Journal of International Law*, 523–540; E. Schmid, *Violations of Economic, Social and Cultural Rights in International and Transnational Criminal Law* (Geneva: IHEID, 2012); S. Skogly, 'Crimes against Humanity—Revisited: Is There a Role for Economic and Social Rights?' (2001) 5(1) *International Journal of Human Rights*, 58–80; D. Marcus, 'Famine Crimes in International Law (2003) 97(2) *AJIL*, 245–281; M. Drumbl, *Accountability for Property and Environmental War Crimes: Prosecution, Litigation, and Development* (New York: ICTJ, November 2009), 1–33;

[132] L. van den Herik, 'Economic, Social, and Cultural Rights: International Criminal Law's Blind Spot?', ch. 12 in this book.

[133] A. Nolan, 'Budget Analysis and Economic and Social Rights', ch. 13 in this book.

about the implications of national and supranational responses for human rights. The author then addresses a number of challenges that arise in relation to human rights budget work, one of them being of a practical or logistical nature faced by practitioners seeking to carry out budget analysis in the performance of such work.

The chapter 'Human Rights Impact Assessments: Emerging Practice and Challenges' by Simon Walker advances a new approach to make free trade work for all people by developing a step-by-step process to identify the human impacts of trade before trade agreements are finalized.[134] The chapter discusses this emerging practice with a particular focus on impact assessments of policies and projects that affect ESC rights. It shows how the growing interest in such rights has naturally led practitioners towards developing tools that can clarify which policies and projects have positive impacts on them and which policies and projects should be better avoided. After identifying a general methodology for human rights impact assessment, Walker illustrates the methodology through a case study of a right to health impact assessment. Most importantly, Walker contends that human rights practitioners should build a body of impact assessment practice so as to move from theory to practice and so better understand the benefits and challenges of impact assessment as a means of promoting ESC rights.

## E. Trends in the justiciability and monitoring of ESC rights at the national and international level

The question of the justiciability of ESC rights has occupied a central position in the discussions on these rights since their recognition at the international level. During the preparatory work of the ICESCR, certain states, such as India, proposed explicitly writing into the ICESCR the non-justiciability of ESC rights. These proposals were subsequently rejected,[135] but in practice, ESC rights continued, as we have seen, to be considered non-justiciable throughout the Cold War. Today, in spite of the opposition of certain states during the negotiations of the Optional Protocol to the ICESCR,[136] the existence of an abundance of jurisprudence and the adoption of the Optional Protocol make it more difficult to credibly maintain that these rights are not at all justiciable.[137] For the former High Commissioner for Human Rights Louise Arbour, '[t]he simplified division between justiciable

[134] S. Walker, 'Human Rights Impact Assessments: Emerging Practice and Challenges', ch. 14 in this book.

[135] Commission on Human Rights, 10 July 1951, UN Doc. E/CN.4/SR.248. See also OHCHR, in cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York and Geneva: OHCHR, 2003), 691.

[136] M.J. Dennis and D.P. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There Be and International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004), 98 *American Journal of International Law*, 462–515, 471–476.

[137] See for example C. Golay, *The Right to Food and Access to Justice: Examples at the National, Regional and International Levels* (Rome: FAO, 2009); C. Golay, *Droit à l'alimentation et accès à la justice* (Bruxelles, Bruylant, 2011).

and non-justiciable rights does not stand up to closer scrutiny. It is contradicted by reality and is contrary to the unified vision of human rights underlying the international human rights system'.[138]

In this regard, it should be noted that over the last 50 years, the ICESCR has fulfilled at least four major functions at the domestic law level: first, it has led to the adoption of specific constitutional law provisions, mirroring ICESCR provisions directly; second, it has served as an interpretation aid for structural principles in those constitutions that prefer to use umbrella provisions like the directive principles of state policy in India, or utilize human dignity in conjunction with notions of solidarity, as is the case in Germany, Switzerland, Spain, Portugal, and Greece; third, the ICESCR has been used generally as a judicial interpretation aid for statutory provisions at the internal law level; fourth, it has also been used as a yardstick *de lege ferenda*, offering rights formulations from the international level for application at the national level, when it comes to developing new legislation. Generally, it is submitted that courts at all levels ought to be bolder when it comes to realizing ESC rights: states parties, after all, have committed themselves internationally, and should be held to account nationally on that score, and internal law should meet the standards that have been agreed upon internationally. In relation to ESC rights generally, one is not talking about a grand, extravagant bouquet of every conceivable social blessing, but of no more than minimum subsistence levels, necessary for survival—the minimum for existence.

In chapter 15, 'Judicial Review in National Courts: Recognition and Responsiveness', Malcolm Langford seeks to temper the outbreak of optimism over the future role of ESC rights adjudication by highlighting an array of issues and challenges faced by the current emerging practice in jurisprudential developments in the field of ESC rights. The chapter focuses mainly on two of them. The first is termed 'recognition', which is the degree to which ESC rights are formally enforceable. Noting an explosion of constitutional guarantees, Langford examines more closely the significant variance in legal opportunity structures for claimants, its causes, and possible solutions. The second challenge Langford engages with is 'responsiveness', an idea that designates the extent to which courts entertain petitions in good faith. Despite the existence of many progressive judgments, the author echoes the criticism that too many courts are unresponsive to ESC rights in general, or to disadvantaged claimants and distributive justice in particular. The chapter then investigates the theoretical contestation over the causes of judicial responsiveness, the lessons learned from a century-long arc of state-level right to education litigation in the United States of America, and the contemporary comparative picture of judicial responsiveness.

In the following chapter, Ioana Cismas examines the various interactions of ESC rights and civil and political rights.[139] The characteristics of ESC rights can no longer

[138] Human Rights Council, *Statement by Ms Louise Arbour, High Commissioner for Human Rights to the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, 31 March 2008.

[139] I. Cismas, 'The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights', ch. 16 in this book; D. Mzikenge Chirwa, 'African Regional Human Rights System', in

be understood in terms of dimensions or generations of rights. As she explains, the evolution of international human rights law departs from its traditional or historical foundations that rights can be neatly compartmentalized into two broad categories. Starting from the premise that ESC and civil and political rights intersect at normative-theoretical level, as well as in practice through litigation, monitoring, and advocacy, this chapter analyses the consequences of such interactions. In grappling with this question, the author draws on the concept of intersectionality rooted in gender studies and demonstrates how it can result in the advancement of both ESC and civil and political rights. In turn, the chapter reveals the risk of weakening the human rights regime because of an over-reliance on intersectional litigation strategies, given the impossibility or unwillingness to directly adjudicate ESC rights.

In their contribution, Allison Corkery and Duncan Wilson trace the role of national human rights institutions (NHRIs)—independent bodies with a specific mandate to promote and protect human rights—in monitoring ESC rights.[140] The authors critically challenge the prevalent assumption that NHRIs are considered to be less effective in relation to ESC rights than civil and political rights. Noting that national institutions play a series of unique 'bridging' roles, which position them well to address these rights, Corkery and Wilson argue that NHRIs do play a strategic role in ensuring states' compliance not only with their obligations to respect and protect ESC rights but also increasingly in addressing the obligation to fulfil them. The chapter also investigates how the particularities of local context impact on an institution's ability to effectively address ESC rights and discuss the need to develop new approaches to pragmatically address broader issues of resource allocation and socio-economic policy.

The chapter by Frank Haldemann and Rachelle Kouassi questions whether ESC rights are an integral, rather than marginal, part of the transitional justice agenda.[141] Throughout the 1990s, the marginalization of ESC rights has been perceptible from debates over how to deal with the aftermath of civil wars or authoritarian regimes. A few voices over the last decade have regretted the fact that ESC rights abuses have rarely been included within transitional justice processes and mechanisms.[142] There is now a rapidly growing discourse concerned with integrating socio-economic and cultural rights into the transitional justice framework.

M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008), 323–338; T.J. Melish, 'The Inter-American Court of Human Rights', in M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (New York: Cambridge University Press, 2008), 372–408; I.E. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff: The Hague, 2009).

[140] A. Corkery and D. Wilson 'Building Bridges: National Human Rights Institutions and Economic, Social, and Cultural Rights', ch. 17 in this book.

[141] F. Haldemann and R. Kouassi 'ESC Rights and Transitional Justice without Economic, Social, and Cultural Rights?', ch. 18 in this book.

[142] Commission on Human Rights, Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights), prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24, 27 June 1997, UN Doc. E/CN.4/Sub.2/1997/8; R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*

In this context, Haldemann and Kouassi critically engage with this emerging discourse, referred to as the 'ESC rights thesis'. While sympathetic to the call for an expanded understanding of transitional justice, the authors warn against one-dimensional thinking—the temptation of fitting transitional justice into one single, central system called 'human rights'. Through the metaphor of the hedgehog and the fox made famous by Isaiah Berlin,[143] the authors argue that viewing the world exclusively through the prism of human rights does not come without costs, as we risk losing sight of its complexity: 'the human rights activist is tempted to rely on "one single system", human rights, to answer any moral and political question; and it is this search for a universal, unitary vision that reduces the possibility for a larger, more nuanced, "fox-like" view of political action and the context of action'.[144] Such a 'hedgehog-like' vision, the authors argue, cannot do justice to the depth and persistence of conflicts and hard choices in societies emerging from large-scale violence.

## 9. Conclusion

This introduction sets the scene for the various studies that follow. In particular it has sought to review the development of ESC rights in international law. The progress made in advancing the universal respect for ESC rights since their recognition in the UDHR in 1948 is notable. After a slow start during the Cold War, this movement accelerated with the 1993 World Conference on Human Rights in Vienna. Twenty years later, some important objectives of the Vienna Declaration and Plan of Action have been reached. Symbolically, the most important one might be the adoption of the Optional Protocol to the ICESCR and its entry into force in 2013.

It is clear from this book that the challenges to implementation and realization of ESC rights remain important, maybe more important than ever, given the persistent deprivation of basic ESC rights for the majority of the world's population. It is opportune to recall that, while this book was being written, a wave of protests around the world—the Arab Spring, the 'Western winter of discontent' in Greece, Spain, Italy, Chile, the United Kingdom,[145] and the Occupy Movement emerged in response to socio-economic inequalities—all of which effectively bear witness to the importance of the ideals of the International Covenant on Economic, Social and Cultural Rights on social progress and better standards of living for all.



(Cambridge: Polity Press, 2002). For more recent views, see L. Arbour, 'Economic and Social Justice for Societies in Transition', Center for Human Rights and Global Justice, New York University School of Law, Working Paper No. 10, 2006; C. Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' paper series commissioned by the Office of the High Commissioner for Human Rights, 2009.

[143] I. Berlin, 'The Hedgehog and the Fox: An Essay on Tolstoy's View of History', in H. Hardy and A. Kelly (eds.), *Russian Thinkers*, 2nd edn (London: Penguin Classics, 2008), 24–92.

[144] F. Haldemann and R. Kouassi, 'Transitional Justice without Economic, Social, and Cultural Rights?', Ch. 18, section 4.A.

[145] Opening Statement by Navi Pillay United Nations High Commissioner for Human Rights, in Panel discussion 'The Relevance of the Right to Development in the context of global challenges', Geneva, 6 December 2011.