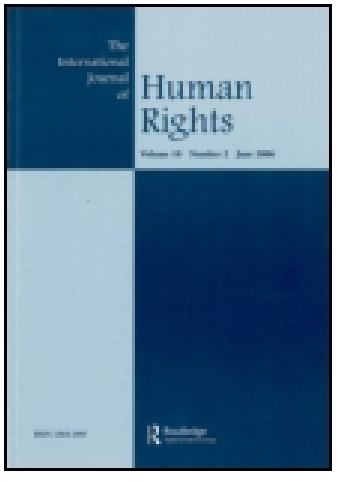

The International Journal of Human Rights

Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/fjhr20

Reflections on state obligations with respect to economic, social and cultural rights in international human rights law

Manisuli Ssenyonjo [a]

[a] Centre for International and Public Law, Brunel Law School , Brunel University , London

Published online: 30 Jul 2010.

To cite this article: Manisuli Ssenyonjo (2011) Reflections on state obligations with respect to economic, social and cultural rights in international human rights law, The International Journal of Human Rights, 15:6, 969-1012, DOI: 10.1080/13642981003719158

To link to this article: http://dx.doi.org/10.1080/13642981003719158

The International Journal of Human Rights
Vol. 15, No. 6, August 2011, 969–1012

Reflections on state obligations with respect to economic, social and cultural rights in international human rights law

Manisuli Ssenyonjo*

Centre for International and Public Law, Brunel Law School, Brunel University, London

In 1948 the Universal Declaration of Human Rights (UDHR) declared a wide range of human rights including economic, social and cultural rights as a 'common standard of achievement' for all peoples and all nations. At an international level, these rights were reinforced by a legally binding international treaty, the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, and more recently by the Optional Protocol to the ICESCR as adopted by the UN General Assembly on 10 December 2008, and opened for signature on 24 September 2009. Despite these positive developments, six decades after the UDHR, there are still questions regarding the status of economic, social and cultural rights as human rights in international law. In particular, four key questions regarding these rights, are addressed in this article: (1) what are the real human rights obligations of states parties to the ICESCR? (2) Are such obligations territorially limited or is there scope for extra-territorial obligations? (3) Are states permitted to derogate from (some) economic, social and cultural (ESC) rights during emergencies despite the fact that the ICESCR does not contain a derogation clause either permitting or prohibiting derogations? (4) Was it really necessary to adopt in 2008 an Optional Protocol to the ICESCR to provide for the competence of the committee monitoring the obligations of states parties under the ICESCR, the Committee on Economic, Social and Cultural Rights, to receive and consider communications alleging violations of any of the rights protected by the ICESCR? And should states parties to the ICESCR sign and ratify this Optional Protocol without delay?

Keywords: economic; social and cultural rights; state obligations; International Covenant on Economic; Social and Cultural Rights; extra-territorial human rights obligations; non-derogable rights; Optional Protocol to the International Covenant on Economic; Social and Cultural Rights

1. Introduction

The Universal Declaration of Human Rights (UDHR)[1] declared human rights, both civil and political rights and economic, social and cultural (ESC) rights, as a 'common standard of achievement' for all peoples and all nations, without separating them. In particular Articles 21–29 of the UDHR declared that 'everyone' has the right to: social security, work; rest and leisure including reasonable limitation of working hours and periodic holidays with pay; adequate standard of living including food, clothing, housing and medical care; education; freely participate in the cultural life of the community; and social and international order in which the rights set forth in the UDHR can be fully realised. Clearly the UDHR contained

*Email: Manisuli.Ssenyonjo@brunel.ac.uk

ISSN 1364-2987 print/ISSN 1744-053X online

DOI: 10.1080/13642981003719158
http://www.informaworld.com

a comprehensive list of ESC rights. However, as noted by Mrs Eleanor Roosevelt, the United States representative to the General Assembly and Chairman of the United Nations Commission on Human Rights during the drafting of the UDHR, the UDHR 'is not, and does not purport to be a statement of law or of legal obligation' but 'a common standard of achievement for all peoples of all nations'.[2] Despite this, the UDHR, as an authoritative interpretation of the rights in the UN Charter, has had a considerable impact in shaping treaties protecting human rights including treaties protecting ESC rights at both regional and UN levels.[3] In addition, the UDHR has influenced the content of new constitutions or constitutional amendments in some states and upon decisions of domestic courts.[4]

In recent years, ESC rights have received increasing attention in various international organisations, academic writings and in human rights law generally. At the United Nations (UN) level, the Committee on Economic, Social and Cultural Rights (CESCR),[5] which monitors the implementation of ESC rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant),[6] has adopted a number of useful General Comments, which clarify the contents of specific rights as well as other issues related to the protection of ESC rights.[7] Furthermore, non-governmental organisations are becoming more interested in working with these rights and the courts in many national legal systems are showing a growing willingness to enforce ESC rights in some of their decisions.[8] Regardless of these positive developments, many actors working with human rights law still focus solely or mainly on issues relating to civil and political rights and tend to pay lip service to the interdependence and interrelatedness of all human rights. This means that in practice ESC rights are still marginalised and still considered, inaccurately, as 'programmatic, aspirational, and not justiciable'[9] and honoured more in 'the breach than the observance'.[10] This has left billions of individuals unable to enjoy ESC rights.[11] The marginalisation of ESC rights affects more the poor and disadvantaged groups/individuals because they lack the resources required for an adequate standard of living (including adequate food, housing, health, and education) and lack a political voice to influence the formulation of government policy. Although at an international level, ESC are protected since 1966 by a legally binding international treaty, the ICESCR, and reinforced by the Optional Protocol to the ICESCR (adopted in December 2008, opened for signature on 24 September 2009), more than sixty years after the UDHR, there are still questions regarding the status of ESC rights as human rights in international law.

In particular, four key questions regarding these rights, are addressed in this article: (1) what are the real human rights obligations of states parties to the ICESCR? (2) Are such obligations territorially limited or is there scope for extra-territorial obligations? (3) Are states permitted to derogate from (some) ESC rights during emergencies despite the fact that the ICESCR does not contain a derogation clause either permitting or prohibiting derogations? (4) Was it really necessary to adopt in 2008 an Optional Protocol to the ICESCR to provide for the competence of the committee monitoring the obligations of states parties under the ICESCR, the Committee on Economic, Social and Cultural Rights, to receive and consider communications alleging violations of any of the rights protected by the ICESCR? And should states parties to the ICESCR sign and ratify this Optional Protocol without delay?

Apart from the first question which has been included to provide a general overview to understanding state obligations with respect to ESC rights under the ICESCR, the other questions have been selected because despite their significance, they are not specifically addressed in the ICESCR and few studies have explored them in relation to ESC rights. After setting out a background to the protection of ESC rights in section 2, the article

examines three aspects of ESC rights, namely: general state obligations including extraterritorial obligations (section 3); non-derogability of ESC rights (section 4); and the recent adoption of the Optional Protocol to the ICESCR (section 5).

In addressing the questions raised above, the article aims to demonstrate that the ICESCR lays down clear human rights legal obligations for states parties, noting that while the Covenant provides for 'progressive realisation' and acknowledges the constraints due to the limits of 'available resources', it also imposes various obligations which are of immediate effect (e.g. the obligation to take steps; and to eliminate discrimination in the enjoyment of ESC rights). It notes that the increase in domestic case-law on ESC rights clearly indicates that violations of ESC rights are justiciable in practice, and states should ensure their justiciability in practice at a national level. At the international level, it is noted that the adoption of an Optional Protocol to the ICESCR by the UN General Assembly in 2008 providing for individual and group communications, inter-state communications as well as an inquiry procedure in cases of grave or systematic violations of any ESC rights was long-overdue. Further, the article argues that any state party to the ICESCR could be in violation of its obligations under the ICESCR for actions taken by it extraterritorially, in relation to anyone within the power, effective control or authority of that state, as well as within an area over which that state exercises effective overall control. The article notes that the absence of a clause allowing derogation in times of public emergency in the ICESCR indicates that the Covenant generally continues to apply in the time of armed conflict, war or other public emergency, and as a minimum, states cannot derogate from the minimum core obligations of ESC rights. While the article is not meant to examine obstacles faced by states in implementing their obligations with respect to ESC rights, it is noted that lack of political will and poverty constrain the progressive realisation of ESC rights in several states and there is a need to address these obstacles in order to enhance the implementation of ESC rights.

A clear understanding of the above points would encourage states to take their human rights obligations under the Covenant more seriously. It would also help to develop the necessary political will for the ratification of the Optional Protocol by states parties which would contribute to generally strengthening the international legal framework of accountability for violations of ESC rights.

2. Economic, social and cultural rights: an overview

It is well established that ESC rights in international human rights law include a wide range of human rights. For example, the rights to work and to just and favourable conditions of work; to rest and leisure; to form and join trade unions and to strike; to social security; to protection of the family, mothers and children; to an adequate standard of living, including adequate food, clothing and housing; to the highest attainable standard of physical and mental health; to education and to participate in cultural life and enjoy benefits of scientific progress.[12] The effective respect, protection, and fulfilment of these rights is an important – but under-explored – component of international human rights law. This is despite the fact that the UDHR, as noted above, recognised two sets of human rights: civil and political rights, as well as ESC rights. In transforming the provisions of the UDHR into legally binding obligations, the UN adopted two separate but interdependent covenants: the International Covenant on Civil and Political Rights (ICCPR);[13] and the ICESCR. As of 23 December 2008, there were 160 states parties to the ICESCR compared to 165 states parties to the ICCPR. The two covenants, along with the UDHR, constitute the core of international human rights law.

At an international level, ESC rights are protected in several international human rights treaties, the most comprehensive of which is the ICESCR. The ICESCR initially did not have an independent treaty monitoring body, let alone one that could receive individual complaints. This omission was partially addressed by the creation of the Committee on Economic, Social and Cultural Rights, which became competent to receive and review regular national reports.[14] One recent development (discussed in section 5 below) which has taken place in the field of ESC rights has been the adoption by the UN Human Rights Council on 18 June 2008 of the Optional Protocol to the ICESCR (the Optional Protocol),[15] which provides the CESCR with three new roles: (i) to receive and consider individual and group communications claiming 'a violation of any of the economic, social and cultural rights set forth in the Covenant'; (ii) inter-state communications to the effect that a state party claims that another state party is 'not fulfilling its obligations under the Covenant'; and (iii) to conduct an inquiry in cases where the Committee receives reliable information indicating 'grave or systematic violations' by a state party of any ESC rights set forth in the ICESCR.[16]

Significantly, on 10 December 2008 the General Assembly unanimously adopted the Optional Protocol,[17] forty-two years after a similar mechanism was adopted for civil and political rights. The signing ceremony for the Optional Protocol was held on 24 September 2009 during the 2009 Treaty Event at the United Nations Headquarters in New York. By 25 September 2009, 26 states had signed the Optional Protocol marking a significant beginning towards support for this historic mechanism.[18] The Optional Protocol will enter into force after ratification by the required number of 10 states in accordance with Article 18 of the Optional Protocol. In its preamble, the Protocol reaffirmed the 'the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms'. As shown in section 5 below, the unanimous adoption of this Optional Protocol on the 60th anniversary of UDHR is indeed a significant human rights development that ushers in a new era of accountability for violations of ESC rights in international law (once the Protocol enters into force) and thus dispel claims that ESC rights under the ICESCR were not intended to be justiciable.[19] This means that, more than ever before, it is timely and pertinent to examine the nature and scope of state obligations under the ICESCR in light of the current state of international law (see section 2 below), for which states that ratify the Optional Protocol could be held accountable to under the Optional Protocol. This is essential in order to provide a clearer understanding of state obligations under the Covenant.

At the regional level, there was largely the same pattern of difference. The European Convention on Human Rights (ECHR) 1950,[20] despite its all embracing name as a 'human rights convention', is concerned almost exclusively with civil and political rights.[21] Indeed, it may be stated that although the 'interpretation of the European Convention may extend into the sphere of social and economic rights',[22] the ECHR does not protect ESC rights, explicitly (with the exception of the right to education and possibly the right to property) or impliedly.[23] It took another generation before the European Social Charter was adopted and a further generation before a right of collective (but not individual) complaints was introduced under it.[24] As to the Inter-American human rights system, the American Convention on Human Rights 1969[25] likewise despite its all embracing name as a convention on 'human rights' emphasises civil and political rights, with it being only later that the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador'[26] was adopted, with its partial system of individual complaint. The African Charter on Human and Peoples' Rights 1981 (African Charter)[27] was a great improvement in that it included from the

outset a comprehensive guarantee of the full range of human rights, including ESC rights alongside civil and political rights, without drawing any distinction between the justiciability or implementation of the two 'categories of rights'. More detailed ESC rights are protected in other African human rights instruments protecting the rights of the child, women and the youth.[28] Significantly the African charter made all rights subject to a right of individual complaints.

However, until recently the African Commission on Human and Peoples' Rights (a body with the mandate to promote and protect human rights in Africa and to interpret all the provisions of the African Charter at the request of a state party, an institution of the African Union or an African organisation recognised by the African Union)[29] did not develop comprehensive jurisprudence under the African Charter on ESC rights.[30] Nonetheless, in two important cases, *Purohit and Moore* v. *The Gambia*[31] and *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*,[32] the African Commission demonstrated the practical application of the principle that the African Charter provisions on ESC rights are justiciable. It has held that 'economic and social rights are essential elements of human rights in Africa' and that 'no right in the African Charter cannot be made effective'.[33] In addition, the African Commission has held that states parties to the African Charter have to take 'concrete and targeted steps', while taking full advantage of their available resources, to 'ensure' that ESC rights such as the right to health are fully realised in all aspects without discrimination of any kind.[34] Although the Commission's promotional activities initially paid lip service to ESC rights by being predominantly focused on civil and political rights, the Commission's approach later paid attention to ESC rights after concerns were raised by representatives of civil society organisations during several of the Commission's sessions about the need for a focus on ESC rights.[35]

It is unlikely, however, that many cases claiming violations of ESC rights would be decided by the African Court on Human and Peoples' Rights (or the African Court of Justice and Human Rights in the future) in the near future because direct access to the African Court by an individual or a non governmental organisation (NGO) with observer status at the African Commission is not automatic. It is subject to consent by a state party by depositing a special declaration, at the time of ratifying the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights[36] or anytime thereafter, accepting the competence of the court to receive cases brought by individuals.[37] Most states have not made such a declaration and in such circumstances the court has no jurisdiction to hear individual or NGO applications.[38]

The legal protection of ESC rights in Africa's regional human rights system is an important step because Africa is currently the continent in the world that is most in need of ESC rights and that is farthest from their realisation. This is due to several factors such as 'persistent conflicts, lack of human and food security due to poverty and underdevelopment, corruption and lack of good governance'[39] as well as 'the historic injustices imposed on Africa such as slavery, colonization, [and] depletion of natural resources'.[40] Such obstacles to the realisation of ESC rights must be addressed before legal guarantees are realised in practice.

At the national level, the courts of some states have demonstrated that ESC rights can be enforced through the courts. In this regard the jurisprudence of the Indian courts[41] and South African courts[42] has been particularly useful. Despite some limitations, important judgements by the South African Constitutional Court, such as judgements in the *Grootboom* and *Mazibuko* cases,[43] have been particularly influential, showing that ESC rights are justiciable and providing a public law model for deciding cases concerning them by

holding that when challenged as to its policies relating to ESC rights the government agency 'must explain why the policy is reasonable' and that the policy is being reconsidered consistent with the obligation to 'progressively realise' ESC rights.

In sum, what emerges from the foregoing overview is that it is not the nature of the rights that is crucial (i.e. not whether rights are considered ESC rights or civil and political rights), but the nature of the obligations that are imposed by international and national law concerning them. It is thus clear that the argument about justiciability has now been resolved. Whenever ESC rights cannot be made fully effective without some role for the judiciary, judicial remedies are 'necessary'.[44] This means that effective judicial remedies must be available for victims of all violations of ESC rights so that such rights can be enforced through the courts. As the CESCR has stated affirming the principle of the interdependence and indivisibility of all human rights, 'all economic, social and cultural rights are justiciable'.[45] Indeed ESC rights, both individual and collective, have long been enforced in national courts without difficulty. At times national (and even regional human rights) courts have in fact been applying ESC rights, such as the rights to health and education, without knowing it, deciding cases that are about these rights (though not necessarily in compliance with them) under different rubrics, such as health or education law or in the case of the ECHR under Article 2, First Protocol.[46]

3. State obligations under Article 2(1) of the ICESCR

In this section, specific human rights obligations of states parties to the ICESCR arising from Article 2(1) are examined since these directly inform all of the substantive rights protected in Articles 6 to 15 of the Covenant. Article 2(1) is fundamental to the ICESCR since it is the general legal obligation provision.[47]

Article 2(1) provides that:

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

It has been observed that '[r]elative to Article 2 of the ICCPR, Article 2 of the ICESCR is weak with respect to implementation'.[48] Hence Craven expressed the position as follows:

> Article 2(1) itself is somewhat confused and unsatisfactory provision. The combination of convoluted phraseology and numerous qualifying sub-clauses seems to defy any real sense of obligation. Indeed it has been read by some as giving states an almost total freedom of choice and action as to how the rights should be implemented.[49]

The language of Article 2(1) is clearly wide and full of caveats making it difficult to ascertain the exact nature of legal obligations arising from this provision. However, the nature and scope of the states parties' obligations under the Covenant, including the provisions of Article 2(1) above, and the nature and scope of violations of ESC rights and appropriate responses and remedies, has been examined by groups of experts in international law who adopted the Limburg Principles on the Implementation of the ICESCR in 1986 (Limburg Principles)[50] and the Maastricht Guidelines on Violations of Economic Social and Cultural Rights in 1997 (Maastricht Guidelines).[51] Although the Limburg Principles and Maastricht Guidelines are not legally binding *per se*, they may arguably provide 'a subsidiary means'

for the interpretation of the Covenant as 'teachings of the most highly qualified publicists of the various nations' under Article 38(1)(d) of the Statute of the International Court of Justice. Moreover, the participants who adopted the Limburg Principles believed that they 'reflect[ed] the present state of international law, with the exception of certain recommendations indicated by the use of the verb "should" instead of "shall"'.[52] Also, the participants who adopted the Maastricht Guidelines considered them to 'reflect the evolution of international law since 1986'.[53]

The CESCR has also, in numerous General Comments and statements, spelt out the content of state obligations and individual/group rights under the Covenant. By December 2009, the Committee had adopted 21 General Comments, 14 of which related to substantive rights while seven dealt with other aspects of the Covenant.[54] In addition the Committee had issued 16 statements on several key issues relevant to ESC rights including, for example, poverty, globalisation, intellectual property and the world food crisis.[55] While General Comments and Statements are not legally binding, they can have a persuasive effect, setting out interpretive positions around which state practice may unite. No state has ever raised any formal objections to the General Comments or statements of the committee, apparently suggesting wide acceptance by states of the Committee's interpretation of the Covenant through its General Comments and Statements.

Four key human rights obligations arise from Article 2(1) namely: (i) the obligation to 'take steps ... by all appropriate means'; (ii) 'achieving progressively the full realisation' of ESC rights; (iii) the obligation to utilise 'maximum available resources'; and (iv) the obligation to seek (or provide) international assistance and co-operation. These obligations are considered below.

3.1 *Obligation to 'take steps ... by all appropriate means'*

The first obligation is to 'take steps' in the field of ESC rights. This is an immediate obligation, which in itself, is not qualified or limited by other considerations.[56] A failure to comply with this obligation cannot be justified by reference to social, cultural or economic considerations within the state.[57] What 'steps' are required under Article 2(1)? States have a wide margin of discretion in selecting the steps they consider most appropriate for the full realisation of ESC rights. Generally two types of steps are required namely legislative and non-legislative steps to respect, protect and fulfil ESC rights. There is no doubt that legislative measures are indispensable in the protection of all human rights including ESC rights,[58] since a sound legislative foundation provides a firm basis to protect such rights (e.g. in the fields of housing, employment, and education) and to enforce them in the case of violations. By adopting legislation on ESC rights, these rights acquire content at a domestic level, and that content could be developed through judicial review. Legislation is particularly essential to combat formal and substantive discrimination faced by some of the most disadvantaged and marginalised individuals and groups such as discrimination against women, minorities, children and persons with disabilities.[59]

Thus, states are obliged to enact, without delay, a comprehensive anti-discrimination law, guaranteeing protection against discrimination in the enjoyment of ESC rights, as stipulated in article 2(2) of the Covenant. Anti-discrimination legislation should attribute obligations to public and private actors and cover all the prohibited grounds of discrimination stated in the ICESCR. Article 2(2) of the Covenant obliges each state party 'to guarantee that the rights enunciated in the ... Covenant will be exercised without discrimination of any kind'. It lists the prohibited grounds of discrimination as 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other

status'. The inclusion of 'other status' indicates that this list is merely illustrative and not intended to be exhaustive. It covers other grounds such as disability, age, nationality, marital and family status, place of residence, health status, sexual orientation and gender identity, as well as economic and social situation.[60] This reflects the fact that the nature of discrimination is not static but 'varies according to context and evolves over time'.[61] Since discrimination undermines the fulfilment of ESC rights for a significant proportion of the world's population, anti-discrimination legislation must cover not only discrimination in the public sector but also discrimination by non-state actors.[62] Among others, this might help to overcome gender inequalities for example by eliminating the wage gap between men and women for work of equal value in all sectors of employment, whether private or public.

It is in this regard that the Committee on the Elimination of Discrimination against Women (CEDAW Committee) has urged states with discriminatory laws against women to accelerate the law review process and to work effectively with parliament in ensuring that all discriminatory legislation is amended or repealed.[63] However, while legislation is essential, it is not enough *per se* for the realisation of ESC rights. Therefore, in addition to legislation, other 'appropriate means', such as the adoption and implementation of strategies, policies and plans of action to guarantee the effective enjoyment of ESC rights. These may include measures to stimulate economic growth and development, increased budgetary allocations to ESC rights and the adoption of measures necessary to eliminate discrimination in ESC rights. In addition, other appropriate means include the provision of judicial or other effective remedies (e.g. compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, and public apologies), administrative, financial, educational or informational campaigns and social measures, must be undertaken to achieve the intended result. The strategies and policies adopted by states should provide for the establishment of effective mechanisms and institutions, where these do not exist, to investigate and examine alleged infringements of ESC rights, identify responsibilities, publicise the results and offer the necessary administrative, judicial or other remedies to compensate victims. This calls for putting in place appropriate means of redress, or remedies to any aggrieved individual or group, and appropriate means of ensuring accountability of states and non-state actors.[64] Essentially, this entails making ESC rights justiciable at a national level, not mere non-legally enforceable principles and values. The Committee has stressed this point in its concluding observations on state reports. For example in May 2009, the Committee urged the UK 'to ensure that the Covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights'.[65] This must be the case to all other states parties to the ICESCR.

It must be acknowledged that the obligation to take steps largely depends on the political will of the executive and the legislature to take the necessary steps such as enacting legislation to protect ESC rights in the language of *human rights* and the selection of ESC rights as priorities for the allocation of resources. Several states have not yet taken such steps. For example, although international human rights law protects the right to free and compulsory primary education, in several states particularly in developing states, primary education is neither really free nor compulsory.[66] The cost of primary education remains very high and in several cases the cost is out of reach of the poor. It is in such a context that '72 million children worldwide were denied the right to education in 2007. Almost half of these children live[d] in sub-Saharan Africa, followed by Southern Asia, home to 18 million out-of-school children'.[67] Without access to the most basic form of education, those denied primary education are less likely to claim their human rights, challenge violations of such rights, and lack the power to make their own informed choices, making it

difficult to secure a life of dignity for themselves and their family. Much work remains to be done to develop the necessary political will that is essential to take steps at a national level to protect ESC rights.

3.2 *Progressive realisation*

The second obligation is to ensure that the steps taken are geared towards the obligation of result which is 'achieving progressively the full realisation' of ESC rights. The appropriateness of the steps taken should therefore be examined by reference to the standard of 'progressive realisation'. But what is meant by 'progressive' realisation? Does the word 'progressive' enable the obligations of states parties 'to be postponed to an indefinite time in the distant future' as argued by Hungary during the preparatory work on the Covenant?[68]

According to its ordinary meaning, the term 'progressive' means 'moving forward'[69] or 'advancing by successive stages'[70] in a manner that is 'continuous, increasing, growing, developing, ongoing, intensifying, accelerating, escalating, gradual, step by step'.[71] Thus, states parties are obliged to improve continuously the conditions of ESC rights, and generally to abstain from taking regressive measures. This notion of progressive realisation of ESC rights over a period of time 'constitutes a recognition of the fact that full realisation of all [ESC rights] will generally not be able to be achieved in a short period of time ... reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of [ESC rights]'.[72] This obligation contrasts with the immediate obligation imposed by Article 2(1) of the ICCPR that obliges states to 'respect and ensure' the substantive rights under the ICCPR.

However, the 'reality is that the full realisation of civil and political rights is [also] heavily dependent both on the availability of resources and the development of the necessary societal structures'.[73] As a result states are also required to take relative positive measures for the realisation of civil and political rights.[74] For example, the right to a fair trial as protected by Article 14(1) ICCPR and Article 6 of the European Convention on Human Rights (ECHR) encompasses the right of access to a court in cases of determination of criminal charges and rights and obligations in a suit at law,[75] and the provision of free legal aid if this is 'indispensable for an effective access to court'[76] for individuals who do not have sufficient means to pay for it.[77] Accordingly fair trial necessitates the provision of independent and accessible organs of justice. Despite this the obligation under the ICCPR is considered to be immediate rather than progressive.

Since the obligation upon states under Article 2(1) of the ICESCR is the progressive achievement of ESC rights, it might be argued that to demand their immediate implementation is not required by the ICESCR. However, some rights under the ICESCR give rise to obligations of immediate effect. One example is the right to be free from discrimination in the enjoyment of all ESC rights. The Committee has stated:

> The prohibition against discrimination enshrined in article 2(2) of the Covenant is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.[78]

Thus, a state cannot argue that it is providing primary education or primary health care to boys immediately but would extend it to girls progressively. Similarly, the argument that a state is paying women less than men for work of equal value until resources are available would not be acceptable since the right of women to an equal remuneration with men for equal work must be implemented immediately.[79]

Also every substantive ICESCR right has a minimum core content which gives rise to minimum core entitlements to individuals and groups and corresponding minimum core state obligations of immediate effect.[80] On the latter, the CESCR has found that, with regard to every substantive ICESCR right, there is:

> . . . a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[81]

The Committee has identified minimum core obligations in several General Comments,[82] and held that a state party cannot, under any circumstances whatsoever, justify its non-compliance with these core obligations, which are 'non-derogable'.[83] Otherwise the ICESCR would be largely deprived of its *raison d'être*. Progressive realisation demands that after achieving the minimum core obligations, states have to take appropriate steps to ensure 'the continuous improvement of living conditions' necessary to live an adequate standard of living, such as adequate food, health, housing, clothing, water and sanitation.[84]

Furthermore, the CESCR has explained that Article 2 'imposes an obligation to move as expeditiously and effectively as possible' towards the Covenant's goal of full realisation of the substantive rights under the Covenant.[85] However, the Committee has not specified how 'expeditiously and effectively' a state should act in achieving the full realisation of all ESC rights, but has established in several General Comments[86] that the full realisation of ESC rights, like other human rights, imposes three types or levels of multi-layered state obligations: the obligations to *respect*, *protect* and *fulfil*.[87] This approach has also been applied by regional human rights supervisory bodies such as the African Commission on Human and Peoples' Rights in some of its decisions,[88] which provides a useful analytical framework to understanding state obligations.

In order to comply with the obligation to achieve ESC rights 'progressively', states parties are required to monitor the realisation of ESC rights and to devise appropriate strategies and clearly defined programmes (including indicators – carefully chosen yardsticks for measuring elements of the right – and national benchmarks – or targets – for each indicator) for their implementation.[89] Monitoring the progressive realisation of ESC rights is important because it helps in identifying what steps have been most effective so that these can be maintained and what steps have been less effective so that new steps can be adopted. A human rights approach to government actions must begin with a proper understanding of the actual situation in respect of each right, accurate identification of the most vulnerable groups, and the formulation of appropriate laws, programmes and policies.[90]

The obligation of progressive realisation entails a related prohibition of 'any deliberately retrogressive measures'.[91] Unless otherwise justified 'after the most careful consideration of all alternatives' and 'by reference to the totality of the rights provided for in the Covenant in the context of the full use of the state party's maximum available resources',[92] the adoption of measures (legislation or policy) that cause a clear deterioration or setback in the protection of rights hitherto afforded violates the ICESCR.[93] For example, unless justified in accordance with the above criteria, 'the re-introduction of fees at the tertiary level of education. . .constitutes a deliberately retrogressive step',[94] especially where adequate arrangements are not made for students from poorer segments of the population or lower socio-economic groups.[95] In this respect, while commenting on the UK's policy on tuition fees for tertiary education, which provides for lower fees for the European Union

(EU) member state nationals while subjecting nationals of other states (so-called 'international students') to higher levels of fees, the Committee has stated as follows:

> In line with General Comment No. 13 (1999) on the right to education, the Committee encourages the State party to review its policy on tuition fees for tertiary education with a view to implementing article 13 of the Covenant, which provides for the progressive introduction of free education at all levels. It also recommends that the State party eliminate the unequal treatment between EU member State nationals and nationals of other States regarding the reduction of university fees and the allocation of financial assistance.[96]

Since ESC rights under the ICESCR apply to everyone within a state's jurisdiction including non-nationals, the standard of progressive realisation requires that nationality and other prohibited grounds should not be a bar to the equal enjoyment of all ESC rights including the right to higher education.

It is vital to note that poverty still remains in many parts of the world mainly in sub-Saharan Africa and Southern Asia[97]and this has added to the difficulties faced by states to implement the progressive realisation of ESC rights. It is well established that while there is no universally accepted definition of poverty:

> In the light of the International Bill of Rights, poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.[98]

Therefore, the disempowering effect of poverty is not confined to measurable economic deprivation or inadequate commodity bundles, but rather entails a shrinking of that human capacity for choice and critical thought of the ability to live with dignity. The situation has worsened in the context of the current global financial crisis. As the African Commission has noted the ongoing global financial crisis has exacerbated the already poor enjoyment of ESC rights, in particular, food security by vulnerable and marginalised groups in Africa such as the poor, women, children, refugees and displaced persons, indigenous peoples, persons with disabilities and persons living with HIV/AIDS.[99] Developing states have to confront poverty through anti-poverty strategies based upon international human rights including principles of non-discrimination, equality, participation and accountability. However, some of the structural obstacles confronting developing states' anti-poverty strategies lie beyond their control in the contemporary international order. As the CESCR noted:

> . . . it is imperative that measures be urgently taken to remove these global structural obstacles, such as unsustainable foreign debt, the widening gap between rich and poor, and the absence of an equitable multilateral trade, investment and financial system.[100]

In short, the removal of the above global structural obstacles to the elimination of poverty should be considered as one of the important priorities of our time. The removal of such obstacles requires international assistance and cooperation examined in section 3.4.

3.3 *Obligation to utilise 'maximum available resources'*

The third obligation is to ensure that 'maximum available resources' are allocated for the protection and fulfillment of ESC rights, especially to the most vulnerable and marginalised individuals and groups. Thus the steps that a state party is obliged to take under Article 2(1) to progressively realise the enumerated rights must be 'to the maximum of its available

resources'.[101] Chapman has noted that evaluating progressive realisation within the context of resource availability 'considerably complicates the methodological requirements' for monitoring.[102] There are two practical difficulties in applying this requirement to measure state compliance with the full use of maximum available resources. The first is in determining what resources are 'available' to a particular state to give effect to the substantive rights under the Covenant. The second difficulty is to determine whether a state has used such available resources to the 'maximum'. It has been suggested that the word 'available' leaves too much 'wiggle room for the state',[103] making it difficult to define the content of the progressive obligation and to establish when a breach of this obligation arises.[104] Nonetheless, it is clear that the Covenant does not make an absurd demand – a state is not required to take steps beyond what its available resources permit. The implication is that more would be expected from high-income states than low-income states particularly the least developed states.[105] This means that both the content of the obligation and the rate at which it is achieved are subject to the maximum use of available resources.

The availability of resources refers not only to those which are controlled by or filtered through the state or other public bodies, but also to the social resources which can be mobilised by the widest possible participation in development, as necessary for the realisation by every human being of ESC rights.[106] In this respect 'available resources' refer to resources available within the society as a whole, 'from the private sector as well as the public. It is the state's responsibility to mobilise these resources, not to provide them all directly from its own coffers'.[107] As shown below, available resources also include those available through international cooperation and assistance.

Given that one of the major issues in the realisation of ESC rights is not resource availability but rather resource distribution, states should demonstrate that the available resources are used equitably and effectively targeted to subsistence requirements and essential services,[108] targeted towards those that are most in need including women, children, older persons, persons with disabilities, minorities, migrants, indigenous peoples, and persons living in poverty. To this end, the Committee requires states to adopt strong, efficient and time-framed measures to promote good governance and combat corruption that negatively impacts on the availability of resources.[109] Corruption may be combated by adopting and strictly applying anti-corruption legislation and measures, intensifying efforts to prosecute cases of corruption and reviewing sentencing policy for corruption-related offences, raising awareness of politicians, law makers, national and local civil servants and law enforcement officers on the negative impact of corruption, as well as adopting effective mechanisms to ensure transparency in the conduct of public authorities, in law and in practice. At the same time states should demonstrate that they are developing societal resources to fulfil ESC rights.[110] In this respect, it is important to note that although states generally have a 'margin of discretion'[111] to decide how to allocate the available resources, 'due priority' must be given to the realisation of human rights including ESC rights.[112] Thus, it is important for the state to make appropriate choices in the allocation of the available resources in ways which ensure that the most vulnerable are given priority.[113] All domestic resources must be considered for use by the state because human rights generally deserve priority over all other considerations.[114]

In determining state compliance with the obligation to utilise the 'maximum available resources', the CESCR has developed in its Concluding Observations some useful indicators. One indicator is to consider the percentage of the national budget allocated to specific rights under the Covenant (such as health, education, housing, and social security) relative to areas outside the Covenant (such as military expenditure or debt-servicing). Many resource problems revolve around the misallocation of available resources: for

example, to purchase expensive weapons systems rather than to invest in primary education or primary or preventive health services.[115] In 2001, for example, with respect to Senegal, the CESCR stated:

> The Committee [was] concerned that funds allocated by the state party for basic social services … fall far short of the minimum social expenditure required to cover such services. In this regard the Committee note[d] with regret that more is spent by the state party on the military and on servicing its debt than on basic social services.[116]

Similarly in 2009 the Committee expressed its concern about the continuous decrease over the past decade of the resources allocated to social sectors in the Democratic Republic of Congo (DRC), notably health and social protection, whereas budgetary allocations to defence and public security had increased considerably to reach 30% of the state expenditures.[117] The Committee concluded that 'unbalanced budgetary allocations constitute *serious breaches* in the State party's obligations under article 2.1 of the Covenant' and recommended that DRC substantially increase its national spending on social services and assistance such as housing, food, health and education so as to achieve, in accordance with article 2, paragraph 1, the progressive realisation of the ESC rights provided for in the Covenant.[118]

It follows that where a state spends more on the military than on basic social services, it would have a high burden before the Committee to convince it that it utilised available resources to the 'maximum' as required by the Covenant. It is, accordingly, imperative to consider the priority or rate of resource allocation to military expenditure in comparison to the expenditure on ESC rights.[119] A reordering of priorities and an increase in budgetary allocations for ESC rights may alleviate some of the resource burden of any state. Another indicator that may be applied is to consider the resources spent by a particular state in the implementation of a specific Covenant right and that which is spent by other states at the same level of development.

It is striking to note that when the Optional Protocol to the ICESCR enters into force, it would be possible for the CESCR to receive and consider communications submitted by or on behalf of individuals or groups of individuals under the jurisdiction of a state party, claiming to be victims of a violation of any of the ESC rights set forth in the Covenant against states parties to the Optional Protocol.[120] If a communication was brought against a state party to the ICESCR and its Optional Protocol, and the state used 'resource constraints' as an explanation for any retrogressive steps taken, the Committee has indicated that it would consider such information on a country-by-country basis in the light of objective criteria such as:

(a) the country's level of development;
(b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
(c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession;
(d) the existence of other serious claims on the state party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict;
(e) whether the state party had sought to identify low-cost options; and
(f) whether the state party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.[121]

The obligation to take steps to the maximum of a state's 'available resources' means that in making any assessment as to whether a state is in breach of its obligations to fulfil the rights recognised under the Covenant of a particular individual or group, an assessment must be made as to whether the steps taken were 'adequate' or 'reasonable' by taking into account, *inter alia*, the following considerations:

(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
(b) whether the state party exercised its discretion in a non-discriminatory and non-arbitrary manner;
(c) whether the state party's decision (not) to allocate available resources is in accordance with international human rights standards;
(d) where several policy options are available, whether the state party adopts the option that least restricts Covenant rights;
(e) the time frame in which the steps were taken; and
(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.[122]

In the context of an Optional Protocol communication, where the Committee considers that a state party has not taken reasonable or adequate steps, the Committee could make recommendations, *inter alia*, along four principal lines:

(a) recommending remedial action, such as compensation, to the victim, as appropriate;
(b) calling upon the state party to remedy the circumstances leading to a violation. In doing so, the Committee might suggest goals and parameters to assist the state party in identifying appropriate measures. These parameters could include suggesting overall priorities to ensure that resource allocation conformed with the state party's obligations under the Covenant; provision for the disadvantaged and marginalised individuals and groups; protection against grave threats to the enjoyment of economic, social and cultural rights; and respect for non-discrimination in the adoption and implementation of measures;
(c) suggesting, on a case-by-case basis, a range of measures to assist the state party in implementing the recommendations, with particular emphasis on low-cost measures. The state party would nonetheless still have the option of adopting its own alternative measures; and
(d) recommending a follow-up mechanism to ensure ongoing accountability of the state party; for example, by including a requirement that in its next periodic report the state party explain the steps taken to redress the violation.[123]

From the above, it is clear that the obligation to use 'maximum available resources' is capable of being subjected to judicial or quasi-judicial scrutiny and as such it is not a bar to justiciability. As noted in section 2 above, domestic courts have dealt with cases that aim at the protection of ESC rights. In South Africa, for example, under the Constitution of the Republic of South Africa, (Act 108 of 1996), which guarantees numerous ESC rights, the justiciability of ESC rights has been demonstrated through constitutional case law.[124] For example, the case of *Minister of Health* v. *Treatment Action Campaign* concerned state provision of Nevirapine, an antiretroviral drug used to prevent mother-to-child-transmission of the HIV.[125] Applying the concepts of progressive realisation and resource availability, the South African Constitutional Court declared that:

> Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.[126]

The programme to be realised progressively within available resources had to include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.[127] While justiciability can not impose political will that is fundamental to realising human rights including ESC rights, simply put, through the institution of the courts, governments can be called upon to account for their decisions affecting ESC rights and, in doing so, impact beneficially on the policy-making process.

Therefore although the 'availability of resources' is an important qualifier to the realisation of ESC rights, it does not alter the immediacy of the obligation to 'take steps' including legislative and other measures to achieve the 'progressive realisation' of these rights. Similarly resource constraints alone should not justify inaction and certainly should not be seen as a bar to judicial review. Where the available resources are demonstrably inadequate, the obligation remains for a state to ensure the widest possible enjoyment of ESC rights by taking reasonable or adequate steps under the prevailing circumstances. It follows therefore that even in times of severe resource constraints the state must protect the most disadvantaged and marginalised members or groups of society by adopting relatively low-cost targeted programmes for the realisation of ESC rights.

3.4 *Obligation to seek (or provide) international assistance and co-operation*

The fourth state obligation is to seek or provide international assistance and cooperation whenever it is necessary to do so. The ICESCR refers to international assistance and cooperation, or similar formulations, in five articles.[128] International assistance and co-operation may be regarded as one element of the more extensive right to development which was affirmed in the Declaration on the Right to Development (1986)[129] and the Vienna Declaration and Programme of Action (1993).[130] More recently, 191 states recognised explicitly in the Millennium Declaration the link between the realisation of the right to development and poverty reduction, and committed themselves to make 'the right to development a reality for everyone' and to free 'the entire human race from want'.[131]

Does 'international assistance and cooperation' oblige developed states to transfer resources to developing states? And are developing states obliged to seek such 'assistance and cooperation'? In general, while most developed states give assistance to developing states,[132] developed states have consistently denied the existence of any clear legal obligation to transfer resources to the developing states.[133] It has further been argued that 'although there is clearly an obligation to cooperate internationally, it is not clear whether this means that wealthy States Parties are obliged to provide aid to assist in the realisation of the rights in other countries'.[134] In the debates surrounding the drafting of the Optional Protocol to the ICESCR the representatives of the United Kingdom, the Czech Republic, Canada, France and Portugal believed that international cooperation and assistance was an 'important moral obligation' but 'not a legal entitlement', and did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal right to receive such aid.[135] It is not surprising, then, that the final text of the Optional Protocol contained a weaker provision on 'international assistance and cooperation' in its Article 14 by referring only to the 'need for technical advice or

assistance' in Article 14(1) and establishing a trust fund with a view to 'providing expert and technical assistance to States Parties' without prejudice to the obligations of each state party to fulfil its obligations under the Covenant in Article 14(3) and (4) of the Protocol. Significantly however, the Optional Protocol did not exclude other possible forms of international cooperation and assistance. Although these were not stated in both the ICESCR and its Optional Protocol, other possible forms of assistance could include the conclusion of international agreements, the provision of human resources, enabling access to literature, the development of collaborative research agendas that enable researchers in developed states to address issues affecting developing states, educational and academic scholarships and exchanges, direct investment and joint venture programmes in the creation of various projects relating to various aspects of ESC rights.

But, if there is no legal obligation underpinning the human rights responsibility of international assistance and cooperation, then, inescapably, all international assistance and cooperation fundamentally rests upon charity.[136] Is such a position tenable and acceptable in the twenty-first century? Increasingly human rights scholars have argued for a legal obligation to underpin international assistance and cooperation.[137] The Committee's approach also seems to suggest that the economically developed states parties to the Covenant are under an obligation to assist developing states parties to realise the core obligations of ESC rights. Thus, the CESCR has stressed that 'it is particularly incumbent on all those who can assist, to help developing countries respect this international minimum threshold'.[138] By implication, where a developing state is in need of assistance to comply with its minimum core obligations there is an obligation to seek assistance and cooperation from 'all those who can assist'.

For example, after identifying core obligations in relation to the right to water, the Committee emphasised that 'it is particularly incumbent on States Parties, and other actors in position to assist, to *provide* international assistance and cooperation, especially economic and technical which enables developing countries to fulfil their core obligations'.[139] In the course of examination of state reports, the Committee has inquired into the percentage of Gross Domestic/National Product (GDP/GNP) that developed reporting states dedicate to international co-operation[140] and Official Development Assistance (ODA).[141] The UN-recommended target/benchmark of 0.7 per cent GDP[142] was reiterated along with other targets in the Monterrey Consensus, arising from the 2002 International Conference on Financing for Development.[143] This was reaffirmed at the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, held in Doha on 29 November-2 December 2008.

However, by 2000 only five states had reached or exceeded the target of 0.7 per cent of GDP in ODA.[144] Most developed states (particularly the Group of Eight industrialised states) were far below the level of 0.7 per cent with an average of 0.22 per cent.[145] In 2008–2009, for example, Australia devoted only 0.32 per cent of its gross national income (GNI) to official development assistance (ODA).[146] In 2007, the only states to reach or exceed the United Nations target of 0.7 per cent of their gross national income (GNI) were Denmark, Luxembourg, the Netherlands, Norway and Sweden.[147] The average for all member countries of the Development Assistance Committee (DAC) of the Organisation for Economic Cooperation and Development (OECD) was just 0.09 per cent.[148]

Despite this state practice, the CESCR commonly 'recommends' and 'encourages' developed states parties 'to increase ODA as a percentage of GNP to a level approaching the 0.7 per cent goal established by the United Nations'.[149] States have been criticised where the levels devoted to international assistance and cooperation fall below this target,[150] and urged to 'review. . .budget allocation to international cooperation'[151] with a

view 'to ensure. . .as quickly as possible, to the UN target of 0.7 per cent GNP'.[152] Other states that have donated more than this target have been commended.[153] Similarly the Committee has considered as a 'positive aspect' a state's commitment to achieve the granting of 0.7 per cent of GDP by a specific date. For example in May 2009 the Committee acknowledged the UK's 'commitment to achieve by 2013 the granting of 0.7 per cent of its Gross Domestic Income as official development assistance in accordance with internationally agreed policies'.[154]

Given a large and growing gap between developed and developing states, and the fact that half the world – nearly three billion people – live on less than two dollars a day,[155] economically developed states can play a key role in enhancing the enjoyment of ESC rights by granting further assistance, especially technical or economic, to developing states targeted to ESC rights. The large investment requirements of developing states imply that a successful transition to increased reliance on domestic resources and private capital inflows will require more, rather than less, official development assistance.[156] Interestingly, the European Union (EU) member states have made commitments to increase more ODA over a period of time. The targets were stated as follows: (i) 0.33 per cent by 2006 according to the EU Barcelona commitment; and (ii) 0.51 per cent by 2010 and 0.7 per cent by 2015 according to the May 2005 EU Council agreement.[157] While this progressive commitment to increase ODA is a step in the right direction, it should be noted that many activities undertaken in the name of development have subsequently been recognised as 'ill-conceived and even counter productive in human rights terms'[158] partly because ODA is not necessarily linked to respecting, protecting and fulfilling human rights including ESC rights. Thus it is necessary to ensure that states giving ODA and states receiving it relate ODA to the progressive realisation of ESC rights. In particular, states receiving international development aid should ensure that there are sustainable institutional frameworks for its absorption and utilisation and that such aid is not mismanaged since the 'mismanagement of international cooperation aid . . . constitute serious breaches in the State party's obligations under article 2.1 of the Covenant'.[159]

It has to be acknowledged that international assistance and cooperation including economic aid entails procedural fairness. Thus, donor states have a responsibility not to withdraw critical aid without first giving the recipient state reasonable notice and opportunity to make alternative arrangements.[160] In addition states providing aid must refrain from attaching conditions to such aid which are reasonably foreseeable to result in the violation of international human rights law in other states. This is consistent with international law providing a general duty on states not to act in such a way as to cause harm outside their territory.[161]

In order to monitor the use of transferred resources, the Committee has sought to establish whether resources transferred are used to promote respect for the ICESCR and whether such resources are contingent upon the human rights record of the receiving country.[162] The Committee has also asked whether states had formulated a policy on the objective of allocating 0.7 per cent of GDP to ODA.[163]

While the Committee can investigate all such issues, it is questionable whether the Committee can find a particular developed state to be in violation of Article 2(1) for the failure to devote 0.7 per cent of its GDP on international assistance. Similarly, it is inconceivable that the Committee can direct or identify a specific developed state to assist a particular developing state party since the criteria for doing so are not yet clearly drawn, and seem to be difficult to justify. For example there is no legal basis for directing Canada to assist any of the least developed states. Nonetheless, it is important to note that international assistance and co-operation should not be understood as encompassing only

financial and technical assistance: it also includes a responsibility to work actively towards equitable multilateral trading, investment and financial systems that are conducive to the realisation of human rights and the elimination of poverty.[164] This may entail genuine special and preferential treatment of developing states so as to provide such states with better access to developed states' markets.[165]

This equitable system is yet to be realised. In 2006, for example, Joseph Stiglitz, former chief economist of the World Bank, noted that:

> We see an unfair global trade regime that impedes development and an unsustainable global financial system in which poor countries repeatedly find themselves with unmanageable debt burdens. Money should flow from the rich to poor countries, but increasingly, it goes in the opposite direction.[166]

This must be addressed in order to ensure that the global trading system facilitates, rather than hampers, the economic development of developing states.[167] Therefore ODA alone without an equitable multilateral trading system would not lead to meaningful realisation of ESC rights in poorer developing states. As Oxfam International estimated in 2002 an increase of 5% in the share of world trade by low income states 'would generate more than $350billion – seven times as much as they receive in aid'.[168]

3.5 *Extra-territorial human rights obligations*

This section considers briefly whether states parties' human rights obligations arising under the ICESCR are limited to individuals and groups within a state's territory or whether a state can be liable for the acts and omissions of its agents which produce effects on ESC rights or are undertaken beyond national territory (e.g. to those individuals and groups who are not within the state's territory but who are subject to a state's jurisdiction).[169] Although the ICESCR refers to 'international assistance and cooperation', it does not make any explicit reference to territory or jurisdiction, in contrast to the ICCPR.[170]

The general territorial scope of treaties is stated in Article 29 of the Vienna Convention on the Law of Treaties[171] as follows: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory'. Applying this provision to the ICESCR, it can be stated that the ICESCR is binding upon each state party in respect of the entire territory of each state party unless a different intention appears or is otherwise stated. However, limiting state obligations to the territory of each state party is inadequate in an increasingly globalised world especially in the post 9/11 environment where some states have waged a 'war on terrorism' abroad often leading to violations of human rights including ESC rights. Thus, it is argued below that while the text of the ICESCR primarily provides for territorial obligations, it leaves some scope for extraterritorial application.

The International Court of Justice (ICJ) has acknowledged some space, albeit in a restrictive way, for the extraterritorial application of the ICESCR. In its Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (the Wall), the ICJ held:

> The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a state party has sovereignty and to those over which that state exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of

> any state which 'at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge'.[172]

This position was confirmed by the ICJ in its decision in *Democratic Republic of Congo* v. *Uganda*, where the court stated that: 'international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories'.[173] Thus, human rights treaties extend state obligations to those within their territory and jurisdiction, the latter term not being limited by a state's territorial boundaries. State responsibility can for example be incurred by the acts or omissions by a state's authorities which produce effects outside their territories.[174] This means that a state party to the ICESCR must respect, protect and fulfil ESC rights laid down in the Covenant to anyone within the power or effective control of that state, even if not situated within the territorial boundaries of the state party.

The extraterritorial application of the ICESCR is reflected in a number of General Comments of the CESCR that interpret state obligations as extending to individuals under a state party's jurisdiction. Some examples are considered below. General Comment 1 indicates that states parties to the ICESCR have to monitor the actual situation with respect to each of the rights on a regular basis and thus be aware of the extent to which the various rights are, or are not, being enjoyed by 'all individuals within *its territory* or *under its jurisdiction*'.[175] For example, in its Concluding Observations of 1998 on Israel, the CESCR confirmed that 'the state's obligations under the Covenant apply to all territories and populations under its effective control';[176] and that 'the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction'.[177] Similarly in General Comment 20 on non-discrimination in ESC rights, the CESCR confirmed that 'States Parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their *jurisdiction* do likewise'.[178]

Therefore, state obligations with respect to the Covenant apply to individuals and groups within a state's territory and to those individuals who are subject to a state's jurisdiction. Thus, under the Optional Protocol adopted by the General Assembly in December 2008 '(c)ommunications may be submitted by or on behalf of individuals or groups of individuals, *under the jurisdiction* of a state Party'.[179] This anticipates that a state can be found to be in violation of its obligations under the ICESCR for actions taken by it extraterritorially, in relation to anyone within the power, effective control or authority of that state, as well as within an area over which that state exercises effective overall control.[180]

The extraterritorial application of the ICESCR is further supported by the reference to 'international assistance and cooperation' in the Covenant (see section 3.4 above). As a minimum, international assistance and cooperation can be understood as entailing obligations to respect ESC rights at an international level. The obligation to *respect* at an international level requires states to refrain from interfering directly or indirectly with the progressive realisation of ESC rights in other states;[181] and not to impose on another state measures that might be foreseen to work against the progressive realisation of ESC rights. This means that states must refrain from causing harm to ESC rights extraterritorially for example by refraining from imposing unilateral economic sanctions on other states without taking full account of the provisions of the ICESCR; refraining from dumping unsafe food or toxic waste in other states; refraining from imposing embargoes or similar measures restricting the supply of another state with essential goods and services including adequate food, medicines and medical equipments; by not supporting armed conflicts in

other states in violation of international law and by not providing assistance to corporations and other actors to violate ESC rights in other states.

It should be recalled that the object and purpose of the Covenant, as a human rights treaty, requires that its provisions be interpreted so as to make its safeguards practical and effective. Effectiveness requires that the human rights obligations to 'respect, protect and fulfil' extend beyond a state's borders to include individuals and groups subject to a state's jurisdiction in other states.[182] Although 'from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial',[183] a state's human rights obligations, as noted above, are not territorially limited. Human rights obligations may extend beyond a state's borders to areas where a state exercises power, authority or effective control over individuals, or where a state exercises effective control of an area of territory within another state.[184] States are legally responsible for policies that violate human rights beyond their own borders, and for policies that indirectly support violations of ESC rights by third parties. It follows, then, that states may, under certain circumstances, be required to respect, protect and fulfil ESC rights in other states.

While there is some debate over precisely when a state should protect human rights in other states, international law permits a state to exercise extraterritorial jurisdiction provided there is a recognised basis, for example, where the actor or victim is a national, where the acts have substantial adverse effects on the state, or where specific international crimes are involved.[185] For example, with respect to economic sanctions, when a state imposes unilateral economic sanctions upon another state and such sanctions lead to violations of ESC rights in another state,[186] the state imposing such sanctions 'unavoidably assumes a responsibility to do all within its power to *protect* the economic, social and cultural rights of the affected population'.[187] Although the Committee has not consistently inquired into the issue of extraterritorial jurisdiction, it has been raised in the course of examining some state reports. For example, in 1999 one Committee Member asked 'whether Germany exercised extraterritorial jurisdiction over German nationals who committed crimes against children abroad'.[188]

The extra-territorial obligation includes, *inter alia*, adopting the necessary and effective legislative and other measures to restrain, for example, third parties within a state's jurisdiction from any activities that might be foreseen to cause harm to the progressive realisation of ESC rights in other states. For example, with respect to the right to social security the Committee stated:

> States Parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States Parties can take steps to influence third parties (non-state actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.[189]

In principle a similar duty to protect ESC rights extraterritorially should apply to all substantive rights. Extraterritorial protection of ESC rights offers an important means to strengthen the protection and enforcement of ESC rights especially where host states lack the ability to effectively regulate non-state actors and monitor their compliance yet home states are able to do so.

Importantly states which are members of international economic institutions, notably the International Monetary Fund (IMF), the World Bank, the World Trade Organisation (WTO) and regional development banks can also protect ESC rights in other states by paying greater attention to the protection of these rights in the policies, programmes and

decisions of these institutions. As part of international cooperation, states have to ensure that international agreements and policies of these institutions are not enforced in a way that adversely impact on ESC rights in other states. For example gradual privatisation of social services including health care, education, water and electricity supply should not make privatised services such as health care less accessible and affordable in particular for the disadvantaged and marginalised individuals and groups.

Yet in practice, states with the ability to influence the policies of international economic institutions do not always pay attention to the impact of such policies in other countries. For example, certain aspects of the Structural Adjustment Policies (SAPs) or Poverty Reduction Strategy Papers (PRSPs) overseen by the IMF and the World Bank in developing countries, desperate for financial assistance, gave preference to neo-liberal economic policy (such as trade liberalisation, privatisation, fiscal and monetary policies) over human rights.[190] Such policies led to a significant decline in public expenditure on ESC rights including health, education, and social security making it more difficult (or even impossible) for developing states to protect and fulfil ESC rights. Consequently, the implementation of SAPs including gender-insensitive privatisation had a disproportionate impact on the poorest individuals and marginalised groups, which were unable to compete economically, in several implementing states particularly in the absence of adequate safety nets.[191] There is, therefore, a need to engage with those states parties to international human rights treaties protecting ESC rights, who are able to influence or determine the policies of international economic institutions, to ensure that ESC rights are integrated into the policies of these institutions.

4. Non-derogability of ESC rights

A derogation of a right or an aspect of a right is its complete or partial elimination as an international obligation.[192] Some international treaties on human rights allow states unilaterally to derogate temporarily from (suspend) *certain* human rights guarantees in times of emergency which 'threatens the life of the nation', but only to the extent strictly required by the situation.[193] However, permissible derogations, in addition to being officially proclaimed, must not conflict with the state's other international law obligations and must be non-discriminatory.[194] The predominant objective of a state party derogating from some human rights must be the 'restoration of a state of normalcy' where full respect for human rights can again be secured.[195] Thus derogation from a particular right must be necessary (strictly required) in light of the prevailing exceptional threat to protect or restore a (democratic) public order essential for the protection of human rights. It is crucial to note that unlike some other human rights treaties, there are no clauses in the UN treaties protecting ESC rights allowing for or prohibiting derogations in a state of emergency, for example in the situation of a failed state, armed conflict or institutional collapse post-conflict.[196] Although the CESCR has acknowledged that the persistent instability and recurrent armed conflicts in some areas of a state party to the ICESCR 'pose great challenges to the State's ability to fulfil its obligations under the Covenant',[197] it has not indicated whether a state can derogate from its obligations under such circumstances. This leaves the question of derogations unclear under the ICESCR. Does the ICESCR apply fully in time of armed conflict, war, natural disasters or other public emergency? Or can states derogate from the ICESCR in such emergencies?

The absence of specific derogation clauses from a treaty is not *per se* determinative of whether derogations are permitted or prohibited. In the case of the ICESCR this may be taken to mean that either derogations from ESC rights are not permissible (since they are not provided for[198] and would seem inherently less compelling given the nature of ESC

rights), or that they may be permissible for non-core obligations where the situation appears to be sufficiently grave as to warrant derogation (since they are not explicitly prohibited). The *travaux préparatoires* of the ICESCR do not reveal any specific discussion on the issue of whether or not a derogation clause was considered necessary, or even appropriate.[199] Thus the possible reasons for its omission are open to speculation. It is possible that this could have been as a result of a combination of factors including (i) the nature of the rights protected in the Covenant; (ii) the existence of a general limitations clause in the Covenant in its Article 4 which allows states to respond flexibly to extraordinary situations of tension within a democratic society, including situations of emergencies, without a need for derogations;[200] and (iii) the general obligation contained in Article 2(1) was 'more flexible and accommodating'.[201]

In General Comment 3, the Committee confirmed that states parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights enunciated in the Covenant, such as essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Accordingly, the CESCR has taken the view that core obligations arising from the rights recognised in the Covenant are non-derogable. In General Comment 14 on the highest attainable standard of health, the CESCR stated: '[i]t should be stressed, however, that a state party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable'.[202] In General Comment 15, on the right to water, the CESCR stated that a 'state party cannot justify its non-compliance with the core obligations set out. . .which are non-derogable'.[203]

It can thus be argued that without a clause providing for derogation in the ICESCR, core obligations arising from ESC rights cannot be derogated from in an emergency including a situation of military occupation.

In *The Wall*,[204] the ICJ asserted the applicability of the ICESCR in Occupied Palestinian Territory. It cited Concluding Observations of the CESCR and also stated that:

> . . . territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, *Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights*. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.[205]

The ICJ also stated that, save through the effect of provisions for derogation, 'the protection offered by human rights conventions does not cease in case of armed conflict'.[206]

Similarly the UN General Assembly confirmed in 1970 the applicability of human rights norms in times of armed conflict, stating that '(f)undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict'.[207] In principle, this position applies to ESC rights as protected by the ICESCR. Some of the General Comments of the CESCR have confirmed this position. For example in General Comment 15, on the right to water, the committee noted that 'during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States Parties are bound under international humanitarian law'.[208] This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.[209] Indeed, it is hard to imagine a situation in which the suspension of core obligations

under the ICESCR corresponding to minimum core entitlements to basic subsistence rights (inherently linked to the non-derogable right to life and the right to freedom from torture and inhuman and degrading treatment),[210] such as rights to basic health care, water, adequate food, and housing can be said to be 'strictly required' in order to maintain or restore (democratic) public order indispensable for the protection of human rights.[211]

Thus, the absence of a clause allowing derogation in times of public emergency in the ICESCR indicates that the Covenant generally continues to apply,[212] and as a minimum, states can not derogate from the Covenant's core obligations. In the words of the CESCR, 'because core obligations are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster'.[213] Does this mean that states can derogate from non-core obligations under the ICESCR provided they comply with the general rules of derogation? The Committee's use of the word 'non-derogable' in relation to core obligations might be interpreted as implying that other non-core obligations are indeed derogable. However, it is vital to note that the statement of the Committee was not a general reference to derogations under the Covenant but a specific example of the non-derogable nature of core obligations. It can not therefore be taken as being conclusive on the question of whether or not states can derogate from non-core aspects of ESC rights. Given the nature of the rights protected in the Covenant, the existence of a general limitations clause in Article 4, and the fact that states are not required to do more than what the maximum available resources permit, derogations from the ICESCR in situations of conflict, war, emergency and natural disaster would appear to be unnecessary.

5. The Optional Protocol to the ICESCR

Was it really necessary to adopt the Optional Protocol to the ICESCR to provide for the competence of the CESCR to receive and consider communications alleging violations of any of the rights protected by the ICESCR? And should states parties to the ICESCR sign and ratify this Optional Protocol without delay? To answer the above questions, it is important to consider some background to the Optional Protocol and to examine the contents of the Optional Protocol.

5.1 *Historical background*

By the year 2008 only two of the seven major UN human rights treaties – the Convention on the Rights of the Child and the ICESCR – lacked a complaints procedure that would allow individuals and groups to submit complaints involving alleged violations of rights recognised in these treaties. With respect to the ICESCR, the effect of this lacuna meant that the CESCR could not carry out an extensive and more in-depth inquiry into the real problems confronting specific individuals and groups, which would in turn lead to the development of international jurisprudence or case law on ESC rights that would prompt states to ensure the availability of more effective remedies at the national level.[214] Where national remedies for violations of ESC rights were either not available or ineffective, the absence of a complaints procedure under the ICESCR greatly limited 'the chances of victims of abuses of the Covenant obtaining international redress'.[215] In this respect, the system based exclusively on a state reporting system, and the making of non-binding Concluding Observations after examination of state reports, was clearly a very weak system of holding states responsible for violations of ESC rights.

Accordingly, it was recognised that there was a need to strengthen the supervision of the ICESCR by providing for a complaint procedure to compliment the existing supervisory

mechanism in form of an Optional Protocol to the ICESCR.[216] This need for an Optional Protocol to the ICESCR (in some respect similar to the Optional Protocol procedure to the ICCPR) providing for a complaint/communication procedure for individuals and groups seeking redress in instances where they consider their human rights guaranteed under the Covenant to have been violated, had been a subject of discussion before the Committee since its fifth session in 1990 until its fifteenth session in 1996.[217] The length of this debate at the Committee level reflected the fact that not all Committee members were in agreement about the need for an Optional Protocol, or about the content of the proposed protocol.

The 1993 World Conference on Human Rights, held in Vienna encouraged the UN Commission on Human Rights (CHR), replaced by the Human Rights Council in March 2006,[218] to continue, in cooperation with the CESCR, the examination of optional protocols to the ICESCR.[219] The CESCR worked on an Optional Protocol to enable complaint procedures under the Covenant. In December 1992, the Committee adopted an 'analytical paper' that examined the various modalities of such protocol, *inter alia*, the possibility of the collective and individual complaints.[220] Through this paper the Committee strongly supported the development of an optional protocol. The Commission on Human Rights, in paragraph 6 of its resolution 1994/20, took note of the 'steps taken by the Committee ... for the drafting of an optional protocol ... granting the right of individuals or groups to submit communications concerning non-compliance with the Covenant, and invite[d] the Committee to report thereon to the Commission...'. A draft Optional Protocol was finally adopted in 1996 at the Committee's fifteenth session.[221]

The draft Optional Protocol of the CESCR was submitted to the UN Commission on Human Rights during its fifty-third session in 1997 but, for the next decade, its future largely remained uncertain.[222] For four consecutive years (1997–2000), the Commission called for comments from states, UN, intergovernmental organisations and non-governmental organisations (NGOs) but did not take any decision.[223] While NGOs were strongly in favour of an Optional Protocol,[224] only a limited number of states submitted comments and even then such comments were generally, with some few exceptions, superficial and did not provide much detail.[225] This partly manifested the considerable lack of enthusiasm and political will on the part of most states to be held accountable for the progressive realisation of ESC rights by an independent international body. It also indicates the limited importance states accorded to the Optional Protocol in particular and ESC rights in general. Some states expressed doubts on the desirability of an Optional Protocol.[226] Some commentators were strongly critical of the proposal to provide for a complaints procedure under the ICESCR. For example, two US State Department legal advisers writing in their personal capacities stated that the 'proposal for a new individual-complaints mechanism remains an ill-considered effort to mimic the structures of the ICCPR – and largely for mimicry's sake'; and that the rights and obligations contained in the ICESCR were 'never intended to be susceptible to judicial or quasi-judicial determination'.[227]

However, after a workshop on the justiciability of ESC rights,[228] in 2001, the Commission took an important step and appointed an Independent Expert (Professor Hatem Kotrane), to examine the question of the draft Optional Protocol to the ICESCR.[229] The Independent Expert made two reports[230] and concluded that 'there is no longer any doubt about the essentially justiciable nature of all the rights guaranteed by the Covenant'.[231] As shown above (in section 2 of this article), some examples from domestic jurisdictions and regional human rights systems demonstrate that the above conclusion is tenable. The Independent Expert also noted that the procedure envisaged under the Optional Protocol would be both beneficial and practical because it would, *inter alia*:

> ensure that effect was given to every individual's right to appeal, and contribute to the development of international law by producing a coherent body of principles covering all the rights set forth in the Covenant; these principles could gradually acquire an authority that would be recognised by all, both at the international level and in the various countries where they could be used in the drafting of national legislation. It would also be beneficial in that it would provide more vigorous support for the principle of the indivisibility and interdependence of all human rights.[232]

Thus, he recommended that the Commission establish an open-ended working group mandated to elaborate an Optional Protocol in the light of the draft Optional Protocol as prepared by the CESCR, comments by states, intergovernmental and NGOs, and the report of the independent expert.[233]

The Commission took a further significant step in 2003 by establishing an 'Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights' to 'considering options' regarding the elaboration of an Optional Protocol.[234] Pursuant to Human Rights Council resolution 1/3 of 29 June 2006, the Chairperson-Rapporteur, Catarina de Albuquerque, submitted a first draft Optional Protocol to the fourth session of the Open-ended Working Group. Based on the discussions held and proposals for amendments made during that session, the Chairperson prepared a revised draft[235] which was considered at the first part of the Working Group's fifth session. Based on discussions held at the first part of the fifth session, the Chairperson prepared a new revised version[236] as a basis for negotiations at the second part of the fifth session.

As noted in section 2 above, in 2008 the UN Human Rights Council and the General Assembly adopted the Option Protocol to the ICESCR without a vote.[237] The Optional Protocol would enter into effect three months after ten states deposit instruments of ratification with the UN Secretary-General.[238]

5.2 *Contents of the Optional Protocol*

It is important to note that in the Optional Protocol debate there were several contentious issues including the following: (i) the scope of the complaints mechanism – whether the mechanism would allow states to pick and choose the right the Committee had the competence to adjudicate or whether a comprehensive approach would be adopted giving the Committee competence to consider all rights under the ICESCR; (ii) *locus standi* (standing) – who would have standing to bring complaints under the protocol? Individuals only or even groups including NGO-generated complaints or other collective complaints; (iii) admissibility – what admissibility criteria to be applied? Should applicants exhaust regional remedies (after exhaustion of domestic remedies)? Should applications disclose that victims have suffered a 'clear disadvantage'?; (iv) criteria for review – what criteria should the Committee apply when examining complaints: reasonableness, appropriateness, margin of appreciation?; (v) international cooperation and assistance – how to include appropriate reference to the crucial role of 'international assistance and cooperation' in the realisation of ESC rights as enshrined in Article 2(1) of the ICESCR? Would this require the establishment of a trust fund?; (vi) reservations – whether to allow or prohibit reservations in an express provision?[239]

It is essential to note that the Optional Protocol contains a number of progressive provisions. For example, under the Optional Protocol states parties to the Covenant that become parties to the Optional Protocol recognise the competence of the Committee to receive and consider communications of three types, namely: (i) communications by or on behalf of individuals or groups of individuals; (ii) inter-state communications; and

(iii) inquiry procedure. While the first one applies to all states parties to the Protocol, the last two are optional binding only on states that would declare that they have recognised the competence of the Committee in respect of inter-state communications and to conduct an inquiry. These methods are outlined below.

The first type involves communications submitted by or on behalf of 'individuals or groups of individuals' or other persons on their behalf, under the jurisdiction of a state party, claiming to be victims of violations of any of the ESC rights set forth in the Covenant (Article 2). This has several advantages. First, this provision is not limited to individuals only but extends to groups of individuals such as minority groups, trade unions, or NGOs. Thus, it offers a wider *locus standi* before the Committee. Secondly, communications are not limited to individuals or groups within a state's territory. Communications could be submitted by or on behalf of individuals or groups of individuals under the jurisdiction of a state party. This means that communications could be brought by anyone within the power, effective control or authority of a state. Thirdly, communications under the Optional Protocol could be brought alleging a violation of *any* provision of the Covenant and not some provisions. Although some states[240] had argued for the exclusion of Part I of the ICESCR (which includes the right to economic, social and cultural self-determination) from the scope of a communications procedure under the Optional Protocol, two delegations, Algeria and Pakistan, objected to the exclusion of Part I from the scope of the communications under the protocol arguing that its exclusion 'risked undermining the Covenant' and created 'artificial distinctions between Covenant rights'.[241] Surely, if other rights under the ICESCR could be subjected to a communications procedure, why should the right to self-determination be left out? The reference in the final Optional Protocol to 'any' of the ESC rights in the Covenant does not appear to exclude the right to self-determination. This confirms that all rights under the Covenant are justiciable. Therefore, like other existing communication procedures, the approach adopted in the Optional Protocol is comprehensive and not selective or limited.

The second type involves inter-state communications. Under this type the Committee can receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under the Covenant (Article 10). This can only take place where a state party has made a declaration recognising in regard to itself the competence of the Committee to receive inter-state communications. This means that a state may not recognise this procedure. The inter-state communications mechanism reflects the fact that every state party has a legal interest in the performance by every other state party of its obligations.[242] However, even if some states were to make Article 10 declarations, the inter-state communications mechanism is unlikely to be widely used because of the perceived diplomatic and political implications of such an action; states might fear retaliatory attacks on their own human rights records.[243] Similar procedures for inter-state complaints under other human rights treaties have not been used so far.[244] For example, despite the fact that Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[245] provides for a mandatory inter-state communication procedure which had entered into force in 1970, not one of the 173 state parties to ICERD (as of December 2008) had invoked the inter-state communication procedure against any of the other states parties where systematic racial discrimination and ethnic cleansing had even led to genocide. Since the contractual dimension of the Covenant involves any state party to the Covenant being obligated to every other state party to comply with its human rights obligations under the Covenant, it is desirable that states parties to the ICESCR should sign and ratify the Optional Protocol and make the declaration contemplated in Article 10. But even if the inter-state procedure would not be (widely) used, its

mere existence provides useful tools for international diplomacy and leaves the door widely open for possible future developments in international human rights litigation. It is better to have it rather than to omit it.

The third type is an inquiry procedure. This can be invoked by the Committee on its own initiative under Article 11 of the Optional Protocol if the Committee 'receives reliable information indicating grave or systematic violations by a state party of any of the economic, social and cultural rights set forth in the Covenant'. There is no definition of what violations would be considered as 'grave or systematic' leaving this to the Committee to determine. The origin of such information is not specified, it is likely that in most cases this would be derived from NGOs or media reports. A similar procedure is provided for in Article 20 of the Convention against Torture (CAT)[246] and Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[247] provided the relevant committees have received indications of grave or systematic practice of torture or forms of discrimination against women.

The inquiry procedure involves, as a first step, an invitation of the state party concerned to submit observations with regard to the information concerned. In addition the Committee may designate one or more of its members to conduct a confidential inquiry, which may include a visit to a state's territory with the consent of the state party. The Committee then transmits the findings of an inquiry to the state party concerned together with any comments and recommendations. A state may then submit its observations to the Committee within six months of receiving the findings, and the Committee may, after consultations with the state party concerned, decide to include a summary account of the results of the proceedings in its annual report. A follow-up to the inquiry procedure is provided for under Article 12 of the Optional Protocol allowing the Committee to invite the state party concerned to inform it of the measures taken in response to such an inquiry. Thus, the success of the inquiry procedure would depend largely on the positive support and cooperation by states. It is likely that if this procedure is used, it would provide an opportunity to address grave or systematic violations of ESC rights. However, a state may at any time, withdraw its declaration under Article 11 of the Optional Protocol by notification to the Secretary-General. Accordingly the success of this procedure would depend on the willingness of states to cooperate.

In practice the inquiry procedure has been rarely used. This has been the case with respect to both CEDAW and CAT. By 2008, the CEDAW Committee had only completed one inquiry under Article 8 of the Optional Protocol concluded in July 2004 regarding the abduction, rape and murder of women in the Ciudad Juárez area of Chihuahua, Mexico.[248] The Committee against Torture had initiated inquiries on systematic practice of torture in seven states parties only and had published results of six procedures (against Turkey, Egypt, Peru, Sri Lanka, Mexico and Brazil).

5.3 *Significance and limitations of the Optional Protocol*

Although some states and some writers are generally sceptical as to the viability of the complaints mechanism in relation to ESC rights that are regarded, incorrectly, as 'non-justiciable',[249] the adoption of the Option Protocol to the ICESCR that allows complaints from both individuals and groups (which is likely to be progressively accepted by States, after all it would be 'optional') is a vital step ahead to enhance the effective protection of ESC rights at an international level. The complaints procedure under the Optional Protocol could contribute to the implementation by states parties of the obligations under the ICESCR in several ways including the following:

> First, concrete and tangible cases would be discussed by the Committee in a framework of inquiry that is otherwise absent under the abstract discussions that arise under the State reporting procedure. . .Second, the views of a treaty monitoring body on a complaint can be more specific than General Comments on how provisions should be understood [and applied in a specific context]. In this way, the views of the Committee on ESCR can contribute to clarifying the content of the obligations from the provisions of the Covenant. Third, the mere possibility that complaints might be brought before an international forum could encourage governments to ensure that more effective local remedies are made available.[250]

The fact that the protocol provides for the Committee to request a state concerned to take interim measures in 'exceptional circumstances' if a victim or victims of alleged violations faces possible 'irreparable damage' (Article 5) provides an opportunity to protect ESC rights before determination of a communication. This would in turn positively influence national legislation and administrative policy to give effect to these rights. It would stimulate the formulation of precise claims, attract political concerns of states and contribute to further clarity of the scope and content of the rights under the Covenant. Such a Protocol should be signed and 'ratified without delay'.[251] When it enters into force, it would strengthen the Covenant and if appropriate cases are brought before the Committee under the Optional Protocol, this would lead to the development of 'detailed jurisprudential scrutiny at the international level'.[252] In the words of one organisation in favour of the Optional Protocol:

> An OP [Optional Protocol] to the ICESCR allowing individuals and groups of individuals to submit claims against violations of economic, social and cultural rights and providing for an inquiry procedure would advance the principle that all human rights are universal, indivisible and interdependent. Additionally it would help overcome the common misconception that economic, social and cultural rights are not 'justiciable' – that their controversies cannot be decided by a court.[253]

As the former UN High commissioner for human rights stressed in March 2008, the establishment of a communication procedure under the ICESCR will truly be a 'milestone' in the history of universal human rights, sending a strong and unequivocal message about the equal value and importance of all human rights and putting to rest the notion that legal and quasi-judicial remedies are not relevant for the protection of ESC rights.[254] Indeed, to the extent that there was still a need for further clarification of the meaning of ESC rights, the early adoption of the Optional Protocol was more necessary.[255] For this reason, the adoption of the Optional Protocol, its signature and ratification by states parties to the ICESCR so that it enters into force without delay makes an important addition to the existing UN system protecting ESC rights.[256]

However, even if the Optional Protocol comes into force, such a Protocol has its own limitations. Two such limitations are significant. First, although the Protocol requires states to give 'due consideration to the views of the Committee' (Article 9(2)), the Committee's views, like those of the Human Rights Committee (HRC), are likely to be considered by states as non-binding and thus, states might simply ignore the Committee's recommendations. Yet there is no political body in the UN that feels responsible to supervise the implementation of treaty bodies' decisions by state parties leaving this to the relevant treaty bodies. Secondly, existing UN treaty monitoring bodies have not handled many cases compared to regional human rights courts which grant binding judgements. For example, while the full-time European Court of Human Rights (ECtHR) decides by a binding judgement on some 1000 individual complaints per year (in relation to 46 state parties to the ECHR), all existing UN bodies competent to deal with individual

communications together (the Human Rights Committee, Racial Discrimination Committee, the Committee against Torture and the Committee on the Elimination of Discrimination against Women) had by 2007 handed down little more than 500 non-binding decisions on the merits ('final views') within almost 30 years in relation to more than 100 state parties![257] Therefore, the ultimate goal should be to establish a World Court of Human Rights so that right-holders are able to hold duty bearers (states or non-state actors) accountable for not living up to their legally binding human rights obligations before a fully independent international human rights court with the power to render legally binding judgements and to grant adequate reparation to the victims of human rights violations.[258]

6. Conclusion

This article has considered how the concept of state obligations with respect to ESC rights has evolved since the UDHR was adopted in 1948. It has noted that states parties to the ICESCR are obliged to 'take steps by all appropriate means' to achieve 'progressively' the full realisation of ESC rights. As noted above, the goal of full realisation entails the obligation to respect, protect and fulfil ESC rights. The 'appropriate means' required to achieve this goal include the adoption of legislative measures to protect ESC rights in national law, as well as the adoption of non-legislative measures including the provision of judicial or administrative remedies for violations of ESC rights.[259] Although some states have claimed that a greater part of the ICESCR reflects statements of 'principles' and 'objectives', rather than justiciable legal obligations,[260] the CESCR has affirmed 'the principle of the interdependence and indivisibility of all human rights, and that all economic, social and cultural rights are justiciable'.[261]

The adoption of the Optional Protocol to the ICESCR by the UN General Assembly on 10 December 2008 on the 60th Anniversary of the UDHR is, therefore, a significant and welcome development that was long over-due. This largely brings ESC rights on the same footing and the same emphasis as civil and political rights in terms of enforcement at an international level. Indeed, there is nothing in the ICESCR to indicate that the rights recognised therein are merely 'principles' and 'objectives'. On the contrary, it is clear from Article 2(1) of the ICESCR that although the rights protected in the Covenant have to be realised 'progressively', some rights under the Covenant such as freedom from discrimination in the enjoyment of all ESC rights and core obligations give rise to obligations of immediate effect. As noted above, in any case, the CESCR has explained that Article 2 'imposes an obligation to move as expeditiously and effectively as possible' towards the Covenant's goal of full realisation of the substantive rights under the Covenant.[262]

It has also been established that states have to use the 'maximum available resources' to realise ESC rights and that this includes resources made available through international assistance and cooperation. Given that poverty limits the ability of the poor to enjoy their human rights, states that provide and receive international assistance should consider the reduction and eventual elimination of poverty as a priority consideration (by identifying and responding to the causes of poverty) since poverty is both a cause and a consequence of human rights violations. As argued above, international assistance and cooperation encompasses more than financial and technical assistance; it must also be understood as entailing responsibility of states to work actively towards equitable multilateral trading, investment and financial systems that are conducive to the realisation of ESC rights. This includes finding ways to allow developing countries to participate effectively in the relevant international organisations (such as the WTO)[263] as well as ways in which they can raise necessary resources to implement their human rights obligations. This may entail genuine special

and preferential treatment of developing states so as to provide such states with fairer and better access to developed states' markets.

The article has also argued that the human rights obligations of states under the ICESCR may extend to anyone within the power, effective control or authority of a state, as well as within an area over which that state exercises effective overall control. In this respect, human rights obligations with respect to ESC rights, though essentially territorial, are not necessarily territorially limited. There is a possibility of extra-territorial application, for example where a state is an occupying power; or where a state directly or indirectly causes harm to ESC rights extraterritorially. In addition it has been shown that the absence of a clause allowing derogation in times of public emergency in the ICESCR indicates that the Covenant's human rights obligations, particularly its core obligations, are non-derogable, they continue to exist in situations of conflict, emergency and natural disaster.

Finally, the article has argued that the adoption of the Optional Protocol to the ICESCR on the 60th anniversary of the UDHR is an important step ahead because it provides victims of violations of ESC rights who have exhausted all available domestic remedies with an avenue to get redress at the UN level. As such, it corrects the longstanding and the well-known imbalance in the protection of human rights in the UN system which marginalised ESC rights by providing a complaint system for civil and political rights but not for ESC rights. Thus, it is important for states parties to the ICESCR to consider signing and ratifying the Optional Protocol without delay. However, given the reluctance of many states to implement ESC rights as human rights, it may take quite some time before a substantial number of states sign and ratify the Optional Protocol. For example, the United Kingdom has remained sceptical about the practical benefits of the protocol, and argued that 'economic, social and cultural rights did not lend themselves to adjudication in the same way as civil and political rights'.[264] In absence of political will, ratification of the Optional Protocol remains an immediate challenge. Other future challenges are likely to include how to ensure the effective implementation of the request for interim measures and effective implementation of the non-legally binding views/recommendations of the Committee.

From the humble beginnings in Articles 22–7 of the UDHR in 1948, it has taken more than four long decades to bring ESC rights to the same level of enforcement accorded to civil and political rights under international human rights law. Notwithstanding the above challenges, it is hoped that, with the entry into force of the Optional Protocol, the enforcement of ESC rights would proceed more smoothly than ever before. In appropriate cases, the Committee on Economic, Social and Cultural Rights would be able to assess whether states parties to the ICESCR have complied with obligations to take steps to 'progressively realise' ESC rights to the 'maximum of available resources'. It would do so by considering whether implementation is reasonable or proportionate with respect to the attainment of the relevant rights, complies with human rights and democratic principles and whether it is subject to an adequate framework of monitoring and accountability. Undoubtedly, this would strengthen the international legal framework of accountability for violations of ESC rights and help to empower disadvantaged individuals and groups who suffer (grave or systematic) violations of ESC rights due to poverty, discrimination, neglect or unreasonable policies.

Notes

1. GA res. 217A (III), UN Doc. A/810 at 71 (1948).
2. (1948) 19 US *Department of State Bulletin* 751.
3. Both the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, entered into force 3 January 1976, and the International Covenant on Civil and

Political Rights (ICCPR), 999 UNTS 171, entered into force 23 March 1976, refer to the UDHR in their preambles recognising that 'in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'.

4. See *Measures taken within the United Nations in the field of Human Rights*, UN Doc. A/CONF.32/5, pp. 28–30.
5. The Committee was established by the United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985.
6. See n. 3 above.
7. See Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), (27 May 2008), 1–171. The General Comments of the CESCR are available at http://www2.ohchr.org/english/bodies/cescr/comments.htm (accessed February 20, 2010).
8. See e.g. M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Oxford: Hart Publishing, 2009), chapter 4; F. Coomans, ed., *Justiciability of Economic, and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia, 2006). For a collection of cases on ESC rights, see ESCR-Net, at http://www.escr-net.org/caselaw/caselaw_list.htm (accessed February 20, 2010).
9. See e.g. CESCR, *Concluding Observations: Poland*, UN Doc. C.12/POL/CO/5 (20 November 2009), para 9.
10. D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: OUP, 2007), 2.
11. See United Nations, *The Millennium Development Goals Report* (New York, 2009), 45, http://www.un.org/millenniumgoals/pdf/MDG%20Report%202009%20ENG.pdf (accessed February 20, 2010). The Report noted that approximately 2.5 billion people were without access to basic sanitation; despite health risks to their families and communities, 18% of the world's population – 1.2 billion people – practise open defecation; almost 1 billion did not have access to safe drinking water; 1.4 billion people lived on less than $1.25 a day, and 72 million children did not have access to education.
12. See ICESCR, n. 3 above, Arts, 6–15.
13. See ICCPR, n. 3 above.
14. See ECOSOC Resolution 1985/17, n. 5 above.
15. See the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Human Rights Council, Resolution 8/2, 28th Meeting, 18 June 2008, http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf (accessed February 20, 2010). See also UN Doc. A/63/435, Annex, (28 November 2008).
16. Ibid., Arts 1, 2, 10, and 11.
17. GA res. A/RES/63/117, (10 December 2008), UN Doc. A/63/435.
18. The first 26 states to sign the Optional Protocol were: Argentina, Azerbaijan, Belgium, Chile, Congo, Ecuador, El Salvador, Finland, Gabon, Ghana, Guatemala, Guinea-Bissau, Luxembourg, Madagascar, Mali, Montenegro, Netherlands, Portugal, Senegal, Slovakia, Slovenia, Solomon Islands, Spain, Togo, Ukraine, and Uruguay. By the end of February 2010, six more states (Armenia, Bolivia, Italy, Mongolia, Paraguay and Timor-Leste) had signed the Protocol.
19. See M. Dennis and D. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health', *American Journal of International Law* 98, no. 3 (2004): 462.
20. CETS No. 5, adopted on 4 November 1950.
21. For a comprehensive discussion of the ECHR see generally D.J. Harris et al., *Law of the European Convention on Human Rights*, 2nd ed. (Oxford: Oxford University Press, 2009).
22. *Airey* v. *Ireland* A 32 (1979); 2 EHRR 305, at para. 26.
23. C. Warbrick, 'Economic and Social Interests and the European Convention on Human Rights', in M. Baderin and R. McCorquodale, eds. *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, 2007), 241.
24. The European Social Charter was adopted in 1961 and revised in 1996. On the European Social Charter see generally D.J. Harris and J. Darcy, *European Social Charter*, 2nd ed. (Ardsley, NY: Transnational Publishers, 2001); and H. Cullen, 'The Collective Complaints

System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights', *Human Rights Law Review* 9, no. 1 (2009): 61–93.

25. O.A.S. Treaty Series No. 36, 1144 UNTS 123.
26. O.A.S. Treaty Series No. 69 (1988), entered into force 16 November 1999. On the justiciability of ESC rights in the Inter-American system see M.F. Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', *Human Rights Quarterly* 29, no. 2 (2007): 431–59.
27. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). For a discussion see Malcolm D. Evans and R. Murray, eds, *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2006*, 2nd ed. (Cambridge: Cambridge University Press, 2008); and F. Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights* (The Hague: Kluwer Law International, 2003).
28. See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (13 September 2000, entered into force 25 November 2005); and the African Youth Charter, n. 40 below.
29. African Charter, ibid., Art 45.
30. See M. Ssenyonjo, 'The Justiciability of Economic, Social and Cultural Rights', *East African Journal of Peace and Human Rights* 9, no. 1 (2003): 1–36.
31. Communication 241/2001, Sixteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2002–2003, Annex VII; (2003) *African Human Rights Law Reports* 96.
32. Communication 155/96, Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2001–2002, Annex V; (2001) *African Human Rights Law Reports* 60; (2003)10 IHRR 282. For a comment on this case se D. Shelton, 'Decision Regarding Communication 155/96: *Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*', *American Journal of International Law* 96, no. 4 (2002): 937.
33. Communication 155/96, ibid., para. 68.
34. Communication 241/2001, n. 31 above, at para. 84.
35. See S. Khoza, 'Promoting Economic, Social and Cultural Rights in Africa: The African Commission Holds a Seminar in Pretoria', *African Human Rights Law Journal* 4, no. 2 (2004): 334. See also 'Statement on Social, Economic and Cultural Rights in Africa, Pretoria, 17 September 2004', *African Human Rights Law Journal* 5, no. 1 (2005): 182.
36. OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (9 June 1998).
37. Ibid., Article 34(6) provides: 'At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol [Article 5(3) reads: The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol]. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration'.
38. See *In the Matter of Michelot Yugogombaye* v. *The Republic of Senegal*, Application No. 001/2008, http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/JUDGMENT._MICHELOT_YOGOGOMBAYE_VS._REPUBLIC_OF_SENEGAL_1_.pdf (accessed February 20, 2010).
39. See Resolution on the Impact of the Ongoing Global Financial Crisis on the Enjoyment of Social and Economic Rights in Africa, ACHPR/Res159(XLVI)09, adopted in Banjul by the African Commission on Human and Peoples' Rights, 25 November 2009, preamble para. 6.
40. See the African Youth Charter, adopted by the African Union Assembly in July 2006, preamble para. 5, http://www.africa-union.org/root/UA/Conferences/Mai/HRST/Charter%20english.pdf (accessed February 20, 2010).
41. See e.g. Supreme Court of India in the following cases: *Francis Coralie* v. *The Union Territory of Delhi* (1981) 1 SCC 608; *Francis Coralie* Mullin v. *The Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Olga Tellis* v. *Bombay Municipal Corp*., (1985) 3 SCC 545; *Shantistar Builders* v. *Narayan Khimalal Totame and Others* (1990) 1 SCC 520; and *Chamelli Singh and Other* v. *State of Uttar Pradesh JT* (1995) 9 SC 380; *Shanti Star Builders*

v. *Narayan K. Totame* (1990) 1 SCC 520; *Consumer Education and Research Centre (CERC)* v. *Union of India* (1995) 3 SCC 42.

42. See e.g. Constitutional Court of South Africa (CC) in the following cases: *Thiagraj Soobramoney* v. *Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); *Minister of Health and Others* v. *Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).
43. *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2001 (1) SA 46 (CC); *Lindiwe Mazibuko and Others* v. *City of Johannesburg and Others*, Case CCT 39/09 [2009] ZACC 28, http://www.saflii.org/za/cases/ZACC/2009/28.html (accessed February 20, 2010), paras 161–2. For a comment on the *Grootboom* case see C. Scott and P. Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise', *South African Journal on Human Right* 16 (2000): 206; P. De Vos, 'Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness', *South African Journal on Human Rights* 17 (2001): 258; S. Liebenberg, 'The Right to Social Assistance: The Implications of Grootboom for Policy Reform in South Africa', *South African Journal on Human Rights* 17, no. 2 (2001): 232; J. Sloth-Nielsen, 'The Child's Right to Social Services, The Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of Grootboom', *South African Journal on Human Right* 17, no. 2 (2001): 210; and R. Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited', *International Journal of Constitutional Law* 5, no. 3 (2007): 391–418.
44. CESCR, *General Comment 9: The Domestic Application of the Covenant*, UN Doc. E/C.12/1998/24 (3 December 1998), para. 9.
45. See CESCR, *Concluding Observations: United Kingdom*, UN Doc. E/C.12/1/Add.79, (5 June 2002), para. 24. See also CESCR, *Concluding Observations: Poland*, UN Doc. E/C.12/POL/CO/5 (20 November 2009), para. 9. For a survey of cases on ESC rights see e.g. Centre for Housing Rights and Evictions (COHRE), *Leading Cases on Economic, Social and Cultural Rights: Summaries*, Working Paper No. 3 (Geneva: COHRE, 2006); and International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008).
46. See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 262, entered into force 18 May 1954. Art. 2 reads: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' For the analysis see Harris et al., *Law of the European Convention on Human Rights*, 697–709.
47. M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995), 106–52.
48. H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals – Text and Materials*, 2nd ed. (Oxford: OUP, 2000), 275. For the analysis of Article 2(1) of the ICCPR, see D. Harris, 'The International Covenant on Civil and Political Rights and the United Kingdom: An Introduction', in *The International Covenant on Civil and Political Rights and United Kingdom Law*, ed. D. Harris and S. Joseph (Oxford: Clarendon Press, 1995), 1–8; M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl: N.P. Engel, 2005), 37–42.
49. M. Craven, 'The Justiciability of Economic, Social and Cultural Rights', in *Economic, Social and Cultural Rights: Their Implementation in United Kingdom Law*, ed. R. Burchill, D. Harris and A. Owers (Nottingham: University of Nottingham Human Rights Law Centre, 1999), 1–12, at 5 (footnotes omitted).
50. UN Doc. E/CN.4/1987/17, Annex; *Human Rights Quarterly* 9, no. 2 (1987): 122–35; and *Review of the International Commission of Jurists* 37 (1986): 43–55. The 29 participants who adopted the Limburg Principles came from various states and international organisations.
51. *Human Rights Quarterly* 20, no. 3 (1998): 691–704. The Maastricht Guidelines were adopted by a group of more than 30 experts. For a commentary on these guidelines see E. Dankwa, C. Flinterman and S. Leckie, 'Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly* 20, no. 3 (1998): 705–30.

52. See the introduction to the Limburg Principles, n. 50 above, para. iii.
53. See the introduction to the Maastricht Guidelines, n. 51 above.
54. See CESCR, *General Comments* at http://www2.ohchr.org/english/bodies/cescr/comments.htm; UN Doc. HRI/GEN/1/Rev.9 (Vol.I), (n. 7 above), 1–171.
55. Statements of the Committee are available at http://www2.ohchr.org/english/bodies/cescr/statements.htm (accessed February 20, 2010).
56. CESCR, *General Comment 3*, para. 2; Limburg Principles, n. 50 above, 16 and 21.
57. CESCR, *Concluding Observations: Iraq*, UN Doc. E/1998/22, (20 June 1998), paras 253 and 281.
58. See e.g., CESCR, *General Comment 3*, para. 3; CESCR, *General Comment 14*, para. 56: 'states should consider adopting a framework law to operationalise their right to health national strategy'. See also generally CESCR, *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights* (Art. 2(2), UN Doc. E/C.12/GC/20 (25 May 2009)); and A. Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"', *Human Rights Law Review* 9, no. 2 (2009): 225–55.
59. See e.g., CESCR, *Concluding Observations: Iraq*, UN Doc. E/C.12/1/Add.17 (12 December 1997), paras 13–14; CESCR, *Concluding Observations: Morocco*, UN Doc. E/C.12/1/Add.55 (1 December 2000), paras 34, 45 and 47; CESCR, *Concluding Observations: United Kingdom*, UN Doc. E/C.12/GBR/CO/5 (22 May 2009), para. 16; CESCR, *General Comment 5*, para. 16.
60. CESCR, *General Comment 20*, paras 27–35.
61. CESCR, *General Comment 20*, para. 27.
62. See, e.g., Committee on the Elimination of Racial Discrimination, *Ylimaz Dogman* v. *the Netherlands*, Communication 1/1984 (29 September 1988); African Commission, *Kevin Mgwanga Gunme et al.* v. *Cameroon*, Communication 266/2003, Twenty-sixth Annual Activity Report of the African Commission on Human and Peoples' Rights 2009, Annex 4.
63. CEDAW Committee, *Concluding Observations: Tanzania*, UN Doc. CEDAW//C/TZA/CO/6 (18 July 2008), paras 16, 17 and 55; CEDAW *Committee, Concluding Observations: Nigeria*. UN Doc. CEDAW/C/NGA/CO/6 (18 July 2008), paras 13,14 and 44.
64. CESCR, *General Comment 9*, para. 2.
65. CESCR, *Concluding Observations: United Kingdom*, UN Doc. E/C.12/GBR/CO/5 (22 May 2009), para. 13.
66. See K. Tomasevski, *The State of the Right to Education Worldwide – Free or Fee: 2006 Global Report* (Copenhagen: August 2006), http://www.katarinatomasevski.com/images/Global_Report.pdf (accessed February 20, 2010).
67. United Nations, *The Millennium Development Goals Report*, 15.
68. 10 U.N. GAOR, para. 9, UN Doc. A/2910/Add.6 (1955).
69. H.W. Fowler, *The Concise Oxford Dictionary of Current English* (Oxford: Oxford University Press, 1990), 954.
70. E.M. Kirkpatrick, ed., *Chambers Family Dictionary* (Edinburgh: Chambers, 1981), 613.
71. P. Hanks, ed., *The New Oxford Thesaurus of English* (Oxford: Oxford University Press, 2000), 754.
72. CESCR, *General Comment 3*, para. 9. Under the Convention on the Rights of the Child (CRC), which includes ESC rights and corresponding state obligations, there is no reference to the qualifying clause 'progressive realisation'. Thus, its obligations arise immediately, although implementation is qualified by the phrase 'within their means'.
73. P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9, no. 2 (1987): 156, at 172. See also H. Steiner, 'International Protection of Human Rights', in *International Law*, ed. M.D. Evans (Oxford,: Oxford University Press, 2003), 757–87.
74. See A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).
75. Human Rights Committee (HRC), *General Comment 32: Article 14 – Right to Equality before Courts and Tribunals and to a Fair Trial*, UN Doc. CCPR/C/GC/32 (23 August 2007), para. 9; *Golder* v. *United Kingdom*, Judgement of 21 February 1975, Series A, No. 18; (1979–1980) 1 EHRR 524, paras 34–5.
76. *Airey* v. *Ireland*, Judgement of 9 October 1979, Series A, No. 32; (1979–1980) 3 EHRR 592, para. 26.

77. HRC, *General Comment 32*, n. 75 above, para. 10.
78. CESCR, *General Comment 13*, para. 31. See also Commission on Human Rights Res. 2002/23, para. 4(b).
79. Under the ICESCR, Article 7(a)(i) 'The States Parties to the ICESCR recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with: 'Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work'.
80. For a discussion of minimum core obligations, see generally A. Chapman and S. Russel, eds, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia, 2002).
81. CESCR, *General Comment 3*, para. 10.
82. See for example CESCR, General Comment Nos 11 (para. 17); 13 (para. 57); 14 (para. 43); 15 (para. 37); 17 (para. 39); 18 (para. 31); and 19 (para. 59); 21 (para 55) respectively, www2.ohchr.org/english/bodies/cescr/comments.htm (accessed February 20, 2010).
83. CESCR, *General Comment Nos 14*, para. 47; and *15*, para. 40. See also CESCR, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2001/10 (10 May 2001), para. 18.
84. A key provision of the ICESCR, Article 11(1) captures the idea of progressive realisation when it recognizes a right to an adequate standard of living including adequate food, clothing and housing, 'and to the continuous improvement of living conditions'.
85. See e.g. CESCR, *General Comment 3*, para. 9; *General Comment 13*, para. 44; *General Comment 14*, para. 31; and *General Comment 15*, para. 18; Limburg Principles, 21. See also CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/C.12/2001/10, (4 May 2001), para. 18.
86. See e.g., CESCR, *General Comment 19* (2008), para. 43; *General Comment 18* (2005), para. 22; *General Comment 17* para. 28 (2005); *General Comment 16* (2005), paras 18–21; *General Comment 15* (2002), paras 20–9; *General Comment 14* (2000), para. 33; and *General Comment 13* (1999), para. 46. The General Comments of all UN human rights treaty bodies are compiled in the UN Doc. HRI/GEN/1/Rev. 7.
87. See A. Eide, *The Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23 (7 July 1987), para. 66; A. Eide, 'Economic and Social Rights', in *Human Rights: Concepts and Standards*, ed. J. Symonides (Aldershot: UNESCO Publishing, 2000), 109–74.
88. See e.g., *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria*, Communication 155/96, (2001) AHRLR 60, para. 44.
89. CESCR, *General Comment 14*, paras 57–8; P. Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights', *Human Rights Quarterly* 9, no. 3 (1987): 332–81, at 357–8; Maastricht Guidelines (1997), para. 8. For example, in the 2002 World Summit on Sustainable Development Plan of Implementation, states made a commitment to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.
90. CESCR, *Concluding Observations*: *Republic of Korea*, UN Doc. E/C.12/1/Add.59 (21 May 2001), para. 34.
91. CESCR, *General Comment 3*, para. 9.
92. CESCR, *General Comment 13*, para. 45; CESCR, *General Comment 14*, para. 32; CESCR, *General Comment 15*, para. 19; *General Comment 21*, para. 65.
93. The Maastricht Guidelines, 14(e).
94. CESCR, *Concluding Observations: Mauritius*, UN Doc. E/C.12/1994/8 (31 May 1994), para. 16.
95. See, e.g., CESCR, *General Comment 13: The Right to Education*, UN Doc. E/C.12/1999/10 (8 December 1999) paras 14, 20, and 45; CESCR, *Concluding Observations: United Kingdom*, UN Doc. E/C.12/1/Add.79 (5 June 2002) paras 22 and 41.
96. CESCR, *Concluding Observations: United Kingdom*, UN Doc. E/C.12/GBR/CO/5 (22 May 2009), para. 44.
97. United Nations, *The Millennium Development Goals Report*, 6–7.
98. UN Doc. E/C.12/2001/10, n. 85 above, para. 8.

99. ACHPR/Res159(XLVI)09, n. 39 above, preamble para. 8.
100. UN Doc. E/C. 12/2001/10, n. 85.
101. See CESCR, *General Comment 3*, para. 9; *General Comment 13*, para. 44; and *General Comment 14*, para. 31; Limburg Principles, para. 21.
102. A. Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly* 18, no. 1 (1996): 23–66, at 31; A. Chapman and S. Russell, 'Introduction', in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, ed. A. Chapman and S. Russell (Antwerp: Intersentia, 2002), 1–19, at 5.
103. See R. Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social and Cultural Rights', *Human Rights Quarterly* 16, no. 4 (1994): 693, at 694.
104. S. Joseph et al., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000), 7.
105. In 2004 the UN identified 50 states as the 'Least Developed Countries'. See UN LDCs List at http://www.un.org/special-rep/ohrlls/ldc/list.htm (accessed February 20, 2010); UNCTAD, *The Least Developed Countries Report 2004* (New York and Geneva: United Nations, 2004), 318.
106. See A. Eide, 'Economic and Social Rights', in *Human Rights: Concepts*; *Declaration on the Right to Development*, ed. J. Symonides (GAR 41/128 of 4 December 1986), Art. 2 stating in part: '1. The human being is a central subject of development and should be the active participant and beneficiary of the right to development. 2. All human beings have a responsibility for development, individually and collectively'.
107. Chapman and Russell, 'Introduction', 11.
108. Limburg Principles 23, 27 and 28.
109. See e.g., CESCR, *Concluding Observations: Nigeria*, UN Doc. E/1999/22, paras 97 and 119; *Mexico*, UN Doc. E/2000/22, paras 381 and 394; CESCR, *Concluding Observations: Cambodia*, UN Doc. (22 May 2009), para. 14; CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (20 November 2009) para. 11; CESCR, *Concluding Observations: Madagascar*, UN Doc. E/ C.12/MDG/CO/2 (20 November 2009), para. 11.
110. Limburg Principles 24.
111. CESCR, *General Comments 14, 15, 16* and *21*, paras 53, 45, 32 and 66 respectively. See also CESCR, *Statement*, n. 121 below, para. 11 stating that 'in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of states to take steps and adopt measures most suited to their specific circumstances'.
112. Limburg Principles, 28. See also CRC, *Concluding Observations: Rwanda*, UN Doc. CRC/C/15/Add.236 (4 June 2004), para. 18.
113. See A. Eide, 'The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights', in *Economic, Social and Cultural Rights: A Textbook*, ed. A. Eide, C. Krause and A. Rosas, 2nd ed. (Dordrecht: Martinus Nijhoff Publishers, 2001), 545–51, at 549.
114. Robertson, 'Measuring State Compliance', 700.
115. See e.g., CESCR, *Concluding Observations: Philippines*, UN Doc. E/C.12/1995/7 (7 June 1995), para. 21 stating that 'in terms of the availability of resources, the Committee notes with concern that a greater proportion of the national budget is devoted to military spending than to housing, agriculture and health combined'.
116. CESCR, *Concluding Observations: Senegal*, UN Doc. E/C.12/1/Add.62 (24 September 2001), para. 23.
117. CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (20 November 2009), para. 16.
118. Ibid. (emphasis added).
119. Eide rightly argued that: 'The "expenditure of death" should be turned into "expenditure of life" (public action to combat poverty)…'. See A. Eide, 'Economic, Social and Cultural Rights as Human Rights', in *Economic, Social and Cultural Rights: A Textbook*, ed. A. Eide, C. Krause and A. Rosas, 2nd ed. (Dordrecht: Martinus Nijhoff Publishers, 2001), 9–28, at 28.
120. Optional Protocol to the ICESCR, n. 15 above, Articles 1 and 2.

121. CESCR, *Statement: An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant*, UN Doc. E/C.12/2007/1 (10 May 2007), para. 9.
122. Ibid. para. 8.
123. Ibid., para. 13. See also the Optional Protocol to the ICESCR, n. 15 above, Art. 9.
124. For a discussion see D.M. Davis, 'Socioeconomic Rights: Do They Deliver the Goods?' *International Journal of Constitutional Law* 6, nos 3–4 (2008): 687–711.
125. CCT 8/02, [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (5 July 2002).
126. Ibid., para. 135. Section 27 reads: '(1) Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment'.
127. Ibid.
128. See ICESCR, Arts 2(1), 11, 15, 22, and 23. For a discussion of these articles see S.I. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerpen: Intersentia, 2006), 83–98. See also UN Charter, Arts 1, 55, and 56; UDHR, 22 and 28; Convention on the Rights of the Child, Arts 4, 7(2), 11(2), 17(b), 21(e), 22(2), 23(4), 24(4), 27(4), 28(3), 34 and 35; the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, GA Res. 61/106, Annex I, UN GAOR, 61st Sess., Supp. No. 49, at 65, UN Doc. A/61/49 (2006), entered into force 3 May 2008, Arts 4(2) and 32.
129. GA res. 41/128, annex, 41 UN GAOR Supp. (No. 53) at 186, UN Doc. A/41/53 (1986).
130. Vienna Declaration (1993), paras 9, 12 and 34.
131. Office of the UNHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002), para. 215, http://www.unhchr.ch/pdf/povertyfinal.pdf (accessed May 1, 2009).
132. P. Heller and S. Gupta, *Challenges in Expanding Development Assistance*, (Washington, DC: IMF, 2002), http://www.imf.org/external/pubs/ft/pdp/2002/pdp05.pdf (accessed May 1, 2009). For the designation of a state as 'developed' and 'developing' see United Nations, Standard Country or Area Codes for Statistical Use, Series M, No. 49, Rev. 4 (United Nations publication, Sales No. M.98.XVII.9), available in part at http://unstats.un.org/unsd/methods/m49/m49regin.htm (accessed February 20, 2010).
133. Alston and Quinn, 'The Nature and Scope of States Parties' Obligations', at 186–91.
134. M. Craven, 'The International Covenant on Economic, Social and Cultural Rights', in *An Introduction to the International Protection of Human Rights: A Text Book*, ed. R. Hanski and M. Suksi, 2nd ed. (Abo: Abo Akademi University, 1999), 101–23.
135. See Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Second Session, UN Doc. E/CN.4/2005/52 (10 February 2005), para. 76.
136. See 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, Addendum: Missions to the World Bank and the International Monetary Fund in Washington, D.C.' (20 October 2006) and Uganda UN Doc. A/HRC/7/11/Add.2 (5 March 2008), para. 133.
137. Ibid.
138. CESCR, UN Doc. E/C.12/2001/10, n. 85 above, para. 17.
139. CESCR, *General Comment 15*, para. 38 (emphasis added).
140. See e.g., CESCR, *Summary Record: Ireland*, UN Doc. E/C.12/1999/SR.14, para. 38.
141. See e.g., CESCR, *Summary Records: Japan*, UN Doc. E/C.12/2001/SR.42, para. 10; *Germany*, UN Doc. E/C.12/2001/SR.48, para. 37.
142. This was originally proposed by the Pearson Commission in 1968 and adopted in 1970. See GA res. 2226, 25 UN GAOR Supp. (No. 28), para. 43; UN Doc. A/8028 (1970); K. Tomasevski, *Development Aid and Human Rights Revisited* (London: Pinter, 1993), 32. This target was reaffirmed in the Copenhagen Declaration on Social Development 1995, Commitment 9, UN Doc. A/CONF.166/9 (14 March 1995), para. 1.
143. Report of the International Conference on Financing for Development Monterrey, Mexico, 18–22 March 2002, A/Conf.198/11.

144. These states are Denmark (1.06%); Netherlands (0.82%); Sweden (0.81%); Norway (0.80%) and Luxembourg (0.70%). See OECD, Press Release, 20 April 2001.
145. Examples are: Belgium (0.36%); Switzerland (0.34%); France (0.33%); Finland and UK (0.31%); Ireland (0.30); Japan, Germany and Australia (0.27%); New Zealand and Portugal (0.26); Canada and Austria (0.25); Spain (0.24%); Greece (0.19%); Italy (0.13%) and the United states (0.10%). Ibid. See also UN Wire, 'World Bank Head Blasts Rich Nations for Record on Aid', May 5, 2004.
146. CESCR, *Concluding Observations: Australia*, UN Doc. E/C.12/AUS/CO/4 (22 May 2009), para. 12.
147. See the MDG Gap Task Force Report 2008, *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals* (New York: United Nations, 2008), vii.
148. Ibid.
149. See e.g. CESCR, *Concluding Observations: Belgium*, UN Doc. E/C.12/1/Add.54 (2000), paras 16 and 30; *Finland*, E/C.12/1/Add.52 (2000), paras 13 and 23; *Ireland*, E/C.12/1/Add.77 (2002), para. 38; *Spain*, E/C.12/1/Add.99 (2004), para. 27. In May 2008 the CESCR recommended that France 'increase its official development assistance to 0.7 per cent of its GDP, as agreed by the Heads of state and Government at the International Conference on Financing for Development, held in Monterrey (Mexico) on 18–22 March 2002'. See CESCR, *Concluding Observations: France*, UN Doc. E/C.12/FRA/CO/3 (2008), para. 32. See also Committee on the Rights of the Child, *General Comment 5*, *General Measures of Implementation for the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/5 (3 October 2003), para. 61.
150. See e.g., CESCR, *Concluding Observations: Spain*, UN Doc. E/C.12/1/Add.99 (2004), paras 10 and 27; *France*, UN Doc. E/C.12/FRA/CO/3 (May 2008), para. 12.
151. CESCR, *Concluding Observations: Belgium*, UN Doc. E/C.12/1/Add.54, para. 30.
152. CESCR, *Concluding Observations: Ireland*, UN Doc. E/C.12/1/Add.77 (17 May 2002), para. 38. See also CESCR, *Concluding Observations: Korea*, UN Doc. E/C.12/KOR/CO/3 (20 November 2009), para. 7.
153. See e.g., CESCR, *Concluding Observations: Denmark*, UN Doc. E/C.12/1/Add.34, para. 11, commended for devoting 1% of GDP to international assistance and cooperation. See also CESCR, *Luxembourg*, UN Doc. E/C.12/1/Add.86, (2003), para. 6.
154. CESCR, *Concluding Observations: United Kingdom*, UN Doc. E/C.12/GBR/CO/5 (22 May 2009), para. 9.
155. UNDP, *The Human Development Report 2007/2008* (New York: Palgrave Macmillan, 2007), 25, http://hdr.undp.org/en/reports/global/hdr2007-2008/chapters/ (accessed February 20, 2010). The report notes that, 'There are still around 1 billion people living at the margins of survival on less than US$1 a day, with 2.6 billion – 40 percent of the world's population –living on less than US$2 a day.'
156. See UNCTAD, 'The Challenge of Financing Development in LDCs', 3rd United Nations Conference on the Least Developed Countries, Brussels, 14–20 May 2001, http://r0.unctad.org/conference/e-press_kit/financing.pdf (accessed February 20, 2010).
157. See *OECD Journal on Development* 7, no. 3 (2006): 38.
158. CESCR, *General Comment 2: International Technical Assistance Measures*, UN Doc. E/1990/23 (2 February 1990), para. 7.
159. CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. E/C.12/COD/CO/4 (20 November 2009), para. 16.
160. See Report of the Special Rapporteur, n. 136 above, para. 29.
161. See for example *The Rainbow Warrior (New Zealand* v. *France)* (Arbitration Tribunal) (1990) 82 ILR 449.
162. See e.g. CESCR, *Summary Records*: *Ireland* E/C.12/1999/SR.14, (2 February 2000), para. 38; *Germany*, UN Doc. E/C.12/2001/SR.48, (31 August 2001), para. 19 and *Finland*, UN Doc. E/C.12/2000/SR.61 (21 November 2000), para. 48.
163. See CESCR, *Summary Records*: *Finland*, UN Doc. E/C.12/2007/SR.11 (15 May 2007), para.11.
164. P. Hunt, 'Mission to the WTO', UN Doc. E/CN.4/2004/49/Add.1, para. 28.
165. Report of the High Commissioner, UN Doc. E/CN.4/2004/40, para. 40. For a summary of issues relating to the participation of developing countries in the multilateral trading system see S. Lester and B. Mercurio, *World Trade Law: Text, Materials and Commentary*

(Oxford: Hart Publishing, 2008) 779–817; M. Matsushita et al., *The World Trade Organisation: Law, Practice and Policy*, 2nd ed. (Oxford: Oxford University Press, 2006), 763–84.

166. J. Stiglitz, 'We Have Become Rich Countries of Poor People', *Financial Times*, September 7, 2006.
167. See Yong-Shik Lee, *Reclaiming Development in the World Trading System* (Cambridge: Cambridge University Press, 2006), chapter 1.
168. Oxfam, *Rigged Rules and Double Standards*: *Trade, Globalisation and the Fight against Poverty* (Oxford: Oxfam, 2002), 48. For a further discussion of the intricacies of foreign aid see generally R.C. Riddle, *Does Foreign Aid Really Work?* (Oxford: Oxford University Press, 2008).
169. For a detailed discussion of the term 'jurisdiction' in public international law see generally M. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 645–96; I. Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), 299–321; V. Lowe, 'Jurisdiction', in *International Law*, ed. M. Evans, 2nd ed. (Oxford: Oxford University Press, 2006), 335; and M. Akehurst, 'Jurisdiction in International Law', *British Year Book of International Law* 46 (1972–1973): 145.
170. Article 2(1) of the ICCPR provides: '1. Each state Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory* and *subject to its jurisdiction* the rights recognised in the present Covenant. . .'. For a comment see H. King, 'The Extraterritorial Human Rights Obligations of States', *Human Rights Law Review* 9, no. 4 (2009): 521–56.
171. 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980.
172. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 4, para. 112. For a discussion of this Advisory Opinion see S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justic*e (Oxford: Hart Publishing, 2007), 337–51.
173. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, (Merits), Judgement of 19 December 2005, 2006 45 ILM 271, para. 217.
174. See the European Court of Human Rights (ECtHR), *Drozd and Janousek* v. *France and Spain*, (Appl No. 12747/8), Judgement of 26 June 1992, (1992) 14 EHRR 745, para. 91; *Loizidou* v. *Turkey* (Preliminary Objections) (App. No. 15318/89) 1995 20 EHRR 99, para. 52 (confirmed in *Cyprus* v. *Turkey* (App. No. 25781/94) (2002) 35 EHRR 30, paras 76–81).
175. CESCR, *General Comment 1*: *Reporting by States Parties* (Third Session, 1989), UN Doc. E/1989/22, annex III at 87 (1989), para. 3 (emphasis added). See also CESCR, *General Comment 8*: *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, UN Doc. E/C.12/1997/8 (12 December 1997), para. 10; CESCR, *General Comment 14*: *The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (11 August 2000), para. 12(b); CESCR, *General Comment 15: The Right to Water*, UN Doc. E/C.12/2002/11 (20 January 2003), para. 12(c).
176. CESCR, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.27 (4 December 1998), para. 8. See also CESCR, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.90 (23 May 2003), paras 15 and 31.
177. CESCR, *Concluding Observations: Israel*, UN Doc. E/C.12/1/Add.27 (4 December 1998), para. 6.
178. CESCR, *General Comment 20*, para. 14 (emphasis added).
179. See Optional Protocol to the ICESCR, n. 15 above, Art. 2(1), emphasis added.
180. See generally R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', *The Modern Law Review* 7, no. 4 (2007): 598–625.
181. CESCR, *General Comment 19: The Right to Social Security*, UN Doc. E/C.12/GC/19 (4 February 2008), para. 53.
182. See CESCR, *Concluding Observations: Cameroon*, UN Doc. E/C.12/1/Add.40 (8 December 1999), para. 38.
183. ECtHR, *Bankovic v. Belgium and Others*, 12 December 2001, Decision, No. 52207/99, Reports 2001-XII, para. 59.
184. See McCorquodale and Simons, 'Responsibility Beyond Borders', at 624.
185. See J. Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc. A/HRC/4/35 (19 February 2007), para. 15.

186. Economic sanctions often 'cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work'. See CESCR, *General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, UN Doc. E/C.12/1997/8 (12 December 1997), para. 3.
187. CESCR, *General Comment 8*, ibid., para. 13 (emphasis added).
188. See CESCR, *Summary Record of the 49th Meeting: Germany* UN Doc. E/C.12/2001/SR.49 (30 August 2001), para. 48.
189. CESCR, *General Comment 19*, para. 54. See also CESCR, *General Comment 15*, para. 33.
190. See e.g. F. Cheru, *Effects of Structural Adjustment Policies on the Full Enjoyment of Human Rights*, UN Doc. E/CN.4/1999/50, para. 31.
191. The CESCR noted this in several Concluding Observations made in 1993–2004 when several states implemented SAPs. See e.g. Algeria, UN Doc. E/C.12/1/Add.71 (2001); Argentina, UN Doc. E/C.12/1/Add.38 (1999); Bulgaria, UN Doc. E/C.12/1/Add.37 (1999); Cameroon, UN Doc. E/C.12/1/Add.40 (1999); Colombia, UN Doc. E/C.12/1/Add.74 (2001); Ecuador, UN Doc. E/C.12/1/Add.100 (2004); Egypt, UN Doc. E/C.12/1/Add.44 (2000); El Salvador, UN Doc. E/C.12/1/Add.4 (1996); Honduras, UN Doc. E/C.12/1/Add.57 (2001); Republic of Korea, UN Doc. E/C.12/1/Add.59 (2001); Nepal, UN Doc. E/C.12/1/Add.66 (2001); Netherlands, UN Doc. E/C.12/1/Add.25 (1998); Nicaragua, UN Doc. E/C.12/1993/14 (1994); Romania, UN Doc. UN Doc. E/C.12/1994/4 (1994); Senegal, UN Doc. E/C.12/1/Add .62 (2001); Senegal, UN Doc. E/C.12/1993/18 (1993); Solomon Islands, UN Doc. E/C.12/1/Add .33 (1999); and Venezuela, UN Doc. E/C.12/1/Add .56 (2001).
192. D. McGoldrick, 'The Interface Between Public Emergency Powers and International Law', *International Journal of Constitutional Law* 2 (2004): 380 at 383.
193. For example Article 4(1) ICCPR states: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'. See Human Rights Committee, *General Comment 29: States of Emergency* (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001).
194. Ibid.
195. See HRC, *General Comment 29*, ibid., para. 1.
196. Such derogation clauses may be found in, e.g., ICCPR, Article 4(1), ECHR, Article 15, and the American Convention on Human Rights, Article 27.
197. See CESCR, *Concluding Observations: Democratic Republic of Congo*, UN Doc. C.12/COD/CO/4 (20 November 2009), para. 6.
198. In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda* v. *Nigeria*, Communications Nos 140/94, 141/94, 145/95, 13th Annual Activity Report (1999), para. 41 the African Commission stated: 'In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations [derogations] on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances…' This view was also stated in *Commission Nationale des Droits de l'Homme et des Libertes* v. *Chad*, Communication No. 74/92, 9th Annual Activity Report (1995–1996), para. 21; *Malawi African Association and Others* v. *Mauritania*, Communication Nos 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, 13th Annual Activity Report (1999–2000), Annex V, para. 84.
199. Alston and Quinn, 'The Nature and Scope of States Parties' Obligations', at 217.
200. Article 4 of the ICESCR provides that: 'The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. For a discussion see A. Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', *Human Rights Law Review* 9, no. 4 (2009): 557–601.
201. Alston and Quinn, 'The Nature and Scope of States Parties' Obligations', at 217.

202. CESCR, *General Comment 14*, para. 47.
203. CESCR, *General Comment 15*, para. 40.
204. ICJ Reports 2004, p. 136 (Advisory Opinion of 9 July 2004).
205. Ibid., para. 112, emphasis added.
206. Ibid., para. 106.
207. See Basic Principles for the Protection of Civilian Populations in Armed Conflicts, UN General Assembly Resolution 2675 (xxv), 9 December 1970, para. 1.
208. CESCR, *General Comment 15*, para. 22. For the interrelationship of human rights law and humanitarian law, the Committee noted the conclusions of the International Court of Justice in Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly), ICJ Reports (1996), p. 226, para. 25.
209. Ibid., citing Articles 54 and 56, Additional Protocol I to the Geneva Conventions (1977), Article 54, Additional Protocol II (1977), Articles 20 and 46 of the third Geneva Convention of 12 August 1949, and common Article 3 of the Geneva Conventions of 12 August 1949.
210. Under the ICCPR, the following rights are non-derogable: the right to life (Article 6); the prohibition of torture, inhuman and degrading treatment (Article 7); the prohibition of slavery and servitude (Article 8, paragraphs 1 and 2); the prohibition of detention for debt (Article 11); the prohibition of retroactive criminal laws (Article 15); the recognition of legal personality (Article 16); and freedom of thought, conscience, religion and belief (Article 18).
211. Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', at 593.
212. See E. Mottershaw, 'Economic, Social and Cultural Rights in Armed Conflict: International Human Rights Law and International Humanitarian Law', *The International Journal of Human Rights* 12, no. 3 (2008): 449–70.
213. UN Doc. E/C.12/2001/10, n. 85 above, para. 18.
214. The 1993 World Conference on Human Rights, UN Doc. A/CONF.157/PC/62/Add.5 (26 March, 1993), paras 32–8.
215. See CESCR, *Fact Sheet No. 16* (Rev. 1).
216. See for example CESCR, 'Towards an Optional Protocol to the ICESCR', UN Doc. E/1993/22; P Alston, 'Establishing a Right to Petition under the Covenant on Economic, Social and Cultural Rights', *Collected Courses of the Academy of European Law* IV, no. 2 (Dordrecht: Kluwer Law International, 1995), at 107; International Network for Economic, Social and Cultural Rights (ESCR-Net), *Resource Page on the Optional Protocol to the ICESCR*, http://www.escr-net.org/resources/resources_show.htm?doc_id=431553 (accessed February 20, 2010).
217. Report of the Fifth Session of the CESCR, UN Docs E/1991/23, para. 25 and E/CN.4/1997/105, para. 2. At the Committee's request, then Committee member Philip Alston reported four times on the Optional Protocol in UN Docs E/C.12/1991/WP.2 (25 October 1991); E/C.12/1992/WP.9 (27 November 1992); E/C.12/1994/12 (9 November 1994); E/C.12/1996/CRP.2/Add.1. For a background to the Optional Protocol see the International Commission of Jurists, *The Evolution of An Optional Protocol Complaints Mechanism Under The ICESCR* (Geneva: International Commission of Jurists, no date), http://www.icj.org/IMG/pdf/1.pdf (accessed February 20, 2010); C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *Human Rights Law Review* 8, no. 4 (2008): 617–46.
218. On 15 March 2006, the General Assembly adopted resolution A/RES/60/251 to establish the Human Rights Council. The Commission on Human Rights concluded its sixty-second and final session on 27 March 2006 before the Optional Protocol was adopted.
219. World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, Part II, para. 75.
220. See Contribution of the Committee on Economic, Social and Cultural Rights to the World Conference on Human Rights, 26 March 1993, UN Doc. A/CONF.157/PC/62/Add.5, Annex I at para. 18 and Annex II.
221. Draft Optional Protocol to the ICESCR, UN Doc. E/CN.4/1997/105. The draft provided for: (i) the justification for the Optional Protocol in the Preamble; (ii) the complaints to the competent supervisory body from individuals, and groups who are alleged victims or who act on behalf of alleged victims of violations of all rights in the Covenant contained in Arts 1–15; (iii) interim and follow-up measures; as well as (iv) a friendly settlement procedure. For comments on the draft, see UN Doc. E/CN.4/1998/84, and for the analysis, see K. Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights,*

Theoretical and Procedural Aspects (Antwerpen: Intersentia, 1999), at 199–342; Report on the workshop on the Justiciability of Economic, Social and Cultural Rights, with Particular Reference to the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/2001/62/Add.2 (22 March 2001).

222. See Reports of UNHCHR, Draft Optional Protocol to the ICESCR, UN Docs E/CN.4/2001/62/Add.2 (2001); E/CN.4/2000/49 (2000); E/CN.4/1997/105.
223. UN Docs E/CN.4/RES/1997/17; E/CN.4/RES/1998/33; E/CN.4/RES/1999/25; E/CN.4/RES/2000/9.
224. UN Docs E/CN.4/1998/84 and E/CN.4/2001/62.
225. Most of those who submitted (11 out of 14) were in favour. See for example Croatia, UN Doc. E/CN.4/1999/112; Cyprus, UN Doc. E/CN.4/1998/84; Czech Republic, UN Doc. E/CN.4/2000/49; Ecuador, UN Doc. E/CN.4/1998/84; Finland, UN Doc. E/CN.4/1999/112; Georgia and Germany, UN Doc. E/CN.4/2000/49; Lebanon and Lithuania, UN Doc. E/CN.4/2000/49; Mauritius, UN Doc. E/CN.4/2001/62; Mexico, UN Doc. E/CN.4/1999/112/Add.1; Norway and Portugal, UN Doc. E/CN.4/2001/62; Syrian Republic, UN Doc. E/CN.4/1998/84.
226. Notably Canada, UN Doc. E/CN.4/1998/84/Add.1 and Sweden, UN Doc. E/CN.4/1999/112/Add.1.
227. Dennis and Stewart, 'Justiciability of Economic, Social and Cultural Rights', at 514.
228. See *Report on the Workshop on the Justiciability of Economic, Social and Cultural Rights, with Particular Reference to the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/2001/62/Add.2 (22 March 2001).
229. Commission on Human Rights Res. 2001/30, 20 April 2001, UN Doc. E/CN.4/RES/2001/30, para. 8(c).
230. Report by Mr Hatem Kotrane, Independent Expert on the Question of a Draft Optional Protocol to the ICESCR, UN Doc. E/CN.4/2002/57 (12 February 2002); UN Doc. E/CN.4/2003/53 and Corr.1 and Corr.2 (13 January 2003).
231. Kotrane, ibid. UN Doc. E/CN.4/2003/53, para. 2.
232. Ibid., para. 3.
233. Kotrane, Corrigendum UN Doc. E/CN.4/2003/53/Corr.2, (7 April 2003), para. 76.
234. CHR Resolution 2003/18, paras 12–13. The open-ended working group met three times in 2004, 2005 and 2006. The first session was on 23 February–5 March 2004 but the working group 'did not reach consensus on whether to start drafting an Optional Protocol'. See UN Doc. E/CN.4/2004/44 (15 March 2004), para. 76. The second session of the working group took place on 10–20 January 2005. See UN Doc. E/CN.4/2005/52 (10 February 2005) and Analytical Paper by C. de Albuquerque, *Elements for an Optional Protocol to the ICESCR*, UN Doc. E/CN.4/2006/WG.23/2 (30 November 2005). The third session of the working group was held on 6–17 February 2006. See UN Doc. E/CN.4/2006/47 (14 March 2006).
235. Contained in UN Doc. A/HRC/8/WG.4/2 (24 December 2007).
236. Contained in UN Doc. A/HRC/8/WG.4/3 (25 March 2008).
237. See notes 15–18 above and accompanying text.
238. Ibid., Art. 18.
239. For an overview see generally Mahon, 'Progress at the Front'; L. Chenwi, 'Correcting the Historical Asymmetry Between Right: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', *African Human Rights Law Journal* 9, no. 1 (2009): 23–51; and C. de Albuquerque, 'Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights', *Human Rights Quarterly* 32, no. 1 (2010): 144–78.
240. These states were: Australia, Greece, India, Morocco, Russia and the US. See Report of the Fourth Session of the Open Ended Working Group, UN Doc. A/HRC/6/8 (30 August 2007), para. 36.
241. See Report of the Open Ended Working Group on an Optional Protocol to the ICESCR on its Fifth Session, UN Doc. A/HRC/8/7 (23 May 2008), paras 214 and 245.
242. See also HRC, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenan*t, adopted on 29 March 2004 (2187th meeting), UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 2.
243. See Joseph et al., *The International Covenant on Civil and Political Rights*, at 21.

244. See CAT, Art. 21; The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, below GA res. 45/158, annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990) entered into force 1 July, 2003, Art. 74; ICERD, Arts 11–13; and ICCPR, Arts 41–3.
245. GA res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 UNTS 195, entered into force 4 January 1969.
246. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987.
247. GA res. 54/4, annex, 54 UN GAOR Supp. (No. 49) at 5, UN Doc. A/54/49 (Vol. I) (2000), entered into force 22 December 2000.
248. See Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, UN Doc. CEDAW/C/2005/OP.8/MEXICO (27 January 2005).
249. As noted in section 2 justiciability of ESC rights is supported by a growing body of case law. See e.g. ESCR-Net, *Caselaw Database: A Database of Economic, Social and Cultural Rights Related Jurisprudence, Cases and Other Decisions*, http://www.escr-net.org/caselaw/ (accessed February 20, 2010); Tinta, 'Justiciability of Economic, Social, and Cultural Rights'.
250. ESCR-Net, ibid. See also P. Alston, 'Establishing a Right to Petition under the Covenant on Economic, Social and Cultural Rights', *Collected Courses of the Academy of European Law* 4, no. 2 (1995): at 107.
251. Maastricht Guidelines, 31.
252. See UN Doc. A/CONF.157/PC/62/Add.5, para. 24.
253. ESCR-Net, Benefits of an OP-ICESCR, http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=426659 (accessed February 2010).
254. See 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, Fifth Session, Salle XII, Palais des Nations, 31 March 2008, http://www.unhchr.ch/huricane/huricane.nsf/0/56935B5FB6A5B376C12574250039EAE0?opendocument (accessed February 20, 2010).
255. W. Vandenhole, 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure Complementing the International Covenant on Economic, Social and Cultural Rights', *Netherlands Quarterly of Human Rights* 21, no. 3 (2003): 459.
256. See Kotrane UN Doc. E/CN.4/2002/57, para. 56(a).
257. M. Nowak, 'The Need for a World Court of Human Rights', *Human Rights Law Review* 7, no. 1 (2007): 251–9 at 253.
258. Ibid., at 254.
259. See e.g. CESCR, *Concluding Observations: Kenya*, UN Doc. E/C.12/1993/6 (3 June 1993), para. 10, the Committee noted: 'with concern that the rights recognised by Kenya as a state party to the International Covenant on Economic, Social and Cultural Rights are neither contained in the constitution of Kenya nor in a separate bill of rights; nor do the provisions of the Covenant seem to have been incorporated into the municipal law of Kenya. Neither does there exist any institution or national machinery with responsibility for overseeing the implementation of human rights in the country'.
260. See e.g. the United Kingdom of Great Britain and Northern Ireland (3rd periodic report), UN Doc. E/1994/104/Add.11 (17 June 1996), para. 9.
261. CESCR, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland, United Kingdom of Great Britain and Northern Ireland – Dependent Territories*, UN Doc. E/C.12/1/Add.79, (5 June 2002), para. 24.
262. See e.g. CESCR, *General Comment 3*, para. 9; *General Comment 13*, para. 44; *General Comment 14*, para. 31; and *General Comment 15*, para. 18; Limburg Principles, 21.
263. D. McRae, 'Developing Countries and the Future of the WTO', *Journal of International Economic Law* 8, no. 3 (2005): 603–10.
264. See UN Doc. A/HRC/8/7 (23 May 2008), above n. 241, para. 246.

Notes on contributor

Manisuli Ssenyonjo LLM PhD (University of Nottingham) is a senior lecturer in law at Brunel Law School, Brunel University, London and an advocate of Uganda's Courts of Judicature. He has published extensively on human rights issues. He is the author of *Economic, Social and Cultural Rights in International Law* (Hart Publishing, 2009), co-editor of *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate, 2010) and editor of *Economic, Social and Cultural Rights* (Ashgate, 2011). He is currently working on a book on the African regional human rights system.