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## Monographie (Book)

### "Economic, Social and Cultural Rights as Human Rights"

De Schutter, Olivier

#### Abstract

This volume offers a selection of those major contributions which have shaped debate in the field of economic, social and cultural rights. The broad range of discussion includes: the nature of economic, social and cultural rights and the ability of courts to protect them; the effectiveness of non-judicial protective mechanisms at both the universal and the domestic level; ways of measuring whether states do enough to 'progressively realize' these rights; the impact of trade and investment liberalization, and of economic globalization generally, on the fulfilment of such rights; and the role of economic, social and cultural rights in development. The editor's original introduction provides an insight into the background to the debate and maps the alternative views which coexist in this highly contentious area.

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# Economic, Social and Cultural Rights as Human Rights

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HUMAN RIGHTS LAW

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# Introduction

*Olivier De Schutter*

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## Introduction

Sixty years elapsed between the vote in favor of the Universal Declaration of Human Rights in 1948 (United Nations General Assembly 1948) and the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, providing for a right to individual communications before the Committee on Economic, Social and Cultural Rights (United Nations General Assembly 2008). It is probably no exaggeration to state that, throughout this period, the history of international human rights was dominated by the controversy about the status of economic, social and cultural rights as human rights.

The foundations for the controversy were laid by the Declaration itself. Franklin Delano Roosevelt, who by then had been elected for his third term as President of the United States, had included 'freedom from want' in his famous 1941 'Four Freedoms' speech (Roseman 1969, vol. 9: 672), and he had outlined a vision of a 'Second Bill of Rights' in his 1944 State of the Union speech to the United States Congress (Sunstein 2004: ch. 1). Roosevelt proclaimed that 'necessitous men are not free men', and his experience in constructing successive versions of the New Deal had gradually converted him – he, the fiscally conservative presidential candidate for the 1932 presidential election – to the idea that social and economic rights were key ingredients for recovery from economic crisis (Brinkley 1995: ch. 4).

His convictions directly influenced the work of the UN delegates building the human rights regime for the post-World War order. The draft of the Universal Declaration of Human Rights was prepared by a Working Group created in 1947 by the newly established Commission on Human Rights, itself a committee of the UN Economic and Social Council. Faithful to the vision of her late husband, Eleanor Roosevelt, the Chair of the Working Group tasked with preparing the Declaration, insisted on economic and social rights being part of the catalogue of rights that the United Nations General Assembly would adopt (Glendon 2001). She had no difficulties convincing the other members of the drafting committee on the principle, for all members agreed on the importance of the economic and social rights that were considered for inclusion – the right to medical care, the right to education, the 'right and the duty to perform socially useful work', the right to good working conditions, the right to 'such public help as may be necessary to make it possible for him to support his family', the right to social security, the right to 'good food and housing and to live in surroundings that are pleasant and healthy', or the right to rest and leisure. Indeed, these rights were listed among the 48 items that the United Nations' Secretariat Human Rights Division, then headed by a 40-year-old Canadian professor at McGill University, John Humphrey, had identified as appearing most frequently in the human rights catalogues across the world, in the document that served as the first working document to the delegates of the Human Rights Commission.

Behind this apparent consensus, however, there were important disagreements on three issues related to the implementation of these economic and social rights. A first issue was whether the fulfillment of economic and social rights required an activist State to deliver the corresponding public programs, relying on a centralized planning of the use of resources. The Soviet Union and other countries of the socialist camp believed the role of the State should be recognized; in contrast, the United States and other Western democracies considered that each State should be left free to determine how, and by whom, such rights should be implemented, and they favored a formulation that would recognize the role of the market in social progress. A second issue resulted from the fears expressed by delegates from the developing countries – most notably Egypt and India – that the poorer nations could only fulfill the promises of the Declaration gradually, they argued that they could not be expected to match the standards set by industrialized nations all at once. A third and related issue concerned the role of international cooperation, and whether rich countries had any duty to support poor countries' efforts in realizing rights to education, housing or food.

In the immediate post-World War II context, these questions were fast emerging as central both to the competition between two ideological systems, the socialist 'East' and the free market 'West', and to the debates on decolonization. The Cold War was beginning as the Universal Declaration of Human Rights was being drafted, and the struggle for political independence and economic emancipation of developing nations was being launched, at a time when colonial empires were already being perceived as anachronistic. It is fortunate that, at an early stage in the work of the Commission on Human Rights, three separate working groups were established, one to work on a draft (non-binding) declaration, under the chairmanship of Eleanor Roosevelt and with the French delegate René Cassin as rapporteur, and the two others to work, respectively, on the text of a convention (binding for the States ratifying it) and on measures of implementation: as illustrated by the fact that it took 18 years for two covenants to be adopted, implementing in treaty form the bold language of the Declaration, no visible progress could have been achieved in the early years if all these issues had been dealt with together, as part of a single package (Glendon 2001: 87).

Instead, agreement was found on a political statement of principle, that the delegates to the UN General Assembly understood as producing no binding legal effects. The Universal Declaration of Human Rights was adopted just before midnight on 10 December 1948 by 48 votes in favor, eight abstentions, and no vote against. The abstentions came from the Soviet Union and its satellites, South Africa, and Saudi Arabia. The Declaration includes a range of economic, social and cultural rights in articles 22 to 27. But the first of these provisions, concerning the right to social security, includes language that applies generally to all the economic, social and cultural rights recognized. It states:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The reference to the 'organization and resources of each State' encapsulated two separate ideas in one single, compromise formula. The expression was meant to convey the idea that the realization of economic, social and cultural rights was without prejudice regarding the means chosen by each State to this effect, and that States had a choice, in particular, between systems

that rely largely on centralized planning by the State, and systems that recognize a greater role for the market. However, it also included the idea that, for the implementation of economic, social and cultural rights, States require resources, and that their ability to guarantee such rights depends on the degree of development achieved. In addition, consistent with the development agenda that accompanied the establishment of the post-war Bretton Woods order, article 28 of the Declaration referred to the need to move towards an international order that enables countries' efforts to implement economic, social and cultural rights at home, stating that: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

Though the Universal Declaration of Human Rights laid the foundations, it was not until the 1960s that a proper United Nations human rights regime emerged, following the adoption of the first binding human rights treaties implementing in legal form the promise of the Declaration. This gradual codification process had a paradoxical impact on the separation between civil and political rights and economic, social and cultural rights. The first human rights treaty to be adopted, the International Convention on the Elimination of All Forms of Racial Discrimination, was adopted by the UN General Assembly on 21 December 1965 (United Nations General Assembly 1965). It included an undertaking 'to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law', notably in the enjoyment of a range of economic, social and cultural rights. The inclusion of economic, social and cultural rights in the treaty acknowledged that, for the protection against discrimination to be effective, it had to extend to the areas of life – access to work, education, housing or healthcare – that are considered most essential for social integration. The Convention also illustrated how the requirement of non-discrimination can constitute a bridge between different categories of rights, and a tool through which economic, social and cultural rights can be enforced by independent monitoring bodies.

By then, however, the idea that economic, social and cultural rights are different in nature from civil and political rights had become a cliché, both in the academic literature and in diplomatic circles. Already in 1952, at the request of the Economic and Social Council (itself acting in answer to concerns expressed by its Commission on Human Rights), the United Nations General Assembly had adopted a resolution in which it requested that the Universal Declaration of Human Rights be implemented through two separate covenants, each corresponding to one category of rights (United Nations General Assembly 1952). Both sets of rights, the diplomats agreed, were of equal importance, and all rights were to be treated as interdependent and indivisible. Nonetheless, the dominant view was that the two categories of rights were sufficiently distinct from one another to warrant separate treatment, and were to be implemented through different legal techniques (De Schutter 2010a: 16–17; Eide 2001). Civil and political rights, the negotiators believed, required essentially from States that they abstain from taking measures that could lead to these rights being infringed: such (primarily negative) obligations were determinate enough, and inexpensive enough, to justify monitoring by independent experts, and the imposition of a requirement that each State guarantees access to effective remedies, preferably of a judicial nature, against instances of violation. In contrast, economic, social and cultural rights were seen as imposing positive obligations on States, requiring both the adoption of legal measures and budgetary commitments, and such rights could only be implemented progressively, depending on the resources available to each State



as well as on the level of international support received (see for instance Cranston 1964: 54; Alston and Quinn 1987: 181–3).

The result was that the International Covenant on Civil and Political Rights established the Human Rights Committee, a body of independent experts sitting in their individual capacity to assess the reports submitted by States on the implementation of the Covenant under their jurisdiction, and an Optional Protocol to the Covenant authorized the Committee to receive individual communications and express views on information thus received (International Covenant on Civil and Political Rights 1966); in contrast, no such monitoring mechanism was included in the International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights 1966): the reports periodically submitted by States under this instrument were addressed to the Economic and Social Council, a body composed of diplomats which was neither equipped, nor in fact willing, to provide any significant follow-up. In addition, the latter covenant included a provision, article 2, para. 1, essentially inspired by article 22 of the Universal Declaration of Human Rights, affirming the specific nature of economic, social and cultural rights in order to take into account the concerns expressed by developing countries. The provision introduced the notion of ‘progressive realization’ and noted the role of international assistance and cooperation in supporting each country’s efforts towards the fulfillment of these rights. It read:

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

Both the civil and political rights and the economic, social and cultural rights covenants were adopted on the same day, on 16 December 1966, and they entered into force almost simultaneously ten years later; but the damage caused to the understanding of human rights and to how they relate to States’ duties took half a century to repair.

## I. The nature of economic, social and cultural rights

The essays collected in this volume are a chronicle of the efforts that developed over the past two generations to bridge the gap between the two categories of rights. The battle was fought on different fronts. The controversies initially centered on the nature of civil and political rights, on the one hand, economic, social and cultural rights, on the other hand, and whether the two families of rights could be assimilated to one another. The dispute first unfolded in the 1970s and 1980s. Together with the Belgian jurist, Mark Bossuyt (Bossuyt 1978), the Dutch lawyer E.W. Vierdag from the University of Amsterdam was among the most vocal opponents of the assimilation of both sets of rights. Vierdag’s article reproduced in this volume (Chapter 1) is significant not only for the summary of the arguments it provides, that helps us understand the widespread skepticism that existed then towards economic, social and cultural rights as human rights, but also for the time at which it appeared: by 1978 the two 1966 covenants had only recently entered into force, forming together with the Universal Declaration of Human Rights the ‘International Bill of Rights’, and the national authorities – including the courts – were

confronted for the first time with the question of which duties were imposed under these respective instruments. The position of Vierdag was that the ‘rights’ listed in the Economic, Social and Cultural Rights Covenant were neither enforceable in a court of law, nor sufficiently well-defined – though it was unclear whether the lack of definability of economic and social rights was considered a cause of their lack of justiciability, or rather a consequence of courts being denied the power to adjudicate such rights. Though contested by some (in particular van Hoof 1984), that position was consistent with the prevailing opinion at the time: it was, to a large extent, conventional wisdom. It was said by a law and development scholar that, though the International Covenant on Economic, Social and Cultural Rights ‘speaks in the language of rights, [it] refers to the realities of programs’ (Trubek 1984: 231); Brownlie, a leading international law scholar, described the Covenant as ‘programmatic and promotional’ in the third edition of his *Principles of Public International Law*, published in 1979 (Brownlie 1979: 572–3).

In parallel, however, efforts developed to overcome the apparent vagueness of the International Covenant on Economic, Social and Cultural Rights, and to bridge the gap between the two sets of rights. A first major doctrinal contribution in this direction was the introduction by Asbjørn Eide, in the early 1980s, of a threefold typology of States’ duties corresponding to the rights of the individual. By the late 1970s Eide had come to the conclusion that an effective guarantee of human rights required that the individual be protected from interference by the State in the exercise of certain freedoms; that the State protect the individual from interference by other actors, whose conduct the State is in a position to control; and that the State provide certain public goods that would be undersupplied if their provision were left to market mechanisms. Eide presented this tripartite typology of obligations in 1981 at a United Nations Seminar (Eide 1984); at about the same time, a similar framework for the definition of States’ obligations was being put forward separately by Henry Shue, a political philosopher at Princeton, in a book dedicated to the role of human rights in US foreign policy (Shue 1980).

The tripartite typology of States’ obligations gradually gained broad acceptance, first among scholars working on the right to food, and then in the broader area of economic, social and cultural rights. It was imported into the UN system by Eide himself, after he joined in 1981 the Sub-Commission on the Promotion and Protection of Human Rights (then called the Sub-Commission on Prevention of Discrimination and Protection of Minorities), as the distinction was elaborated upon in a series of reports he prepared on the right to food at the request of the Sub-Commission (United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1983, 1987 and 1999). The mental view of jurists working on economic, social and cultural rights gradually came to resemble a three-pillar structure, with each category of the State’s obligations calling for specific types of reasoning and relying on different legal techniques:

Obligation to respect	Obligation to protect	Obligation to fulfill
Obligation not to interfere with existing levels of enjoyment	Obligation to intervene in order to control the conduct of non-State actors	Obligation to take proactive steps to move towards the full realization of the right
Non-discrimination		

The establishment in 1986 of the Committee on Economic, Social and Cultural Rights provided a further impetus to these efforts aimed at clarifying the normative content of the rights listed in the International Covenant on Economic, Social and Cultural Rights. Ten years after the Covenant entered into force, the Economic and Social Council had finally decided to create a body of 18 independent experts, modeled on the Human Rights Committee, after it came to realize that it would be unable to monitor the implementation of the Covenant on its own. The newly established Committee was facing the considerable challenge of having to clarify the content of the Covenant on Economic, Social and Cultural Rights. The expectations were high, and there were very few precedents it could build upon (Alston 1987).

An expert meeting organized in Maastricht in 1986 provided the opportunity to further advance the understanding of the legal significance of economic, social and cultural rights, beyond the right to food on which most efforts had been converging until then. The timing was propitious: it was held after the members of the Committee had been appointed (and four of them were present in Maastricht), but before they held their first session, and at a time when, although the significance of the Covenant on Economic, Social and Cultural Rights was clearly recognized, it listed rights that were still largely underexplored by human rights scholars and underenforced by courts.

The Limburg Principles that were adopted at the Maastricht meeting marked an important advance in the understanding of economic, social and cultural rights (Dankwa and Flinterman 1988), and their influence further increased after they were officially transmitted to the Commission on Human Rights at the request of the Netherlands (see UN document E/CN.4/1987/17); but it was not until ten years later, when another expert meeting convened in Maastricht between 22 and 26 January 1997, that the tripartite framework of States' obligations was taken as a departure point. In contrast to the Limburg Principles, which provided a set of examples of how economic and social rights could be violated, and qualified all the obligations imposed on States by a reasonableness criterion (see paragraph 71), the document adopted at that second meeting, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (later reissued as UN document E/C.12/2000/13), offered guidance across the full range of rights listed in the Covenant (see Chapter 2 in this volume). The Maastricht Guidelines stated in paragraph 6:

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to *respect* requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to *protect* requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

By the mid-1990s, the advantages of such an approach were increasingly recognized. Focusing on the obligations of the State rather than simply on the rights of the individual makes it possible to move economic and social rights away from their initially 'programmatic' nature to becoming enforceable rights, determinate enough for a 'violations' approach to become plausible.

However, useful though as it is as an analytical tool, the respect-protect-fulfill typology of States' obligations does not provide all the answers. For the typology remains essentially static. It does clarify what conduct may be expected from States given a certain level of enjoyment of the right to food, the right to education, or the right to housing. It is consistent with the idea, put forth already in the late 1970s, that at a minimum, a good faith interpretation of the Covenant requires that States move towards the realization of the economic and social rights that it enumerates, which renders highly suspect any deliberately retrogressive steps. Nevertheless, the typology is unhelpful, in and of itself, in determining how much effort the State must make in order to gradually improve the level of enjoyment of the right in question, or the speed at which the State must go about 'progressively realizing' the right. Moreover, it presents a major disadvantage: in low-income countries, where the rights of the Covenant are only realized to a weak degree, it clearly cannot be enough to demand from the government that it 'respects' existing levels of enjoyment of the right, and that it 'protects' such enjoyment by controlling private actors, while leaving it to the State's appreciation how much more it should do beyond that. The respect-protect-fulfill typology, in sum, provides a grid of analysis; but it remains insufficient to provide a benchmark.

## II. The question of justiciability

The apparent vagueness of economic and social rights still constitutes the main obstacle to their enforcement by courts or quasi-judicial mechanisms. The contributions collected in Part II of this volume provide a summary of the debate on this issue, focusing successively on justiciability at the domestic level (Chapters 3 to 5) and on enforcement by the Committee on Economic, Social and Cultural Rights at the international level (Chapters 6 and 7). There is general agreement that effective remedies both at national and at international level are indispensable for the safeguard of the human rights of the individual, and the progress made in this area over the past few years is impressive.

At the domestic level a rich jurisprudence in the area of economic and social rights is emerging. This is encouraged by the Committee on Economic, Social and Cultural Rights. In a General Comment it adopted in 1998, the Committee made clear its expectation that the States parties to the Covenant should give effect to this instrument in the domestic legal order: it stated that 'the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place' (CESR (1998a): para. 2). Though there exists a notable difference in this regard between the International Covenant on Civil and Political Rights, which requires from States that they 'develop the possibilities of judicial remedy' (article 2(3)(b)), and the International Covenant on Economic, Social and Cultural Rights, which is silent on this issue, the Committee takes the view that the requirement to ensure access to effective remedies follows from the duty of States to move towards the full realization of the rights recognized in the Covenant 'by all appropriate means' (article 2(1)): a State that would entirely exclude the competence of courts to adjudicate claims relying on the Covenant, the Committee suggests, would not only be seeking to justify a failure to comply with its international obligations by invoking provisions from its domestic legal order – which obviously cannot be tolerated, as confirmed by article

27 of the Vienna Convention on the Law of Treaties (1969) – it would also be failing to act in the spirit of the Universal Declaration of Human Rights, article 8 of which refers to effective remedies for violations of human rights without making any distinction between different categories of rights.

In Chapter 3 of this volume Matthew Craven describes the different channels through which such a jurisprudence may emerge from the penetration of the Covenant on Economic, Social and Cultural Rights into the domestic legal orders, whether through the direct application of the Covenant's norms or through other means. Remarkably, courts in the global South – most notably, the Supreme Court of India, the Constitutional Court of South Africa, and various courts in Latin America – have been leading in this process, typically on the basis of domestic constitutional provisions rather than relying on international human rights law (on this development, see among others, in chronological order, Matscher 1991; Liebenberg 2001; Scheinin 2001; Ramcharan 2005; Coomans 2006; Nolan et al. 2007; International Commission of Jurists 2008; Gauri and Brinks 2008; Langford 2009b).

Malcolm Langford's contribution in Chapter 4 describes the background conditions that enabled this development, and the litigation strategies that were used by claimants in these cases. He shows that the enforcement of economic and social rights by courts depends on a variety of factors, both legal (such as adequate protection of these rights under the constitution or by direct application of human rights treaties, effective access to justice for victims and the provision of legal aid, as well as the availability of public interest litigation allowing groups to file claims on behalf of victims) and extra-legal (including the existence of social movements exercising pressure 'from below'). The study by David Landau, also reproduced below as Chapter 5, offers a different and complementary perspective, inspired especially by the role of the Colombian Constitutional Court, but moving beyond that court to provide a comparative perspective – and one skeptical about the ability for courts to deliver social change that truly benefits the poor and the marginalized (see also, expressing a similar skepticism, Rosenberg 2008).

At regional and universal levels, courts or quasi-judicial bodies have increasingly been recognized as competent to assess compliance in certain situations with the duties of the State in the area of economic and social rights. Developments in the Council of Europe and in the Inter-American human rights system are particularly noteworthy. Since the 1960s a body of independent experts is tasked with monitoring compliance with the European Social Charter, the Council of Europe instrument that is the counterpart, for economic and social rights, to the European Convention on Human Rights (European Social Charter 1961). For thirty years, this body – now called the European Committee on Social Rights (ECSR) – adopted 'Conclusions' on reports that States submitted periodically. These Conclusions were then reviewed by a Committee of governmental delegates (the 'Governmental Committee') before reaching the level of the Committee of Ministers of the Council of Europe; partly because of this, and partly because of the relative obscurity with which the States' reports were examined, the Conclusions were largely ignored even by lawyers specializing in the issues covered by the Charter. In 1995, however, the ECSR was accorded the additional competence to receive collective complaints, filed by non-governmental organizations or unions alleging that a particular legislation or policy is in violation of the concerned State's obligations under the European Social Charter (Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1995). At about the same time, the original version of the European Social Charter

was improved upon: the Revised European Social Charter was adopted in 1996, building on the text of 1961 but expanding the list of guarantees and improving the control mechanism (Revised European Social Charter 1996). A rich body of case-law has since emerged from the European Committee on Social Rights, that could serve as a source of inspiration for domestic courts in Council of Europe member States and beyond (De Schutter and Sant'Ana 2012; Benelhocine 2012).

This development had been preceded, in the framework of the American Convention on Human Rights, by the adoption in 1988 of the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights (1988). This Additional Protocol, also referred to as the 'San Salvador Protocol', establishes a reporting system for the implementation of a range of economic and social rights based on States' reports, and allows the Inter-American Commission and Court of Human Rights to receive individual petitions alleging violations of trade union rights or the right to education (respectively protected under articles 8(1) and 13 of the Protocol) (see Melish 2002).

This evolution was further strengthened at a universal level by the agreement on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol was adopted by the United Nations General Assembly, symbolically, on 10 December 2008, sixty years after the Universal Declaration of Human Rights. It was the result of a long battle that really began in the course of the preparation of the World Conference on Human Rights held in Vienna between 14 and 25 June 1993. The World Conference on Human Rights stated its support for the elaboration of such a protocol, encouraging 'the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights' (Vienna Declaration and Programme of Action 1993: para. 75). The contributions of Michael Dennis and David Stewart and of Beth Simmons, that appear respectively as chapters 6 and 7 of this volume, are representative of a range of views that have been expressed on the usefulness of attributing this new competence to the Committee on Economic, Social and Cultural Rights: though most authors have taken the position that, thanks to the adoption of the Optional Protocol, the Committee henceforth would be in a position to define with greater clarity the implications of the rights of the Covenant, thus overcoming the suspicion that such rights are too vague to form the basis of monitoring by independent experts (Alston 1996; Coomans and van Hoof 1995; Vandenhoele 2003; De Schutter 2006; Mahon 2008; Langford 2009a; de Albuquerque 2010), some, like Dennis and Stewart or, in another vein, Tomuschat (2005), have denounced this as an illusion: the enforcement of economic and social rights at international level, according to these authors, should not be seen as a substitute for development policies that will only produce results in the long term.

It is of course true that uncertainties remain as to the precise significance of some of the rights listed in the Covenant, particularly in the context of individual communications where the framing may be different from that used in State reporting procedures. Nonetheless, as remarked by Philip Alston in the plea he presented in 1995 for a communications procedure before the Committee on Economic, Social and Cultural Rights, we should avoid being caught into a 'vicious cycle' in which 'no innovative procedures are adopted on the grounds that the rights remain normatively under-developed and no normative development occurs because new procedures are studiously avoided' (Alston 1996: 51–2). It is this vicious cycle that may now be broken. Instead, as Langford notes in Chapter 4 of this volume, a virtuous cycle is emerging,

in which advances in the jurisprudence on economic and social rights before domestic courts make the development of international monitoring mechanisms to enforce these rights increasingly plausible. This in turn should gradually allow the emergence of tools that national courts may use to adjudicate claims based on the rights to adequate housing, to food, to healthcare, or to education. Also, as regards the argument that the recognition of rights to health, to education or to housing is not a substitute for development policies that seek to create these outcomes, it is clear that we are not facing mutually exclusive alternatives – quite the contrary. As discussed further in the introduction and in Part V of this volume, economic and social rights can support development, and ensure that policies that seek to overcome deprivation in whole populations will be better understood, better implemented, and ultimately more effective.

Unfortunately, these responses are not sufficient. In a way, they still beg the question of justiciability: even if we agree that the emergence of a jurisprudence on economic and social rights shall, in time, concretize sufficiently rights such as the right to food or the right to housing, which tools should allow such jurisprudence to emerge? How are jurists to use these rights in their practice? The question of the *indeterminate* character of many so-called ‘social’ rights is central to this discussion. According to the argument of indeterminacy, such rights are not sufficiently well defined to lend themselves easily to adjudication, and the judge would of necessity act arbitrarily – making the law rather than applying it – by seeking to clarify those rights. In this volume the argument is made, for instance, by Vierdag in Chapter 1, and by Dennis and Stewart in their joint contribution that appears as Chapter 6. The specific formulation differs slightly, depending on whether it is formulated in the domestic setting (as in Vierdag’s paper) or whether it addresses international monitoring (as where Dennis and Stewart question the attribution to the Committee on Economic, Social and Cultural Rights of a competence to receive individual communications). By adjudicating social and economic rights, domestic jurisdictions would be exceeding their powers under a classical understanding of separation of powers: courts should leave it to the Legislature or to the Executive to implement social and economic rights, since they have no legitimacy to make choices concerning social policy. Also, because of such indeterminacy, it would run counter to the State’s sovereignty for a body such as the Committee on Economic, Social and Cultural Rights, to fill in the gaps of the Covenant, and to draw concrete conclusions – and real obligations – from its vague provisions.

The two other arguments are, in a sense, derivative: once the argument of indeterminacy is retained, they seem to follow by implication. One is the argument of *democratic self-determination*: courts or expert bodies would not have the required legitimacy to second-guess choices made by democratically elected assemblies, or (where the same argument is expressed to oppose the role of international supervisory bodies) following decision-making processes that are internal to the State.

A third and final argument against the adjudication of economic and social rights, again linked to the supposed indeterminacy of these rights, is the argument of *competence*. Courts, it is said, are ill-equipped to deal with complex, society-wide issues, and the adjudicatory setting is inappropriate for the resolution of problems of social policy: because the enforcement of economic and social rights is not a matter of legal interpretation as much as a matter of social policy, it is another type of expertise that we need, that of health specialists or urban planners, not that of judges or human rights experts.

These arguments carry a particular weight once we consider the ‘multipolarity problem’: courts or quasi-judicial bodies generally decide on a case-by-case basis, focusing on the

interests of the individual litigant, which by definition would make them ill-suited as fora to decide on society-wide issues – such as how to rank priorities in spending between education, health, public housing, or defense, or whether it is more important to save the life of one individual requiring expensive, life-saving medical treatment or to free funds for primary healthcare services to reach more people in impoverished areas (Holmes and Sunstein 1999: 95).

The answers to the skeptics’ views about the adjudication of economic and social rights fall in three broad categories. One answer is straightforward. It is to reaffirm that the adjudication of claims based on economic and social rights is quintessentially a task of legal interpretation, that jurists – courts and independent human rights experts – are in fact best equipped to perform. That is, in essence, the approach followed by the scholars who have proposed various methodologies to give ‘concrete meaning’ to economic and social rights, in order to overcome the argument of incompetence. A representative sample of these efforts is offered in Part III of this volume, since the contributions collected in this part provide various methods through which discussions on policy issues (on how to realize certain aims judged to be socially desirable) can be transformed into issues of legal interpretation (on how to assess compliance with the requirements of economic and social rights).

These efforts are briefly reviewed below. Let us note, however, for the moment, that we are seemingly faced with a paradox, that the article of David Landau presented in Chapter 5 helps bring to light. The paradox may be formulated as follows: *It is precisely where the courts intervene with the greatest legitimacy, by preserving existing entitlements or prohibiting steps backwards in the realization of economic and social rights, that they are least able to bring about the kind of social change that would truly benefit the disempowered and the marginalized.* For, although it is difficult for courts to insist that a State discharges ‘positive duties’ towards its population where such obligations are based only on certain vague provisions of the constitution or found in international law, it is more easily accepted that they should intervene to protect *existing* entitlements, or that they should impose ‘negative duties’ to refrain from reducing existing levels of enjoyment of rights. It is significant in this regard that many examples of successful judicial application of economic and social rights relate to situations where the domestic lawgiver had adopted statutes implementing such rights, which courts simply contributed to enforce (as also remarked by Viljoen 2005: 6–9, and by Coomans 2006: 7–8). However, Landau asserts, it is precisely then – when they act to preserve the *droits acquis* or the entitlements that individuals already enjoy, as it were – that the courts contribute the least to strengthening the position of the most powerless, because the poorest among the poor simply have no entitlements to be protected. Only more structural forms of judicial intervention would actually benefit low-income groups, and this, says Landau, requires different forms of adjudication from those that courts enforcing social rights usually resort to.

Following his review of the various legal techniques used by courts to enforce social rights, Landau concludes that, the more a court seeks to preserve its legitimacy and to remain within the boundaries of its capacity, the less it is capable of delivering the kind of social change that the poor require. This claim is a powerful one, but it should not be left unchallenged. One response is to point to situations where, in fact, courts have intervened with a high degree of legitimacy, and did play a transformative role. This, arguably, may be the case in the right to food case launched before the Supreme Court of India with the *People’s Union for Civil Liberties v. Union of India & Others* petition presented in 2001. The case led the Court to issue



a large number of judicial orders, implemented under the supervision of two 'Commissioners of the Court' especially appointed by the Court itself (Birchfield and Corsi 2010). Confirming the remark by Langford that social movements providing support 'from below' to the efforts to enforce economic and social rights are an important ingredient in litigation, a 'right to food campaign' of civil society accompanied the case and contributed to a largely decentralized effort to monitor compliance with the judicial orders.

Landau sees this case as a relative success. Indeed, by transforming a range of social programs, eight in total, that governments are now prohibited from reversing, the Supreme Court of India not only established a link between the constitutionally recognized right to life and specific measures that were not initially seen as implementing a constitutional mandate; it also significantly strengthened the effectiveness of the programs concerned and their ability to reach all those in need of support. However, Landau interprets such a success as having been possible because 'the court had strong and unified support from civil society, and the court rebuked the government by taking a moral stance that the government could not easily oppose'; this in his view 'suggests [...] that courts might be better at building new public policies than at attempting to work within already established and entrenched policies and bureaucracies', as doing the latter would per necessity be fruitless and result in a waste of judicial efforts (p. 237). However, whether qualified or not, the success of the right to food case could also lead to the exact opposite conclusion: that, under certain conditions, there is no trade-off between a court acting with legitimacy and remaining within its capacity, and being an effective agent of social transformation. This, after all, was a transformative case, significantly expanding, for instance, the provision of midday school meals for children across the country, yet it was based on guaranteeing entitlements already set forth in various state laws – only to ensure that all, the poor in particular, would be able to benefit.

As illustrated by the five contributions forming Part III of this volume, most authors seek to defend the justiciability of economic and social rights by asserting that the content of the requirements of such rights can be ascertained by various legal techniques. However, another set of responses both to Landau and to the skeptical views expressed about the enforcement by courts of social and economic rights are located at the other end of the spectrum. They argue not that courts should do *more* if they want to be relevant, but rather than they should do things *differently* if they want to remain within the boundaries of their mandate. These responses emphasize that the apparent contradiction between a greater role for courts or other independent monitoring bodies in enforcing such rights, on the one hand, and democratic self-determination on the other hand, is by no means necessary: rather, it is linked to a certain mode of institutionalization of judicial decision-making that can be changed.

Indeed, Landau's challenge may also be seen as a call to explore new ways of delivering justice. One possible route that may be followed is to invest courts with the duty of perfecting the political process. This first path is illustrated by the 'cooperative model' of the relations between different branches of government, in which judges and other authorities interact in ways that favor a 'constitutional dialogue' concerning how human rights should be implemented (Scott and Nedelsky 1992), or in which courts grant remedies that require other branches of government to come up with their own solution to the problem that has been identified through the judicial process (Scott and Alston 2000). As noted by Sandra Liebenberg: 'The courts can place a burden on the executive and the legislature to justify the reasonableness of their policy choices in the light of the constitutional commitment to economic and social rights. Should

they fail to discharge this burden of justification, a court may issue a declaratory order to this effect. This can set the parameters for a constitutionally acceptable decision while still preserving sufficient "space" for the exercise of a choice of means by the legislature' (Liebenberg 2001: 60). When courts intervene to protect economic and social rights through such means, it cannot be said that they exercise a power that is removed from other branches of government: what we are seeing is not a zero-sum game, but one in which the political branches are strengthened by such judicial intervention.

Other arguments may be put forward to emphasize the complementarity between the role of courts and that of parliaments or the Executive. The realization of certain economic and social rights, in particular the right to education, has a key role to play in the proper functioning of a democratic process based on deliberation. Moreover, by identifying violations of economic and social rights, courts bring to the attention of the political branches of government issues that they might otherwise have ignored, encouraging a public debate on these issues and requiring that the choices made be justified in the light of such consequences as may have been highlighted through litigation. The specific contribution of courts is to ensure not only that macro-level injustices are being addressed, but also that in the design and implementation of public policies that seek to remedy societal problems, attention is paid to the poorest and most marginalized groups within society. The voices of these groups often may be more easily heard through the judicial process, as material deprivation is often combined with political disempowerment. The role of courts may therefore consist in making these groups visible, thus ensuring that their specific needs are not neglected in the design and implementation of public policies: as noted by the South African Constitutional Court in an evictions case in the Province of Eastern Cape, while the judiciary 'cannot of itself correct all the systemic unfairness to be found in our society', 'it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails' (Constitutional Court of South Africa 2005: para. 38).

For all these reasons, far from being undermined, the exercise of democratic self-determination may in fact be reinforced and supported by the intervention of courts, ensuring that democratic deliberative processes will work better. There is, moreover, another way to mitigate the apparent tension between judicial intervention to preserve economic and social rights and the requirements of democracy. The tools at the disposal of courts to discharge their traditional function of designing remedies are not fixed once and for all: they may be transformed in the name of the quality of democratic deliberation itself. This second path is illustrated by a range of decisions in which, moving beyond the simple violation/non-violation dichotomy, courts adjudicating economic and social rights have put in place processes through which, at local or national level, solutions could be found that take into account the specific context in which these rights ought to be implemented. This goes beyond courts merely making a declaration of the compatibility or incompatibility of certain situations or policies with the requirements of economic and social rights, and leaving it to the political branches of government to draw their own conclusions. It results in the active involvement of courts in designing processes facilitating the search for solutions that should ensure compliance. The remedies courts shape are democracy-enhancing rather than democracy-restraining: they facilitate deliberative processes, instead of introducing obstacles to such processes.

Thus, in order to give effect to economic and social rights by moving beyond a purely 'conservative' jurisprudence – one that protects existing entitlements – and to contribute to

removing the deep causes of deprivation, courts have a tendency to reinvent themselves: they develop new approaches to what it means to deliver justice, in an institutional framework in which their powers are constrained. Inevitably, this raises the question whether classic conceptions of separation of powers are compatible with the effective enforcement of economic and social rights, or whether something else is needed.

National human rights institutions may provide one response. Such institutions have been developing particularly since 1993, following the adoption of the Paris Principles which defined certain minimum criteria with which they should comply (United Nations General Assembly 1993) and after the Vienna World Conference on Human Rights encouraged their establishment (Murray 2007). In general, national human rights institutions pay far greater attention to civil and political rights than to economic, social and cultural rights, even when their mandate covers both sets of rights (Kumar 2006). Yet, their contribution to the latter may be particularly important, not only thanks to their promotional activities and through monitoring progress in their realization, but also through examining complaints alleging non-compliance with economic and social rights and addressing recommendations to the different branches of government without facing the same institutional constraints as courts (CESCR 1998b). The contribution of Mario Gomez, included as Chapter 8 of this collection, makes a number of recommendations in this regard, highlighting in particular the role of national human rights commissions in clarifying the requirements of social and economic rights in the domestic context and the key advantages of flexibility and accessibility that such institutions present (see also Brems et al. 2013).

### III. Assessing compliance and the question of 'progressive realization'

Part III of this collection of essays brings together a range of contributions to what has been the most disputed question accompanying the rise of economic and social rights. It is generally accepted that such rights include both elements that are 'immediate' (imposing on States duties that cannot be made dependent on resource availability) and others that are subject to 'progressive realization', to which States must dedicate the maximum of available resources. But how are each of these sets of duties to be distinguished? Also, as regards the components that are to be realized only 'progressively', what progress is enough? At which speed must States deliver on their promise to move towards the full realization of economic and social rights? Almost fifty years after the adoption of the International Covenant on Economic, Social and Cultural Rights, the answers remain highly contested. What follows is an attempt to map these answers, highlighting both areas of consensus and outstanding areas of contention.

#### 1. The 'core content' of rights

This issue of progressive realization was central to the discussions that led to the adoption in 1986 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. The Limburg Principles already contained three important lessons in that regard. First, they noted that: 'Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time' (para. 4). Second, the principle

of progressive realization cannot be a pretext for not taking immediate action: 'All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant' (para. 16). Instead, the obligation 'to achieve progressively the full realization of the rights', as stipulated in art. 2 para. 1 of the Covenant, 'requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant' (para. 21). Third, though resources available to each State matter to assess the scope of that State's obligations to realize economic, social and cultural rights, the experts agreed that each State must 'ensure respect for minimum subsistence rights for all', 'regardless of the level of economic development' (para. 25).

The views expressed by the Limburg Principles found their way into the doctrine elaborated by the Committee on Economic, Social and Cultural Rights when it adopted General Comment No. 3, detailing the nature of States' obligations under Article 2(1) of the Covenant (CESCR 1990). The General Comment emphasized that, while this provision allowed for a certain flexibility and acknowledged the constraints States face due to a lack of available resources, 'the undertaking [...] "to take steps", [...] in itself, is not qualified or limited by other considerations'; therefore, 'while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant' (para. 2): the aim should be to 'move as expeditiously and effectively as possible' towards the full realization of the right of the Covenant (para. 9).

In General Comment No. 3, the Committee also expressed the view that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party' (para. 10). Though it has its source in the work of the International Labour Organisation (ILO 1982), the reference to 'basic needs' or to 'minimum subsistence rights' found support in particular with Philip Alston, a member of the Committee present in Maastricht. Writing in his academic capacity, Alston urged that the Committee should 'find a way of conveying to states the fact that priority must be accorded to the satisfaction of minimum subsistence levels of enjoyment of the relevant rights by *all* individuals' (Alston 1987: 359–60). Yet, the Committee felt compelled to add one proviso, noting that even at this level, for the satisfaction of the core obligations, the lack of available resources cannot be dismissed as irrelevant: 'In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations' (para. 10). In 1997 the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights would state that the minimum core obligations referred to in General Comment No. 3 'apply irrespective of the availability of resources of the country concerned or any other factors and difficulties' (para. 9). This however is not an accurate reading of the Committee's own position. Although it is true that (as stated again by the Maastricht Guidelines) 'resource scarcity does not *relieve* States of certain minimum obligations in respect of the implementation of economic, social and cultural rights' (para. 10; emphasis added), it does facilitate the burden of the State asked to justify why it has failed to satisfy the minimum obligations prescribed.

How then is the 'core content' of the rights listed in the Covenant to be defined? Providing such a definition as regards the right to food is relatively straightforward. Article 11 of the Covenant refers in its second paragraph to 'the fundamental right of everyone to be free from hunger', in addition to its more general reference in the first paragraph to 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. The Committee could therefore easily define the core obligation corresponding to the right to food as an obligation to 'take the necessary action to mitigate and alleviate hunger' (CESCR 1999a: paras 6, 14 and 17).

The 'core obligation' has been defined with greater difficulty as regards the other rights listed in the Covenant. Under article 13 of the Covenant, for instance, the Committee considers that the core content of the right to education 'includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a) [which provides that primary education shall be compulsory and available free to all]; to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" (art. 13 (3) and (4))' (CESCR 1999b: para. 57). In its General Comment No. 14 on the right to the highest attainable standard of health, the Committee includes in its description of 'core obligations' corresponding to this right, *inter alia*, the duty to ensure access to health services without discrimination and to ensure 'equitable distribution of all health facilities, goods and services'; to ensure access to 'minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone', as well as to 'to basic shelter, housing and sanitation, and an adequate supply of safe and potable water', and to essential drugs; and to adopt through participatory means and implement with independent monitoring of progress a national public health strategy and plan of action (CESCR 2000: para. 43). A similar list is provided in the Committee's discussions of the right to water (CESCR 2002: para. 37) and of the right to work, where it consists in an elaborate description of the requirements of non-discrimination and equal protection of employment (CESCR 2005: para. 31).

The 'core content' of the rights stipulated in the Covenant, it appears from these examples, includes three components: (i) a *non-discrimination* requirement, ensuring that any progress made in the realization of the right in question benefits all without discrimination, and that where distribution issues arise, priority be given to the most disadvantaged and marginalized groups; (ii) a *basic needs* requirement, ensuring that each individual is not deprived of essential goods or services that keep him/her safe, physically and emotionally, and protect him/her from permanent social exclusion: this would include basic shelter, adequate food, water and sanitation, and essential drugs, but also access to primary education; and (iii) a *procedural obligation*, requiring from the State that, having identified the key challenges associated with the realization of each right, it designs and implements a strategy that will put it on track of moving towards the full realization of the right for all.

This third element is key, because it highlights the inadequacy of a simple opposition between obligations that are immediate and purely programmatic objectives that do not impose any duties on States. When the administration of President Jimmy Carter transmitted the Covenant

on Economic, Social and Cultural Rights to the United States Senate for approval in 1978, it accompanied its presentation by a statement according to which, in the understanding of the US, the Covenant describes 'goals to be achieved progressively rather than through immediate implementation'. Philip Alston, reflecting on this a few years later, at a time when he had become the Rapporteur to the Committee on Economic, Social and Cultural Rights, felt compelled to denounce this approach. There exists, from the moment of ratification, an immediate requirement to take steps towards full realization of the right of the Covenant: 'The starting point for a program to implement economic and social rights is to ascertain, as precisely as possible, the nature of the existing situation with respect to each right, so as to identify more clearly the problems that need to be addressed and provide a basis for principled policy making' (Alston 1990: 379).

Though they are presumed to be affordable for all States, even these core obligations as outlined above are not costless – particularly not the duties corresponding to the 'basic needs' component, which require States, for instance, to set up primary health care centers and to ensure that all have access to primary schools at a reasonable distance from the home. The question of which resources are available to the State still matters, therefore, but identifying certain core components serves to shift the burden of proof: unless the State makes a convincing case that, even by calling upon international support, it is unable to finance what it would take to deliver even that 'essential content' of the right, it will be presumed that it has not been complying with its obligations to prioritize the fulfillment of economic and social rights under its jurisdiction (CESCR 2007: para. 6). In that sense, reliance on the 'core content' of a right introduces a baseline that is less dependent on the degree of realization of the right that is already attained in any particular State. It also helps in defining priorities for domestic efforts towards the fulfillment of human rights obligations. In addition it should guide international assistance and cooperation: according to the Committee, 'core human rights obligations create national obligations for all States, and international responsibilities for developed States, as well as others that are in a "position to assist"' (CESCR 2001: para. 16).

Yet, that still remains incomplete. For the 'core obligations' approach leaves open the question of the speed at which the State must move towards the full realization of the rights of the Covenant. As noted above, the Committee expects each State to move 'as expeditiously and effectively as possible' towards that end. But what, exactly, does that mean? And if this is not to be left entirely to the goodwill of the State concerned, which benchmarks may the Committee rely upon to assess whether the efforts made are sufficient? The authors who attempted to list the resources that should be mobilized towards the fulfillment of economic, social and cultural rights, and the degree of mobilization required, spectacularly failed in doing so (see, for instance, Robertson 1994). Nor were the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of much help here. They listed among violations of the Covenant those that could result from the 'failure to take appropriate steps as required under the Covenant', as well as the 'failure to utilize the maximum of available resources towards the full realization of the Covenant' (Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997: para. 15, (a) and (e)). But this left the reader to guess what 'appropriate' means, as well as what the 'maximum use of available resources' required. It is this question that the contributions collected in part III of this volume seek to address.

## 2. Progressive realization 'to the maximum of available resources'

Four approaches may be distinguished. The mapping of these approaches proposed here intersects to a certain extent with Chapters 9 to 13, although some approaches described below are not represented in the sample of positions proposed in this volume.

### A) 'CORE OBLIGATIONS' AND THE 'VIOLATIONS APPROACH'

A first approach is called by Audrey Chapman, its main proponent, the 'violations approach'. This approach is described in Chapter 9 (see also Chapman and Russell 2002). A specialist in public health at the University of Connecticut, Chapman takes the view that human rights lawyers should abandon the quest for a benchmark by which to assess 'progressive realization'. This search, ultimately, risks undermining the task of monitoring itself, distracting us from the more urgent task of focusing on the most egregious violations of economic and social rights. Instead, a 'more feasible and effective alternative' would consist in focusing on 'three types of violations: (1) violations resulting from actions and policies on the part of governments; (2) violations related to patterns of discrimination; and (3) violations taking place due to a state's failure to fulfill the minimum core obligations contained in the Covenant' (Chapman, in Chapter 9: 23). In later publications Chapman insisted that this focus did not mean lowering the bar for States. Quite to the contrary, in her view:

'if states actually *did* fulfill their core obligations, it would in most cases represent significant progress. The purpose of the minimum state obligations approach is not to give states an escape hatch for avoiding their responsibilities under the Covenant. It is in fact the opposite: a way to accommodate the reality that many economic, social and cultural rights (and often civil and political rights as well) require resources that are simply not available in poor countries. The minimum state obligations approach affirms that even in highly strained circumstances, a state has irreducible obligations that it is assumed to be able to meet. If it cannot, the burden of proof shifts to the state to justify its claim of the need to cut back. By definition, minimum core obligations apply irrespective of the availability of resources or any other factors and difficulties' (Chapman 2007: 154).

Although the label chosen may be misleading – the 'violations approach' is not the only route by which the rights of the Covenant on Economic, Social and Cultural Rights can be interpreted to allow for findings of 'violations' to be made – the intention behind the proposal is clear: it is to strengthen the credibility of the monitoring of the Covenant, by adopting a position of restraint that would allow the Committee to tackle only the most obvious cases, where the conduct of the government is clearly below the standards of acceptability. However, approaching the enforceability of economic and social rights by relying on the identification of a 'core content' of each right, to which certain 'core obligations' would correspond, raises two major objections.

One concern is that the definition of such 'core content' may appear arbitrary. This concern is most explicitly detailed by Katharine Young in Chapter 10. Young notes that the 'core content' of economic and social rights listed in the Covenant is identified, alternatively, through four pathways, to which different justifications correspond. In the language used by the Committee on Economic, Social and Cultural Rights, the 'core content' often is described as a 'needs-based core', in which the 'core' is derived from the basic needs of the individual, and particularly his or her survival needs, in line with the theories of development *en vogue* in the 1970s. A second

approach is to define the 'core content' as a 'value-based core', in which its contours are based on what is required by certain basic values such as the dignity of the individual, equality or freedom. A third approach is to see the 'core content' as the result of a consensus that gradually takes shape across jurisdictions, across States (as expressed in international declarations in which governments profess their attachment to certain 'core' dimensions of economic and social rights), or across experts of the concerned fields – such as public health, education or housing – that correspond to the rights of the Covenant. Finally, a fourth approach would be to define the 'core content' taking as a departure point the corresponding obligations, and asking what can reasonably be demanded from the State immediately, rather than being left to be subject to progressive realization: by paying attention to the remedial dimension associated with the 'core content', we would be able to define the 'core' based on what can practically be achieved.

Young concludes that none of these approaches is convincing in isolation, and that taken together, they result in a doctrine that is neither principled nor, for that matter, legitimate. She finds that the various functions that the 'core content' approach to economic and social rights seeks to fulfill would be better served by abandoning the approach altogether. Instead, she suggests, we should rely on indicators and benchmarks to track progress in the realization of the rights and, where violations are alleged to result from certain measures being adopted by States that infringe on the enjoyment of economic and social rights, on classic notions of responsibility and causality. She lands in a position that is almost diametrically opposite to that of Chapman (see also Young 2012).

The theoretical foundations of the 'core content' doctrine are fragile, and the critique by Young is in that respect perfectly valid. It must be placed in perspective, however. The fact that there are different motivations behind the doctrine, which results in a certain confusion about why, exactly, certain elements are considered to form the 'core' content of the rights listed in the Covenant, simply means that the doctrine performs different functions at the same time; to each of the functions may correspond different consequences. We have distinguished above the non-discrimination, basic needs, and procedural components of the 'core content': it is entirely understandable that each of these components has different foundations, and that the 'core content', as a result, resembles a patchwork. In defense of the concept, however, we must recall the limited purpose for which it was developed in the first place: the objective was to identify the dimensions of the right that should be guaranteed also in low-income countries, given that relatively low-cost measures are sufficient to guarantee them. As noted by Robertson (1994: 702): 'there is an assumption, though a rebuttable one in the eyes of the Committee, that every state possesses sufficient resources for subsistence purposes if they define resources broadly enough and are sufficiently aggressive in resource acquisition'.

However, a second critique of the 'core obligations' approach that plays such a key role in the 'violations approach', as defined by Chapman, is more important. By definition, this approach has nothing to say on what corresponds, in Eide's terminology, to the obligation to fulfill, which is a duty to move towards the full realization of the right beyond its 'essential' content: this is why many commentators considered that the proposal made by Audrey Chapman might represent a step backwards, not forward – in her own words 'weaken[ing] the calls for a full implementation of the rights of the Covenant by concentrating on the most flagrant abuses' (Chapman 2007: 156). For instance, writing on the right to health, Birgit Toebe notes that clarifying the 'core content' of that right may encourage States to 'put the elements not



contained by the core into an “indefinite” (Toebes 2001: 176). Young makes a similar critique, though with a more ideological spin. She writes that ‘the minimalist focus within the core may well legitimate neoliberalism, especially if the claim for the minimum core is made in order to increase the bundles of commodities or consumption share of the disadvantaged, while failing to challenge the underlying economic institutions which have produced the disadvantage in the first place’ (Chapter 10: 174). Indeed, by focusing on the core content of economic and social rights – providing the poor and marginalized with the essential minimum that they require to live healthy lives in dignity – while neglecting the other requirements associated with the progressive realization of the promises of the Covenant, we do not question the structures that cause the poverty and marginalization of the victims in the first place: we leave them untouched, while guaranteeing a ‘floor’ to the individual that avoids him or her falling permanently into extreme poverty.

More recently – moved, perhaps, by such critiques – Chapman recognized that her ‘violations approach’ should, perhaps more suitably, be treated as just one methodology among others: ‘It is obviously important to go beyond a ‘violations approach’ so as to provide a positive guideline on how best to implement the rights in question, and to assess whether particular states parties are making reasonable progress in improving their human rights implementation’ (Chapman 2007: 156). However, going beyond a ‘core obligations’ approach requires that we equip ourselves to assess *progress* in the realization of human rights. This in turn calls for the development of indicators, measuring not only outcomes but also the normative framework adopted by the State and its efforts in moving towards such outcomes (see, on the use of indicators to measure progress in the realization of economic and social rights, Green 2001; Landman 2004; de Beco 2007; Welling 2008; Rosga and Satterthwaite 2009; Landman and Carvalho 2010). Also, it requires, especially, that we agree on clear criteria to assess whether the degree of realization of rights, in any particular State, is sufficient to meet the requirements of the Covenant. The analysis of public budgets has been proposed as a tool in this regard: Chapters 12 and 13 provide a discussion of the potential, but also of the limitations, of this approach.

#### B) PUBLIC BUDGET ANALYSIS

In the second of its series of annual Human Development Reports, published in 1991, the United Nations Development Programme offered to analyze how public expenditures can be mobilized in favor of human development objectives. The 1991 HDR proposed the use of four ratios in this regard (UNDP 1991: 39). The *public expenditure ratio* is the percentage of national income that goes into public expenditure: it represents the weight of the public sector in the total GDP of the country. The *social allocation ratio* is the share of social services in total government spending: it measures how much of the public budgets goes to finance health, housing, or education, rather than to other expenses such as those related to national defense or infrastructural projects. The *social priority ratio* measures, within the public spending that goes to social services, what goes to basic health care, primary education, and the extension of basic water systems to poor areas in both cities and rural areas, all of which are called ‘human priority concerns’. These three ratios provide increasingly more precise means of assessing whether the budgetary priorities set by the State aim at supporting the needs of the poor. They can be combined to lead to a fourth ratio, which the HDR calls the *human expenditure ratio*, representing the share of total GDP that goes to human priority concerns.

Where human development outcomes are poor, it may mean that the decisions on the respective allocations are inadequate and should be revised. The UNDP estimates that the human expenditure ratio ‘may need to be around 5% if a country wishes to do well in human development’. This, the UNDP suggests, should ideally be done ‘keeping the public expenditure moderate (around 25%) [for instance by slashing down on military spending, on internal policing, on debt servicing or on the costs associated with loss-making public enterprises], [but allocating] much of this to the social sectors (more than 40%) and [focusing] on the social priority areas (giving them more than 50%)’; in contrast, a less efficient option is to ‘withdraw a large proportion of national income into the public sector, to depress private investment and initiative and to restrict the economic growth and resource expansion that can ultimately finance human development’ (UNDP 1991: 39). Countries with a high public expenditure ratio but a low ranking of social priorities would therefore constitute the worst case: on the basis of data from 1988, the HDR 1991 places in this category countries such as India (with a public sector representing 37% of the GDP (public expenditure ratio) but only 2.5% of the GDP going to human priorities (human expenditure ratio)), Nigeria (29% public expenditure ratio and 2.2% human expenditure ratio), Pakistan (25% and 0.8% respectively), or Indonesia (25% and 0.6%).

Drawing attention to such figures is a useful way to stimulate a public debate about whether a State is setting the right priorities, ones that are consistent both with human development aims and with the progressive realization of the corresponding economic and social rights. As such, however, the benchmarks set by the UNDP cannot form a substitute for a deeper analysis relating outcomes to the actions or omissions of the State. First, some public investments that would not count as corresponding to ‘human priority’ issues or even to ‘social services’, in fact matter significantly to the realization of economic and social rights. That includes reliable law enforcement agencies and courts that can uphold the rights of the individuals and may be expected to address the claims of individuals with the required independence and impartiality. But it also includes what, in the terminology introduced by Eide, the duty to ‘facilitate’ – as part of the broader duty to fulfil – refers to. The duty to facilitate may be described as a duty to take proactive measures in order to create the conditions that will ensure that individuals may enjoy the right in concern: it consists, in brief, in creating the required ‘enabling conditions’ for such enjoyment (Eide 1999: para. 52; Eide 2001: 24; CESCR 1999a: para. 15). Such conditions may require investment in infrastructures, ranging from roads and grain storage facilities to clean energy and agricultural research and development. Such expenses do not fall under the narrow definitions of either ‘human priority’ or ‘social services’, yet, these investments can be vital both to human development and to the realization of certain economic and social rights such as the right to food, to education or to housing. In 1991, when the Human Development Report on *Financing for Development* was published, it was perhaps necessary to emphasize the need to focus more on the needs of the poor in social spending, as investments in infrastructures had been mobilizing both domestic resources and international donors’ contributions during the previous two decades. But, two decades later, we now understand better the limitations of an approach that aims to respond to the most urgent needs, without addressing the deeper causes of the inability of the poor to climb out of poverty and graduate from short-term support measures.

In addition, it is perfectly possible for a State to ensure an adequate level of fulfillment of human rights, even though it dedicates less than the ratio of 5 per cent to total GDP to social priority issues, the ratio suggested by the UNDP if countries want to ‘do well in human

development' (UNDP 1991: 40). From the point of view of the individual's rights, the outcomes matter – more than the means that serve to produce such outcomes. Where, for example, a smaller percentage of the total GDP goes to education in State A than in State B, but education is both more affordable and of better quality in State A than in State B, should we consider that State B complies with the requirements of the right to education, when State A does not? Perhaps the total GDP per capita is significantly higher in State A, so that in absolute terms, the public spending per pupil in State A is higher than in State B; or perhaps there is a large network of private schools in State A, that the parents can afford to fund themselves because of high average incomes, combined with subsidies for children from low-income families. Should we care more about the results achieved, or about whether the efforts deployed by the State correspond to the resources available, and are therefore commensurate with its capacity to fulfill rights? One might be tempted to think that the notion of 'progressive realization' of economic and social rights 'to the maximum of [each State's] available resources', as prescribed by article 2(1) of the Covenant, bridges the conceptual gap between obligations and result and obligations of means, by requiring from States not that they achieve certain results (by whichever means they see fit), but that they dedicate a sufficient share of the resources at their disposal to move towards the full realization of economic and social rights, in a never-ending quest for improvement. Yet, apart from the fact that this would provide no indication as to which share is 'sufficient', it does not take into account that beyond a certain level of enjoyment, the financing of economic and social rights has a decreasing marginal utility, which sheds doubt on the usefulness of setting fixed percentages of public expenditure (or of a country's total incomes): in a country where access to all levels of education is free and where the educational services follow high standards, is it still justified to demand that any increase in GDP results in a proportionate increment in the sums dedicated to education?

There is a third limitation to the approach pioneered by the UNDP in its 1991 Human Development Report. It is that how much is spent on supporting the realization of economic and social rights – whether in absolute terms or as a proportion of the country's GDP or public budget – would only be indicative of the seriousness of its efforts towards fulfilling such rights once such expenses are related to the source of State revenues. When the Special Rapporteur on the right to food visited Brazil, he praised the country for increasing the levels of social spending from 11 per cent of the total public budget in 1995 to 15 per cent in 2007, and for dedicating 1 per cent of the budget to the 'Hunger Zero' program alone. However, he then added that the tax system in Brazil was highly regressive, due to the importance of value-added taxes (basically hurting the poor more than the rich in the proportions of their respective incomes) and the low rate of property taxes. His conclusion was that, 'while the social programmes developed under the "Zero Hunger" strategy are impressive in scope, they are essentially funded by the very persons whom they seek to benefit, as the regressive system of taxation seriously limits the redistributive impact of the programmes. Only by introducing a tax reform that would reverse the current situation could Brazil claim to be seeking to realize the right to adequate food by taking steps to the maximum of its available resources' (De Schutter 2009: para. 36).

These are some of the difficulties encountered by recent attempts to use public budget analysis in order to assess compliance with the requirements of economic and social rights. Such attempts have grown in importance over the past decade. In 2004 the International Human Rights Internship Program and other organizations published *Dignity Counts*, intended as a

guide to use budget analysis to advance human rights, which used the analysis of health-related expenditures in the Mexican national budget as a case study (Fundar 2004). A few years later, a team at Queens University Belfast completed a 'Budget Analysis Project', providing a human rights framework for the analysis of public budgets insofar as they relate to the realization of economic and social rights, and applying that framework to the budgetary allocations and expenditure in Northern Ireland (Budget Analysis Project 2010).

Budget analysis serves two distinct purposes. One is to promote transparency in the use of public revenue: by comparing sources of government revenue with expenditures, instances of 'leakage' can be identified, and corruption, nepotism or clientelism by government officials can be highlighted by examining who benefits from public programs. Such a scrutiny can take many forms, including social audits at community level, that can be empowering even to the poor and illiterate (Peisakhin and Pinto 2010; UNESCO 2007; for a more skeptical assessment, Cleaver 1999). By thus enhancing accountability, budget analysis is a major asset in ensuring that public policies are more pro-poor, and that they will therefore indirectly benefit the realization of economic and social rights.

However, another function of budget analysis is to monitor the fulfillment of economic and social rights *directly*: that is to say, to ensure that the expenditures are in compliance with the duty of the government to dedicate the maximum of available resources to the progressive realization of these rights, as required by Article 2(1) of the International Covenant on Economic, Social and Cultural Rights. The hope is that using a human rights framework will provide some benchmark, allowing activists representing the poor to hold the government to account for its choice of priorities:

By digging into the details of the budget, by making the raw numbers tell a story about government priorities, budget analysis helps lay bare the choices confronting a government and its people. But while budget work can assist in identifying what government officials are doing or have done over time and what the true priorities of the government are, budget analysis cannot by itself identify what the true priorities ought to be. A human rights framework can help fill this gap. (Fundar 2004: 30)

Economic and social rights, as stipulated in the Covenant, are expected to provide advocates with enough guidance, allowing them to link their analysis of public budgets to the human rights obligations of the State. But can they? Identifying choices made in public budgets that shall lead to a retrogression in the enjoyment of certain rights – choices that are considered highly suspect and require a special justification from the government – or that may result in discrimination against certain particularly disadvantaged groups, is relatively straightforward. Beyond that, however, the relationship between the percentage of a country's GDP (or, even less plausibly, the percentage of the public budget) going to the fulfillment of economic and social rights and that country's legal obligations to fulfill such rights, is bound to remain contested. As reported by Aiofe Nolan and Mira Dutschke in Chapter 13 of this volume, a country may stipulate in its constitution that a particular part of its budget shall go to improving education, as Ecuador, Brazil and the Philippines have done; but that of course does not indicate the existence of a legal obligation under international law to make a particular budgetary effort. Also, it is significant that most judicial decisions that conclude that an economic or social right has been violated as a result of budgetary choices do, in fact, impose a prohibition on reducing existing levels of enjoyment of the said right: this not only illustrates the difficulty of defining, *positively*, what the required level of expenditures should be; as Landau remarked, it also raises

the fear that the courts using this tool may, in fact, be protecting those that already have recognized entitlements, rather than the poorest whose situation would only improve following more ambitious social reforms. The exceptions to this pattern are cases where welfare benefits were set at a level so low that they could not be defended as meeting even the 'essential content' of the right to an adequate standard of living, or cases where the budget entailed a discrimination against certain groups. Though it can be asserted in theory, as Nolan and Dutschke do, that there are budgetary implications also to the duty to protect and to the duty to fulfill, compliance with both of which courts should be able to assess, there is so far no case-law that builds on that possibility.

One reason why courts may be reluctant to assess the adequacy of budgetary commitments to the realization of economic and social rights is the difficulty in distinguishing the real constraints that States may face – for instance, as a result of low revenues or the burden of a foreign debt – from their unwillingness to make the necessary investments in human development. Countries are at very different levels of development, and there is no doubt that this is relevant in assessing whether they comply with the duty to progressively realize economic and social rights. For the moment, however, clear criteria to relate the financial capacities of countries to their human rights duties are still missing.

### C) THE ACHIEVEMENT POSSIBILITIES OF STATES

One attempt to propose such criteria is by Sakiko Fukuda-Parr and her collaborators. Fukuda-Parr, formerly a loan officer at the World Bank, later joined the United Nations Development Programme, for which she worked a number of years in Africa. As the Director of the Human Development Report Office between 1995 and 2006, she was a lead author of the annual flagship publication of the UNDP, the *Human Development Report*, which introduced the 'Human Development Index' as a measure of development alternative to GDP growth per capita. Bringing the human development perspective to human rights, she seeks in her recent work as an academic at the New School in New York to define a metrics through which to assess the fulfillment by States of their obligations towards economic and social rights, taking into account their capacity (in terms of resource availability) to do so. In a 2008 paper, for instance, Fukuda-Parr and her colleagues offer to assess whether a particular economic and social right is adequately fulfilled (z) by examining the ratio between the extent of rights enjoyment, as measured through socio-economic indicators commonly used in the development field (x), and State resource capacity, using GDP per capita as a proxy for such capacity (y), so that  $z = x/y$  (Fukuda-Parr et al. 2008: 13–15). Under this approach, countries such as Moldova, Malawi and Tanzania, though scoring low on the HDI, would score well on the ESRF Index (Economic and Social Rights Fulfillment Index); the reverse would be true for Mexico and Malaysia, two countries which, although relatively well ranked on the HDI, could do much better to fulfill economic and social rights given the resources at their disposal (Fukuda-Parr et al. 2008: 31).

Alternatively, in another, slightly different, version of the same approach, the degree of fulfillment of the right (z) could be assessed as a value between 0 and 1, calculated as the ratio between the actual achievement of the country (x) and the maximum level of achievement possible at the per capita income level of the country concerned, such a maximum being based on the highest level of the indicator historically achieved by any country at that per capita GDP level (y). This latter approach is called the 'Achievement Possibilities Frontier Approach', a

terminology that adequately conveys that it seeks to assess a country's performance against the best performing country at the same level of development, as indicated by the GDP per capita (Fukuda-Parr et al. 2008: 18). Its main advantage, the authors note, lies in the 'theoretical coherency of assessing a country's fulfillment of its obligation of progressive realization based on the level at which a country with a given per capita GDP *could* perform' (Fukuda-Parr et al. 2008: 20). The APF approach does not differ in fundamental ways from the proposal of Cingranelli and Richards that we adopt as a standard (in order to assess the performance of any particular government in implementing economic and social rights) 'whether the condition of the poorest people in a country is better or worse than the condition of the poorest people in other countries that are peer benchmarks, because the available wealth per capita is similar' (Cingranelli and Richards 2007: 223). The major difference, evidently, is that the Cingranelli–Richards standard is constantly shifting, based as it is on the changing average performance of the peers, which makes comparisons across time more difficult: even a country making significant progress could be scoring less well if the other countries at the same stage of development made even faster progress.

The approach developed by Sakiko Fukuda-Parr and her colleagues provides an elegant way to distinguish between how a State performs on human development indicators, and how it performs on indicators of economic and social rights fulfillment: to rank countries on this second metrics, we must distinguish between a country's *unwillingness* to do more to support economic and social rights and its *inability* to do so. At the same time, whether in the form of an 'ESRF Index' or in the form of the 'Achievement Possibilities Frontier Approach', the demarche of Fukuda-Parr and her colleagues is incomplete. This is not simply because – as they themselves acknowledge (Fukuda-Parr et al. 2008: 34) – it should be enlarged to certain rights (such as the right to social security) or human rights principles (particularly non-discrimination and participation), the measurement of which poses difficult methodological problems or questions of data availability. Nor is it only because the methodology proposed does not address the question of trade-offs between, say, the right to housing and the right to education, where all the investments required for the fulfillment of both rights cannot be done at once in a context where the resources are not infinite. Two more fundamental questions arise.

A first question is how the capacity of a State to fulfill economic and social rights should be measured. Such capacity is determined essentially by reference to the GDP per capita (as a proxy for the resources available to the country) rather than the State revenue, since the latter depends on policy choices (concerning in particular the rates of taxation) that cannot be relied upon by governments to justify a weaker performance in the fulfillment of economic and social rights. The choice of the GDP per capita as a measure of the State's capacity to fulfill human rights is itself contestable, however, for two reasons. The first reason is acknowledged by Fukuda-Parr and her colleagues. They note, rightly, that poor macroeconomic policy choices by governments could explain a lower GDP per capita, and in certain extreme cases, the mismanagement by a government of the country's economy – resulting in a low GDP per capita – could be such that it could amount to a violation of the obligations imposed on the State by the Economic, Social and Cultural Rights Covenant, where the failure to take appropriate policy measures impedes the realization of economic and social rights (Fukuda-Parr et al. 2008: 13).

However, the GDP per capita cannot be the sole indicator of resource availability, because domestic resources may be complemented by resources from outside the country. Among such resources that could be mobilized are the resources from foreign direct investment (that the

government could seek to attract to the country, as a means to create employment, to access technologies, and to raise the standards of living), and the resources that the international community could contribute through development cooperation. This may not make a significant difference in fact: econometric studies have concluded that GDP per capita may be taken to be an adequate proxy for the various factors that could be anticipated to affect the ability of the country to move towards the fulfillment of economic and social rights (Cingranelli and Richards 2007: 225–6; referring to Richards et al. 2001). Yet, the question of principle remains. In its interpretation of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights considers that ‘the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance’, noting in this regard that ‘the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23 which refer to international cooperation’ (Alston and Quinn 1987: 179–80; CESCR 2007: para. 5). It has also repeatedly called on States to seek assistance where needed to realize economic, social and cultural rights (for example, CESCR 2009: paras 16–17).

A second reason for concern is that the model is incomplete, in that it does not allow a distinction to be made between the different reasons *why* a country scores poorly on the proposed measure of economic and social rights fulfillment – either because of a relatively poor ratio between its achievements on certain outcome indicators and the resources it could mobilize to improve such indicators further, or compared to what, historically, countries at a similar level of development could achieve. Yet, this would seem to matter. For instance, even with an identical GDP per capita, the ability of countries to perform well on socio-economic indicators related to health or child malnutrition (as measured by stunting rates) may differ widely in the presence of epidemics or where climatic conditions affect the quality of harvests; access to water and sanitation may be more difficult to achieve in countries with a population dispersed over a large territory, than in countries where the population is concentrated in certain areas; and certain social or cultural norms, such as those that reduce the mobility of women or their decision-making power within the household – though women’s empowerment can significantly affect the educational, nutritional and health outcomes for children (Smith and Haddad 2000; Pitt et al. 2003) – may be difficult to transform in the short run.

In assessing whether a country is setting its priorities adequately, such constraints cannot be ignored. Indeed, that is what makes the use of indicators in development studies different from their use to promote human rights accountability: while there are many reasons why socio-economic indicators are poor in certain countries – including natural calamities, lack of resources, or constraints imposed by the international environment – the finding that human rights violations have occurred, potentially leading to a finding of responsibility, presupposes that the State is in a position to improve such outcomes – in other terms, that the deprivations are the result of a lack of political will. As noted by the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights: ‘In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations’ (para. 13).

In some respects, therefore, the approach by Fukuda-Parr and her colleagues underestimates the ability of a country to transform the conditions it is confronted with; in other respects, such

an ability seems to be overestimated, and the real constraints it faces ignored. To overcome these limitations of the model proposed, two directions may be explored. One is diagnostic monitoring: the identification, by a causal analysis, of the reasons why certain outcomes are unsatisfactory, and of the measures that could be adopted to remove such obstacles. Another is to take into account the time dimension: the fact that the achievement of economic and social rights may require a sustained multi-year effort, across a range of sectors, in order to overcome the constraints identified.

#### D) CAUSALITY ANALYSIS AND DIAGNOSTIC MONITORING

The first direction is explored by Eitan Felner in Chapter 11 of this volume (see also Felner 2009). Felner proposes using quantitative data, combined with qualitative information, in order to move from outcomes (economic and social rights deprivations and disparities of outcome) (step # 1 of the three-steps approach), to the identification of the ‘main determinants of these outcomes so as to identify the policy responses that can reasonably be expected of the state’ (step # 2), and finally (in step # 3) to the assessment of the extent to which ‘deprivations, disparities and lack of progress can be traced back to failures of government policy’ (Chapter 11: 116). Only by identifying why a State scores poorly on certain socio-economic indicators can certain questions be asked about State conduct: for instance, in a State with a low schooling rate for girls, whether that outcome is attributable to social or cultural norms or, instead, to the lack of economic incentives (for instance, due to discrimination against women in employment, which is a disincentive to invest in girls’ education), leads to different expectations as to what the response of the State should be (Chapter 11: 126). Such a causality analysis should make it possible to identify which deprivations of social and economic rights (as measured by outcome indicators) are attributable to a failure of the State to comply with its obligations, and which are, instead, the result of a lack of capacity of the State. Indeed, the final stage of the analysis (step # 3) should enable the identification of ‘cases in which the government had the capacity to deal with some of the determinants of specific deprivations and inequalities identified in Step #2, but failed to do so’ (Chapter 11: 122).

How then should such a capacity be assessed, and how can we determine what a reasonable response of the State should be? Felner proposes a variety of ways (five in total) to identify the relevant benchmarks. Some of the answers proposed are irrelevant to the question of how a country’s responses are to be assessed where the outcomes are unsatisfactory, because, by design, they rule out the possibility that the country could invoke factors beyond its control to provide a justification for poor achievements: for instance, if we consider that part of the ‘core obligations’ of the State under international human rights law is to ensure 100 per cent of access to primary education, it could follow that no excuse should be allowed for the State failing to reach that target. The other answers address the harder cases, where lack of resources cannot be so easily dismissed as irrelevant. They fall in two groups: they consist either in the benchmark to be achieved being set by each individual State, or in the benchmark being defined using cross-country comparisons.

The first approach may consist in relying on an objective a State has set for itself – for instance, by endorsing an international goal such as one contained in the MDGs, or by specific commitments, such as increasing the budget going to public housing by 20 per cent in two years or dividing by two the gap between the educational achievements of boys and those of girls; or in the past performance of the State constituting the benchmark against which to assess



further progress. The main advantage of this approach is that the benchmark is not imposed from the outside, but derives from choices made by the concerned State itself, which makes it difficult to challenge on legitimacy grounds. Nonetheless, it begs the question of how to assess whether the goals set by the State are adequate, given the resources at its disposal: has the State been ambitious enough in setting an objective, and if progress was made in comparison to previous years, was that progress sufficient? As Felner himself recognizes, referring to the proposal to evaluate the performance of a State against the targets it has set for itself, this commitment in turn 'should also be scrutinized, as it could be flawed from a human rights perspective' (Chapter 11: 116).

The second approach is more promising. It relies on cross-country comparisons, using as a reference point countries of the same region at a similar level of development: such cross-country comparisons, Felner argues, 'could reveal whether the levels of deprivation of the focus country are lower than expected given the country's development level' (Chapter 11: 116). The choice of relying on countries of the same region and at a similar level of development (by which Felner presumably means countries with a similar GDP per capita), should be seen as a compromise. A more rigorous methodology should take into account a variety of factors in multiple regression analyses, to control for the various obstacles with which a country may be confronted. Such obstacles could include, for instance, though not being limited to, the country being landlocked, the country having a weak population density making the delivery of services more costly and more difficult, or the country being heavily dependent on a narrow range of commodities for its export revenues. However, taking into account a large range of factors that might potentially affect a country's ability to progressively realize economic and social rights would soon make monitoring compliance with social and economic rights an unmanageable task: for the sake of simplicity, Felner therefore proposes to limit the comparison to the countries of the same region, geographical proximity being a proxy for the range of obstacles faced.

The principal merit of Felner's approach is that it allows for a highly contextualized analysis. Even when the levels of deprivation in certain areas (such as health, education or food) are identical in countries at a similar level of development, different recipes will correspond to their respective conditions. Because the demarche proposed here is inductive, taking outcomes as a departure point and moving backwards along the causality chain to identify the policies that explain the outcomes, it avoids falling into the trap of presupposing that there are certain policies valid across time and geography to address social and economic deprivation. Instead, there is room for deliberation: where one country from a group underperforms, the question must be asked why it does not succeed, and whether, given the constraints that country faces and in the light of how other countries at a similar level of development address similar constraints, it could perform better.

However, even placing Felner's proposals under the best possible light, it fails on one point: it does not take into account that certain obstacles, which appear in a *static* perspective as being constraints imposed on the State, can be treated in a *dynamic* perspective as a State's own creation. This is in part compensated by Felner's proposal to develop cross-country comparisons across time, in order to show, for instance, that 'while India had a much higher income growth than its neighbors in South Asia, its reduction in the child mortality rate during the same period was one of the lowest in this sub-region', or that 'the proportion of urban Kenyans with access to an improved water source has been declining since 1990, in contrast to many of Kenya's

neighbors that have made progress during the same period' (Chapter 11: 151). However, even that would not address explicitly the question of the shifting boundary between what the State may and may not be held responsible for in the assessment of the duty of progressive realization: if India were to attribute its failure to reduce child mortality to the inadequate feeding practiced by women, and if Kenya were to attribute its poor record on access to water and sanitation to budgetary constraints, should these factors be treated as exogenous or as endogenous? Also, if treated as exogenous in the short run (the State, say, was surprised to find that increases in food availability did not result in improved nutritional outcomes due to poor feeding practices), should they not be treated as endogenous in the long run (after the State had time to conduct information campaigns towards the population about feeding infants)? This is the challenge associated, in legal thought, with the realist school of jurisprudence (for contemporary approaches in the same vein, see Sunstein 1987 or Tribe 1989); it is one that still must be met in scholarship on economic and social rights.

#### IV. Economic globalization

Chapters 14 to 20 address the impacts of economic globalization on economic, social and cultural rights, and how such impacts might be better taken into account. Economic globalization is both a legal phenomenon, characterized by a web of international agreements that facilitate cross-border trade and investment flows, and the result of technological developments, including the reduced costs of transportation and of communication. The international law of human rights is poorly equipped to deal with these developments. It faces five major challenges in this regard.

##### 1. The fragmentation of international law

A first challenge is the fragmentation of international law. International trade and investment law, international environmental law, international human rights law, and other regimes of international law, have increasingly developed in isolation from one another, each with their own set of norms, specialized dispute-settlement bodies, and communities (Simma 1985; International Law Commission 2006a). As a result, inconsistencies may emerge; and given the limits to the jurisdiction of the International Court of Justice, they may never be addressed authoritatively. The implication is that economic globalization – as the product of trade and investment liberalization – may be insufficiently informed by human rights considerations. Trade and investment agreements may either impose on States certain obligations that conflict directly with their obligations under human rights instruments, or make it more difficult for them to comply with such obligations, particularly those that concern the progressive realization of economic and social rights.

Moreover, where such conflicts occur, States may be strongly inclined to prioritize their obligations under trade and investment agreements, both because of the risk of counter-measures being imposed on them if they violate such agreements, and because of the need for States to be seen as trustworthy and hospitable to foreign investors. There are, of course, theoretical arguments in favor of recognizing the primacy of human rights treaties, including the fact that the Charter of the United Nations itself refers to human rights and proclaims its

superiority above all other agreements (see Article 103 of the UN Charter); and human rights courts have occasionally affirmed that the special nature of human rights treaties – that seek to guarantee rights to human rights and therefore ‘do not depend entirely on reciprocity among States’ – require that they be seen as standing ‘in a class of their own’ and prevail over other obligations of States (Inter-American Court of Human Rights 2006: para. 140). However, these arguments are of little weight in fact, when balanced against the commercial interests of States and their wish to send reassuring messages to the international community of investors.

That, at least, is the classic way of framing the question of the relationship between economic globalization and human rights in general, and trade and human rights in particular (for excellent studies on this issue, see Harrison 2007 and Joseph 2011). Yet, it is this view that chapters 16 to 18 in this volume seek to challenge. They do so in different ways. In Chapter 16, Christian Barry and Sanjay Reddy assert the need to go further than simply avoiding conflicts between trade and human rights. Focusing on the question of how to avoid trade liberalization conflicting with the requirements of basic labor standards, as guaranteed in the core instruments of the International Labour Organization, they insist that trade should be seen as an instrument to promote compliance with such standards, in order to avoid the reverse consequence, in other words the risk that opportunities to compete on global markets will discourage countries from improving the rights of workers, at least in labor-intensive lines of production in which the costs of labor represent a significant component of competitiveness. By systematically examining the arguments that could be raised against such a linkage by the inclusion of social clauses in trade agreements, they carefully list the conditions under which linking trade and labor standards might be acceptable, in order to avoid any instrumentalization for protectionist purposes, or misuse of such a linkage. They conclude that linkage should be considered desirable provided it is: unimposed, transparent and rule-based; involves adequate burden sharing; incorporates measures that ensure that appropriate account is taken of viewpoints within states; and is applied in a context-sensitive manner. A fair and effective system of linkage, they add, ‘will likely demand action to promote labor standards not only from countries that are the sites of production, but also by countries in which firms involved in the process of producing or marketing goods are located, owned or managed’ (Chapter 16: 622).

In Chapter 17, Lang addresses another challenge to the classic discourse of ‘fragmentation’. He questions in particular the simplified, ‘legal centralist’ framework, that sees the WTO primarily as a rules-setting and rules-enforcing organization, whereas in fact, its influence resides as much (or even to a larger extent) in the socialization process it encourages, and in the collective learning it leads to. It follows that the WTO regime is not simply one that constrains States, and is therefore not to be seen primarily as a threat to human rights insofar as it may narrow down the ‘policy space’ States require to progressively realize them. It is also a ‘teaching’ forum that has a potential to educate policy-makers in certain values – instruct them, as it were, about what it means to be a liberal trading nation. What results is a reframing of the debate between trade and human rights: rather than the search for ‘coherence’ between regimes, what is required is for the human rights community to become relevant to the debate on the desirable trade regime, encouraging policy learning and the production of new ideas about desirable trade policy.

The agenda Lang proposes to the human rights community is in a sense a more radical project than the classic search for ‘overcoming fragmentation’ – since it would lead the human rights community to participate in shaping the discussion about the constitution of the liberal trade

project itself, rather than remaining at the margins of the process through which the project is permanently redefined. At the same time, the tools advocated for such a contribution of the human rights movement to the reshaping of the liberal trade project remain classical. They include in particular a renewed emphasis on the need to see trade as a means towards socially desirable ends, rather than as an end in itself; or the human rights-impacts assessments of trade agreements, as a means to stimulate policy learning within the trade negotiators’ community.

This latter tool is discussed in Chapter 18, where Harrison and Goller explore the range of issues that are raised in the preparation of human rights-impacts assessments of trade agreements, anticipating a number of problems that, three years later, the Guiding Principles on human rights impacts of trade and investment agreements sought to address (Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements 2011). The Guiding Principles define the preparation of human rights impact assessments as an obligation of States, which are bound by pre-existing human rights treaty obligations and therefore are prohibited from concluding any agreements that would impose on them inconsistent obligations: this, the Guiding Principles argue, imposes on States a duty to identify any potential inconsistency between pre-existing human rights treaties and subsequent trade or investment agreements, and to remove any inconsistency which has been found to exist. However, as Lang notes in Chapter 17, though ostensibly using the language of ‘consistency’ and presented as an antidote to ‘fragmentation’, human rights assessments could also be construed, perhaps more importantly, as a learning device that may lead trade negotiators to question some of their most deeply held assumptions. It is therein, arguably, that their greatest subversive capacity resides.

## 2. *The ‘paradox of the many hands’*

Where a State encounters obstacles in seeking to fulfill economic and social rights because of an unfavorable international economic environment, this may only rarely be attributed to a single State alone: instead, it is the *combined* effect of the conduct of a number of States that results in such an environment. This is a second difficulty in addressing the relationship of economic and social rights to economic globalization. There emerges what some have called the ‘paradox of the many hands’: the larger the number of States involved in a situation that creates obstacles to one State fulfilling its human rights obligations, the more difficult it will be to assert a responsibility of any individual State in that situation. This problem is well known in the area of climate change (Voigt 2008), but it is equally relevant here, where the question is whether any State may be held responsible for a situation – resulting in the lack of realization of economic and social rights in another State – for which not the conduct of the former State alone, but that conduct *in combination with that of a large number of other States*, has contributed to this result (see, most notably, Salomon 2007).

In international law it is accepted that the responsibility of the State may be engaged even though the adoption by that State of a different conduct may not have led to a different result: if a particular conduct of the State is illegal, responsibility is not conditional upon the likelihood that the outcome, in terms of prejudice suffered by the victims, would have been different. In the *Bosnian Genocide Case*, the International Court of Justice noted that, in order to find Serbia responsible for not having prevented acts of genocide:

'it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce' (International Court of Justice 2007: para. 430).

According to the Court, how much the adoption by the State of a different conduct could have altered the outcome would only be relevant to the question of damages to be awarded (International Court of Justice 2007: para. 461).

This is consistent with the position adopted by the International Law Commission when it addressed the issues of foreseeability and causality – the link between conduct and result. In its Commentary to Principle 4 of its 2006 *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, it remarked:

'The principle of causation is linked to questions of foreseeability and proximity or direct loss. Courts in different jurisdictions have applied the principles and notions of proximate cause, adequate causation, foreseeability and remoteness of the damage. This is a highly discretionary and unpredictable branch of law. Different jurisdictions have applied these concepts with different results. It may be mentioned that the test of proximity seems to have been gradually eased in modern tort law. Developments have moved from strict *condicio sine qua non* theory over the foreseeability ("adequacy") test to a less stringent causation test requiring only the "reasonable imputation" of damage' (International Law Commission 2006b).

Thus, a particular violation of economic, social and cultural rights may be attributed to the conduct of one State, even if other, intervening causes, or the conduct adopted by a number of other States, have also played a role in the violation. The problem nevertheless remains that alleging the responsibility of one State in a situation for which other States also bear some responsibility (potentially to an even larger degree) may be politically difficult to justify. This is especially the case where the argument made is that the State in question should have done more to support the realization of economic and social rights in another State – for instance, by increasing the level of development aid or by facilitating access of that State to international finance. It is one thing for a State to be found responsible for implementing trade policies that destroy local producers' ability to compete on their own domestic markets; it is quite another to seek to engage the responsibility of that State for not ensuring that the multilateral trading system works for the benefit of the State which, due to its poor trade balance, finds it difficult to make progress on development indicators.

### 3. Human rights and international organizations: international financial institutions

In the post-World War II era, economic globalization has proceeded to a significant extent through international organizations to which certain competences have been transferred to guide the development efforts of poor countries, or to help them access financial support on international markets. However, international human rights law has largely developed through treaties that States – and, almost without exception, States alone – may accede to, and that are not addressed to international organizations. We encounter, thus, a third difficulty in addressing the relationship between economic and social rights and economic globalization.

Of course, human rights treaties binding on States' parties are not the sole source of international human rights law. However, we again find a gap between the answers that may be found in theory and the level of practical implementation. As subjects of international law, international organizations are in principle bound by 'any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties' (International Court of Justice 1980: para. 37). Undoubtedly, human rights are part of general international law. They are recognized in customary international law. They also may be seen as part of the general principles of law that are a source of international law, as the vast majority of national constitutions provide a list of basic rights often directly inspired by the Universal Declaration of Human Rights, or have themselves served as a source of inspiration to the Declaration (De Schutter 2012). Yet, the potential avenues to allege the responsibility of international organizations, including in particular international financial institutions, for violations of economic and social rights, remain very limited (De Schutter 2010b). Unless international organizations acknowledge that they are bound to comply with human rights in the exercise of the powers attributed to them, and establish mechanisms that will ensure adequate accountability, this is an area in which impunity may remain the rule. The alternative is, of course, to allege the responsibility of the member States of the said organizations in having transferred powers without acting with due diligence to ensure that such powers would be exercised in accordance with the requirements of human rights with which those States are bound to comply. At the current state of development of international human rights mechanisms, this remains the most favored avenue, but it is an admission of the still immature state of the relationship between human rights and globalization.

One related problem is the alleged tension between the limited mandate of international agencies (resulting from the principle of specialty) and their duty to comply with human rights. By insisting on the human rights responsibilities of international organizations, are we not asking them in effect to betray the mandate for which they were originally established, and which should, in principle, guide the exercise by these organizations of the competences they have been attributed? This is not an imaginary concern. The natural tendency of international organizations has always been to interpret extensively their constituting charters, thus expanding their powers and the scope of their operations (Alvarez 2005: 65–108). Yet, at the same time, a strict interpretation of their mandate could be nothing more than a figleaf to allow them to disregard the requirements of human rights, despite the very real impacts their activities might have on the enjoyment of such rights and on the ability for States to fulfill them.

This latter concern has been discussed especially in the context of international financial institutions (the World Bank Group and the International Monetary Fund). This is due to the influence exercised by these institutions on poor countries: the World Bank, for instance, makes loans worth 20 billion USD per year to finance projects in developing countries (see Bradlow and Grossmann 1995; Skogly 2001; Darrow 2003; Dañino 2005; Boisson de Chazournes 2007). Article IV, section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development states, under the heading 'Political Activity Prohibited': 'The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.' While the Articles of

Agreement of the IMF do not include a similar clause, the requirement to take only economic considerations into account has been seen as also applicable to the Fund. Is this not a prohibition against taking human rights into account?

This debate is addressed in Chapters 14 and 15 respectively by Ibrahim Shihata and Daniel Bradlow. The position of Shihata, expressed at a time when he was general counsel of the World Bank, is that the Bank is prohibited from taking human rights into account in making its decisions: that would inevitably lead to politicizing its mandate, and to introducing a form of conditionality in its lending policies. This remains to this day the professed doctrine. During his tenure as general counsel of the World Bank between 2003 and 2006, Roberto Dañino did appear open to reexamining this doctrine. In a document titled 'Legal Opinion on Human Rights and the Work of the World Bank', issued on 27 January 2006, Dañino noted that the mission of the World Bank consists in the alleviation of poverty through economic growth and social equity. This, he remarked, has 'an especially strong human rights dimension' (para. 7). Therefore: 'Human rights relate substantively to many of the activities of the World Bank. They are deeply interconnected with the purposes outlined in Article I, in large measure because they are directly relevant to the Bank's mission of poverty alleviation' (para. 8). This led Dañino to conclude that the consideration of human rights should be essential to the Bank's work (see also Dañino 2005). This opinion, however, remained isolated, and it has not become the official position of the Bank.

Beyond the narrow legal question of the definition of its mandate lies a broader question, that of the organizational culture within the World Bank and the respective ethos of economists and lawyers, which makes a radical cultural change within the Bank difficult to conceive (Sarfaty 2013). In 1995 Daniel Bradlow and Claudio Grossmann wrote to encourage the IFIs to

'reinterpret their charters to clarify what issues are considered "domestic" political issues, and therefore outside the scope of their mandate. While this prohibition has a continuing validity in excluding undue influences, it should not prevent the IFIs and the multilateral development bank from incorporating all matters governed by international law, such as human rights and the protection of the environment, into their operations. Such a reinterpretation would facilitate efforts to promote a development process that is governed by the rule of law' (Bradlow and Grossmann 1995: 439).

The call was valid then; it remains so today.

Beyond IFIs, the question may be addressed with respect to all international agencies that are key actors in the process of globalization: must such agencies do more to contribute to the fulfillment of human rights, by taking human rights into account at the risk of betraying the mandate for which they were established? There is no simple or immediate way out of this dilemma. It may, however, be useful to distinguish between the negative obligations (to abstain from violations) and the positive obligations (to protect and fulfill human rights) which are traditionally imposed on the parties to international human rights treaties. Whereas, in order to be fulfilled, positive obligations require that the addressee possess the required competences to do so, negative obligations merely impose limits on how existing competences may be exercised. The implication is that, by requiring from an international organization that it complies with human rights in the course of its activities, we are not asking it to expand its powers beyond those which it has been attributed by its member States. We are not even necessarily asking that it exercise the powers it has been attributed with a view to ensuring the

protection and promotion of human rights. We ask, rather, that when it takes action, and insofar as it takes action, it ensures that it will not negatively impact upon human rights. In that sense, the danger of 'creeping competences' usually associated with the imposition of human rights responsibilities on international organizations should not be exaggerated: while such a danger cannot be ignored, nor should it be considered an unavoidable consequence.

#### 4. The extraterritorial human rights obligations of States

We encounter a fourth difficulty in seeking to ensure that economic globalization is shaped in accordance with the requirements of human rights. It is that, traditionally, the human rights obligations of States only extend to the situations that fall under their 'jurisdiction'. Of course, this notion should not be equated with the national territory of the State, over which it exercises territorial sovereignty: human rights bodies have interpreted the notion of 'jurisdiction', insofar as it is a condition for the human rights obligations of the State to come into play, as referring to the situations over which the State exercises a certain degree of *de facto* control, whether or not this is in accordance with international law. However, in contrast to the primarily negative duties to abstain from interfering with the enjoyment of the rights of the individual, the duties to fulfill economic, social and cultural rights, may require the exercise of powers that are those of the territorial State or of an occupying State acting as the *de facto* territorial sovereign, which results in limiting the range of situations to which economic and social rights can be invoked.

Indeed, this is probably why, in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice remarks that, while the International Covenant on Civil and Political Rights, 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory' (International Court of Justice 2004: para. 111), the situation may be slightly different as regards the International Covenant on Economic, Social and Cultural Rights: the Court notes that this instrument 'contains no provision on its scope of application. *This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial*' (International Court of Justice 2004: para. 112 (emphasis added)). The Court does acknowledge that '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', and it finds that the Covenant on Economic, Social and Cultural Rights does impose obligations on Israel as the Occupying Power in the Occupied Palestinian Territories. However, the Court still presumes that the Covenant requires for its implementation that the State does exercise 'quasi-sovereign' powers – for instance, to establish a system of schools, to build health care centers, or to implement a program for social housing. This illustrates the difficulty of imposing extraterritorial obligations in the area of economic, social and cultural rights, at least if we remain trapped in the current (and still dominant) mindset that sees such rights as imposing positive duties on the State, whereas civil and political rights only (or primarily) would impose negative duties of abstention.

However, significant progress has been achieved over the past few years in extending the responsibility of States beyond the situations that occur on their national territory, not only for civil and political rights, but also for economic and social rights. Human rights-treaty bodies have increasingly acknowledged the existence of extraterritorial obligations, both in order to prohibit them from adopting measures that have negative impacts on the enjoyment of human rights outside their national territory, and in order to oblige them to contribute to the protection



of human rights outside their national territory in situations which they are in a position to influence (for instance, CESCR 1999a: para. 19 and 36; CESCR 2000: para. 39; CESCR 2002: paras 31 and 35–6). The emerging consensus in this regard is also illustrated, for instance, by the Guiding Principles on Human Rights and Extreme Poverty endorsed by consensus by the UN Human Rights Council in September 2012 (United Nations Human Rights Council 2012), which state that ‘as part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices’ (Guiding Principles on Extreme Poverty and Human Rights 2012: para. 92). Another indication of the progress made in this direction is the presentation at the Human Rights Council, in 2012, of the already mentioned Guiding Principles on human rights impact assessment of trade and investment agreements, that describe the methodology that should guide the conduct of such impact assessments prior to the conclusion of such agreements (Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements 2011). Finally, the endorsement in September 2011, by a large range of international human rights experts and organizations, of the Maastricht Principles on the extraterritorial obligations of States in the area of economic, social and cultural rights, that may be seen as a restatement of the obligations of States outside their national territory, also has significantly contributed to this momentum (De Schutter et al. 2012a; Coomans and Künnemann 2012).

### 5. Controlling transnational corporations

Part of this movement towards the affirmation of extraterritorial obligations of States in the area of economic, social and cultural rights, consists in imposing on States a duty to control private actors over which they can exercise control, even outside their national territories: in Chapter 19, David Kinley and Justine Nolan explain why this matters, highlighting the increased role of large corporations in the global economy and the difficulties States encounter in seeking to regulate their activities (see also, for an early and compelling assessment, Joseph 1999). However, a second answer to the challenge of ensuring that economic globalization does not proceed in disregard of the requirements of economic and social rights has consisted in imposing on such actors certain human rights obligations, sometimes euphemistically referred to as ‘responsibilities’. The most significant achievement in this regard was the endorsement by the Human Rights Council, in 2011, of a set of Guiding Principles on Business and Human Rights proposed by the Special Representative of the UN Secretary-General, Professor J. Ruggie, on the issue of human rights and transnational corporations and other business enterprises.

That development was also long in the making. When, on 20 April 2005, the United Nations Commission on Human Rights adopted a resolution requesting that the UN Secretary-General appoint a Special Representative on the issue of business and human rights (United Nations Commission on Human Rights 2005), the field was a deeply divided one. After a wide consultation involving all relevant stakeholders including in particular the business community, the independent experts of the UN Sub-Commission for the Promotion and Protection of Human Rights had proposed in August 2003 a set of ‘Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises’ (United Nations Sub-Commission

for the Promotion and Protection of Human Rights 2003; see Weissbrodt and Kruger 2003, 2005). The draft Norms presented themselves as a restatement of the human rights obligations imposed on companies under international law. They were based on the idea that ‘even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights’, and therefore ‘transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments’ (Preamble, 3d and 4th Recital).

However, as documented in a report prepared in 2004–2005 by the Office of the High Commissioner for Human Rights, the ‘Norms’ were deeply contentious (Office of the High Commissioner for Human Rights 2005). Some stakeholders challenged the very idea that international human rights law was relevant to corporations: they asserted that international law could not impose direct obligations on companies, which are not subjects of international law. Others questioned the choice of the experts of the Sub-Commission on Human Rights to base the ‘Norms’ they were proposing on a range of instruments that were not necessarily ratified by the countries in which the corporations operate, thus in practice imposing on business actors obligations that went beyond the duty to comply with the legal framework applicable to their activities where such activities are located. Moreover, it was said, the ‘Norms’ were inapplicable, due to the ambiguities of the standards guiding certain key questions, such as the definition of the situations which corporations had a duty to influence: Principle I of the ‘Norms’ referred in this regard to the notion of ‘sphere of influence’ to provide such a definition (‘Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups’); but that was considered exceedingly vague and the source of legal insecurity for both the victims of human rights abuses of corporations and for these corporations themselves.

Not only were the ‘Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises’ highly contentious due to the prescriptions they contained; they also were seen as objectively competing with the flagship initiative of the United Nations in promoting corporate social responsibility, the ‘Global Compact’. The Global Compact was first proposed by the United Nations Secretary General K. Annan at the 1999 Davos World Economic Forum. It was conceived as a voluntary process, meant to reward good corporate practices by publicizing them, and to promote a mutual learning among businesses. The companies joining the process pledge to support a set of values in the areas of human rights, labor and the environment, to which anti-corruption was added in 2004. They report annually on initiatives that contribute to the fulfillment of these values in their business practices, through a ‘Communication on Progress’. The companies joining the process who fail to comply with the reporting requirement face ‘de-listing’: by 2011, more than 2,000 participating companies had been thus sanctioned.

The Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in June 2011 is now seen as the most authoritative statement of the human rights duties or responsibilities of States and corporations adopted at UN level. These Guiding Principles

go beyond the plethora of voluntary initiatives, often sector-specific, that existed hitherto. They have been widely endorsed, by business organizations and in intergovernmental settings – including, notably, by the Organization for Economic Cooperation and Development (OECD) when it revised its Guidelines on Multinational Enterprises in 2011. They have also been invoked, albeit at times grudgingly, by civil society, and they are now subject to a follow-up mechanism within the United Nations system, through the Working Group on business and human rights and an annual forum to be held on this issue.

Though these are major breakthroughs, it remains difficult to make general statements about the human rights impacts of the growth of foreign direct investment through transnational corporations (see however, for an attempt at a synthesis, De Schutter et al. 2012b). Part of the difficulty is that such assessments can be made at two distinct levels, one concerned with the macro-economic dimensions and another with the level of each individual investment project (De Schutter 2005). In Chapter 20, Matthias Sant'Ana explores the methodological issues raised in the attempts to provide such assessments. He considers which quantitative approaches have sought to link the arrival of FDI to the human rights record of the receiving country, and how project-level approaches have been conducted to measure the human rights impacts on the communities affected by one particular investment project. He identifies the methodological difficulties associated with both. Clearly, we need more empirical studies such as those mapped by Sant'Ana, in order to improve existing human rights-impact assessments methodologies and ensure that the new consensus on the responsibility of corporations to respect human rights translates into reality.

## V. Economic, Social and Cultural Rights and Development

The final set of chapters collected here discuss the role of human rights in development. Chapters 21 and 22 address the question whether there exists a duty for rich countries to support the development of poor countries, based either on the 'right to development' proclaimed by the United Nations General Assembly in 1986 or on the reference to 'international assistance and cooperation' that appears in the International Covenant on Economic, Social and Cultural Rights and in later human rights instruments. Chapters 23 and 24 examine the role of human rights in development cooperation and in the realization of the development objectives set by the international community.

### 1. The duty to assist developing countries

The idea of a right to development was first expressed by Kéba M'Baye in his 1972 inaugural lesson to the International Institute for Human Rights (M'Baye 1972). On 21 February 1977 the Commission on Human Rights adopted Resolution 4 (XXXIII) requesting that a study be prepared on 'the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and fundamental human needs'. The study, authored by Philip Alston, was presented to the Commission on Human Rights in 1979. It emphasized both that measures adopted at domestic level and measures at international level should be mutually supportive and should go hand in

hand, and that the realization of the right to development should be based on participation at all levels (Report of the Secretary-General 1979). In 1986, after five years of discussions within a Working Group established by the Commission on Human Rights, the UN General Assembly adopted the Declaration on the Right to Development, defining it as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized' (United Nations General Assembly 1986); the only negative vote was cast by the United States. Since then, various working groups, task forces and independent experts have been trying to identify ways to overcome obstacles to the realization of the right to development, and to define criteria that would allow to measure progress in its fulfillment (for an excellent synthesis, Marks 2011). Whichever advances were made stumbled, however, on the apparently insurmountable oppositions between rich and poor countries, concerning issues such as the need for a new international instrument or the use of indicators.

As the Independent Expert on the right to development to the United Nations Commission on Human Rights between 1999 and 2004, before becoming the Independent Expert on Human Rights and Extreme Poverty, Arjun Sengupta played a major role in these discussions. An Indian economist from West Bengal and longtime member of the Indian Parliament, Sengupta emphasizes in Chapter 21 that human rights are both an end of development and ingredients for development, an idea also championed by his compatriot Amartya Sen (Sen 1999). As Independent Expert on the right to development, Sengupta pioneered the idea of 'development compacts', which he elaborates on in his contribution to this volume (Chapter 21: 880–83). The basic idea is that rich countries could ensure that they provide financial support and remove a range of obstacles to a developing country's ability to fulfill human rights, in exchange for a firm commitment by that country to work towards the full realization of human rights, under the supervision of an independent body such as a human rights commission: in essence, instead of having vague commitments of the international community to facilitate the process of development, and equally vague promises of developing countries to focus on human development priorities for the benefit of their populations, there would be a contractualization of the efforts made on both sides, and a corresponding shift from promises to binding obligations. Though this scheme smacks of conditionalities, it differs from conditionalities as usual in that the commitments and the accountability are conceived as the result of a negotiated agreement rather than imposed, and as mutual rather than unilateral.

In Chapter 22, Magdalena Sepúlveda Cremona, who later was to be appointed the Independent Expert (and then Special Rapporteur) on Extreme Poverty and Human Rights, explores the role of 'international assistance and cooperation' in human rights instruments, and in particular in the International Covenant on Economic, Social and Cultural Rights. Article 2(1) of the Covenant specifically refers to an obligation to take steps, including through international assistance and cooperation, to realize economic, social and cultural rights. It therefore clearly affirms an obligation to engage in international cooperation, as recognized by the Committee on Economic, Social and Cultural Rights (CESCR 1990: para. 14). Similarly, the Convention on the Rights of the Child requires states to take measures to implement the economic, social and cultural rights in the treaty 'to the maximum extent of their available resources and, where needed, within the framework of international cooperation' (Art. 4, and see also Articles 24 (4) and 28 (3), requiring states to promote and encourage international

cooperation in regard to the right to health and to education, taking particular account of the needs of developing countries). Thus, as noted by the Committee on the Rights of the Child, '[w]hen States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation' (CRC 2003: para. 5).

Disagreement persists, however, about whether the reference to international assistance and cooperation implies the existence of binding obligations (Vandenhoele 2009). Neither the drafting history of the Covenant nor subsequent State practice provide a definitive answer. When negotiating what came to be Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the drafters agreed that international cooperation and assistance was necessary in order to realize economic, social and cultural rights, but they disagreed as to whether it could be claimed as a right (Alston and Quinn 1987: 188–9). No vote was conducted to decide between these competing views and to reflect one of the contending views in the text.

The issue was reopened in recent years, when the Optional Protocol to the Covenant was negotiated. During those negotiations, some industrialized countries accepted moral responsibility for international cooperation, but argued that the Covenant does not impose legally binding obligations in regard to economic, social and cultural rights internationally (United Nations Commission on Human Rights 2006: paras 78 and 82). However, that interpretation was far from unanimous among States: as seen above, although there are disagreements as to the scope of the duty and its precise implications, there is today broad agreement that the Covenant imposes at least some extraterritorial obligations in the area of economic, social and cultural rights. This is reflected in international declarations adopted without a vote, such as the resolutions of the United Nations General Assembly on the right to food, which indicate that the right to adequate food requires 'the adoption of appropriate environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfillment of human rights for all', and which provide that 'all States should make all efforts to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries' (United Nations General Assembly 2009: paras. 20 and 32). Moreover, reaffirmations over many decades to cooperate internationally in advancing economic, social and cultural rights, including those expressed in Millennium Development Goal 8 to develop partnerships for development to realize the MDGs, lend strength to the legal commitment to internationalize responsibility in this area.

Yet, even the most progressive readings of the existing treaties fall short of asserting that there exists a duty, grounded in the idea of international assistance and cooperation, to provide certain levels of support to developing countries. The Committee on Economic, Social and Cultural Rights itself, though it has repeatedly affirmed that international assistance and cooperation for the realization of economic, social and cultural rights is 'particularly incumbent on those States in a position to assist' (CESCR 1990: para. 14; CESCR 2000: para. 45; CESCR 2006: para. 37), as well as 'other actors in a position to assist' (CESCR 2000: para. 45; CESCR 2001: para. 16), and though it systematically refers States to their commitment to dedicate 0.7 per cent of their GDP to official development assistance, has refrained from describing this duty as sufficiently 'perfect' to potentially give rise to enforceable claims against the donor States. This, we may note, led the experts having set out the 2011 Maastricht Principles on the extraterritorial obligations of States in the area of economic, social and cultural rights referred

to above, to include the principle according to which 'States should coordinate with each other, including in the allocation of responsibilities, in order to cooperate effectively in the universal fulfillment of economic, social and cultural rights'. This Principle – Principle 30 – recognizes that the implementation of the duty of international assistance and cooperation requires further specification, as the respective responsibilities of States in a position to support the realization of economic and social rights in developing countries should be better delineated: this is both reminiscent of what was described above as the 'paradox of many hands', and a variation on the theme of 'development compacts'; in other words, on the need to contractualize obligations to assist development efforts where such obligations are still insufficiently defined.

## 2. *Human rights and development*

In Chapter 23, Paul Gready explores the notion of a human rights-based approach to development. Formerly with Amnesty International and a specialist of human rights and development in the African context, Gready has moved to become the Director of the Centre for Applied Human Rights at the University of York in the United Kingdom. The importance of his attempt in Chapter 23 and in other publications on the same topic (see Gready and Ensor 2005; Gready 2009) stems from the fact that it seeks to demonstrate that human rights are not simply an add-on to development cooperation policies, nor are they of purely symbolic value: they are operational tools that can improve the effectiveness and the legitimacy of these policies.

Policy-makers and practitioners in this area would be wrong to neglect human rights, because of the important contribution they can make: participation improves the information on the basis of which policies are designed and implemented, and it ensures adequate feedback and therefore accelerates learning; accountability provides access to claims mechanisms for those that are unjustifiably excluded from certain programs, thus reducing the potential leakage of funds or mistargeting; empowerment, putting people in the driver's seat, ensures that the solutions that are designed will respond to the real problems that the poor face, and will be based on the local knowledge that they can mobilize about how to address such problems (see also Darrow and Tomas 2005; and Dorsey et al. 2010). Many of these advantages of a rights-based approach to development are also captured by Arjun Sengupta in his contribution to this volume (Chapter 21: 873):

'The human rights approach helps to establish accountability, and where possible culpability for the failures or mistakes in implementing the policies by establishing the duties and obligations of the different parties, especially of the state and of the international community. Even if they are "imperfect obligations", the rights-duty correspondence for each of the rights has to be established. The remedial or corrective actions have to be enforceable, some of them through legislation, where possible, others through appropriate monitoring mechanisms. The search for accountability leading up to culpability is a genuine value addition of the human rights approach to the fulfillment of human development.'

It should nevertheless not come as a surprise that, despite the advantages of a human rights-based approach to development, the dialogue has been difficult between the human rights and development communities – the former predominantly populated by lawyers and community activists, the latter by development economists and practitioners within aid agencies. In Chapter 24, Mac Darrow, who has been following this debate for a number of years from within the Office of the High Commissioner for Human Rights, seeks to explain the roots of the mistrust

between the two communities, and why, as Alston has written, the human rights and the development agendas have been like 'ships passing through the night': both moving according to their own itinerary and at their own speed, without a real attempt to coordinate with one another, and at a permanent risk of colliding (Alston 2005). At the end of his exhaustive review of the debate on the role of human rights in the fulfillment of the Millennium Development Goals, Darrow concludes this: 'The main barriers to realising the MDGs are deficits in political will, rather than resources. The human rights framework can help to close the accountability gap and strengthen incentives for action, mobilising individuals and communities to demand the MDGs as a matter of right, rather than charitable dispensation' (Chapter 24: 123).

As this volume goes to press, the World Leaders are finalizing discussions on a new set of goals to succeed the eight Millennium Development Goals, that were developed by the United Nations Secretariat following the Millennium Declaration adopted by the Heads of State and Governments in September 2000. It is to be hoped that, in defining this new set of commitments, greater attention will be paid to the issue of accountability, both at domestic level and at international level, to the question of inequality and to the situation of the poorest, based on the realization that economic growth combined with growing inequalities within countries has limited poverty-reducing impacts. In this interdependent world more than in any other time in past history, the full realization of economic and social rights is a shared responsibility.

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