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Economic, Social and Cultural Rights

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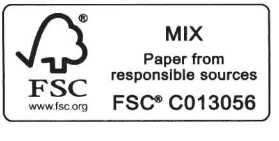

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Series Preface

Much of contemporary moral, political and legal discourse is conducted in terms of rights and increasingly in terms of human rights. Yet there is considerable disagreement about the nature of rights, their foundations and their practical implications and more concrete controversies as to the content, scope and force and particular rights. Consequently the discourse of rights calls for extensive analysis in its general meaning and significance, particularly in relation to the nature, location of content of the duties and responsibilities that correlate with rights. Equally important is the determination of the forms of argument that are appropriate to establish whether or not someone or some group has or has not a particular right, and what that might entail in practice.

This series brings together essays that exhibit careful analysis of the concept of rights and detailed knowledge of specific rights and the variety of systems of rights articulation, interpretation, protection and enforcement. Volumes deal with general philosophical and practical issues about different sorts of rights, taking account of international human rights, regional rights conventions and regimes, and domestic bills of rights, as well as the moral and political literature concerning the articulation and implementation of rights.

The volumes are intended to assist those engaged in scholarly research by making available the most important and enduring essays on particular topics. Essays are reproduced in full with the original pagination for ease of reference and citation.

The editors are selected for their eminence in the study of law, politics and philosophy. Each volume represents the editor's selection of the most seminal recent essays in English on an aspect of rights or on rights in a particular field. An introduction presents an overview of the issues in that particular area of rights together with comments on the background and significance of the selected essays.

TOM CAMPBELL
Series Editor
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Introduction

Background

The essays in this volume examine selected issues concerning economic, social and cultural (ESC) rights. International human rights law protects a wide range of ESC rights. Broadly, such rights include the right of every individual to work and the enjoyment of just and favourable conditions of work; the right to form and join trade unions; the right to social security, including social insurance; the right to an adequate standard of living, including adequate food, clothing and housing; the right to the enjoyment of the highest attainable standard of physical and mental health; the right to education; the right to take part in cultural life; the right to enjoy the benefits of scientific progress and its applications; and the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[1]

The international legal protection of ESC rights against state interference is very largely a post-1945 phenomenon. Events in Europe in 1930s and during the Second World War focused attention upon the protection of human rights including ESC rights. Thus the promotion of human rights including ESC rights became one of the purposes of the United Nations (UN)[2] and the Charter of the United Nations imposed legal obligations upon the UN and its members to promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;
(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[3]

As the foregoing provision demonstrates, the UN Charter clearly placed emphasis on key issues relevant to protection and promotion of ESC rights notably higher standards of living, employment, health, education, cultural cooperation and non-discrimination. Although the exact scope of these rights was not defined, all UN Members pledged themselves to take 'joint and separate action' in cooperation with the UN for the achievement of the above purposes.[4] The content of human rights to be achieved was later declared in the Universal Declaration

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[1] See the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant), GA res. 2200A (XXI), 21 UNGAOR Supp. (No. 16), p. 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force 3 January 1976, Arts. 6–5.

[2] Charter of the United Nations, 26 June 1945, 59 Stat. 1031, TS 993, 3 Bevans 1153, entered into force 24 October 1945, Art. 1.

[3] Ibid., Art. 55.

[4] Ibid., Art. 56.

of Human Rights 1948 (UDHR)[5] and further protected in a series of multilateral and regional human rights treaties ratified by most states.[6]

The UDHR recognised all human rights: civil and political rights as well as ESC rights from inception without separating them. In transforming the provisions of the UDHR into legally binding obligations, the UN adopted two separate but interdependent covenants: the International Covenant on Civil and Political Rights (ICCPR)[7] and the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant). As of 31 December 2009, there were 160 states parties to the ICESCR compared to 165 states parties to the ICCPR. The two covenants, along with the UDHR, constitute the so-called 'international bills of rights'.

At the international level, ESC rights are protected in several international human rights treaties, the most comprehensive of which is the ICESCR. In addition, there are International Labour Conventions that guarantee human rights including: the Unemployment Convention, 1919 (No. 2); the Social Security (Minimum Standards) Convention, 1952 (No. 102); the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117); the Equality of Treatment (Social Security) Convention, 1962 (No. 118); the Employment Policy Convention, 1964 (No. 122); the Labour Statistics Convention, 1985 (No. 160); the Indigenous and Tribal Peoples Convention, 1989 (No. 169); and the Prevention of Major Industrial Accidents Convention, 1993 (No. 174).[8] Some human rights are also protected by customary international law of human rights and thus legally binding on all states regardless of being parties to relevant human rights treaties. As noted in the Restatement of the Law: Third Restatement of US Foreign Relations Law:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones:

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.[9]

Thus, grave or systematic violations by a state of any of the ESC rights (for example, practising, encouraging or condoning systematic racial discrimination in education, health, housing or social security) is a breach of customary international law.

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[5] GA res. 217A (III), UN Doc A/810, p. 71 (1948).

[6] On a survey of major developments in the international protection of human rights, see Baderin and Ssenyonjo (2010).

[7] GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976.

[8] A list of International Labour Organization (ILO) conventions is available on the ILO website at http://www.ilo.org/ilolex/english/convdisp1.htm (accessed 6 July 2010).

[9] See *Restatement of the Law: The Foreign Relations Law of the United States* as adopted and promulgated by the American Law Institute at Washington DC, May 14, 1986 (St Paul: American Law Institute, Vol 2, 1987), S. 702.

It is important to note that the ICESCR initially did not have an independent treaty monitoring body, let alone one that could receive individual complaints. This omission was partially addressed by the creation of the CESCR in 1985, to receive and review regular state party reports.[10] It was not until 18 June 2008 that the UN Human Rights Council adopted an Optional Protocol to the ICESCR. Significantly, on the sixtieth anniversary of the UDHR (10 December 2008), the UN General Assembly unanimously adopted the Optional Protocol,[11] 42 years after a similar mechanism was adopted for civil and political rights. The signing ceremony for the Optional Protocol was held on 24 September 2009 during the 2009 Treaty Event at the UN Headquarters in New York. By September 2010, more than 30 states had signed the Optional Protocol, although only three states (Ecuador, Mongolia and Spain) had ratified it.[12] The Optional Protocol provides the CESCR with three new roles: (1) to receive and consider individual and group communications claiming 'a violation of any of the economic, social and cultural rights set forth in the Covenant'; (2) inter-state communications to the effect that a state party claims that another state party is 'not fulfilling its obligations under the Covenant'; and (3) to conduct an inquiry in cases where the Committee receives reliable information indicating 'grave or systematic violations' by a state party of any ESC rights set forth in the ICESCR.[13] The Optional Protocol will enter into force after ratification by ten states in accordance with its Article 18. In its preamble, the Protocol reaffirmed the 'the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms'. The unanimous adoption of this Optional Protocol on the sixtieth anniversary of UDHR is indeed a significant human rights development that ushers in a new era of accountability for violations of ESC rights in international law (once the Protocol enters into force) and thus dispels claims that ESC rights under the ICESCR were not intended to be justiciable (see Dennis and Stewart, Chapter 11, p. 515).

At the regional level, there was largely the same pattern of difference. The European Convention on Human Rights (ECHR) 1950,[14] despite its all-embracing name as a 'human rights convention', is concerned almost exclusively with civil and political rights.[15] Indeed, it may be stated that, although the 'interpretation of the European Convention may extend into the sphere of social and economic rights',[16] the ECHR does not protect ESC rights, explicitly (with the exception of the right to education and possibly the right to property) or impliedly (Warbrick, 2007, p. 241). It took another decade before the European Social Charter was adopted and a further generation before a right of collective (but not individual) complaints was introduced under it.[17] As for the Inter-American human rights system, the American

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[10] See ECOSOC Resolution 1985/17.

[11] UN Doc. A/63/435, GA Res. A/RES/63/117 (10 December 2008).

[12] See note 40 below for a list of states signatory to the Optional Protocol as of 23 September 2010.

[13] UN Doc. A/63/435. (note 11), Articles 1, 2, 10 and 11.

[14] CETS No. 5, adopted on 4 November 1950.

[15] For a comprehensive discussion of the ECHR, see Harris et al. (2009); and White and Ovey (2010).

[16] *Airey* v. *Ireland* A 32 (1979); 2 EHRR 305, at para. 26.

[17] The European Social Charter was adopted in 1961 and revised in 1996. On the European Social Charter, see Harris and Darcy (2001); and Cullen (2009).

Convention on Human Rights (ACHR) 1969,[18] likewise despite its all-embracing name as a convention on 'human rights' emphasizes civil and political rights. it being only later that the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador'[19] was adopted, with its partial system of individual complaint. The African Charter on Human and Peoples' Rights 1981 (African Charter)[20] was a great improvement in that it included from the outset a comprehensive guarantee of the full range of human rights, including ESC rights (for example, the rights to work under equitable and satisfactory conditions, to health and to education) alongside civil and political rights, without drawing any distinction between the justiciability or implementation of the two categories of rights. Significantly, the African Charter made all rights subject to a right of individual complaints, an acknowledgement that accountability through the law was part of the solution and that states had legal obligations to respect, protect and fulfil ESC rights. Other African Union human rights treaties – in particular, the African Charter on the Rights and Welfare of the Child[21] and the Protocol to the African Charter on the Rights of Women in Africa[22] – have echoed the indivisibility of human rights by protecting civil, political, economic, social and cultural human rights in one instrument.

At the national level, the courts of some states have demonstrated that ESC rights can be enforced through the courts. In this regard the jurisprudence of the Indian courts[23] and South African courts[24] has been particularly useful. Despite some limitations, celebrated judgments by the South African Constitutional Court, such as judgments in the *Grootboom* and *Mazibuko* cases,[25] have been particularly influential, showing that ESC rights are justiciable and providing a public law model for deciding cases in that regard by holding that when challenged as to its policy relating to ESC rights the state 'must explain why the policy is reasonable' and that

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[18] OAS Treaty Series No. 36, 1144 UNTS 123.

[19] OAS Treaty Series No. 69 (1988), entered into force 16 November 1999. On the justiciability of ESC rights in the Inter-American system, see Tinta (2007).

[20] Adopted 27 June ,1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). For a discussion see Evans and Murray (2008); and Ouguergouz (2003).

[21] OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

[22] Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003; available at http://www.achpr.org/english/_info/women_en.html.

[23] For example, Supreme Court of India in the following cases: *Francis Coralie* v. *The Union Territory of Delhi* (1981) 1 SCC 608; *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Olga Tellis* v. *Bombay Municipal Corp.* (1985) 3 SCC 545; *Shantistar Builders* v. *Narayan Khimalal Totame and Others* (1990) 1 SCC 520; and *Chamelli Singh and Others* v. *State of Uttar Pradesh JT* (1995) 9 SC 380; *Shanti Star Builders* v. *Narayan K. Totame* (1990) 1 SCC 520; *Consumer Education and Research Centre (CERC)* v. *Union of India* (1995) 3 SCC 42. See also Kothari (2007).

[24] For example, Constitutional Court of South Africa (CC) in the following cases: *Thiagraj Soobramoney* v. *Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); *Minister of Health and Others* v. *Treatment Action Campaign* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

[25] *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2001 (1) SA 46 (CC); *Lindiwe Mazibuko and Others* v. *City of Johannesburg and Others*, Case CCT 39/09 [2009] ZACC 28; available at http://www.saflii.org/za/cases/ZACC/2009/28.html, paras 161–2.

the policy is being reconsidered consistent with the obligation to 'progressively realize' ESC rights. Thus, justiciability of ESC rights may be most insightful where a state does not allocate its available resources to progressively realize ESC rights.

In sum, what emerges from the foregoing overview is that it is not the nature of the rights that is crucial (that is, not whether rights are considered ESC rights or civil and political rights), but the nature of the obligations that are imposed by international and national law concerning them. It is thus clear that the argument about justiciability has now been resolved. Whenever ESC rights cannot be made fully effective without some role for the judiciary, judicial remedies are 'necessary'.[26] This means that effective judicial remedies must be available for victims of all violations of ESC rights so that such rights can be enforced through the courts. As the CESCR has stated, affirming the principle of the interdependence and indivisibility of all human rights, 'all economic, social and cultural rights are justiciable'.[27] Indeed ESC rights, both individual and collective, have long been enforced in national courts without difficulty. At times national (and even regional human rights) courts have in fact been applying ESC rights, such as the rights to health and education, without knowing it, deciding cases that are about these rights (though not necessarily in compliance with them) under different rubrics, such as health or education law or, in the case of the ECHR, under Article 2 of the First Protocol.[28]

Despite the developments considered above, there are still some conceptual and practical issues surrounding ESC rights which undermine their effective realization. These issues relate to human rights obligations of states and non-state actors; the nature and scope of substantive ESC rights; and the justiciability of ESC rights at an international level as well as at the national level. As it is impossible to cover all aspects of ESC rights in a volume of this nature, the scope of the essays contained herein is limited to the above three themes. These will now be reviewed below, and a brief summary provided of each essay included in the volume, giving a general insight into the issues covered.

Human Rights Obligations

In the discussion of human rights obligations relating to ESC rights, the following questions are often raised. First, what are the human rights obligations of states parties to treaties protecting ESC rights such as the ICESCR? Second, are there any human rights obligations for non-state actors to respect, protect or even fulfil ESC rights? Third, what are the permissible limitations to ESC rights? And can states derogate from ESC rights? Finally, should states

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[26] CESCR, *General Comment 9: The Domestic Application of the Covenant*, UN Doc. E/C 12/1998/24 (3 December 1998), para. 9.

[27] See CESCR, *Concluding Observations: United Kingdom*, UN Doc. E/C 12/1/Add.79 (5 June 2002), para. 24. See also CESCR, *Concluding Observations: Poland*, UN Doc. E/C 12/POL/CO/5 (20 November 2009), para. 9.

[28] See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 262, entered into force 18 May 1954. Art 2 reads: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.' For the analysis, see Harris et al. (2009), pp. 697–709.

align their economic policies including those relating to international trade with human rights obligations with respect to ESC rights? The four essays in Part I of this volume examine the above issues.

In the first essay, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights (Chapter 1), Philip Alston and Gerard Quinn, two of the earliest commentators on the nature and scope of state obligations under the ICESCR, observe that a number of commentators have contested the status of ESC rights as human rights – noting, for example, that since 1981 the US government has maintained that ESC rights should not be seen as rights but as goals of economic and social policy. In order to destroy some of the fallacies and misperceptions surrounding the legal status of ESC rights, Alston and Quinn examine the nature and scope of the states parties' obligations under Parts I, II and III of the ICESCR. Their essay begins with an overview of common perceptions about ESC rights and a commentary on the principles of interpretation of the ICESCR in light of the principles of the customary rules of international law pertaining to treaty interpretation as reflected, *inter alia*, in Articles 31–3 of the Vienna Convention on the Law of Treaties.[29] Applying the principles in these articles, the authors make an analysis of the words and phrases used in Article 2(1) of the ICESCR[30] and the implications of the Covenant in terms of different systems of governance. Furthermore, they then examine the implications following from the use of specific words and phrases in Part III of the Covenant on the nature of state obligations – for example, the understanding to 'respect' certain rights; progressive achievement of rights 'recognized' in the Covenant; undertakings to 'ensure' and 'guarantee'. The authors further examine the nature of states parties' international obligations arising from the phrase used in Article 2(1) 'individually and through international assistance and co-operation, especially economic and technical'. Further analysis is made of the limitations provisions in the Covenant contained in Articles 4, 5 and 8, as well as the implications of the absence of the derogation provision from the obligations under the Covenant. The authors conclude that, by virtue of ratification of the Covenant, states assume treaty obligations that do have domestic legal implications and that the obligations in the Covenant are 'real'. This conclusion finds support from the Committee on Economic, Social and Cultural rights, which has stressed that: 'In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.'[31] The obligation of states parties to the ICESCR have further been a subject of analysis by the Committee on Economic, Social and Cultural rights (CESCR or the Committee) in several General Comments,[32] and recent academic analysis (for example, Ssenyonjo, 2010). It is

[29] 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980.

[30] Article 2(1) provides: '1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

[31] See CESCR, *General Comment 9: The Domestic Application of the Covenant* (19th session, 1998), UN Doc. E/C 12/1998/24 (1998), para. 4.

[32] See CESCR, *General Comment 3: The Nature of States Parties' Obligations* (5th session, 1990), UN Doc. E/1991/23, annex III, p. 86 (1991). The Committee has adopted several General Comments

observed that the challenge of giving substance to those obligations in practice must be taken up by peoples, non-governmental organisations (NGOs) (for example, Oloka-Onyango, 2006), states parties to the ICESCR, and the Committee on Economic, Social and Cultural Rights.

Manisuli Ssenyonjo, in his essay 'The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?' (Chapter 2), begins by observing that, in recent years, non-state actors (NSAs) such as transnational corporations, civil society groups, international organizations – including the World Trade Organisation (WTO), the World Bank and the International Monetary Fund (IMF) – as well as armed opposition or terrorist groups have assumed major roles in relation to the progressive enjoyment throughout the world of all human rights, and economic, social and cultural rights in particular. Despite this development, NSAs are still not bound directly by existing international human rights treaties which apply to states parties. Nonetheless, it is clear that in the era of globalisation, it is not enough to look only to the state as the primary actor to respect, protect and fulfil human rights. It is noted that various factors have contributed to this development including:

(1) the privatization of functions previously performed by states;
(2) the ever-increasing mobility of capital and the increased importance of foreign investment flows, facilitated by market deregulation and trade liberalization;
(3) the expanding impact and responsibilities of multilateral organizations, such as the WTO, affecting broader society;
(4) the enormous growth in the role played by transnational civil society organizations, many of which now have multimillion-dollar budgets, employ very large staffs, and perform public-type functions in a large number of states;
(5) a rise in the impact of organized armed groups violating human rights or controlling territory and population and aspiring to gain international legitimacy; and
(6) the growth of international terrorist networks, such as Al Qaeda, and international criminal networks, such as drug cartels, which are not confined to any one state and some of whose activities have become global in scope.

Thus the growth in the wealth and power of NSAs has meant an enhanced potential for NSAs to promote or undermine respect for human rights.

Ssenyonjo then notes that this raises two fundamental questions examined in his essay: First, how should international human rights law ensure that the activities of NSAs are consistent with international human rights standards? Second, how should accountability of NSAs be promoted effectively when violations of international human rights law occur? In his analysis, he defines NSAs, state obligation to protect against human rights violations by NSAs, protection against discrimination, remedies against violations by NSAs, and direct human rights responsibilities of NSAs. He observes that treaties are made to be performed. NSAs, therefore, should not (as a minimum) contribute to a state's failure to comply with a treaty obligation concerning ESC rights. It is noted that human rights treaties are of a special character since their object and purpose is the protection of the basic rights of individual

in recent years which have contributed to the clarification of states' obligations corresponding to many rights contained in the ICESCR. The text of the Committee's General Comments is available at http://www2.ohchr.org/english/bodies/cescr/comments.htm.

human beings, irrespective of their nationality, both against the state of their nationality and all other contracting states. If this object and purpose is to be meaningfully achieved, NSAs must not undermine state efforts to comply with their human rights obligations. After a brief survey of the IMF, the World Bank and the WTO, he makes two concluding observations. Firstly, it is noted that international human rights law is historically, and will remain (at least in the near future), essentially state-centred. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law. This includes ensuring that NSAs respect human rights. Secondly, it is observed that, given the current limitations of state power with respect to NSAs, it is necessary that NSAs (defined broadly to include international organizations) should accept/recognize some moral human rights obligations; however, present they have no clearly defined legal obligations to respect human rights apart from compliance with the legal regime of the particular state in which they are operating. The challenge that faces human rights activists is to reflect on the most appropriate manner in which to enhance the obligations of NSAs with respect to ESC rights. In the author's view, in order to ensure more accountability for human rights violations by NSAs, it is relevant to consider the adoption of a Statute of an International Court of Human Rights, to which NSAs could also become parties in addition to states.

In Chapter 3, 'Limitations to and Derogations from Economic, Social and Cultural Rights', Amrei Müller explores the extent to which states should be permitted to limit or derogate from ESC rights. In the first part of the essay, Müller begins by observing that although the Committee on Economic, Social and Cultural Rights (CESCR) has adopted several General Comments clarifying states' obligations, there has been little direct discussion about legitimate limitations to and derogations from ESC rights, even though the question about the extent to which states are allowed to limit and possibly derogate from some ESC rights is intrinsically linked to the question of the precise scope of states' obligations under the ICESCR. In the second part of this essay, the concepts of limitations and derogations and their underlying rationale is explained in order to establish the basis for the discussion of them with regard to ESC rights. This includes an attempt to clarify the differences and overlaps between these concepts, since there is a tendency in the states' and the CESCR's approach to confuse them. In the third part, the discussion moves to the question of the extent to which states are permitted by the ICESCR to limit ESC rights, and to possibly derogate from some of them in situations of emergency. This includes an analysis of Article 4 of the ICESCR,[33] the ICESCR's general limitations clause, and a discussion of its relationship to Article 2(1) of the ICESCR (progressive realization). Finally, the essay examines the question of whether states may derogate from ESC rights in situations of emergency, against the background of the absence of a derogation clause from the ICESCR. The discussion primarily draws upon states' reports to the CESCR, the CESCR's documents (Concluding Observations, General Comments and other statements), and the *travaux préparatoires* of the ICESCR, as well as academic literature. It is argued that the criteria of Article 4 should be applied as a uniform

[33] Article 4 provides that: 'The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'

standard to evaluate all limitations of ESC rights, regardless of the reasons for which these limitations are made. This is against the background of the approach of the CESCR, which draws a distinction between retrogressive measures states may take when they face resource constraints under Article 2(1) on the one hand; and limitations for other reasons under Article 4 on the other hand. With regard to derogations, the question is discussed whether states are permitted to derogate from the ICESCR despite the fact that the ICESCR does not contain a derogation clause. The author concludes that a tendency can be observed in the states' and the CESCR's approach to allow for derogations from the ICESCR's labour rights (the right to strike, rights related to trade unions and the right to work in exceptional situations which threaten the life of the nation), but to exclude derogations from other ESC rights, in particular from minimum core obligations under these rights. It is observed that states derogating from these rights should be required to satisfy the criteria applicable under the ICCPR, and to resort to derogations only after they have exhausted the ICESCR's limitation clause.

It is often suggested that there is a profound normative tension between the human rights regime on the one hand and the WTO on the other.[34] In this context, a question arises whether, and how, states should align their economic policies including policies and practices in the international trade regime with human rights obligations? Robert Wai's essay on 'Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime' (Chapter 4), explores how the creative use of international economic and social rights law might assist actors operating inside and around the international trade law regime to address the impact of trade on social concerns. Wai observes that, in a world context where trade and social concerns overlap in many ways, strategies based on international human rights law may disturb conceptions of the trade regime as narrowly directed towards trade facilitation, while also providing a basis to address difficult problems such as reconciling the concerns for high social standards in both the South and the North. The essay describes and relates strategies based on international social rights at three potential venues for the development of the trade regime. First, a strategy of 'countering' could utilize international social rights law to guide interpretation and application of trade treaties, including to challenge the selective spread of such 'human' rights intellectual property rights and investment rights. Second, international social rights might be achieved by, and in turn guide, NGO 'branding' practices. Third, a strategy of 'dealing' informed by norms of international social rights could generate broader reforms to the trade regime that would address both concerns about fair trade and regulatory competition in developed countries, and concerns about trade access and development in developing countries. Wai concludes by noting that the three levels discussed in this essay are linked in important ways: for example, seemingly arcane issues of treaty interpretation have been important to NGO mobilization.

Selected Substantive Rights

As noted above, the Covenant protects a wide range of ESC rights. Although the scope of many of these rights has now been clarified in the Committee's General Comments, there are still a number of debatable issues surrounding ESC rights. These include how to monitor

[34] For an examination of the relationship between the WTO and human rights, see Joseph et al. (2009).

the progressive realization of ESC rights in states parties to the ICESCR and the domestic application of these rights in the era of globalization. The five essays in Part II reflect on these questions, focusing on some selected ESC rights – namely, the rights to education, health, work and water; the right to enjoy the benefits of scientific progress; and cultural rights.

First, Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh, in their essay, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (Chapter 5), observe that, nearly fifteen years ago, Audrey Chapman emphasized the importance of ascertaining violations of the ICESCR as a means to enhance its enforcement (Chapman, 1996, p. 24). The authors note that, today, this violations approach is even more salient given the recent adoption of the Optional Protocol to the ICESCR. Their essay focuses on the right to education in the ICESCR to illustrate how indicators can be employed to ascertain treaty compliance and violations. It is noted that indicators are important to enforcing ESC rights because they assist in measuring progressive realization and furthers the ultimate goal of full realization and enjoyment of all human rights. The methodology that is proposed calls for: (1) analysing the specific language of the treaty that pertains to the right in question; (2) defining the concept and scope of the right; (3) identifying appropriate indicators that correlate with state obligations; (4) setting benchmarks to measure progressive realisation; and (5) clearly identifying violations of the right in question. The essay makes a brief discussion of the historical and theoretical foundations for the right to education as it relates to the ICESCR. It applies the proposed methodology to the right to education under the ICESCR, and concludes by recommending the use of the proposed methodology to ascertain violations of ESC rights.

In the next essay, 'Health Systems and the Right to Health: An Assessment of 194 Countries' (Chapter 6), Gunilla Backman, Paul Hunt, Rajat Khosla et al. examine the right to health and the right-to-health features of health systems. It is observed that, 60 years ago, the UDHR laid the foundations for the right to the highest attainable standard of health. This right is central to the creation of equitable health systems. The authors identify some of the right-to-health features of health systems, such as a comprehensive national health plan, and propose 72 indicators that reflect some of these features. The authors collect globally processed data on these indicators for 194 countries and national data for Ecuador, Mozambique, Peru, Romania and Sweden. It is noted that globally processed data were not available for 18 indicators for any country, suggesting that organizations that obtain such data give insufficient attention to the right-to-health features of health systems. Where they are available, the indicators show where health systems need to be improved to better realize the right to health. The authors provide recommendations for governments, international bodies, civil-society organizations and other institutions, and suggest that these indicators and data, although not perfect, provide a basis for the monitoring of health systems and the progressive realization of the right to health. It is observed that the right-to-health features are not just good management, justice or humanitarianism, they are obligations under human-rights law. It is emphasized that an equitable health system is a core social institution, no less than a fair court system or democratic political system. Accordingly, it is concluded that 'Governments must be held to account to ensure that health systems have, in practice, the features required by international human-rights law' (p. 304 below).

Haina Lu's essay 'The Personal Application of the Right to Work in the Age of Migration' (Chapter 7) analyses some aspects of the right to work, focusing on the right of non-nationals

to work in the host state. It is observed that the right to work is an important human right recognised by most major human rights instruments. It is, however, not clear whether and to what extent non-nationals can enjoy the right to work in the host State. The essay observes that, as globalization stimulates international migration more than ever, clarifying the personal application of the right to work has important implications for protecting the human rights of immigrants and for promoting immigrants' integration in the host country. In practice, the right of non-nationals to work is restricted to varying degrees according to their legal status in the host country. Based on existing human rights standards and jurisprudence, this study attempts to clarify the right to work of several categories of non-nationals: long-term residents, temporary residents, refugees and asylum-seekers, undocumented immigrants, and migrant workers. It is concluded that the right to work applies to non-nationals in general, although limitations are permitted in current international law. However, the restrictions imposed on non-nationals should be regarded as an exception to the right to work instead of a general rule, and therefore as subject to strict scrutiny in accordance with established rules such as legitimate aims and the principle of proportionality.

In Chapter 8, 'Human Right to Access Water? A Critique of General Comment No. 15', Stephen Tully examines access to water as a human right. Although there is no specific provision in the ICESCR providing explicitly for the right to water, at the conclusion of its twenty-ninth session in 2002, the CESCR identified a human right to water uniquely straddling two provisions of the ICESCR.[35] General Comment No. 15, para 2, stated that: 'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.. It is thus limited in scope in as far as the human right to water was not defined to extend to water for industrial or agricultural applications. Tully's essay critiques that instrument for the phraseology used, the substantive omissions and the reasoning of the Committee. The essay also evaluates the broader implications of a human right to access water within a liberalized market context. Section 1 questions the legal basis identified by the Committee for a human right to access water and considers the existence of a right to access water under contemporary international law. Section 2 assesses the policy justifications which prompted a human rights orientation to the global challenges confronting water resources, including the treatment of water services under international economic law. Most notable among the several omissions from General Comment No. 15 is the increasingly prominent role and responsibilities of the private sector, as outlined in section 3. Section 4 sceptically examines the prospects for implementing a human rights approach to water resources in light of applicable economic and environmental principles. Finally, in section 5, it is argued that unreflective resort to the General Comment template for addressing individual interests will render such instruments outdated or unhelpful as normative guides and several solutions are offered. It is concluded that the right to access water would be more convincingly grounded in the context of health, food or housing, rather than the general rubric of adequate living standards.

Audrey R. Chapman's 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Application' (Chapter 9) observes that both the UDHR and the ICESCR enumerate a right to the benefits of scientific progress, but science is rarely addressed through a human rights lens. Nor has the human rights community systematically

[35] See UN Doc. E/C 12/2002/11 (20 January 2003).