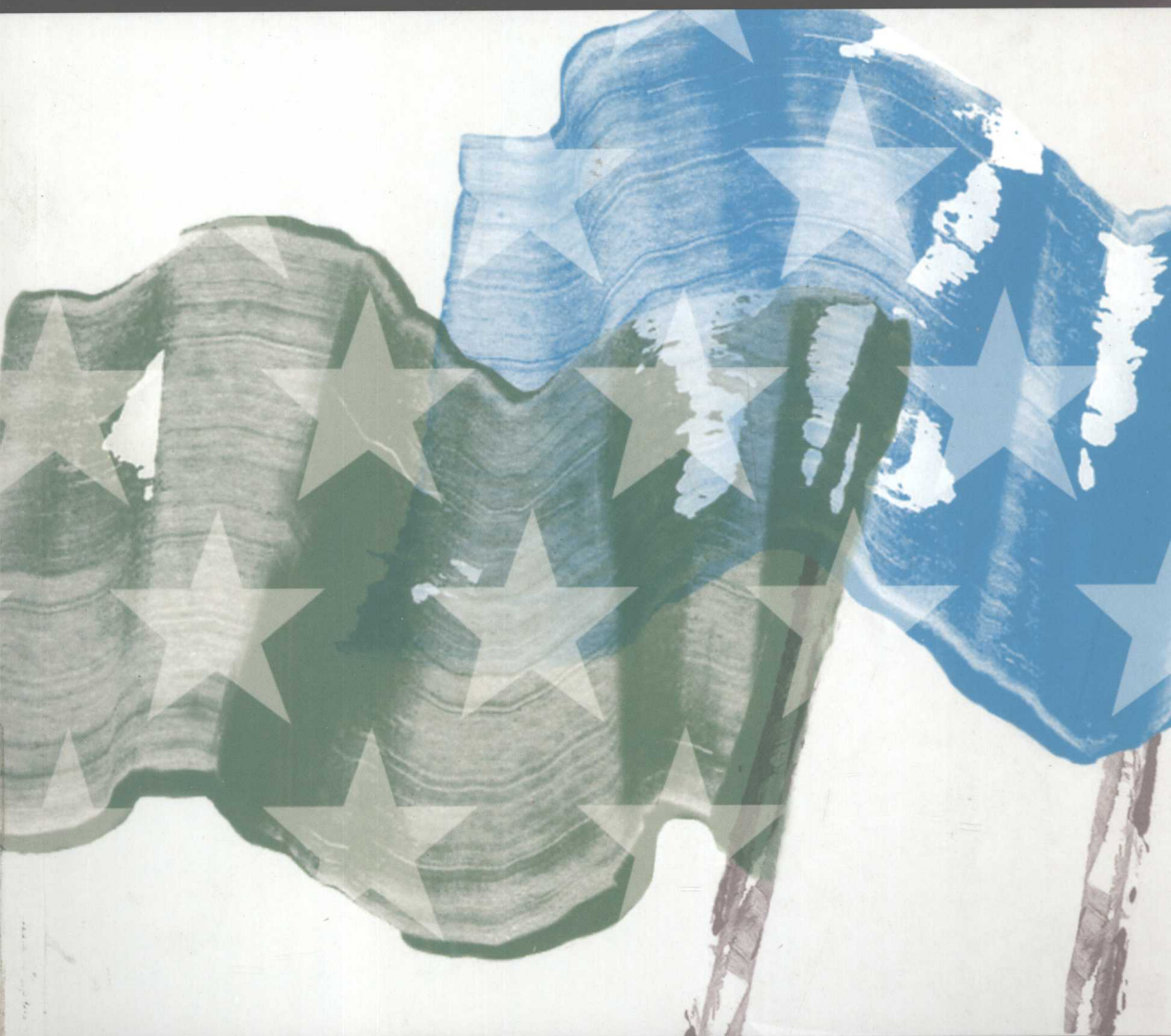


Economic, Social and Cultural Rights in International Law



Manisuli Ssenyonjo

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON
2009

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190

Fax: +1 503 280 8832

E-mail: orders@isbs.com

Website: <http://www.isbs.com>

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Telephone: +44 (0)1865 517530 Fax: +44 (0)1865 510710

E-mail: mail@hartpub.co.uk

Website: <http://www.hartpub.co.uk>

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-915-9

Typeset by Forewords Ltd, Oxon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Preface

Economic, social and cultural rights (ESC rights) are protected in several international human rights instruments, the most comprehensive being the International Covenant on Economic, Social and Cultural Rights (ICESCR or ‘the Covenant’), which has been ratified by a vast majority of states. One of the most recent developments with respect to the international protection of ESC rights has been the unanimous adoption on 10 December 2008 by the United Nations General Assembly of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (GA resolution A/RES/63/117).

In adopting the Optional Protocol, the General Assembly took note of the adoption by the Human Rights Council, by its resolution 8/2 of 18 June 2008, of the Optional Protocol. The Optional Protocol provides the Committee on Economic, Social and Cultural Rights (CESCR or ‘the Committee’), the body of independent experts that monitors implementation of the ICESCR by its states parties, competence to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, claiming to be victims of a violation of any of the ESC rights set forth in the Covenant.

The Optional Protocol reaffirms ‘the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms’. Significantly, in recent years ESC rights have received increasing attention from various international organisations and in academic writing, and the contents of specific ESC rights have been clarified by the CESCR and the courts in many national legal systems. Regardless of these positive developments, and the fact that ESC rights are fundamental to the dignity of every person, many actors working with human rights law still focus solely or mainly on issues relating to civil and political rights and tend to pay lip-service to the interdependence and interrelatedness of all human rights. Claims of violations of ESC rights are still treated less seriously. This means that in practice ESC rights are still marginalised.

Economic, Social and Cultural Rights in International Law subjects ESC rights protected in the Covenant to a deeper analysis in the light of the practice of the CESCR while taking into account other relevant sources of ESC rights at national, regional and international levels.

This book analyses key issues relevant to ESC rights, with particular emphasis on various themes including state obligations; non-state actor obligations; women’s ESC rights; domestic protection of ESC rights; and state reservations to ESC rights. The book further makes a thorough examination of selected rights, in particular the rights to work, health and education. By so doing, it demonstrates that ESC rights are human rights just as much as the traditional civil and political rights and do not

deserve to be marginalised. It is noted that even if the Optional Protocol to the Covenant eventually comes into force, the views of the Committee under the Protocol would not be legally binding in a strict legal sense.

Thus, states could easily ignore them. In this context, the book questions whether there is a need for a World Court of human rights which could also consider claims involving alleged violations of ESC rights in legally binding judgments against willing States and non-State actors. Finally, the book also brings together a collection of selected essential materials on ESC rights needed to understand and analyse the subject. This timely study will be of value to all those interested in human rights and international law.

I would like to express my special thanks to all colleagues and to Professors David Harris and Robert McCorquodale who helped me to study international human rights law at the University of Nottingham. I would also like to express my special thanks to my family for their love over the years. Thanks also to Ife Ogbonna. Richard Hart and the team at Hart Publishing deserve my thanks for seeing this book through completion. Special tribute to Nick Allen who edited the book with skill. The book states the law as at 31 January 2009.

Finally, this book is dedicated to Jamilah, Yaseen and Zainab for their hard work.

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January 2009

Foreword

Happily, the legal protection of economic, social and cultural rights has come more to the fore in recent years than previously. Although United Nations texts have consistently over time stressed the indivisibility and equal importance of civil and political rights and economic, social and cultural rights, in practice there has been a great divide, with the latter not being given the same legal priority as the former. The International Covenant on Economic, Social and Cultural Rights initially did not have an independent treaty-monitoring body, let alone one that could receive individual complaints. This omission was partially remedied by the creation of the Committee on Economic, Social and Cultural Rights, which became competent to receive and review national reports. The most recent and hugely encouraging development has been the adoption of the Protocol to the International Covenant on Economic, Social and Cultural Rights in 2008 which will provide a right of individual complaint when it enters into force.

At the regional level, there was largely the same pattern of difference. The European Convention on Human Rights 1950, despite its all-embracing name, is concerned almost exclusively with civil and political rights. It took another generation before the European Social Charter was adopted and a further generation before a right of collective (but not individual) complaints was introduced under it. As to the inter-American human rights system, the American Convention on Human Rights 1969 likewise emphasises civil and political rights; only later was the San Salvador Protocol on Economic, Social and Cultural Rights—with its partial system of individual complaint—adopted. The African Charter on Human and Peoples' Rights 1981 was a great improvement in that it included from the outset a comprehensive guarantee of the full range of human rights, including economic, social and cultural rights, and made these subject to a right of individual complaint.

At the national level, the courts of some countries have shown the way, with the jurisprudence of the Indian and South African courts being particularly well known, demonstrating that economic, social and cultural rights can be enforced through the courts. Celebrated judgments by the South African Constitutional Court, such as that in the *Grootboom* case, have been particularly influential, showing that such rights are justiciable and providing a public law model for deciding cases concerning them. What emerges is that it is not the nature of the rights that is crucial, but the nature of the obligations that are imposed by national law concerning them. Two other points have become clear. First, that the argument about justiciability, which has now largely been resolved, concerns social and, to some extent, cultural rights only. Economic rights, both individual and collective, have long been enforced in national courts without difficulty. Second, national courts have in fact been applying social 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.

All of these considerations make the present book very timely and valuable. It offers a comprehensive analysis of the basic elements of the legal regime of the International Covenant on Economic, Social and Cultural Rights and of certain key economic and social rights and themes more generally. Of considerable importance is the focus upon the economic, social and cultural rights of women. The book also critically reviews the jurisprudence of selected national courts. With the anticipated arrival of the right of individual communication following the entry into force of the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights, together with the increased interest in and awareness of economic, social and cultural rights resulting from the adoption of the Protocol and other developments, the present study will be particularly welcome in both the academic and practitioner world.

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March 2009

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACmHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
AIDS	acquired immunodeficiency syndrome
AmCHR	American Convention on Human Rights
ASIL	American Society of International Law
BCLR	Butterworths Constitutional Law Reports
CC	Constitutional Court
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, social and Cultural rights
CESTS	Council of Europe Treaty Series
CIL	Customary International Law
CRC	Convention on the Rights of the Child
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CERD Committee	Committee on the Elimination of All Forms of Racial Discrimination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
CHR	Commission on Human Rights
CHR Res	Commission on Human Rights Resolution
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRC-AC	Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict

CRC-SC	Optional Protocol to the Convention on the Rights of the Child on the Sale of children, Child Prostitution and Child Pornography
CESCR	Committee on Economic, social and Cultural rights
DAC	Development Assistance Committee
ECHR	European Convention on Human Rights
ECOmHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EFA	Education for All
EJIL	European Journal of International Law
ESC(s)	European Social Charter(s)
ESCR/ESC rights	economic, social and cultural rights
ETS	European Treaty Series
EU	European Union
FAO	Food and Agriculture Organization
GA	United Nations General Assembly
GA res	United Nations General Assembly Resolution
GAOR	General Assembly Ordinary Resolution
GDP/GNP	Gross Domestic/National Product
GNI	Gross National Income
HIV	human immunodeficiency virus
HRA	Human Rights Act
HRC	Human Rights Committee
IACmHR	Inter-American Commission on Human Rights.
IACtHR	Inter American Court of Human Rights.
ICC	International Criminal Court.
ICCPR	International Covenant on Civil and Political Rights.
ICERD/CERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRR	International Human Rights Reports
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund

IPEC	International Programme on the Elimination of Child Labour
NHRIs	National Human Rights Institutions
NGO	non-governmental organisation
NSA	non-state actor
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OP	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
PCIJ	Permanent Court of International Justice
TS	Treaty Series
TNC	transnational corporation
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights.
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
UDHR	Universal Declaration of Human Rights
UST	United States Treaties Series.
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization

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