CHAPTER TWO

AN OVERVIEW OF THE CHARACTERISTICS AND CONTROVERSIES OF HUMAN RIGHTS

Introduction

In an examination of the nexus between the environment and human rights, Chapter 1 discussed the ethical and philosophical underpinnings of the concept of the environment. This chapter concentrates on the major controversies and issues in the conceptualisation and implementation of contemporary international human rights in order to determine the appropriateness and constraints of the human rights-based approach to environmental issues. The chapter is comprised of five sections. Section A examines the main theories that underlie the concept of human rights. Section B focuses on the issue of rights-holders and the expansion of human rights law beyond human beings. Section C considers the internationalisation and universalism of human rights. Section D presents the taxonomy of human rights and its corollary issues. Section E investigates the implementation mechanisms for human rights and the impediments to their enforcement at national and international levels.

A. *Theories of Human Rights: Philosophical and Legal Foundations*

While it is beyond the purpose of this chapter to examine thoroughly the philosophical underpinnings of the human rights concept, it is important to look at some of the main theoretical controversies that surround it in order to highlight the conceptual issues that accompany the transformation of a specific claim into a human right. Since its inception, the doctrine of human rights has oscillated between two theories of law: natural law and positive law. This oscillation reflects the unsettled debate in international human rights law over the source of human rights, that is, whether they emanate from the inherent dignity of the human person or from the will of the State.[1] Among the legal theorists and philosophers of the Enlightenment era who debated the legal aspect of human rights, Bentham represents the most extreme view against natural law. His stance was that positive law is the only accepted form of law and that

[1] See Philip Alston, "Making Space for New Human Rights: The Case of the Right to Development," *Harvard Human Rights Year Book* 1(1988): 31.

rights emanating from natural law are 'metaphysical' or even 'nonsense upon stilts'.[2]

Alternative concepts such as utilitarianism and socialism advanced to fill the gap created by the decline of natural rights at the end of the 18th century. The utilitarian principle, based on the quest for ultimate happiness, moved away from the 'metaphysical abstraction' of natural rights to be a channel for social reform.[3] Instead of liberal political philosophy, French social theorists such as Saint Simon proposed economic science as a remedy for what natural rights failed to achieve for the poor.[4] Similarly, Karl Marx expressed disdain for the 'rights of the man', describing them as bourgeois rights that overlooked the importance to human emancipation of socio-economic factors like labour, production and wealth.[5] Thus, the drift away from the emphasis on the natural rights of the individual that occurred in the 19th century opened the door to the development of socio-economic rights. Although individual rights did not vanish, they were viewed through utilitarian and socialist lenses as a channel of the public good instead of as part of the traditional concept of natural rights.[6]

Several contemporary human rights scholars have also reconsidered the validity of the philosophical underpinnings of the human rights concept. Gearty argued that the philosophical bases of human rights are fading and that there is a crucial need to look for an appropriate foundation to solidify the concept in the future.[7] If the term 'human rights' is neglected on the theoretical level, many might fill it with notions at odds with the essence of human rights.[8] To fill the gap, the term 'compassion' is suggested as a proper justification for human rights to replace both the religious and rational underpinnings of the past. Compassion, described by Davies as a 'virtuous disposition',[9] is a powerful channel through which human rights can be used to "frame and mobilise responses to suffering and to atrocities."[10]

On the other hand, some scholars have refuted the overemphasis on the notions of legality and justiciability to justify a new human right. Alston noted that notions of 'implementation' and 'supervision', rather than those of justiciabilty or enforceability are those that mainly govern international

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[2] Jeremy Bentham, "Critique of the Doctrine of Inalienable, Natural Rights," *Anarchical Fallacies* 2(1843). Available at http://www.ditext.com/bentham/bentham.html.

[3] William A. Edmundson, *An Introduction to Rights*, Introductions to Philosophy and Law Series (Cambridge: Cambridge University Press, 2004), 28.

[4] Ibid., 29.

[5] Ibid.

[6] Ibid., 30.

[7] Conor Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), 56.

[8] Ibid.

[9] Quoted in Gearty, 43.

[10] Ibid., 43.

human rights.[11] Thus, the enforcement of a human right is not necessarily tied to its judicial applicability. Contrary to the traditional legalist view that sees the legal component of a human right as the main factor in its recognition and implementation, Sen adopted the constructive view of human rights, which is predicated on social ethics and open public scrutiny.[12] Sen argued that the coercive force emanating from a legislated right does not necessarily lead to better enforcement of the desired claim; instead, the social and political awareness of human rights' abuses often create a tremendous public pressure that incites appropriate legislation or actions to address the violated right. In Sen's view, the moral realm of human rights is broader than their legal realm.[13]

Many philosophers differentiate between legal rights and moral rights. In Cranston's view, while legal rights are accompanied by *lawful* entitlements, moral rights are conducive to mere entitlements.[14] Accordingly, he considered human rights as moral rights with a universal dimension.[15] Edmundson equated human rights with natural rights, arguing that, despite the tendency towards the legal recognition of human rights, they are predominantly moral rights.[16] The distinction between legal and moral human rights is inextricably linked to the ambiguity inherent in the definition of human rights, so one can argue that a certain degree of osmosis has occurred between legal and moral rights over time. Human rights are rooted both in natural law and moral values and in positive law. The fact that not all moral rights can be transformed into legal rights indicates that society has already decided which rights are worthy of joining the legal realm in order to guarantee an appropriate level of protection and autonomy to the rights-bearers and that the chosen rights are perceived as urgent and important.[17]

B. *Human Beings as Rights-Holders*

Throughout history, the scope of human rights has expanded gradually to encompass all human beings, regardless of race, ethnicity, gender or social status.[18] Locke's perception of natural rights was exclusively confined to

[11] Alston, "Making Space," 35.

[12] Amartya Sen, "Human Rights and Development," in *Development as a Human Right: Legal, Political, and Economic Dimensions*, ed. Bård A. Andreassen and Stephen P. Marks (London: Harvard School of Public Health, 2006), 1–8.

[13] Ibid.

[14] Maurice Cranston, *What Are Human Rights?* (London: The Bodley Head, 1973), 19.

[15] Ibid., 23.

[16] See Edmundson, *Introduction to Rights,* 187.

[17] See especially Alice Erh-Soon Tay, "Human Rights Problems: Moral, Political, Philosophical," in *Rethinking Human Rights*, ed. Brian Galligan and Charles Sampford (Sydney: The Federation Press, 1997), 25.

[18] Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, NY: Cornell University Press, 2003), 60.

property-owning Christian males. Slaves, oppressed minorities, women, children and homosexuals have been progressively added to the ever-expanding club of human rights-holders.[19] In conjunction with the expansion of the beneficiaries of human rights, their substance stretched tremendously from Locke's narrow list of the rights to life, property and liberty to a wide array of internationally recognised rights.[20]

In an attempt to extend the scope of human rights beyond human beings, some commentators have argued that the distinction between human rights and others' rights lies not so much in the 'human factor' as in the universality, inalienability and non-conditionality features of such rights.[21] This line of thought enables the human rights concept to spread out to non-human beings and entities. In order to find a justification for assigning the privileges of human rights to non-human beings or entities, some authors have suggested that the term 'human rights' is obsolete and must be superseded by another expression that reflects a more modern concept of the rights rhetoric. As Edmundson put it, "the expression "human rights" suggests that there is some deep conceptual connection between belonging to the human species and having rights; perhaps it should be retired–just as the phrase "the rights of *man*" has given way to gender-neutral equivalents."[22]

Legal philosophers such as Edmund Burke were deeply hostile to the idea of human equality that was asserted by the 'rights of man'. Burke based his objection on the fact that human beings are not equal in reality and concluded that human rights rhetoric is misleading and utopian.[23] However, his argument is untenable because the inequalities in people's physical abilities, mental abilities and their socio-economic status are not an impediment to the enjoyment of human rights. In contrast, the core function of human rights is, based on the inherent characteristic of human dignity, to rectify inequity among human beings. In other words, the emphasis is on what a person *is* rather than on what he or she *has*.[24]

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[19] The atrocities and horrors inflicted on slaves in America and Europe triggered powerful anti-slavery movements in the 18th and 19th centuries. The abolition of slavery started in Great Britain with the Abolition Act of 1833. In contrast, the abolitionist movement in the United States stimulated domestic political turmoil and threatened the Union of the States. After a devastating civil war between US Southern and Northern States, the Thirteenth Amendment was incorporated into the American Constitution leading to the suppression of slavery in all States. By the end of the 19th century, abolitionism was successful in ending the slave trade and slavery practices all over the world. Women who were heavily involved in antislavery movements in Britain and the USA went on to form strong suffrage movements with a tremendous impact on women's rights in general. See generally Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), 157.

[20] Ibid.

[21] See especially Edmundson, *Introduction to Rights*, 186.

[22] Ibid., 191.

[23] Cranston, *What Are Human Rights?* 15.

[24] In Cranston's words, human rights "belong to a man simply because he is a man [sic]". Ibid., 24.

The 'interest theory' of legal rights may be insightful to the justification of an emerging human right. The core of the theory is that rights are created to serve the interests of its addressees. In contrast, the 'choice theory' of legal rights limits the scope of rights to beings who are capable of making choices.[25] In that context, many groups of beings and non-beings who are not capable of making autonomous choices—such as infants, animals and even ecosystems—are automatically deprived of such rights.[26] By applying the 'interest theory', it is possible for the human rights doctrine to include nature, ecosystems and animals as rights-bearers based on their inherent worth, rather than the 'human' prerequisite mentioned by Cranston.

C. *Internationalisation and Universalism of Human Rights*

1. *Internationalisation of Human Rights*

Although sovereignty is the bedrock concept of international law, human rights have been the companion of this concept since WWII, when the internationalisation of human rights began.[27] There was a failed attempt to establish a human rights system in the aftermath of WWI. However, the atrocities caused by two consecutive global wars along with alarming fascist ideologies triggered the institutionalisation of human rights.[28] This ushered in a new era of rights wherein a state is no longer immune from international scrutiny in the case of egregious human rights violations, such as the Holocaust that shock the collective human consciousness. International scrutiny is promoted through the international standardisation of human rights norms that allow the international community to verify the commitment of a country to the protection of its citizens' rights.[29] According to Cranston, "human rights is the twentieth century name for what has been traditionally known as natural rights or … the rights of man."[30] In fact, our modern international human rights system can be traced to the earliest declarations and bills of rights of the 18th century: the 1776 United States Declaration of Independence, the 1789 French Declaration of the Rights of Man and of the Citizen, and the 1789 Bill of Rights of the United States Constitution.[31] These earliest rights, which were aimed principally at restricting the abusive power of rulers, laid the bases for democratic forms of government.

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[25] Edmundson, *Introduction to Rights*, 120–21.
[26] Ibid., 127.
[27] Vesselin Popovski, "Sovereignty as Duty to Protect Human Rights," *UN Chronicle* 41, no. 4 (2004).
[28] George Kent, *Freedom from Want: The Human Right to Adequate Food* (Washington, D.C.: GeorgeTown University Press, 2005), 28.
[29] See Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), 17.
[30] Cranston, *What Are Human Rights?* 1.
[31] See Thomas Fleiner, *What Are Human Rights?* (Sydney: The Federation Press, 1999), 15.

Due to national and international pressure, human rights rhetoric made its way into the *United Nations Charter*, whose preamble affirms the organisation's "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[32] Article 1 clarifies that one of the goals of the United Nations is to advance and foster the worldwide respect of human rights, regardless of 'race, sex, language and religion.'[33] While the Charter did not elaborate on the subject of human rights, its primary influence lies in the revolutionary idea that human rights can no longer be left to the discretion of public authorities and that the international community should respond to gross violations of human rights.[34] Thus, through Article 56, the Charter opened the door to a substantial codification of human rights that culminated in the proclamation of the 1948 Universal Declaration of Human Rights (UDHR).[35]

The UDHR[36] is a building block in the edifice of internationally recognised human rights. Szabo viewed it as "a success rarely encountered in the history of international law"[37] and Ignatieff described it as a 'fire-wall against barbarism.'[38] The UDHR, a non-binding document under international law, offers a conciliatory approach to human rights within the diverse cultural traditions of states that were not ready to comply or abide by the principles enshrined in the Declaration.[39] It took 18 years for the human rights embedded within the UDHR to materialise into treaties. In 1966, the *International Covenant on Civil and Political Rights* (ICCPR), its *First Optional Protocol*, and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) were adopted.[40] These Covenants, along with the UDHR, formed what is commonly known as the International Bill of Rights. Other international human rights treaties also focus on specific rights or rights-holders, such as the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,*

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[32] *The United Nations Charter*, Preamble.

[33] Ibid., art. 1.

[34] See Thomas Buergenthal, "Centennial Essay: The Evolving International Human Rights System," *American Journal of International Law* 100(2006): 787.

[35] Ibid.

[36] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (1948).

[37] Imre Szabo, "Historical Foundations of Human Rights and Subsequent Developments," in *The International Dimensions of Human Rights*, ed. Karel Vasak (Paris: Greenwood Press, 1982), 24.

[38] K. Anthony Appiah, "Grounding Human Rights," in *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton: Princeton university Press, 2001), 5.

[39] Szabo, "Historical Foundations," 23.

[40] *International Covenant on Civil and Political Rights*, Opened for signature 16 Dec. 1966, 999 UNTS 171 (Entered into force 23 Mar. 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN GAOR Supp, UN Doc A/6316 (1966), 999 UNTS 302 (Entered into force Mar. 23, 1976); *International Covenant on Economic, Social and Cultural Rights*, Opened for signature 16 Dec. 1966, 933 UNTS 3 (Entered into force 3 Jan. 1976).

UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the *UN Convention on the Rights of the Child*.[41]

In addition to global agreements, many countries cooperate on a regional level. Europe, the Americas and Africa have fashioned their own human rights agreements with varying degrees of success. The *European Convention on Human Rights (European Convention),* adopted in 1950, deals only with civil and political rights.[42] Under the terms of this agreement, states and individual persons from the Council of Europe are allowed to lodge complaints to the European Court of Human Rights (ECtHR). The *American Convention on Human Rights* (ACHR) excludes economic and social rights but includes them in a separate protocol.[43] Unlike the *European Convention* and the ACHR, the *African Charter on Human and Peoples' Rights (Banjul Charter)* adopted by the African Unity in 1981, encompasses all rights—civil, political, social, economic and cultural—in one document.[44] There is no regional human rights commitment among Asian States.

2. *Universalism versus Cultural Relativism*

The main characteristic of human rights, as opposed to particular rights, is their universality in that they stand for the equality of all human beings' fundamental rights.[45] Human rights are conceptualised as "something that pertains to all men at all times"[46] but, this universality is not accepted by all countries, cultures and ideologies. Broadly speaking, Asian nations, Islam and Western postmodernism question the validity of such a feature of human

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[41] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Opened for signature 10 Dec. 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Elimination of All Forms of Discrimination against Women*, Opened for signature 18 Dec. 1979, 1249 UNTS 13 (Entered into force 3 Sept. 1981); *Convention on the Rights of the Child*, Opened for signature 20 Nov. 1989, UN Doc A/44/49 (Entered into force 2 Sept. 1990).

[42] *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, Opened for signature 4 Nov. 1950, 213 UNTS 222 (Entered into force 3 Sept. 1953, as amended by Protocols Nos. 3, 5, 8 and 11, Entered into force 21 Sept. 1970, 20 Dec. 1971, 1 Jan. 1990, and 1 Nov. 1998 respectively).

[43] *American Convention on Human Rights*, Opened for signature 20 Nov. 1969, 1144 UNTS 123 (Entered into force 18 July 1978); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador)*, Opened for signature 17 Nov. 1988, OAS Treaty Series No. 69 (Entered into force 29 Nov. 1999).

[44] *African Charter on Human and Peoples' Rights (Banjul Charter)*, Opened for signature 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (Entered into force 21 Oct. 1986).

[45] Mark Freeman and Gibran Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004), 26. For different legal theories on the functions of fundamental rights, see Ernst Brandl and Hartwin Bungert, "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad," *Harvard Environmental Law Review* 16, no. 1 (1992): 9–15.

[46] Cranston, *What Are Human Rights?* 23.

rights based on cultural and practical considerations.[47] For instance, some Islamic nations argue against universalism on the grounds of religion and tend to view human rights through the teachings of the *Holy Quran*.[48]

A central objection against the universalism of human rights revolves around its alleged Western origin and 'cultural imperialism', as reflected in the Universal Declaration.[49] Many human rights scholars have rebutted these allegations, arguing that, throughout the half century of its existence, the UDHR has established itself as a reputable instrument of international law and politics. The UDHR was not drafted by a homogenous group of experts but was the outcome of the concerted efforts of eminent figures from all continents, who represented different religious, cultural and ideological backgrounds.[50] In addition, the wide ratification of human rights treaties is indicative of their universality and not a matter of moral or ethical preferences since desirable moral human rights often evolve into legal human rights.[51] The UDHR is itself a cultural instrument that transcends the cultural and ideological peculiarities underlying the inherent worth of human beings. To illustrate, societies that still deny equality between men and women should adjust to a higher value simply for the sake of individuals' well-being, rather than perceiving gender equality as a matter of acculturation or imperialism. The international human rights system is not concerned with cultural specificity unless it affects or degrades the individual for the sake of societal or political values.

The 1993 Vienna Declaration and Programme of Action clarified that, despite the cultural peculiarities of local or traditional groups, states are required to respect the universality of human rights.[52] The Declaration states that "[w]hile the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[53] While it is true that cultural recognition is an essential component of human dignity, as Tully asserted, the aim of universal human rights is to transcend cultural differences that might jeopardise the *minimum standards* set by

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[47] See generally Michael Ignatieff, "Human Rights as Politics and Idolatry," in *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton: Princeton University Press, 2001), 58–63.

[48] Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002), 112.

[49] Ibid., 107–08.

[50] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania, 2000), 21.

[51] Kent, *Freedom from Want*, 82.

[52] *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23 (1993).

[53] Ibid., par. 5.

international human rights norms.[54] For instance, some cultural practices, like child abuse, amputation of hands as punishment for theft, and female genital mutilation, are incompatible with the essence of international human rights law.

The accusation of 'cultural imperialism' is ill-founded because imperialism contradicts the egalitarian nature of universalism. Thus, the claim that cultural relativism protects the cultural specificities of local groups is suspicious, because, as long as these cultural claims are not revealed to the public, there is a risk that dominant elites will use the principle of cultural relativism to oppress minorities.[55] In this case, universalism is of paramount importance because it endows minorities with the ability to understand and claim their basic rights. As Fleiner pointed out, "we need human rights to protect minorities from discrimination by the majority."[56] Article 27 of the UDHR and Article 15 of the ICESCR acknowledge the right of everyone to participate in the cultural life of the community.[57] International human rights do not exclude cultural rights, and therefore the arguments in favour of cultural relativism are no more than pretexts to justify infringements on human dignity. As Ignatieff put it, "relativism is the invariable alibi of tyranny."[58] Cultural relativism is a convenient concept for undemocratic governments because it equips them with a 'legitimate' excuse to control and intimidate their citizens. For this reason, repressive regimes are often uneasy with the human rights doctrine, but this reluctance does not negate the universality of human rights and their purpose of protecting powerless people from authoritarian, theocratic or despotic regimes.

Rejecting human rights on the grounds of their Eurocentric origins is similar to refusing to travel by aeroplanes or to undergo certain medical procedures just because the West has invented them. Europeans had to go through two devastating global wars before they realised the necessity of universal human rights and adopted the UDHR. In Ignatieff's view, "human rights is not so much the declaration of the superiority of European civilisation as [it is] a warning by Europeans that the rest of the world should not seek to reproduce its mistakes."[59] In fact, the predominance of collectivism over individualism and the idolatry of the nation-state opened the door to Nazi and Stalinist oppression, which sacrificed individual rights on the altar of the nation-state.

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[54] See Freeman, Michael, *Interdisciplinary Approach*, 118.
[55] Ibid., 110.
[56] Fleiner, *What Are Human Rights?* 21.
[57] *Universal Declaration of Human Rights,* art. 27; *International Covenant on Civil and Political Rights,* art. 15.
[58] Ignatieff, "Human Rights as Politics and Idolatry," 74.
[59] Ibid., 65.

Therefore, the emphasis on individualism in the UDHR aimed to empower the individual against an oppressive state.[60]

D. *Unity and Indivisibility of Human Rights: Taxonomy of Human Rights*

1. *Dichotomy of Human Rights*

Despite the different methods and theories adopted to classify human rights, many international instruments have reiterated and reaffirmed the principle of the unity and indivisibility of human rights. In a study of the history of the UDHR, Morsink found that the drafters perceived it as an 'organic unity' in which every right is interconnected with all other rights.[61] As early as 1968, the Proclamation of Teheran expressly acknowledged the 'indivisibility' of all human rights.[62] The categorisation of human rights is crucial for an emerging human right since how a nascent human right is classified is an important factor in its theoretical underpinnings, its justiciability and eventually its implementation. One of the most common classifications of international human rights is the one that emanates from the International Bill of Rights.[63] Initially, the two International Covenants were meant to be included in one covenant.[64] In 1950, the UN General Assembly issued a resolution regarding the drafting of an international covenant on human rights encompassing, on one hand, civil and political rights and, on the other, economic, social and cultural rights (ESCR). The resolution explicitly acknowledged the intimate links among all rights in stating that "the enjoyment of civic and political freedoms and economic, social and cultural rights are interconnected and interdependent."[65] However, in 1952, another resolution called upon the UN Commission on Human Rights to draft two separate covenants in order to distinguish between the two different types of rights and to give states the choice to adhere to either one.[66]

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[60] Ibid., 65–66.

[61] Morsink, *Universal Declaration of Human Rights*, XIV.

[62] *Proclamation of Teheran*, Final Act of the International Conference on Human Rights, Teheran, UN Doc A/CONF. 32/41 (1968). Paragraph 13 of the Tehran Proclamation states that "[s]ince human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."

[63] The International Bill of Rights consists of the UDHR and the 1966 Covenants: ICCPR and ICESCR.

[64] Szabo, "Historical Foundations," 29.

[65] *Resolution on Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights*, GA Res 421, UN GAOR, 5th sess, 317th plen mtg, UN Doc A/Res/421 (1950).

[66] *Resolution on the Preparation of Two Draft International Covenants on Human Rights*, GA Res 543, UN GAOR, 6th sess, 375th plen mtg, UN doc A/Res/543 (1952).

Some commentators have not regarded these reasons as sufficiently well-founded to justify such a dichotomy in rights.[67] Typical of this view is that of Jhabvala who refuted the validity of the division of rights, as well as their corresponding monitoring mechanisms, describing it as an 'artificial, even unhelpful, formulation.'[68] This earliest division in human rights mirrored the ideological divide that hovered over the Cold War era.[69] It was a reflection of the fierce struggle between the Soviet camp and the Western camp, each of which hailed and prioritised one aspect of the UDHR while accusing the other of human rights violations.[70] The Soviet Union and its European allies were persistently inimical to civil and political rights, considering them 'bourgeois' values of little benefit to most nations.[71]

The idea of positive freedoms was not always appealing to Western powers because of the ingrained liberal conception that prohibited the state from interfering in the individual realm of its citizens.[72] Many American political and business figures viewed socio-economic rights as an obstacle to private enterprise. For instance, there was a tendency in the US Supreme Court to interpret the Constitution in terms of negative rights and to deny the positive duty of the government to grant socio-economic rights like medical assistance.[73] Not surprisingly, the United States has refrained from ratifying the ICESCR on the grounds that these rights represent aspirational goals, rather than rights. From a political perspective, some US Congressmen were particularly suspicious about the adoption of economic and social rights during the Cold War era because they associated the enthusiastic espousal of socialism by some nations with communism.[74] However, not all Western countries adopt the same stance concerning socio-economic rights. Many European constitutions, such as those of Germany and Sweden, explicitly incorporated provisions compelling the government to provide a certain degree of social and economic protection.[75] As Gordon noted, ethical problems arise from the

[67] Szabo, "Historical Foundations," 30.

[68] Quoted in W. Paul Gormley, "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms," *Georgetown International Environmental Law Review* 3(1990): 113.

[69] Edmundson, *Introduction to Rights*, 173.

[70] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2003), 236–38.

[71] Ibid., 237.

[72] Justice Michael Kirby, "Human Rights: An Agenda for the Future," in *Rethinking Human Rights*, ed. Brian Galligan and Charles Sampford (Sydney: The Federation Press, 1997), 2–3.

[73] *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189(1989); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

[74] David P. Forsythe, *Human Rights in International Relations* (Cambridge: Cambridge University Press, 2000), 41.

[75] Ziyad Motala, "Socio-Economic Rights, Federalism and the Courts: Comparative Lessons for South Africa," *South African Law Journal* 112(1995): 71–72.

exclusion of socio-economic rights from the human rights philosophy.[76] For instance, economic sanctions imposed on a country that does not respect the civil and political rights of its citizens have the unintended consequence of depriving the most vulnerable from means of survival, like food, water and medical treatment.[77]

A sense of integration between both sets of rights is noticeable in international human rights instruments.[78] The *UN Convention on the Rights of the Child* is the first international human rights instrument to include all rights embedded in both the ICCPR and the ICESCR.[79] The *UN Convention on the Elimination of All Forms of Racial Discrimination* and the CEDAW also stressed the need for both types of rights.[80] The division between the two types of rights often coincides with the distinction between negative rights and positive rights. Negative rights or 'rights of abstention' such as the right to freedom of expression and the right to privacy require the non-intervention of the state. In contrast, positive rights such as the right to health and the right to education necessitate a proactive approach by the state in order to be fulfilled.[81] Realistically, both types of rights require a certain degree of state involvement or abstention, depending on the right involved.[82] For instance, in its General Comment on Article 2 of the ICCPR, the UN Human Rights Committee (UNHRC) asserted that the duty of states is not restricted to the respect of human rights but "calls for specific activities by the States Parties to enable individuals to enjoy their rights."[83]

Shue rejected the differentiation between positive and negative rights and replaced it with the notion of basic human rights, which encompass the security rights and subsistence rights, considered essential to human survival and, therefore, indispensable to the enjoyment of all other rights.[84] Shue argued that the real distinction lies in the correlative duties required to fulfil these basic rights and suggested three types of duties for each basic right: avoidance, protection and aid.[85] For example, the right to physical security requires the

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[76] Joy Gordon, "The Concept of Human Rights: The History and Meaning of Its Politicization," *Brooklyn Journal of International Law* 23(1997–1998): 725–26.

[77] Ibid.

[78] Eide Asbjørn, "Economic, Social and Cultural Rights as Human Rights," in *Economic, Social and Cultural Rights*, ed. Allan Rosas, Eide Asbjørn, and Catarina Krause (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995), 23.

[79] *Convention on the Rights of the Child*, arts. 4–17.

[80] *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 5; *Convention on the Elimination of All Forms of Discrimination against Women*, arts. 7–14.

[81] See Freeman, Mark and Van Ert, *International Human Rights Law*, 31–32.

[82] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980), 37–38; Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s?" *Rutgers Law Review* 33, no. 2 (1980–1981): 438.

[83] *General Comment 3: Implementation at the National Level*, United Nations Human Rights Committee, UN Doc HRI/GEN/1/Rev.7 (1981).

[84] Shue, *Basic Rights,* 30.

[85] Ibid., 52.

duty of not depriving someone of their own security (avoidance), the duty to protect against harm or assault by third parties through proper social arrangements (protection) and the duty to aid the deprived (aid). In the same way, the right to subsistence entails the duty of not depriving people from their means of subsistence (avoidance), the duty to protect them from deprivation by others (protection) and the duty to supply necessities to those who are unable to provide for themselves (aid).[86] In this context, subsistence rights as economic rights do not automatically correlate with the duty of the state to deliver commodities, but with the availability of opportunities and appropriate social guarantees. This approach has practical implications because it brings both types of rights to the same level of priority and urgency. Although Shue's basic rights are restricted to entitlements to minimum social guarantees of physical security and subsistence, they are an attempt to reveal the fallacy of negative/positive rights and to highlight the urgency of subsistence rights that enable individuals to sustain their livelihoods without being jeopardized by the action or inaction of others. The notion of subsistence, as Shue defined it, includes "unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter, and minimal preventive public health care."[87] From this perspective, environmental rights could be portrayed as subsistence rights that are necessary to the fulfilment of other rights. This view is compatible with the genesis theory discussed in Chapter 3.

In an attempt to transcend the dichotomy between political/civil rights and socio-economic rights, some writers have opted to categorise human rights on different grounds.[88] Of special importance is the taxonomy based on the concept of generations of human rights advanced by Vasak and outlined in the next section.[89]

2. *The Concept of Third-Generation Rights*

With the advent of new areas of interest into the family of human rights, a controversial taxonomy that divides human rights into three 'generations' has been proposed and subsequently widely debated. Vasak invoked the metaphor of 'generation' in his attempt to promote a new type of human rights and presented this new classification of human rights in the inaugural lecture at the Tenth Study Session of the International Institute of Human Rights in Strasbourg in July 1979.[90] According to Vasak, the first generation of rights

[86] Ibid., 52–53.
[87] Ibid., 23.
[88] For instance, Sieghart relied on the subject protected such as physical integrity, family, work, property, politics and democracy, and collective rights. See Eide, "Economic, Social and Cultural Rights," in Eide and Krause, 21–22.
[89] Vasak, "Troisième Génération."
[90] Ibid.

entails civil and political rights; the second generation of rights consists of social, economic and cultural rights; and the third generation of rights is a set of rights designed to protect human values that are likely to be severely violated as a result of rapidly evolving issues on the international stage (e.g., development, environmental pollution, nuclear proliferation and the North-South divide).[91] The list of new rights proposed by Vasak includes the right to development, the right to peace, the right to environment, the right to property over the common heritage of humankind, and the right to communicate.[92] Vasak's innovation stems from matching the three generations of rights with the famous three pillars of the French Revolution: *liberté, égalité* and *fraternité* (liberty, equality and brotherhood/sisterhood).[93] Accordingly, the first generation of rights represents freedoms or liberty, and the second generation of rights represents equality. Vasak drew upon the third pillar of brotherhood/sisterhood (*fraternité*) to label third-generation rights 'solidarity rights'.[94]

Many commentators have been critical of the use of the terms 'generation'[95] and 'solidarity'. For example, Wellman observed that the reference to 'generations' to describe different sets of rights can be 'misleading and potentially harmful' to understanding the reality of human rights or the intention of advocates of third-generation rights. In essence, the new wave of human rights is not intended to be a substitute of the earlier generations of human rights but to complement and promote them.[96] In addition to this linguistic objection, Alston listed reservations against the classification of rights into generations.[97]

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[91] Ibid.

[92] Ibid. Third-generation rights are also called rights of developing countries. See V. T. Thamilmaran, *Human Rights in Third World Perspective* (New Delhi: Har-Anand Publications, 1992), 128.

[93] Vasak, "Troisième Génération," 839.

[94] Ibid.

[95] Instead of the generational approach, Sampford proposed a 'multi-dimensional' interpretation of the traditional conception of human rights that emphasises the non-interference of the state into the personal life of its citizens. Sampford broadened the scope of our understanding of human rights by exploring the possibility of viewing them through three or four dimensions. If negative rights, deeply rooted in our legal and social fabric, protect us from the state's infringement of our liberties, protective rights are those that prohibit other individuals from violating them, and therefore require more interference from the state to guarantee protection. Positive rights, a more complex and perplexing set of rights, are defined as 'the rights to resources necessary to act upon our choices.' He added a fourth dimension to his typology: the ability of rightholders to choose freely. This psychological dimension, as he called it, is a necessary step to the genuine realisation of all other rights. See Charles Sampford, "The Four Dimensions of Rights," in *Rethinking Human Rights*, ed. Brian Galligan and Charles Sampford (Sydney: The Federation Press, 1997), 52–56.

[96] Carl Wellman, "Solidarity, the Individual and Human Rights," *Human Rights Quarterly* 22, no. 3 (2000): 641.

[97] Philip Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?" *Netherlands International Law Review* 29(1982): 316–17.

First, this 'generational terminology' leads to a conceptual misunderstanding that newer generations are more elaborate or better than the previous ones, which contradicts the international principle of indivisibility of human rights.[98] Second, there is a weak level of homogeneity among the putative new generation of human rights, so it is questionable whether they should be brought together under one umbrella.[99] Alston also questioned the need for a new generation of rights to meet current global challenges, rather than developing the content of existing and well-established human rights.[100] Alston added that the use of the word 'solidarity' to refer or 'launch' a new generation of rights is not appropriate because it implies that solidarity is restricted to third-generation rights. In Alston's words, "solidarity is an essential ingredient in the promotion and realisation of *all* human rights, and not just those of third generation."[101] However, the level and breadth of international cooperation needed to resolve complex issues such as peace and war, transnational pollution, climate change and development are greater than those required for the implementation of other kinds of rights.

Vasak justified the novelty of solidarity rights based on three factors.[102] First, they introduce the human rights dimension into areas traditionally confined to states, particularly development, peace, environment and common heritage of humankind. Second, these rights are negative and positive rights in the sense that they can be invoked by the state and against it at the same time. Finally, the implementation of such broad rights stretches beyond the responsibility of States to include individuals, non-state bodies and the international community.[103] The specific feature of joint responsibility of all relevant actors in global issues is what justifies the need for solidarity rights. In the case of humanitarian assistance, the international community as a whole is considered the right-bearer that is responsible for helping affected people.[104] Commenting on the notion of solidarity in Vasak's proposition of third-generation rights, Wellman noted that the new generation of rights, Vasak conceived it, is designed to fill a gap in the classical doctrine of human rights that is based on excessive individualism and egoism.[105] Filling this gap is achieved through *fraternité*, the solidarity component of human rights that creates a sense of social solidarity among citizens.

In summary, solidarity rights are inclined towards group or collective rights in that citizens, private groups, and the entire international community share

[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid., 318.
[102] Vasak, "Troisième Génération," 839.
[103] Ibid.
[104] Marks, "Emerging Human Rights," 325.
[105] Wellman, "Solidarity," 642.

responsibility with the states in order to fulfil and guarantee these rights. Sen described the allocation of duties to such a wide range of duty-holders as the Kantien view of 'imperfect obligations', which contradicts the notion of 'perfect obligations' that links rights to 'agent-specific' duties.[106] According to Sen, the notion of 'imperfect obligations'—which implies that the fulfilment of rights can be the responsibility of a flexible range of duty-bearers such as the State or the international community—circumvents the traditional conception of states as the main duty-bearers in guaranteeing human rights.[107] In this respect, Vasak's theory of third-generation rights provides a useful contribution to the doctrine of human rights because it extends the scope of obligations to non-state actors. The main objection against socio-economic rights and solidarity rights lies in the ability of these rights to be judicially enforceable but the most common response to this objection is that a legal norm is not necessarily conditional on the means of its execution.[108] The implementation of second and third generations of rights necessitates more than a traditional bill of rights, judicial reviews and high courts. There is a pragmatic need for 'joint efforts' from other social and political institutions.[109] However, this sense of solidarity does not necessarily undermine the individualistic nature of universal human rights but complements it.

3. *Individualism versus Collectivism*

Third-generation rights and collective rights differ in several ways. Some human rights already recognised under the International Bill of Rights—including minority rights, the right to self-determination and cultural rights—have a collective element, while solidarity rights such as the right to development have an individual component.[110] Much suspicion surrounds the move towards the concept of collective human rights. Apart from Indigenous peoples, Donnelly asserted that groups such as women and minorities can have their rights protected through well-established international human rights, while some collective human rights, such as cultural rights, the right to self-determination and the right to cultural identity, lack viable bases.[111] The problem lies in the observance of individual human rights by states, rather than in the liberal individual rights approach.[112] In Donnelly's words, people's

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[106] See Arjun Sengupta, "On the Theory and Practice of the Right to Development," in *Development as a Human Right: Legal, Political, and Economic Dimensions*, ed. Bård A. Andreassen and Stephen P. Marks (Boston: Harvard School of Public Health, 2006), 65.

[107] Ibid., 65.

[108] Vasak, "Troisième Génération," 843.

[109] Ibid.

[110] See Allan Rosas, "So-Called Rights of the Third Generation," in *Economic, Social, and Cultural Rights*, ed. Asbjørn Eide, Catarina Krause, and Allan Rosas (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1995), 244.

[111] Donnelly, *Universal Human Rights*, 211–14.

[112] Ibid., 221.

rights "are best seen as rights of individuals acting as members of social groups."[113]

Despite the growing enthusiasm for collective rights, individualism is—and always will be—at the core of human rights philosophy. Undermining individual rights for the sake of higher social interests strips the concept of human rights of its very foundation.[114] In some respects, classifying some rights into the category of group rights or collective rights does not affect the individualistic essence of human rights since it is a tactical approach related to the intrinsically complex nature of rights such as the right to environment and the right to development. According to Appiah, group rights should be perceived "as instruments in the service of enriching the lives and possibilities of individuals."[115] In the same vein, Ignatieff noted that "the ultimate purpose and justification of group rights is not the protection of the group as such but the protection of the individuals who compose it."[116] For instance, environmental disasters infringe on the rights of individuals as well as those of whole communities; it is impractical to address many human rights violations on an individual basis because thousands of people are affected. Thus, an innovative and suitable mechanism is necessary to remedy such situations.

E. *The Implementation of Human Rights*

1. *The Observance of International Human Rights*

As Thomas Hobbes once said, "[c]ovenants, without the sword, are but words!"[117] Most international human rights treaties are endowed with treaty-monitoring bodies the primary role of which is to monitor and promote States' compliance with treaties' provisions through reporting and complaints procedures. All States Parties to an international human rights treaty are required to submit to the relevant body periodic reports of the status of human rights within their territories. Apart from reporting and complaint procedures, some treaty bodies, such as the UNHRC and the Committee on the Elimination of Discrimination against Women, are also empowered to accept petitions from individuals.[118]

The implementation of international human rights is not confined to treaty-based procedures since some non-treaty based mechanisms derive from

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[113] Ibid., 222.

[114] Fleiner, *What Are Human Rights?* 30.

[115] Appiah, "Grounding Human Rights," 115.

[116] Ignatieff, "Human Rights as Politics and Idolatry," 67.

[117] Thomas Hobbes, "Leviathan," in *Oxford World's Classics Series* (New York: Oxford University Press, 1998). Chapter XVII. Available at http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html#CHAPTERXVII.

[118] *First Optional Protocol to the International Covenant on Civil and Political Rights*; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Opened for signature 10 Dec. 1999, UN Doc A/54/L4 (Entered into force 22 Dec. 2000).

resolutions of the UN Human Rights Council or the General Assembly. These mechanisms are assigned to working groups of experts or individuals, such as Special Rapporteurs, Special Representatives or Independent Experts. All these appointed experts work independently from their governments to address serious human rights issues through either country-specific or thematic mandates. The Special Rapporteur on Afganistan and the Special Representative on Iran are examples of country-specific mandates, while thematic mandates include the Special Rapporteur on religious intolerance, the Special Rapporteur on the right to education, and the Independent Expert on the right to food, among others. The appointment of rapporteurs, representatives or working groups is of central importance to the development of international human rights.[119] In contrast to the international environmental law system, the international human rights system is endowed with the supervisory and judiciary mechanisms necessary for the protection and enforcement of human rights. A human rights approach to environmental issues relies on these mechanisms to defend both ecosystems and victims of environmental degradation.

2. *Role of Non-Governmental Organisations*

Apart from the judiciary's role, non-governmental organisations (NGOs) and public opinion have a constructive and complementary role to play in the observance of international human rights. NGOs, whether international, regional or local, carry out diverse functions. Through the submission of 'shadow reports', these NGOs keep track of the status of human rights violations and channel their information to specialised UN human rights bodies such as the CEDAW Committee.[120] Such records, whether or not facilitated by the official bodies, exert tremendous pressure on local authorities to act in conformity with international human rights norms. Of equal importance are the NGOs' efforts to lobby governmental bodies on behalf of human rights matters. It is a common practice for international human rights organisations, such as Amnesty International and Human Rights Watch, to reveal alarming governmental records to the media in order to mobilise public support for the environment. In reality, it is difficult to imagine a functioning and effective human rights law without the advocacy of NGOs.

[119] See Office of the High Commissioner for Human Rights, "Human Rights Bodies," http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

[120] WLP Women's Learning Partnership, "Shadow Reports: Holding Governments Accountable for Women's Human Rights," http://www.learningpartnership.org/news/enews/2003/iss4/shadow.

3. *The Justiciability of Socio-Economic and Cultural Human Rights*

One of the most debated issues in the implementation of human rights lies in the widespread belief that socio-economic rights are less justiciable or enforceable than civil and political rights. Since its inception, the ICCPR has been endowed with more explicit enforcement provisions than the ICESCR. In addition, the first *Optional Protocol* to ICCPR empowers individuals to lodge complaints with the UNHRC when all domestic legal avenues are exhausted. From a practical standpoint, such legal considerations lead to the supremacy of civil and political rights, perceived as 'real rights', over socio-economic rights.[121] If rights-holders can file suits against perpetrators only when the human right involved is a civil and political right, rather than a socio-economic right, then a certain degree of hierarchy exists amongst human rights. Accordingly, one might question the validity of the biased difference in the implementation between the two sets of rights. Many arguments have been unconvincingly advanced in an attempt to answer this legitimate question. Among them is the specious notion that political rights require a more acquiescent attitude from States and less governmental resources than do economic rights. Another argument reiterates the idea that the non-interference of states in the enjoyment of political and civil rights alone leads to their full and immediate implementation.[122] The first argument can be refuted on the grounds that expenditures are needed in support of both types of rights. For instance, the protection of the 'due process' rights of defendants does not occur without governmental expenditure on judicial institutions.[123] As for the second argument, a sovereign state should be held accountable not only for torturing its people but also for its inaction or involvement in or failure to prevent serious human rights abuses, such as when civilians are the victims of a genocide executed by unofficial armed groups acting within a state's boundaries.[124]

The reluctance to treat these rights as justiciable and the failure to apply the principle of *locus standi* under diverse national courts in related cases, used to be the main obstacles to their implementation.[125] However, this situation is changing in favour of more judicial recognition of ESCR, especially in national jurisdictions. The *Human Rights Development Report 2000* found that people are increasingly relying on the law—including international human rights

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[121] Shelley Wright, *International Human Rights, Decolonization and Globalization* (London: Routledge, 2001), 187.

[122] Lauren, *Evolution of International Human Rights*, 711–12.

[123] Ibid., 711.

[124] Ibid., 713.

[125] Justice C. Nwobike, "The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*," *African Journal of Legal Studies* 1(2004–2005): 141.

law—to vindicate their social and economic rights such as housing rights.[126] Despite the complexity and difficulty of implementing the second generation of rights, the judiciary was, in many instances, able to achieve a breakthrough in the development of the jurisprudence of socio-economic rights. In the *Grootboom* case,[127] the South African Constitutional Court questioned the justiciability of socio-economic rights. Sachs, Justice of the Constitutional Court of South Africa, considered the case a major test of the enforceability of constitutional economic and social rights and of the influence that the judiciary can exert on the executive in order to guarantee such rights.[128]

This case law is indicative of the complexity of these rights and the judiciary's ability to adjudicate them. Mrs Grootboom was one of about a thousand squatters, half of them children, living in dreadful conditions in a Wallacedene sports field in South Africa.[129] After failing to get help from the municipality, Mrs Grootboom and members of her community launched an urgent application in the Cape High Court basing their claims on constitutional provisions related to the right to access to adequate housing and the right of children to shelter.[130] While the Cape High Court dismissed the right of the applicant to adequate housing, it held that the State is under the constitutional obligation to provide shelter and other basic services to homeless parents and children and issued a declaratory order that obligated public authorities to take the necessary measures to provide relief to the poverty-stricken community of Wallacedene.[131] The national government challenged the order in the Constitutional Court, which asserted the responsibility of the State to comply with its obligations regarding the constitutional right of access to adequate housing. Despite the State's poor compliance with the order, the *Grootboom* case, theoretically speaking, is an interesting example of how the judiciary can explicitly compel the executive to comply with the requirements of a socio-economic human right. State non-compliance with a judicial order is not the

[126] United Nations Development Programme (UNDP), "Human Development Report 2000: Human Rights and Human Development," http://hdr.undp.org/en/reports/global/hdr2006/. 76.

[127] *Government of Republic of South Africa and Others v. Grootboom*, 11 BCLR 1169 (2000).

[128] Hon. Mr. Justice Albie Sachs, "Enforcing Socio-Economic Rights," in *Sustainable Justice: Reconciling Economic, Social and Environmental Law*, ed. Marie-Claire Cordonier Segger and C.G. Weeramantry (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 2005), 66.

[129] In fact, South Africa struggles with deep-rooted housing crises, a legacy of colonialism and apartheid. The advent of democracy and the Bill of Rights was supposed to rectify the inequity practiced for centuries against deprived and homeless people who lack basic rights like adequate housing and shelter for children.

[130] *Constitution of the Republic of South Africa* secs. 26(2) and 28 (1-c).

[131] *Grootboom v. Oostenberg Municipality and Others*, 3 BCLR 277(2000). Available at http://www.communitylawcentre.org.za/Childrens-Rights/05Legal-Resources/cases-judgements/high-courts/2_groot.pdf/.

responsibility of the courts but is primarily related to the peculiarities of the state's political system and does not necessarily affect the jurisprudential value of a judgment, although persistent non-compliance with judicial decisions may undermine the legitimacy of the judiciary.

On the regional level, the *SERAC* decision[132] of the African Commission on Human and Peoples' Rights (African Commission) is another groundbreaking case because of its role in the evolution of international jurisprudence on ESCR.[133] Two NGOs, the Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights, brought an action before the African Commission against the Nigerian government for violations related to two state-run oil companies operating in Ogoniland—National Nigerian Petroleum Company (NNPC) and Shell Petroleum Development Corporation—accusing them of gross human rights violations against the Indigenous Ogoni people. In this case, the African Commission refuted the common misunderstanding regarding the non-judicial enforcement of ESCR. Many human rights scholars and commentators have argued that individual petitions should not be confined exclusively to civil and political rights and have proposed that the right to individual petitions be advanced to socio-economic matters.[134] This approach would address the discrepancy in the protection of the human rights that belong to the so-called 'non-justiciable' category of rights. Scott argued that the concepts of 'interdependence' and 'permeability' justify expanding the expediency offered by individual petition procedures to some socio-economic rights that have the potential to 'permeate' the category of civil and political rights.[135] Scott defined permeability as "the openness of a treaty to the supervision of human rights norms from a different category of rights found in another treaty."[136] For instance, General Comment 6 of the UNHRC expanded the scope of the right to life enunciated in the ICCPR by interpreting the right to life in a wider context.[137] This right stretches beyond the physical integrity of a person to include socio-economic rights such as the rights to health, food and shelter. Therefore, if these socio-economic rights acquire the legal status of the right to life, they may become as justiciable as political and civil rights.

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[132] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (SERAC Case)*, Communication 155/96, ACHPR/COMM/A044/1(2002).

[133] See Nwobike, "Demystification of Second and Third Generation Rights."

[134] Wright, *International Human Rights,* 187.

[135] Craig Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Conventions on Human Rights," *Osgoode Hall Law Journal* 27(1989): 841.

[136] Ibid.

[137] *General Comment 6: The Right to Life*, United Nations Human Rights Committee, 16th sess, UN Doc HRI\GEN\1\Rev.7 (1982).

Moreover, General Comment 3 of the UN Committee on Economic, Social and Cultural Rights (CESCR) requires states to satisfy 'minimum core obligations' to fulfil socio-economic rights.[138] A state fails to comply with its core obligations under the ICESCR if "a significant number of individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or the most basic forms of education."[139] Without such minimum requirements, the Committee argues, the Covenant loses its 'raison d'être'.[140] Therefore, lack of resources does not justify violations of ESCR.[141] The Limburg Principles on the Implementation of the ICESCR clarified that human rights listed in the ICESCR should be fulfilled gradually and that "some rights can be made justiciable immediately while other rights can be justiciable over time."[142] As a result of staunch advocacy for the promotion of ESCR as legal rights, the CESCR drafted an *Optional Protocol* to the *International Covenant on Economic Social and Cultural rights* (OP-ICESCR).[143] The aim of the Protocol is to establish an individual complaint mechanism in the UN that enables victims of alleged breaches of socio-economic and cultural rights to submit formal complaints to the CESCR in order to seek appropriate remedies where domestic avenues are lacking or insufficient.[144] The *Optional Protocol* to CEDAW also provides a communication procedure that enables both individuals and groups of individuals to submit complaints to the Committee on the Elimination of Discrimination against Women.[145]

4. *States' Obligations*

The tripartite obligations as elaborated by Eide, or quadruple obligations as expanded by Van Hoof, are presented as alternatives to the traditional notion of negative and positive duties. Eide, the UN's Special Rapporteur for Food in the early 1980s, identified three types of obligations regarding human rights: the obligations to *respect, to protect* and *to fulfil*.[146] The obligation to *respect* requires non-interference by the state in the enjoyment of human rights. The

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[138] *General Comment 3: The Nature of States Parties Obligations*, Committee on Economic, Social and Cultural Rights, UN Doc E/1991/23 (1990), par. 10.

[139] Ibid.

[140] Ibid.

[141] Sachs, "Enforcing Socio-Economic Rights," 71.

[142] *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN ESCOR, 4th Comm, 43rd sess, Annex, UN Doc. E/CN.4/1987/17(1987), Principle 8.

[143] See *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Note by the Secretary-General*, UN CHR, 53rd sess, E/CN.4/1997/105(1996).

[144] See ESCR-Net, "Optional Protocol to the ICESCR Initiative," http://www.escr-net.org/actions_more/actions_more_show.htm?doc_id=433788.

[145] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, art. 2.

[146] *General Comment 12: The Right to Self-Determination of Peoples (Art 1)*, United Nations Human Rights Committee, 21st sess, UN Doc HRI/GEN/Rev.1 (1984), par. 15.

obligation to *protect* requires states to protect its citizens' rights from being violated by a third party. The obligation to *fulfil* requires a more proactive role from states regarding the realisation of human rights and includes the duty of governments to *facilitate* and to *provide*.[147] Through the obligation to *facilitate*, the government guarantees the social and economic preconditions for its citizens to enjoy their socio-economic rights. A strong economy, for example, is a prerequisite for the fulfilment of the right to work and the right to an adequate standard of living. However, when, under exceptional circumstances, some people fail to provide for themselves through employment or personal resources, the government is under the obligation to *provide* the right to social security so the person involved is not subject to humiliation, hunger or disease.[148]

According to Eide, the obligations related to ESCR are not restricted to states; individuals are supposed to seek the fulfilment of their needs through their own resources, protected by the state.[149] Consequently, the responsibility of the state lies in its enabling and protective role and not necessarily in the provision of specific economic resources. The protective function of the state is often reflected in constitutional provisions and existing laws that can be administered by the judiciary, so the assumption that socio-economic and cultural rights are non-justiciable is not tenable.[150] The quadruple typology is similar to the tripartite one, with the exception that the obligation *to fulfil* is replaced by two more nuanced obligations: *to ensure and to promote*. These are called 'programmatic', meaning that they are positive actions taken by states with a progressive element.[151] The 'tripartite typology'[152] and the quadruple categorisation of obligations transcend the rigid dichotomy of negative and positive duties, taking it to a different level of understanding. The traditional argument raised against the legal status of social rights is diminishing gradually as a result of global awareness of the importance of these rights. These categorisations are more suited to the emerging environmental rights whose realisation requires a more sophisticated approach to obligations that goes beyond the traditional dichotomy of negative and positive duties.

5. *Limited Duty-Bearers*

Human rights are also criticised for having a limited number of duty-bearers. Most of the responsibility for guaranteeing human rights is placed upon the

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[147] Kent, *Freedom from Want*, 106–7.
[148] Ibid.
[149] Eide, "Economic, Social and Cultural Rights," 37.
[150] Ibid.
[151] Scott, "Human Rights Norms," 835.
[152] See Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties?" *Human Rights Law Review* 5, no. 1 (2005): 82.

government, but many authors have argued that international law should not be static in a dynamic world and that it must move beyond the traditional conception of states as the primary abusers of human rights. In the sweeping era of globalisation, non-state entities are increasingly becoming a new threat to the status of human rights worldwide.[153] Terrorist and clandestine organisations, along with large corporations, are just some examples of the inability of governments to control new international actors. Practically and theoretically speaking, as long as human beings' rights are violated, the identity of the perpetrators makes little difference.[154] As Kennedy pointed out, "[h]uman rights implicitly legitimates ills and delegitimates remedies in the domain of private law and non-state action."[155] Typical of this view is the feminist criticism of a human rights system that is predominantly focused on states' violations while overlooking individual domestic violations that men inflict on women.[156]

The tripartite typology described above attempts to hold private entities accountable for human rights violations. It includes the obligation of the state to take measures to *protect* its citizens from private parties, not only from public authorities. To hold third parties accountable for their violations of human rights does not change the fact that the main obligation for fulfilling human rights remains in the hands of governmental bodies. On the international level, states are the main signatories of treaties, including human rights covenants. However, the power of multinational corporations (MNCs) and their influence on local economies reduce considerably the capacity of states to fulfil their obligations under the ICESCR.[157] As global businesses, many MNCs cross national boundaries in order to run their operations in host countries where social and environmental regulations are less stringent. Driven by profit maximisation and competitiveness, they are often insensitive to the sociocultural needs of local communities.[158] These MNCs are called upon to play a more positive role in host countries, particularly developing countries, by requiring an acceptable standard of human rights from local governments as a prerequisite to bringing in their investment operations.[159] When local governments are unable or unwilling to invest in the local communities where most of the impact from MNCs' operations occurs, MNCs are urged to step in and reinvest some of the profit generated from using local resources back into

[153] See Sampford, "Four Dimensions," 52.
[154] See Daniel Aguirre, "Multinational Corporations and the Realisation of Economic, Social and Cultural Rights," *California Western International Law Journal* 35(2004): 57.
[155] David Kennedy, *The International Human Rights Movement: Part of the Problem?* (Sydney: The Federation Press, 2001), 10.
[156] See Freeman, Michael, *Interdisciplinary Approach*, 128.
[157] Aguirre, "Multinational Corporations," 56.
[158] Ibid., 60–61.
[159] Ibid., 64.

those localities.[160] Accordingly, the responsibility for fulfilling human rights, especially the ESCR, can be transferred to the private sphere in cases where the state fails to comply with its international obligations. In this regard, MNCs should be held accountable for human rights' violations especially when those violations are endorsed by public authorities, such as the use of the military or security forces to suppress and torture local people who protest against harmful and inequitable development projects.[161] In such circumstances, the state cannot protect its own citizens from a third party when, by its own actions, it is condoning and facilitating the exploitative operations of MNCs.

The efforts of the international community have gradually moved towards breaking the complicity between MNCs and host countries by regulating the conduct of corporations at an international level. Large-scale industrial and nuclear environmental disasters, in particular, have raised the issue of corporate accountability worldwide. The Bhopal disaster of 1984, described as the world's worst industrial disaster, is a tragic illustration of the impact of the environmentally unsound management of dangerous industries on vulnerable communities and their environments. The Bhopal disaster caused by the release of 27 tons of toxic gases from a pesticide factory run by an Indian subsidiary of Union Carbide, a US-based company, killed an estimated 22,000 people as a result of the gas leak and left about 100,000 more with debilitating and chronic ailments.[162] The effects of the disaster still haunt the survivors of Bhopal and shockingly, neither Union Carbide nor Dow Chemical, who took over Union Carbide in 2001, were held accountable for their plight.[163] More recently, Shell agreed, after 14-year trial, to pay $15.5 million to settle a legal suit in which the plaintiffs accused the oil giant of human rights violations in the Ogoni region of the Niger Delta, alleging that Shell was complicit in the 1995 executions of Ken Saro-Wiwa, leader of the Movement for the Survival of Ogoni People, and eight other leaders.[164] Although Shell never admitted its involvement in the death of the Ogoni Nine, this large settlement, portrayed by Shell as 'a humanitarian gesture', will undoubtedly have a significant impact on corporate responsibility in the future by encouraging MNCs to take their social and environmental responsibilities seriously when they operate in host countries.

In response to the increased pressure on multinational firms to comply with their social responsibilities, many corporations have adopted voluntary codes

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[160] Ibid., 64–65.

[161] See Nwobike, "Demystification of Second and Third Generation Rights," 143.

[162] Amnesty International, *Clouds of Injustice: Bhopal Disaster 20 Years On* (London: Amnesty International Publications, 2004), 1.

[163] Ibid.

[164] The Case Against Shell, "Wiwa v. Shell: Victory Settlement!" http://wiwavshell.org/wiwa-v-shell-victory-settlement/.

of conduct. However, judging by the numerous cases of human rights violations by such corporations, these voluntary codes are often insufficient. In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights approved the UN Human Rights Norms for Business (UNHRNB), which lists the human rights obligations of MNCs.[165] This international instrument refers to MNCs as 'transnational corporations' and to domestic companies as 'other business enterprises'. Although the UNHRNB reiterates that States are the primary duty-bearers of human rights on the international stage, it also mentions that "transnational corporations and other business enterprises have the obligation to promote … and protect human rights recognised in international as well as national law, including the rights and interests of Indigenous peoples and other vulnerable groups."[166]

The duties of the states are also compromised by the work of welfare organisations, both national and international, that try to fill the gaps in basic services such as shelter, food and medical assistance. In this regard, Kent stressed the importance of differentiating between 'humanitarian assistance work and human rights work'.[167] While the excessive reliance on charitable work to meet people's needs strips the state of its own social responsibilities, human rights work targets the public sector in a bid to pressure the government to remedy the social and economic discrepancies in its own system.[168] Welfare assistance through either private or public entities is not desirable in the long-term because it leads to the disempowerment of communities, and the respect of human dignity is compromised when people of low socio-economic status have to rely on external financial assistance to survive. The state is obliged to secure appropriate employment strategies to empower the marginalised and to encourage them to participate in political and social systems. In this regard, democracy is often portrayed as an essential precondition for the implementation and enforcement of human rights.[169]

Conclusion

The culture of human rights is one of struggle and nobility. Despite the human aspect enshrined in its core concept, human rights cannot be fully associated with anthropocentrism since its scope goes beyond the mere immediate

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[165] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[166] Ibid., sec. A.

[167] Kent, *Freedom from Want*, 124.

[168] Ibid., 121–23.

[169] It is worth noting that democracy has its own limitations and does not offer solutions to all social and political problems. Such critique is beyond the scope of this book. See generally Samuel Gregg, "The Tragedy of Democracy: 'Rights', Tolerance and Moral 'Neutrality'," *Comment* (Winter 2000). Available at http://www.cis.org.au/policy/winter00/win2k-8.pdf.

materialistic interests of human beings to the preservation of the integrity and dignity of humanity in its spiritual and ecological dimensions. There is great potential to defend the rights of nature through the human rights discourse because of the complementarities between humans and the environment. Moreover, the conceptualisation of human rights as solidarity rights and the elaboration of the tripartite obligations constitute significant legal bases for emerging environmental rights, as proposed in this book. Without necessarily adopting the generational classification of human rights advocated by Vasak, the current research views 'solidarity' as a concept that can address the complexities of environmental issues and the multiplicity of duty-bearers involved. Similarly, the tripartite typology of obligations, which is more detailed than the traditional dichotomy of negative and positive duties, is of central importance to the realisation of environmental rights.

The principle of sovereignty constitutes a constraint on the ability of the international community to hold states accountable for gross human rights violations. Despite this impediment, the strength of the human rights concept lies in its weaknesses. In essence, human rights advocates tend to target primarily powerful entities, such as governments and businesses, in order to protect the most vulnerable and, in doing so, position themselves as the voice of the voiceless. In the public conscience, human rights are endowed with a psychological puissance that can mobilise the masses around urgent global issues such as genocide, environmental degradation and poverty. Most important, human rights are endowed with a sense of urgency, a 'trumping' effect that counterbalances economic and financial interests. In the domestic realm, environmental rights, as defensive legal rights, have the potential to elevate environmental concerns above politics by providing an additional tool of checks and balances to offset the ever-increasing power of the legislative and executive branches of government in environmental matters.